have to lay a proper and appropriate foundation before eliciting any testimony regarding future care or the appropriateness of other physicians' treatment.

MR. WALL: And that's covered really -- the future part, I think, is covered more in a later motion.

MR. ROGERS: In a later motion. I actually didn't even address that, but I -- it makes since to address it, but could I before we get an ultimate ruling on futures? So far all I've been discussing is whether a doctor can say under oath in his deposition, I've relied on A, B and C and then come into court and say oh, I didn't tell anybody this, but now it's X, Y and Z too. That's really what we've been talking about so far and the unfair surprise in that. And I'm just requesting that the Plaintiff disclose whether that's going to happen, so that I can evaluate it and advise my client, this is what's coming and you need to be aware of this and we may need to do some more work.

The futures, though, has more to do with the computation of damages rule. And that -- it also is folded within Rule 26[e], in that the Plaintiff is not permitted to come into court and request damages for which no computation has been supplied. Now, the Plaintiff has provided a computation. We're ready right now with the current computation. The motion in that regard is that if that's changed any change should be disallowed.







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THE COURT: Seems like you're arguing the subject of another motion perhaps?

MR. ROGERS: Okay. I thought that's where you were going and that's why I jumped into that.

THE COURT: Okay.

MR. WALL: The next part of our omnibus motion in limine is to preclude any referral to the -- I guess it would be Dr. Fish and Dr. Wang on behalf of the Defendants as independent. I'm not sure there's really a major opposition to that, it's just -- really the gist of the motion is that somehow there isn't some suggestion that they're appointed by the Court or in some way the parties got together and said, let's have someone independent look at Mr. Simao. So that's the gist of the motion. I'm not sure there's really an opposition to that.

THE COURT: I don't think Ms. Rogers really opposed that. I think his statement in the pleadings was basically if it's going to be referred to as Defense expert, they ought to similarly be referred to as Plaintiffs' experts.

MR. WALL: That's fine. That's fine.

THE COURT: I don't disagree with that. The motion is granted.

MR. WALL: The next part is to preclude any reference or argument that the case is attorney driven or a medical buildup case. I know the Court has seen this before. They can say



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there's not objective evidence of injury, they can say the injuries weren't caused by the motor vehicle accident, but what they cannot argue or have an expert say is that it's attorney driven or that it's a medical buildup case. There isn't any evidence in the record to support it. Dr. Fish didn't say that -- their expert. I don't believe that Dr. Wong, who is being deposed today, is going to say that, because it's not in his reports to date.

The opposition then goes into a little different area and that is the admissibility of any of the treating doctors' relationships with counsel. Now I'm not sure where we're going with that or what's going to be offered. It's generally not admissible, I don't know whether it's that -- I guess, you know, you can ask questions of experts as to whether they worked with a particular attorney or a particular firm before. We got into this long after the surgery, I think, it probably was about a year ago, I think, that our firm got into it, so I'm not sure what the relevance is.

My request on that, because it was sort of brought up as a collateral issue a little bit in opposition to our motion is that there be some offer of proof before any argument or examination of a treating doctor about any relationships with counsel. I don't think it has any relevance, I don't think there's much probative value. The prejudicial effect of that could be significant. So that



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would be our request and it's a little different than what we put in the papers after we read the opposition.

THE COURT: You know, I -- it's interesting that you make those comments because I also thought that the opposition really didn't address Plaintiff's motion. It sort of veered off in other tangents, Mr. Rogers?

MR. ROGERS: Yes, I believe the reason for that is that, while the motion is entitled an exclusionary motion on our arguments that the case is attorney driven or medical buildup, it moves into areas broader than that, that seems to invite a bigger discussion. Might not hit it directly, but we thought let's just make sure that this is all shored up, so that we're all on the same page. I don't want to come in here and do anything that might offend the Court, so I figured let's just get the playing field clear and let's cover all these issues.

Now, the Defense doesn't intend to -- I've never once in my career used the phrases attorney driven or medical buildup, however the -- I guess very close cousin to those phrases is attorney relationships with the medical providers. Mr. Wall did a fine job at last Thursday's deposition of the Defense medical expert, Dr. Fish, of exploring the expert testimony history between Dr. Fish and Defense attorneys and Plaintiff attorneys and my firm and that's fair game. That's the reason that the rules of discovery require a disclosure for experts of these testimony lists -- or histories and the

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same is true for the medical providers and specially retained experts that the Plaintiff will put on the stand. The money that they've made, prior cases in which they've testified for Plaintiffs and for that law firm.

And even beyond that, like Mr. Wall was suggesting, relationships. Well, of course a relationship is relevant. If some expert is a good friend of mine who I go to football games with, well that's something relevant to bias. And that's something a jury should know about because now he's not -- he's even less objective than a Defense medical expert then. He's a friend and wouldn't a friend maybe color things a little bit more favorable to my case than someone who I don't socialize with? Of course these things are relevant. That's the stuff juries should hear about so that they can fairly evaluate the credibility of the witnesses.

THE COURT: Okay. I have a couple of questions for you.

MR. ROGERS: Yes.

THE COURT: The first is, I think you've probably answered this by not -- but you haven't specifically and I want to hear specifically, do you have any evidence that this case is attorney driven or that there's any medical buildup issues?

MR. ROGERS: Yeah, I -- well, as I said, I don't use those terms. Let me think, it's -- this really isn't that kind of a case. The Plaintiff treated within his HMO network

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after the accident. This isn't one of those where, you've seen many times, okay right after the accident I drove to this attorney's office and this attorney referred me to this medical provider and I began treating on a lien. It's not like that. So to -- yeah, to the extent that the question is concerned about that, no it -- that's not what this case is about.

THE COURT: So you don't have any evidence of any attorney driven issues or medical buildup issues?

MR. ROGERS: Yeah, I think to the extent I understand that -- those terms, I believe you're right.

THE COURT: Well, I mean to the extent that the motion was briefed and to the extent that we heard Mr. Wall's argument, I really haven't heard, nor did I see in your written pleadings, anything to suggest that you have any evidence like that. I think if you have any evidence like that, then let's hear about it.

MR. ROGERS: Yeah, it's -- I guess my question then is does that question incorporate these concerns about prior testimony histories, relationships, you know, social relationships, things like that --

THE COURT: I see that as a different issue.

MR. ROGERS: -- is that part of attorney -- okay, good.

THE COURT: I see that as a different issue.

MR. ROGERS: Then -- yeah, I -- no, I think -- as I

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believe I understand the term, no we don't see that an attorney told the Plaintiff get this medical treatment and a doctor said okay, attorney, I'll do that for you. I don't see that in this case.

THE COURT: Okay. Then the motion as it was drafted is granted. With respect to the other issues you raised, which I think are important issues for trial purposes relating to bias of expert witnesses and how many times they've testified, for example, for a certain firm and what kind of compensation they've received for their time, I think those are all fair game.

With respect to your other issue regarding a social relationship, do you have any evidence of that? Social relationship between an attorney and an expert witness?

MR. ROGERS: Well, I know off-hand of one instance -- one example of it, so yes.

THE COURT: In this case?

MR. ROGERS: Yes.

THE COURT: And was it something that came up during the course of deposition?

MR. ROGERS: No, no, it's just something that is -- I hate to -- can I tell Mr. Wall first, because I don't want anybody to be offended as -- now that we're on the record and --

THE COURT: You know what, let's trail that issue since



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it really wasn't an issue in Mr. Wall's motion and we can address it -- maybe we'll take a five minute break and you can address it with Mr. Wall.

MR. ROGERS: I'll even tell you as long as -- I don't want to say it on public record if it might cause offense and sort of a chambers approach and then we can decide whether everybody is okay with discussing --

THE COURT: I think we'd better trail it for -- maybe when we take a break in between, we finish up Plaintiff's motions and before we move on to Defense motions.

MR. ROGERS: Sure.

THE COURT: You can bring it up if you wish.

MR. WALL: Judge, the next section is collateral source. I don't think there's a disagreement on the issues of collateral source, except for the issues of liens. There's no dispute on sources of payment of medical bills, health insurance, HPN, I think is the HMO that was used here. The issue, I guess, that there's a dispute on is that of liens.

I'm not sure why ultimately it's a major issue here. As Mr. Rogers said, Mr. Simao treated mostly with his health insurance under HPN. They will likely have a subrogation lien, I'm not sure why that's relevant. Any of the other treatment that he had that may have been on a lien is likewise not relevant. There's been no evidence of any bias, based on the existence of any lien. We haven't pointed the Court to



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any provider who testified even remotely to any bias or it was even explored the issue of bias with respect to any outstanding lien.

It becomes evidence of the Plaintiff's financial condition, that he doesn't have the money to pay for everything, that's why he has health insurance through his business. It's not relevant. Their financial condition isn't relevant. He's been forced to treat on liens or through his healthcare -- health insurance provider, it's our position as a result of the Defendant's negligence. And so to beat him over the head with that and use that against him and somehow bring in the fact of -- that it may have been on liens is irrelevant. Unless there's some actual evidence of bias as a result of some provider treating on a lien, I don't think it's relevant.

THE COURT: Mr. Rogers?

MR. ROGERS: Thank you. There's a reason our Supreme Court has never categorized a lien as a collateral source. A collateral source is something that a victim purchases before a casualty, for which they receive a benefit after the casualty that our courts have said, as a matter of public policy, we won't allow to inure to the benefit of the tort fees here. That's a collateral source.

A lien is a subsequent undertaking. A lien is the very polar opposite of a collateral source. It is the stuff

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that bias and prejudice and all those things are made of. The Plaintiff did treat on a lien with two medical providers, Drs. Grover and Dr. Rosler. And the Defense is unquestionably entitled to ask them about their financial interest, as we discussed in a previous motion. Their financial interest consists not only of what they're being paid to appear here in trial, but what they might stand to gain if their opinions persuade the jury of the verdict that would most benefit them. Of course that's relevant.

THE COURT: Any response, Mr. Wall?

MR. WALL: Well, then I don't know how you differentiate. Neither one of them did the surgery, so do we leave the jury with the impression that Mr. Simao paid for his surgery and all of his medical treatment out of his pocket? Do we bring in the fact that health insurance covered it and why didn't health insurance cover Dr. Grover and Dr. Rosler? Is it because the third-party administrator, or whoever, from the health insurance doesn't, you know, allow these two doctors? And why did he go to these two doctors outside of his insurance? Things like that. I mean, that's the next step if we bring that in.

I don't recall from the depositions of Dr. Rosler or Dr. Grover that there was any suggestion of any bias. They didn't even end up doing the surgery. Dr. Grover did, Dr. McNulty did. And so I think that it inevitably leads to more



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questions that are more prejudicial than whatever probative value they might -- there might be.

I don't think the Defense experts say that Dr. Grover and Dr. Rosler did something that wasn't medically indicated. Their position is none of this was caused by the accident. Their position is all he had was migraines and whatever they did isn't related to the accident. And there's some discrepancy, I think, although Dr. Wong hasn't been deposed yet until this afternoon.

So I don't know where the relevance is as to those two medical providers. And I think I agree that those are the only two that were outside HPN, but it ends up prejudicing Mr. Simao to the extent that he can't bring out the fact of maybe why he went there or why Dr. McNulty ended up doing the surgery or any of that because it all gets back to the issues of health insurance, which are inadmissible.

THE COURT: I agree. The motion is granted.

MR. WALL: Thank you.

THE COURT: I think counsel can explore the issue of bias aside from getting into issues with respect to payment and collateral sources. Next motion?

MR. WALL: I'm going to pass the next section --

MR. ROGERS: Can I get a -- just a point of clarification? Is the Court characterizing a lien then as a collateral source?



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THE COURT: I don't think the Court has to do that. I think once you start discussing liens you're discussing issues of who's paid for what and issues of insurance are invariably going to come up and I think that's exactly what Proctor forbids.

MR. WALL: Judge, the next section I guess I'm going to table because there's -- it's evidence of when Plaintiff retained counsel and the opposition goes into relationships again. So --

THE COURT: Okay.

MR. WALL: -- I guess we'll table that one in -- as well. And then the final part of our omnibus motion in limine is seeking a ban on an argument that the attorney, on behalf of the Plaintiff, is asking for more than they expect to receive. I know you've seen this before. They can argue that what we're asking for isn't supported by the evidence, they can argue causation, they can't say the reason they're asking for this amount because you -- they really want you to return this lower amount, and that's what we seek to preclude.

THE COURT: And my understanding of Mr. Rogers' written opposition was he didn't really oppose -- he didn't really oppose that motion as it was framed and drafted by counsel. What he wanted, I understand, was to be able to argue the evidence and inferences and so on.

MR. ROGERS: Right. And if Plaintiff requests an

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excessive amount that we be, of course, permitted to say so. I -- this is another one of those catch phrases that I don't use, that the Plaintiff is asking you for more than he hopes to get. So if that's what's to be excluded, fine.

THE COURT: Then I think we're all on the same page on that one. Motion is granted.

Let's take a five minute break, allow counsel an opportunity to chat.

MR. ROGERS: Okay.

MR. WALL: Thank you.

[Recess]

THE COURT: Back on record.

MR. ROGERS: Yes.

THE COURT: So what about that remaining motion --

MR. ROGERS: The attorney --

THE COURT: -- in Plaintiff's packet?

MR. ROGERS: Oh, the attorney relationship with the medical provider?

THE COURT: No, it was titled "Attorney Retention and Referral."

MR. ROGERS: Oh.

MR. WALL: Well, we -- I'm sorry, Judge.

THE COURT: It's okay.

MR. WALL: When you chew those mints, man, whew.

The one that was attorney driven or medical buildup



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had as a component of the opposition this issue of doctor's relationships with counsel. So we've tabled that, and I think Mr. Rogers was going to make a statement on that.

I -- the one that's later on, evidence of when the Plaintiff retained counsel, in the opposition, again, they go into the issue of relationships between experts and lawyers being relevant. And so that's the reason I said, hey, let's table that until -- until after the break, too, because it --

THE COURT: Oh.

MR. WALL: -- it's the same type of issue.

THE COURT: Okay.

MR. WALL: So I think what -- Well, I don't know. You want me to do it, or --

THE COURT: Mr. Rogers?

MR. ROGERS: On -- well, yeah, it's your motion, I believe.

MR. WALL: Well, I mean, the nature of this relationship in regard to --

MR. ROGERS: Oh, no. Yeah. The relationship that the Defense may introduce if Dr. McNulty takes the stand is that he has a social relationship with Plaintiff's counsel. No, not Mr. Wall, but the law firm, and that he vacations with them. And that, we submit, is relevant. Any relationship that he may have with counsel is relevant.

THE COURT: Mr. Wall?



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MR. WALL: I guess I have a problem with it on a couple levels. You are essentially introducing it to say or explore the possibility that the spine surgeon either would color his testimony based on a relationship with somebody at Plaintiff's counsels' table or their firm, or -- strike that.

And/or that Plaintiff's counsel, based on their relationship, would intentionally elicit information that was untruthful. And when you balance it between the probative value of that cross and the prejudicial effect, it's necessary to factor into that balance the fact that Dr. McNulty recommended surgery, potentially, or at least discussed surgery in 2006. Again he discussed it with Mr. Simao, I believe, in 2008. He ultimately performed the surgery in 2009. He was deposed, I want to say, October or November of 2008 before the surgery, and he was deposed again about May or June of 2009 after the surgery.

We were never in the case at that point. Our firm was never in the case. So to say -- if that's going to come out during cross, then on redirect we have to get into the fact that we weren't in the case. We have to defend ourselves and our client saying, "We weren't even in the case when you treated him, recommended surgery, were deposed, cut on him, and were deposed again."

We weren't in the case even at that point. So I think when it factors into the balance based on all of those



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facts, it's more prejudicial than probative, and it's basically not only an attack on the witness, but it's an attack on Plaintiff's counsel. And I think that that's inappropriate.

THE COURT: When did you come into the case, Mr. Wall?

MR. WALL: I want to say -- I think it was spring of 2010, but it may have been a little earlier than that. I know -- I know when I came in the case, but -- but as to when the firm came in the case, I don't know for sure. But that's -- I don't believe that we were present for any of the depositions of Dr. McNulty.

THE COURT: Okay.

MR. WALL: But I don't think I have a copy of it with me.

THE COURT: Mr. Rogers?

MR. WALL: Wait, you know what, I might. I might actually. No, I don't.

MR. ROGERS: The Defense would submit that the timing is immaterial in that the relationship is during the trial process. The issue presented in this case is really cause. And --

THE COURT: Is really what?

MR. ROGERS: Cause, causation. And if Dr. McNulty is on the stand, and Plaintiff's counsel is asking him questions, and there's a relationship between the two of them, that is every bit as material as whether a Defense medical expert is

on the stand and he has been paid for his services. Mr. Wall points out all sorts of improper inferences the jury could draw from that; however, there's no question that that line of questioning is permissible.

The fact that Plaintiff's counsel and Dr. McNulty socialize is relevant for the very same reason as financial gain, because friendship is at least as important as that. And if there is a friendship, it's something the jury should be permitted to incorporate into their evaluation of this witness to determine whether he has any bias, prejudice or credibility concerns.

THE COURT: You know, I think both parties make some really good points. When did you discover this information, Mr. Rogers?

MR. ROGERS: Probably -- I'm sorry. Probably four or five months ago. It wasn't a matter of discovery; it was -- actually, I socialize with some of the guys who work in -- in Mr. Wall's and on that floor, and -- and that's where I discovered it, but it wasn't formal discovery. And so, you know, knowing that I thought, well, that's something that if Dr. McNulty is called the jury should be aware of.

THE COURT: I think you have the right to bring that and brief it, and the Court will take a look at it. I don't know if there are any other motions in limine other than these that are calendar today. Are there?

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MR. ROGERS: Oh, well, in that -- if none on your calendar, then we've got lots of reading for you.

MR. WALL: She means -- she means other than the ones that are on the calendar.

THE COURT: Other than --

MR. WALL: There are some. There have been --

THE COURT: -- today's.

MR. WALL: -- some that have been filed since these were filed.

THE COURT: That's what I'm asking.

MR. ROGERS: Oh.

MR. WALL: She doesn't mean it -- you know there's still a bunch of Defense motions on today.

THE COURT: I know. Defense has way more than you had, Mr. Wall.

MR. WALL: Correct.

MR. ROGERS: Okay.

MR. WALL: I saw that.

But, yes, there are some more. So --

THE COURT: I think whatever date those are set for you could -- you could file your motion, and counsel could brief it, and the Court could address it.

MR. ROGERS: Yeah, let me write that down. So brief the admissibility of a social relationship between counsel and a medical provider?

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THE COURT: I mean, it's your motion, so however you --
MR. ROGERS: That -- okay.
MR. WALL: But would she -- you want them to file a motion to allow that, and then we'll file an opposition to it?
THE COURT: Yeah. I think both sides have made some very good points, and I'd like an opportunity to think about it rather than just shoot from the hip on this one.
MR. WALL: Okay.
The other part of our motion in limine, the omnibus motion in limine that we sort of held in abeyance was evidence of when Plaintiff retained counsel.
MR. ROGERS: Yeah, I can make this short. I don't even know that that's an issue in this case.
MR. WALL: All right.
THE COURT: So the motion is granted.
MR. WALL: Thanks.
THE COURT: Okay. That concludes all of your motions, right, Mr. Wall?
MR. WALL: It does.
THE COURT: So that takes us to Defense motions.
MR. WALL: I will say that we're still, I think, circulating the stipulation that we had about other motions that we wouldn't be filing based on the agreement. I suppose we can make a record on that.
MR. ROGERS: Oh, that EVCR --

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MR. WALL: Yeah.

MR. ROGERS: -- stip? Okay.

MR. WALL: Okay. I just didn't want to waive anything by not bringing up things and then not have some disagreement later. But I -- we are working on that stipulation.

MR. ROGERS: Okay.

THE COURT: I don't know anything about that one.

MR. WALL: That's fine.

THE COURT: Okay, whenever you're ready, Mr. Rogers.

MR. ROGERS: Thank you.

Okay. I'm going to do my best to remember that -- there were a couple just housekeeping things I wanted to take care of when we're done with the motions.

THE COURT: Okay.

MR. ROGERS: Okay. Where would you like to begin? We have, I don't know, 10 or 12 of these.

THE COURT: Well, I think in order -- for the Court's benefit, and for the clerk's benefit as well, we get -- we need to make good minute orders.

MR. ROGERS: Okay. The order, then, doesn't -- I mean, the -- which one goes first doesn't matter?

THE COURT: It matters to me, because I read them in order as you presented them.

MR. ROGERS: Yeah.

THE COURT: So Number 1 was the traffic accident report.

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MR. ROGERS: Okay. Good. Let me juggle through my papers and get to it.

Yeah, Frias/Valle obviously holds that the report at least in terms of conclusions don't come in. The Plaintiff provided a qualified opposition to the motion to which he attached a proposed redacted report. The Defense, as you'll see in the reply, found that those redactions were incomplete, and so submitted a second form for your consideration.

The -- if I remember right, the problems that were not redacted in the Plaintiff's proposed form included insurance information, conclusions such as speed estimates, and things of that nature. This is an officer -- this accident happened on the freeway, and the vehicles were moved to the side of the freeway off the road before the police arrived. There's nothing resembling a -- an admissible accident reconstruction. The officer admitted as much at his deposition.

So those conclusions, and obviously talking about insurance, is -- is improper.

THE COURT: Mr. Wall?

MR. WALL: I agree, frankly; although, the insurance part is something that was basically an oversight, that I'm looking now and I see on -- I think it's the fourth or fifth page of the report, the speed -- because I was -- the one that's attached to their reply has the description of the accident in

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narrative on that first page. And I didn't know -- we had redacted that.

MR. ROGERS: Okay. Let me pull that. Maybe we can just reach an agreement right here and now.

MR. WALL: And the speed part that I -- the only speed part that I saw was -- I think he just had zeroes with everyone in it.

THE COURT: Let me make it easy. The motion's granted.

MR. ROGERS: Yes.

MR. WALL: All right.

MR. ROGERS: Okay.

If -- we'll look at the report and see if there are any other redactions we think that we should agree to. But the default, I gather, is that the one that was attached is the redacted form to the reply?

THE COURT: I don't know that the traffic accident report is admissible at all.

MR. ROGERS: Okay.

THE COURT: You've got photos of the accident, right?

MR. ROGERS: That -- yes.

THE COURT: You've got testimony of the witnesses. I don't know that you need it. So the motion's granted.

MR. ROGERS: Okay. Very good. So the reports out.

THE COURT: Right.

MR. ROGERS: Okay.



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Okay

MR. ROGERS:

MR. WALL: I don't need

MR. ROGERS: Okay.

And I'm sorry, Your Honor, I don't have the order in which -- which you --

THE COURT: Okay.

MR. ROGERS: -- in which we filed them. So what's next?

THE COURT: Number 2 is argument of the case during voir dire.

MR. ROGERS: Okay. Now, as you know, we've kind of touched on this the first time we met in this case on the jury questionnaire issue. There's not a lot to add to that, other than that Plaintiff agrees that counsel shouldn't be arguing the case during voir dire. And the Court, it's clear from our last hearing, you have a good understanding with your role to make sure that everyone behaves themselves, and limits the inquiries to matters that do go to fitness to sit on the jury.

I've just been in a few trials, where things have gone kind of haywire, and people are actually discussing facts of the case. And I thought, let's just not let that happen here.

THE COURT: Well, Mr. Wall's an experienced trial attorney. I would hope that by virtue of the jury questionnaire a lot of this information you're going to have

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already had access to it before you examine the panel. So did you want to address this issue?

MR. WALL: If it's just that we can't argue the case, that's fine. I don't have a problem with that.

The -- the motion says, "can't use the process to seek jurors with similar viewpoints." I'm not sure that I agree with that, and I'm not sure that a -- that a -- any trial lawyer would necessarily agree with that. Obviously, as you know, we can explore certain areas. We can follow-up to questions in the questionnaire, and all that. So if it's just that we're not to argue our case, I'm with you.

THE COURT: Mr. Rogers?

MR. WALL: Reciprocally, of course.

THE COURT: Right.

MR. ROGERS: Okay.

THE COURT: Do you agree with that, Mr. Rogers?

MR. ROGERS: Well, again, this is more an art than a science; and that is, the artists push too far once counsel have begun questioning jurors in a way that ensures jurors who are favorable to their case rather than jurors who are simply unbiased and qualified to hear the case.

That's where this conditioning concern that we all discussed at our last meeting comes into play. A lot of these questions, whether by design or not, do have the effect of conditioning, and that's not a proper use of voir dire.

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So, yes, while counsel obviously on both sides want to have jurors favorable to their case, it's a misuse of the process to ask questions that do nothing about that. I know it's an art question. We can't draw an exact line. I think -- I think you get where the concern is on it.

THE COURT: Won't you be seeking jurors who are favorable to the Defense?

MR. ROGERS: I think both sides will, and the whole point is, how far does it go. And the answer, it seems, is it shouldn't go very far.

THE COURT: We'll have to just play this one by ear. The motion is partly granted on -- on counsel's statements and representations.

MR. ROGERS: Okay.

MR. WALL: Judge, can I just -- I wanted to go back to the one on the traffic accident report. I was just kind of skimming through it. There might be some facts in there that may be relevant. And I will certainly sit down with Mr. Rogers to redact whatever we think is inappropriate. I, frankly, agreed with most of the things in his motion. But if we take all of that out, there might still be some measurements and things that may be necessary, just out of an abundance of caution. And I don't know if Mr. Rogers -- in the reply it didn't seem like he had an opposition to that.

THE COURT: Mr. Rogers?

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MR. ROGERS: Well, yeah, if it's measurements I would because the officer testified he didn't conduct any. These -- these are the problems with that report, when the vehicles were moved, the officer said, "I'm not an accident reconstructionist. I didn't do any of that kind of work. I just talked to the people on the side of the road and then wrote up this report."

So I'm happy to talk to Mr. Wall about whatever it is he might be interested in getting in.

MR. WALL: That's fine.

MR. ROGERS: For example, if a party told the officer something and he reported it, well, maybe. I don't know. But I don't see it in this report.

THE COURT: Well, he --

MR. WALL: And he's got things in there like the light conditions were daylight, and the roadway was dry. You know, those -- those facts that are separate from the kinds of things that Frias said shouldn't come in; you know, estimating the speed or what someone told him, things like that.

MR. ROGERS: Right, but all of that's undisputed. I mean, the --

MR. WALL: That's --

MR. ROGERS: -- Defendant, as Mr. Wall pointed out --

THE COURT: I think that's why he wants it in there.

Look, here's the thing though: The ruling stands

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unless counsel stipulate to some sort of redacted report coming in.

MR. WALL: Okay.

THE COURT: The Court has no problem with that.

MR. WALL: Okay.

THE COURT: Number 3, Mr. Rogers, was witness testimony regarding credibility of other witnesses, but there was not a -- there was a non-opposition to that filed by Plaintiffs.

MR. WALL: Correct.

MR. ROGERS: Okay.

THE COURT: Motion's granted.

So the next one I have is regarding duplicative or cumulative testimony or evidence.

MR. ROGERS: Okay. And while I leaf through my notes to it, we're citing the evidentiary statute that precludes duplicative testimony, which is simply getting people on the stand to say, "Yeah, I agree with the last person who was up here."

And the problem is that the Courts don't allow it, and in part that's because -- in a case like this, where the -- the volume favors one side over the other, the Defense isn't entitled to retain nearly as many experts as the Plaintiff has treating providers. And the Court certainly wouldn't allow the Defense to hire two spine surgeons to get up on the stand to say the same thing, and two pain management specialists to



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get up on the stand and say the same thing.

We're just saying, look, if one treating provider -- for example, McNulty, who we've been talking about, if he gets up on the stand and he covers issues A, B, and C, then a Dr. Grover, the other spine surgeon in the case, can't get up and duplicate what Dr. McNulty said. He can testify about observations that he made in his treatment of the Plaintiff, but ultimate issues such as causation and things of that nature would really be getting into the duplicative arena. And that's what the statute prohibits.

THE COURT: Mr. Wall?

MR. WALL: Judge, I don't have any problem with -- generally with the rule, obviously. But -- but what they're asking for is not cumulative testimony. They ask in their motion, "The Plaintiff shouldn't be able to call surgeons and pain management doctors to have them agree with each other."

These are all separate treating physicians. You've heard now that he was sent out, Mr. Simao was sent out to this -- by the surgeon to this pain management doctor; did a procedure or a number of procedures; get the results; they go back. They may have opinions on causation, but they're not cumulative. They're each treating Mr. Simao. They're each -- or they're each part of the diagnostic process and reaching certain conclusions.

The pain management doctors might complete some of

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those procedures. They can certainly testify to what they did; the Plaintiff's response to any of those; the results, even if it's forwarded to the surgeon who then reviews it and makes a determination. I mean, their -- part of their case, according to their experts is he shouldn't have undergone surgery. The surgery was unnecessary."

So those -- these aren't cumulative things. These are part of the entire puzzle that the surgeon had at the time he -- he performed the surgery.

They're also saying that none of this, if there was anything there, was caused by the motor vehicle accident. The procedures weren't necessary. They didn't work. I don't know that that's cumulative evidence.

But, again, I'm -- there isn't a specific request in the motion to say, "Hey, keep this out." It's not as though we have three spine surgeon experts. We just have treating doctors.

And so my request would be that the motion be denied as a blanket prohibition to preclude a certain provider or a number of them from testifying, obviously reserving the right to -- to the Defense to object to whatever they deem to be -- to be cumulative during the testimony.

THE COURT: Mr. Rogers?

MR. ROGERS: Well, it's -- it isn't one of those things that can be forecasted. But the definition alone is

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sufficient for today's purpose. And the definition of cumulative evidence is corroborative evidence on the same issue. And the Court can write an order saying that, "Yes, I'll enforce" -- it's 48.035[2], "and we won't permit, whether it's treating providers or specially retained experts to come into this -- into the court and simply offer corroborative evidence of the same issue that's been covered by someone else."

THE COURT: You know, I don't disagree with your characterization of N.R.S. 48.035, subsection 2, but the motion is so broadly drafted that the Court has to deny it, noting that counsel can certainly make his objections at time of trial if he thinks that we're hearing cumulative testimony.

Next item that I had in your omnibus motion, Mr. Rogers, was Number 5, Dr. Stan Smith, the economist.

MR. ROGERS: Okay. Now is it okay if I sit for this one just to --

THE COURT: Sure, why not.

MR. ROGERS: -- thumb through my notes?

THE COURT: Sure.

MR. ROGERS: The -- the opposition to this motion, I think, much like some of the examples in the oppositions to the Plaintiff's omnibus motion, sort of miss the mark of and the issues presented in the motion. I think roughly eight pages were spent explaining how hedonic damages have already

been determined by our Supreme Court to be appropriate.

And our reply to that opposition was, well, of course. We don't dispute that. That's not what this motion is about.

What this motion is about is a breakdown of the various categories that Mr. Smith has offered opinions on, some of which are entirely unrelated to the -- to the long explanation of hedonic damages that the Plaintiff provided in the opposition.

Fist is loss of business earnings, and in this case the Plaintiff hired an economist you've probably known before, Ira Spector. And he -- am I getting that right?

MR. WALL: He's a vocational rehab.

MR. ROGERS: It wasn't Ira Spector. I can't recall who it was.

But, anyway, withdrew him. And what we have is MR. Smith saying, "Okay, look, the evidence -- the factual evidence in this case doesn't support a loss. And so what I'm going to do is, I'm going to use what I call a benchmark, $10,000 benchmark, and based on this benchmark, I'm going to project future business loss."

Now he -- Mr. Smith has been sort of supplementing, like crazy lately, we just got another one on Friday, and even still the deficiencies in his foundation have not been cured. And here's what they are: He has the Plaintiff's tax returns,



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his personal returns. They prove that the Plaintiff has earned more money every year since the accident then he ever earned before the accident.

But remember the category that's being addressed right now is business loss. And the problem with this is, he only has post-accident earning records. Now we know that the Plaintiff is earning more and more from his business every year, but we have no way to measure whether the business has a loss. He has two years from 2007 and 2008, again, this is two and three years after the accident, that show $250,000 of income, net income I believe, for the business both of those years. So there's no factual basis for a loss here.

In fact, the Plaintiff testified at his deposition that he has not lost any income since the incident. He also testified that he bought this business two-and-a-half years after the incident inviting a speculation. Our court has already addressed this dating back to the 1960s saying, listen, if you've got a new venture, you're getting into speculation when you're asking for damages because you don't have a history. Well, he had no history with the business, the Plaintiff didn't, because he didn't own it until two-and-a-half years afterwards.

And so on this category, not only are the -- any losses speculative, the factual foundation that Mr. Smith supplies has no basis at all. And that's the danger of it, is

letting him get on the stand and say, "Well, okay. I don't have any facts, but using this benchmark and then adding a bunch of ten-syllable economic terms, we can forecast, and all that stuff, and here's the loss into the future," nothing at all remotely supported by the records, the Plaintiff's testimony, or anything else. But to get him to put that number out there and to put that in front of the jury not only lacks foundation, it presents a serious prejudice to the Defense because now we have to respond to smoke. There's nothing to it, but it's a number that the jury might write down and get misled by.

And then I'll walk through these if you want, just category by category, and let Mr. Wall respond to it.

THE COURT: Yes, that would be great.

MR. ROGERS: All right.

THE COURT: I think he wants you to respond as to each of these items.

MR. WALL: Well, you know, I -- I went back because I heard the argument, and I went back to read the motion because it sounded like a motion to, I guess, strike any wage loss or business loss claim, and that's not really what the motion was. It was -- it was that his methodology wasn't part of Hallmark, that -- that his foundation was insufficient. And then when shown his foundation in the supplemental report, then the reply was sort of, you know, "Hey, we didn't have



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this at the time that we filed the motion."

So I -- we've attached his reports to the opposition that we filed. You know, I am not an economist, but he has laid out on pages 2 and 3 of his report, and the tables that are attached to it, the manner in which he calculated loss of business earnings, loss of household family services, the hedonic damages, and even the loss of society or relationship.

The -- the areas that I heard Mr. Rogers discuss are perfectly appropriate cross-examination. They have an economic expert -- is it Dr. Skauge [phonetic] or Mr. Skauge?

MR. ROGERS: Yes, doctor.

MR. WALL: -- Dr. Skoog who has --

MR. ROGERS: They both are.

MR. WALL: Huh?

MR. ROGERS: They're both.

MR. WALL: Dr. Smith and Dr. Skoog. His -- he has reviewed the reports. He has an opinion. We'll take him on cross-examination. They can take Dr. Smith, who is undoubtedly a very highly qualified economic expert, and take it from there. But I can't say that I can artfully recreate the economic basis for each of his conclusions. I think I'd be stepping out far past my expertise.

But I understood the motion as sort of being on qualification and evidence, and I would -- I would stand on Dr. Smith's -- on Dr. Smith's reports, including the updates.



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THE COURT: Mr. Rogers?

MR. ROGERS: Yes. On page 4 we outline the arguments, page 4 of the -- the motion. We outline the foundational deficiency. The reason Hallmark is cited is because this is a foundational challenge.

Foundation doesn't go only to Mr. Smith's education and training. This foundation goes to, does he know enough here to say what he intends to say; and is this idea of a benchmark a -- a recognized substitute for facts. And the evidence that we've presented is that it is not. You can't simply say, oh, I see that the Plaintiff is earning more now than he ever did before, and I see that his business earnings are the same as they ever were. So I'm going to, instead of rely on the facts, use a made-up thing called a benchmark, and I'm going to project future losses based on that.

That's foundational. That's not cross-examination, because the facts aren't admissible at all, or the opinions, I should say, aren't admissible at all.

THE COURT: The motion is granted as it relates to loss of business earnings.

MR. ROGERS: Okay. Shall I -- okay.

Next, you'll -- you'll see that this -- what I'm going to say now about household, family replacement, housekeeping and house -- or, pardon me, home management services is another running theme. It's a continuation of



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this benchmark idea.

Here -- I've been saying Mr. Smith. I'll say Dr. Smith if -- if that makes everybody here feel better about him. He makes up a number, again, just like the benchmark. On no foundation at all he assumes a 45-percent decrease in activity. And there's no medical or factual foundation for a 45-percent assumption. Nothing at all.

As Mr. Wall pointed out just a little bit ago, the Plaintiff de-designated their vocational rehabilitation specialist. There's no disability exam; nobody discussing this 45-percent number.

Next there's no evidence that Dr. Smith conducted any type of examination that would help him understand what it was that the Plaintiff did before that he isn't doing, or is 45 percent assumptive -- or presumptively unable to do now in the home. I mean, is it washing dishes, or is it mowing the lawn; what is it? And, again, most importantly, how on earth did an economist arrive at a 45-percent limitation in ADL.

Smith is a derivative expert. He can't make up these numbers. He has to have foundation from someone who's qualified to supply that number to him, and then he can put it to numbers. Without that, he -- he can't offer the opinions in this category.

THE COURT: Mr. Wall?

MR. WALL: You know, I -- listening to what Mr. Rogers

says, I think maybe the appropriate middle ground, then, is to do what we've -- what's been done in obviously a number of cases when Dr. Claurity [phonetic] testifies; that is, he says, look, here's the total value of household services given his age, and his education, and all the things that -- the same things, basically, that Dr. Smith used.

And if we want to say Dr. Smith shouldn't assign the percentage of 45 percent, but rather let the trier of fact assign the percentage, which is what we do when Dr. Claurity testifies on this same issue, I think that's probably an appropriate middle ground. I don't -- I don't really have a problem with doing it that way. Then it leaves the -- the issue of what de minutian [sic], if that's the right word, of household services would be appropriate and the jury can award that. But at least they have a total amount, and then if they think he can only do 30 percent of -- of household services, and he's lost 70 percent, then they can -- they can factor that, which is what we do routinely with Dr. Claurity.

The fact that Dr. Smith took it a little further after reviewing the Plaintiff's deposition, if you want to leave that to the jury to determine after hearing Mr. Simao's testimony, that's -- I think that's fine, and that would essentially eliminate the issue.

THE COURT: Mr. Rogers?

MR. ROGERS: Yes, thank you.

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Dr. Claurity is used in these cases after Dr. Olaveri [phonetic] or someone of his qualifications supplies the jury some guidance on what the limitations are, on what the disabilities are. You can't simply say, okay, household services over his expected -- or pardon me, his life expectancy now of whatever it is, 35 years, amount to a total of $2 million, because the jury sees this number and they go, "Well, I don't know what to do that, and nobody tells me what he can and can't do."

Again, for the same reason that Smith can't assume 45 percent, neither could a jury. They'd have to have some evidence of how to use that number and why it's relevant. And there haven't been any disability or other qualifying reports or evidence to even put that number in front of the jury.

THE COURT: What testimony or what expert witnesses is the jury going to hear with respect to what Plaintiff can and can't do now since this surgery, since this accident?

MR. WALL: Well, they'll hear from his treating providers, the ones who are continuing to treat him. In fact, I think we're going to do probably at one more deposition of a new treating provider. So they will hear that.

They will hear the result of the surgery, what limitations there are. There's going to be the life-care plan expert, obviously, to talk about how much those things cost, and what's -- what would be necessary in the future. I know

that's another one of the motions. And they'll hear from the Plaintiff himself, and probably his wife, as to what he can or can't do. So they'll take all that information together, which is what they routinely do when Dr. Claurity testifies on this, and -- and come up with a percentage, which is what they'd be instructed to do during their -- during closing, so.

THE COURT: Okay. Mr. Rogers, any concluding thought?

MR. ROGERS: Just that they would be instructed only after guidance; that Dr. Claurity doesn't get up and give those numbers until someone with medical qualifications to advise them on disabilities and limitations in activities of daily living, and so forth, gets up and says, "This is the practical application and effect of this problem."

And then the jury can receive that and make sense of it. Otherwise, you really are just throwing numbers at them with no guidance as to what to do with them.

MR. WALL: Respectfully, Judge, that's not true. There -- you don't have a -- it's not a worker's comp case where you need somebody to come in and say his permanent partial disability is 26 percent, and then do it. And it's not routinely done after -- after a medical provider says, "Here's his percentage of disability." That wouldn't come before the trier of fact.

Rather, it's done as a collection of the entire evidence, and allow the jury to say, look, here's the number



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if he couldn't do any household services. We think he can still do X-percentage, and that's the way it's routinely done.

THE COURT: Motion -- the motion is denied with respect to loss of housekeeping and household management services; but that ruling is contingent upon counsel being able to lay the proper foundation.

MR. ROGERS: What -- I may come back to this when we get into a later motion addressing undisclosed evidence, because it seems to me that the foundation in this case is going to require new evidence. But I'll leave that until we get to that.

Next in the loss of enjoyment of life, this seems to be where the hedonic damages, where the Plaintiff spent most of their time in their paper with really something more in the nature of a legal treatise on the admissibility of it in principle. That's what the Defense responded to in saying, yes, of course. It's -- it's legally recognized.

The problem here is, again, Smith's continuing assumption of numbers that have no foundation at all. He assumes a 15 to 30-percent disability, again a wide range, that provides virtually no guidance and has no medical foundation. And then he calculates a loss of enjoyment of life based on that assumed disability.

Now aside from the foundational problem, it is vague and really leads the jury to speculate. And it serves only to

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put a large number in front of the jury that they won't know what to do with because there's no medical doctor explaining to them how 15 to 30 percent really factors into this, and even if it does.

THE COURT: Mr. Wall?

MR. WALL: Judge, you know, this is -- this is what we covered in Banks, and it was the same model, the same methodology. It was someone who learned from Dr. Smith the actual methodology. It's the exact same methodology that he's used in the past. If they jury wants to change that percentage, that percentage is based -- I believe the 15 to 30 was based on the Plaintiff's own deposition testimony which Dr. Smith reviewed.

This is exactly the type of evidence that -- that Banks allowed by expert testimony. It's obviously set forth in -- in -- admitted under the same methodology and the same theory in -- in countless other cases within the state of Nevada. And so I would submit it on that history.

THE COURT: Mr. Rogers?

MR. ROGERS: But very dissimilar foundation. All we're discussing here today is foundational concerns, and there is no medical evidence or foundation to support these assumptions: The 45-percent decrease in ADLs, for which you said the Plaintiff must lay foundation; and this 15 to 30-percent disability that is involved in the hedonic analysis.



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THE COURT: Like the last ruling, assuming the proper foundation can be laid, the motion is denied as to number 3, reduction in the value of life.

MR. ROGERS: Okay, next in loss of society and relationship, this is a different undertaking, entirely, from hedonic damages. This is something where Smith departs from what he was permitted to do. Ascribing one person's disability, assumed in this case, to someone else, the spouse; and then assigning a number for the loss to the spouse, to someone else, is something that is not supported in Mr. Smith's field. I don't see any evidence that this has been permitted. Certainly Mrs. Plaintiff can get on the stand and say, "I have experienced losses." But Mr. Smith cannot quantify them.

THE COURT: Okay. Mr. Wall?

MR. WALL: You know, actually I'm just going to submit that to the Court. The -- the report that he talks about uses the same model that he used for hedonic damages; and that is sort of a loss of enjoyment of life based on all of the research that has been provided.

But, you know what, I would submit it, and if the -- if the ruling is that they'll base that on the testimony of Mr. and Mrs. Simao, I'm perfectly comfortable with that.

MR. ROGERS: I have nothing to add.

THE COURT: Again, assuming a proper foundation can laid,

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the motion is denied as to Cheryl Simao's loss of William's society or relationship.

MR. ROGERS: And the final category is the present value of the future life-care plan. I suppose we should table that until we discuss Ms. Harman's life-care plan. Certainly Smith is -- is allowed to reduce a life-care plan to present value if the life-care plan is admissible in the first place in this case.

THE COURT: I agree.

MR. ROGERS: Okay.

THE COURT: Well, the next one I had on my list, Mr. Rogers, was having to do with graphic and lurid videos.

MR. ROGERS: Okay. You probably saw the -- the cases that were cited that exclude these videos. The basis for exclusion is that they -- that they can tend to make someone sick to their stomach. I've actually observed some of these, and they don't help you understand what going on because what little you can see is simply blood and tools. They don't serve, in other words, a probative purpose; but they do inflame. And evidence that does nothing but that has no business being admitted in court.

Now we're talking sort of in theory right now, you and I, because I haven't seen anything from Plaintiff's counsel that I can address concretely and say, "That is too much," or, "Maybe that's okay." As long as it's something



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that serves the purpose to educate and to appeal to the jury's reason, that's fine. But if it's something that's simply designed to impassion or to -- to gross a jury out, that doesn't come in.

THE COURT: Mr. Wall?

MR. WALL: Yeah, I don't really have an objection to that. I mean, I didn't know how far the motion was going. Generally what we would do is, we might use sort of an animation, like hesitant -- I'm hesitant to use the word "cartoon" because it downplays the significance of it, but it's essentially an animation that may help the medical provider describe what he did. They're generally not bloodthirsty type of video of an actual procedure.

You know, we may very well do that for the surgery that took place. Let Dr. McNulty describe with the help of the animation where he went in, what he did, maybe with some of the injection procedures; but we're not -- I guess my -- I agree with him, frankly. It's not our intention to gross a jury out, and if -- if he wants to be able to -- my suggestion would be deny the motion at this point without prejudice if -- if -- you know, we'll show him whatever animations we would use before trial, and he can reserve whatever objection he wants at that point.

But -- but basically, they can explain what they did, and how, and why, and if it helps to have a little



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animation to do it -- it's certainly also relevant to the Plaintiff's pain and suffering. But we're not -- we're not seeking to gross them out.

THE COURT: Mr. Rogers?

MR. ROGERS: Yeah, I guess my suggestion would be to -- to grant the motion as written, because it sounds like the Plaintiff doesn't have any opposition to it. For example, if these animations are still images, the doctor is going to point to a level of the spine and say, "This is the area that I worked on," well, that's not contemplated in this motion, so.

MR. WALL: Well, I guess I wasn't sure because it was entitled "Motion in Limine to Exclude Graphic or Lurid Video, or Animated Depictions." And so I didn't know if the "graphic and lurid" also was an adjective to describe the animated depictions, or whether it was just two separate things. To exclude graphic and lurid video, I agree with that. To exclude animated depictions, I don't agree with that, and that's why I phrased it the way I did.

THE COURT: Well, you know, I've seen both. I've seen the animated videos, and I've seen the actual photography of the surgery, and it's kind of sped up really fast because, of course, I guess these surgeries take hours to do. And, frankly, there wasn't a lot of blood, really, in the actual photography of the actual surgery.

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So I think the motion should probably be granted in part and denied in part: Granted as to bloody, lurid depictions of spinal surgery; and denied as to actual photos that aren't bloody and lurid depictions of spinal surgery, or in the alternative, the animated videos.

MR. ROGERS: Thank you, Judge.

THE COURT: And, by the way, we did have one juror who actually fainted when one of those actual surgeries was shown; although, I didn't find it particularly sorted or awful.

All right. You know, I think we're going to have to bring you back either this afternoon, or Tuesday morning to finish these. What's your preference?

MR. WALL: We do have an expert deposition at 2:00 today, I think.

THE COURT: Yeah, you mentioned that. So you're going to be busy doing that, right?

MR. ROGERS: Yes.

THE COURT: So do you want to come back Tuesday morning and argue the rest of these? Are you going to submit them on the Chamber's calendar? What's your pleasure?

MR. ROGERS: Well, we -- we may want to come back, because it sounds like Dave wanted to discuss one of the motions that he tabled pending today's deposition. It was the Senate investigation motion. I'm moving to exclude a Senate investigation that was basically dropped into Dr. Wohlfeil

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[phonetic], he's going to be deposing today.

And I don't know what you want to do with that?

MR. WALL: Yeah. Our opposition was essentially to table it until after the deposition. So we can do the -- one, two, three, four, five, six, seven -- eight remaining motions. I don't think -- there may be only two or three that are very lengthy.

THE COURT: So do you want to come back Tuesday?

MR. WALL: That would be fine, Judge.

MR. ROGERS: Yeah. I'm just making sure that it -- what time do you -- do you want us here?

THE COURT: I don't know what the rest of Tuesday's calendar looks like, to tell you the truth. How about 9:00?

MR. WALL: Fine.

MR. ROGERS: I can do that. I've got stuff I can pawn off.

THE COURT: February 22nd.

[Court and Clerk confer]

THE CLERK: February 22nd at 9 a.m.

MR. WALL: Thank you, Judge.

THE COURT: Okay. Thank you.

MR. ROGERS: All right. You gave us lots of time. I appreciate that.

THE COURT: No problem.

[Proceedings Concluded at 11:16 a.m.]



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

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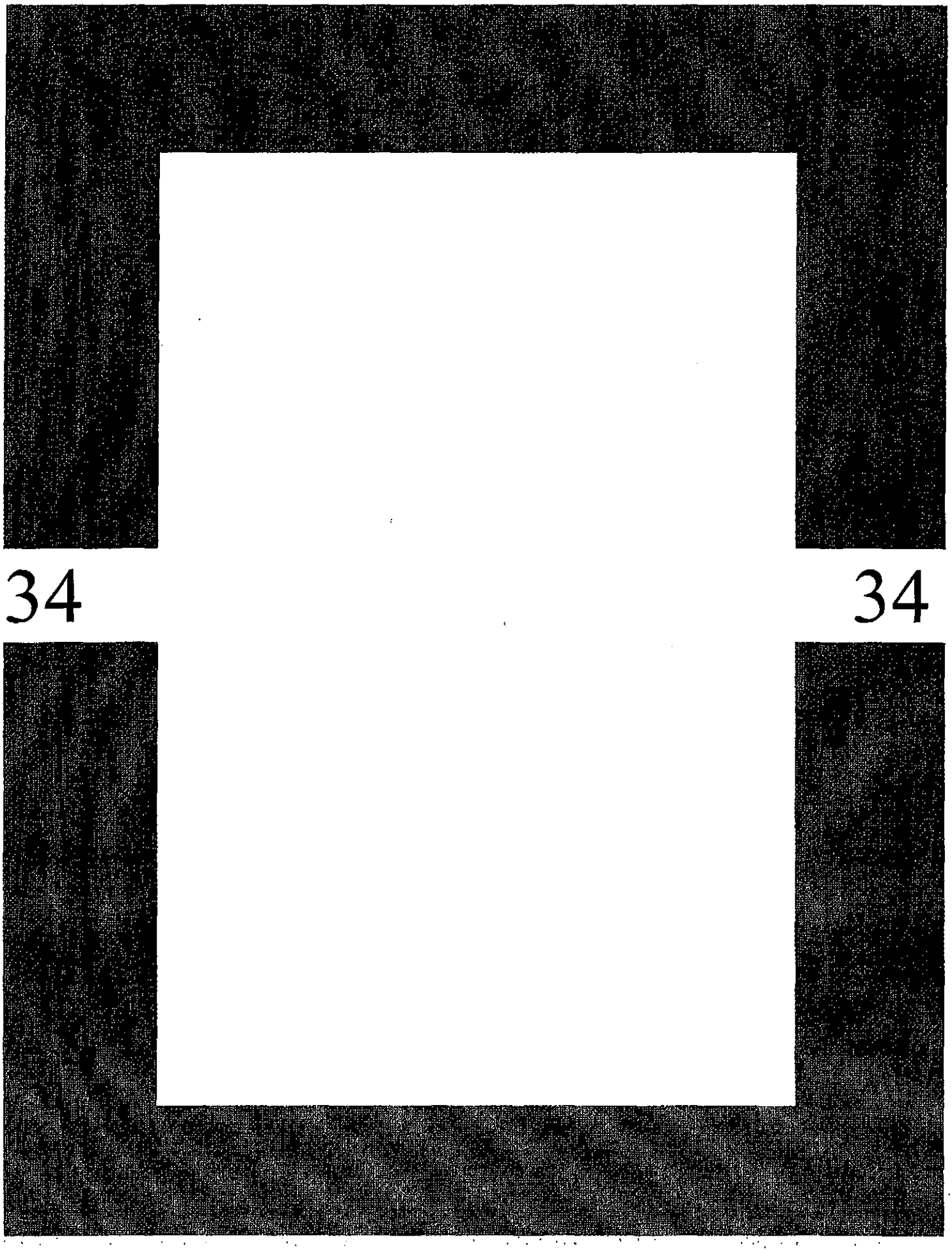
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**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X<br><br>**PLAINTIFFS' MOTION IN LIMINE TO (1) PRECLUDE DEFENDANT FROM RAISING A "MINOR" OR "LOW IMPACT" DEFENSE; (2) LIMIT THE TRIAL TESTIMONY OF DEFENDANT'S EXPERT, DAVID FISH, M.D. AND; (3) EXCLUDE EVIDENCE OF PROPERTY DAMAGE** |

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

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firm of MAINOR EGLET, and hereby file this Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; (2) Limit the Trial Testimony of Defendant's Expert, David Fish, M.D., and; (3) Exclude Evidence of Property Damage.

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 16 day of February, 2011.

**MAINOR EGLET**

DAVID T. WALL, ESQ.

**ORDER SHORTENING TIME**

It appearing to the satisfaction of the Court, and good cause appearing therefore, IT IS HEREBY ORDERED that the time for hearing on **MOTION IN LIMINE TO (1) PRECLUDE DEFENDANT FROM RAISING A "MINOR" OR "LOW IMPACT" DEFENSE; (2) LIMIT THE TRIAL TESTIMONY OF DEFENDANT'S EXPERT, DAVID FISH, M.D., AND; (3) EXCLUDE EVIDENCE OF PROPERTY DAMAGE** for hearing on the 1 day of MARCH, 2011, at the hour of 9:30 a.m., in Department X, in the above-entitled Court, or as soon thereafter as counsel can be heard.

DATED this _____ day of February, 2011.

DISTRICT COURT JUDGE

Respectfully submitted by:

DAVID T. WALL, ESQ.



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**AFFIDAVIT OF DAVID T. WALL, ESQ. IN COMPLIANCE WITH EDCR 2.47 AND IN SUPPORT OF PLAINTIFFS' MOTION ON AN ORDER SHORTENING TIME**

STATE OF NEVADA )
) ss.:
COUNTY OF CLARK )

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

1. Affiant is an attorney licensed to practice law in the State of Nevada and a partner with the law firm of **MAINOR EGLET**, counsel for Plaintiffs in this matter;

2. That pursuant to EDCR 2.47, Affiant and defense counsel, Steve Rogers, Esq., discussed the merits of the instant Motion on February 15, 2011 in good faith, but have been unable to resolve this matter satisfactorily, thereby necessitating the filing of the instant Motion.

3. Trial of this matter is currently set to go forward on March 14, 2011;

4. Plaintiffs took the deposition of Dr. Jeffrey Fish on February 10, 2011, during which Dr. Fish opined regarding matters outside his area of expertise, prompting the instant Motion;

5. That because the trial date is quickly approaching and because the instant Motion concerns matters that are central to trial, 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.

FURTHER, AFFIANT SAYETH NAUGHT.

DAVID T. WALL, ESQ.

SUBSCRIBED AND SWORN to before me
This 16th day of February, 2011.

NOTARY PUBLIC

Ashley M. Ganier
Notary Public, State of Nevada
My Commission Expires: April 7, 2014
Certificate No: 10-10304



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## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

### FACTUAL BACKGROUND

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

### II.

### RELIEF REQUESTED

Plaintiffs file this Pre-trial Motion and respectfully moves this court as follows:

1. To instruct Defendant and Defendant's attorneys not to mention, refer to, comment upon or bring before the jury directly or indirectly, upon voir dire examination, reading of the pleadings, statement of the case, opening statement, interrogation of witnesses (i.e. questions and/or responses to questions) introduction of exhibits, written discovery or any other documents, arguments, objections before the jury, closing argument, or in any other manner, any of the matters set forth below, unless and until such matters have first been called to the Court's attention, out of the presence and hearing of the jury, and until a favorable ruling has been received regarding the admissibility and relevance of such matters;

2. To instruct Defendant's counsel to inform Defendant and all witnesses called by Defendant not to mention in the presence or hearing of the jury any of the below–enumerated matters, unless and until specifically permitted to by ruling of the Court.



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3. To instruct counsel for Defendant that failure to abide by such order of the Court may constitute contempt of the court and result in sanctions.

4. Plaintiffs' Motion is made on the ground that violation of any or all of these instructions would cause great harm to Plaintiffs' cause and would deprive Plaintiffs of a fair and impartial trial.

5. Counsel for defendant, defendant, defendant's expert, Dr. Fish, and all other witnesses will refrain from referencing or insinuating that 1) the subject motor vehicle crash as a "low" or "minor impact 2) that the dynamics of the crash were insufficient to result in the injuries or medical care of Plaintiff.

## III.

## LEGAL AUTHORITY

The primary purpose of a motion in limine is to prevent prejudice at trial. *Hess v. Inland Asphalt Co.*, 1990 U.S. Dist. Lexis 6465, 1990-1 Trade Cases (CCH) P68, 954 (E.D. Wash., Feb. 20, 1990). The court has authority to issue a preliminary ruling on the admissibility of evidence. The decision to do so is vested to the sound discretion of this court. *See State v. Teters*, 2004 MT 137, 91 P.3d 559, 563 (Sp. Ct. Mont. 2004). The court's discretion will not be overturned on appeal absent a showing of a clear abuse-of-discretion. *See Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 966-67 (7th Cir. 1996); *United States v. Brady*, 595 F.2d 359, 361 (6th Cir.), cert. denied, 444 U.S. 862, 100 S.Ct. 129, 62 L.Ed.2d 84 (1979); *United States v. Robinson*, 560 F.2d 507, 513-515 (2d Cir. 1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978); *United States v. Hall*, 565 F.2d 1052, 1055 (8th Cir. 1977); *Texas Eastern Transmission v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1347 (5th Cir. 1978);



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*Longenecker v. General Motors Corp.*, 594 F.2d 1283, 1286 (9th Cir. 1979); *United States v. D'Alora*, 585 F.2d 16, 21 (1st Cir. 1978); *United States v. Juarez*, 561 F.2d 65, 70-71 (7th Cir. 1977).

Such motions are designed to simplify the trial and avoid prejudice that often occurs when a party is forced to object, in the presence of the jury, to the introduction of evidence. *Fenimore v. Drake Construction Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976).

NRS 48.035 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Nevada Revised Statutes 48.015; & 48.035.*

When the proffered testimony or evidence is not relevant, its prejudicial effect outweighs its relevance, the substance of the proffered testimony or evidence is collateral to the issues of this trial and would only serve to confuse and mislead the jury, the evidence must be excluded. *See e.g.*, *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995); *Larsen v. State*, 102 Nev. 448, 725 P.2d 1214 (1986).

## IV.

## ARGUMENT

Nothing in the accident report of April 15, 2005 indicates that the impact was minor. In fact, the responding officer listed that the damage to each vehicle was "moderate." *See* Traffic Accident Report, dated April 15, 2005, attached hereto as **Exhibit "1."** As mentioned above, Defendant failed to decrease her speed and rear-ended Plaintiff's vehicle while he was stopped for traffic. Defendant was cited for failure to use due care. *See* **Exhibit "1."** Clearly, it was Defendant's own negligence that caused the subject crash.



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As a result of the incident, William sustained serious and disabling personal injuries that resulted in years of ongoing medical care.

**A. DEFENSE PHYSICIAN EXPERTS ARE NOT QUALIFIED TO TESTIFY TO THE SEVERITY OF THE ACCIDENT AND MUST BE PRECLUDED FROM DOING SO**

Medical doctors are not qualified to testify regarding the nature of the impact.

Nevada Revised Statute 50.275, "Testimony by experts," provides that:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters ***within the scope of such knowledge***.

Medical professionals who are qualified as experts with special knowledge in the field of medicine may testify to matters within the scope of that medical knowledge. This does not include the nature of the impact, how they believe the accident occurred by their review of the accident report, or what they believe happened at the time of impact. Their testimony must be limited to Plaintiff's medical history and medical examination of the Plaintiff, if applicable.

**B. THE DEFENSE AND HER EXPERTS SHOULD BE PRECLUDED FROM PRESENTING TESTIMONY OR ARGUMENT THAT THE SUBJECT CRASH WAS MERELY A "MINOR IMPACT" NOT SUFFICIENT ENOUGH TO CAUSE PLAINTIFF'S INJURIES**

The defense must be precluded from commenting upon the dynamics of the motor vehicle crash and from arguing, suggesting or insinuating at trial that the crash was a "minor impact" or "low impact" collision, and not significant enough to cause Plaintiff's injuries.

Only a qualified expert in the area of biomechanical engineering may offer opinions regarding the nature and extent of the forces imparted to a body and how those forces may or may not cause trauma. The defense has not designated **any** expert qualified in the field of biomechanics to testify



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with regard to the forces that may have been imparted upon Plaintiff in the subject crash and whether those forces could have caused his injuries. Consequently, without any scientific evidence, the defense may not argue or suggest that this motor vehicle crash was simply a "minor-impact" and that William could not have been hurt by the impact. There is simply no evidence to support such an argument.

Biomechanical engineers are commonly retained in motor vehicle cases to offer expert testimony relating to the effect of the forces that were imparted upon a plaintiff's body in a collision. Biomechanical engineers typically rely upon the accident reconstructionist's data and calculations relating to impact speeds and Delta V. However, in this case, the defense has failed retain an accident reconstructionist, let alone submit any scientific evidence that the impact speeds and Delta V(s) involved in this crash could not have caused William's injuries. Now that discovery has closed and the defense's medical experts have submitted their reports, the defense, including their experts, must be precluded from introducing evidence at trial which suggests or insinuates that William could not have been injured in the subject crash because it was a purported "minor-impact" collision. The defense has no foundation in the evidence from which to suggest that the forces imparted upon William's body in the crash were not significant enough to cause his injuries. As such, because there is no foundation in the evidence to support such arguments, and especially because no qualified expert has expressed such an opinion, Plaintiff would be unfairly prejudiced if the defense were permitted to argue that the collision in this case was a "minor impact" collision. NRS 48.035. To allow the defense to argue as such would be to permit an argument outside the evidence.

"There is no rule of trial practice more universally accepted and applied than the rule that counsel may not introduce into his argument to the jury, statements unsupported by evidence produced



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on the trial . . ." *State of Nevada v. Kassabian*, 69 Nev. 146, 149 (1952). While counsel may enjoy wide latitude in arguing facts and drawing inferences from the evidence during closing argument, (*Silver v. McFarland*, 109 Nev. 465, 476 (1993)), counsel "may not state facts which are not in evidence." *Williams v. State of Nevada*, 103 Nev. 106, 110 (1987). Counsel is limited to arguing "any reasonable inferences from the evidence the parties have presented at trial." *Silver*, 103 Nev. at 476. However, "Courts will ban closing arguments which go beyond the inferences the evidence in the case will bear." *Wickliffe v. Sunrise Hospital, Inc.* 104 Nev. 777, 781 (1988). The Nevada Supreme Court has ruled in multiple cases that it is reversible error for an attorney to make statements of fact beyond the scope of the records in closing arguments. *Kassabian*, 69 Nev. at 151.

Accident reconstruction and biomechanical issues **are not common sense issues within the common knowledge of lay persons**. In fact, the Nevada Supreme Court has set forth stringent foundational requirements with respect to expert testimony relating to these areas of expertise. *See Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008); *Levine v. Remolif*, 80 Nev. 168, 390 P.2d 718 (1964) and *Choat v. McDorman*, 86 Nev. 332, 468 P.2d 354 (1970). These cases hold that expert testimony cannot be based upon speculation. *Id.* Rather, such testimony must come from a qualified expert and must be based upon hard data, such as the speed of the vehicles, the depth of the crush damage based upon a visual inspection of the vehicles, and the weight and height of the vehicles, to name a few. *Id.*

In *Levine*, the case arose as the result of a motor vehicle accident and was a wrongful death action. The accident occurred when one of the drivers failed to yield the right of way to another vehicle at an intersection. At the accident scene, various photographs were taken and a diagram of the scene was drawn to show the intersection, place of impact, skid marks and where the two cars came to rest. This diagram was prepared by two (2) police officers.



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At trial, one of the parties offered the expert testimony of an accident reconstructionist. The expert testified as to the speed of the vehicles involved in the accident and his testimony was based entirely upon the exhibits in evidence, which included photographs of the scene and of the vehicles after they had come to rest and a diagram made by the two police officers. The accident reconstructionist did not inspect either of the vehicles and relied upon the diagram prepared by the police officer. The trial court granted the motion to strike the reconstructionist's testimony with respect to his conclusion as to the speed of either vehicle. The Nevada Supreme Court upheld the exclusion of the accident reconstructionist's testimony because he had not inspected the vehicles, but rather relied upon photographs and a diagram made by an inexperienced police officer.

In *Choat*, the Choat car struck the rear of the McDorman vehicle and drove it approximately 85 to 90 feet. Both vehicles were severely damaged and the McDormans were injured in the accident. Choat died a few days later as a result of the accident, and an action was filed against the McDormans as a result of the collision. At the trial, the court allowed an officer who had investigated the accident to testify as to the relative impact speed of the Choat vehicle at the time of the accident. The investigating officer was a former highway patrolman who had arrived at the scene approximately ten minutes after the collision occurred. He investigated the accident, determined the point of impact, and assisted local police with some measurements.

Upon voir dire examination, he admitted that he had made no measurement of the skid marks made by the Choat vehicle, had made no measurement of the road grade or any particular computations, and did not know if the brakes were set on the McDormans car or if it was in gear when it was struck. He further testified that he did not know the weight of the vehicles involved, but believed that their weight would have had some bearing on the resulting damage, and that the speed



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estimate was based on the resulting damage to the vehicles and his experience as a patrol officer. The court held that "[o]pinion evidence as to the speed of a car at the time an accident occurred, based on the appearance or condition of the car and the locus after the accident, is inadmissible, upon the ground that the conclusion if given would amount to a mere guess." *Choat,* 86 Nev. 332, 336. The court further stated:

> Just because a witness may be qualified as an expert does not automatically qualify him to give an opinion necessarily based on facts beyond his knowledge even though the opinion may be within the range of his expertise. In *Levine v. Remolif*, 80 Nev. 168, 390 P.2d 718 (1964), this court held that the testimony of an expert who had never examined the wrecked vehicles, as to their speed at the time of the accident, was properly stricken when based entirely on photographs of vehicles and certain diagrams made after the accident because the photographs could not disclose damage to the frames of the cars.

*Id.*, at 335-36.

Changed conditions and lack of physical inspection of the vehicles can also invalidate the testimony of an expert witness. In the case of *Powers v. Johnson*, 92 Nev. 609, 555 P.2d 1235 (1976), Plaintiff presented an expert who had conducted his investigation:

> . . . [N]early three and one-half (3 1/2) years after the accident. Photographs taken in the interim showed that the street had been resurfaced, rendering the relied upon coefficient of friction test irrelevant. One witness had described tree limbs as being in visual obstruction when the accident occurred; [the expert] concluded that the limbs were in a completely different condition when he made his 'investigation' on August 6, 1973. Additionally, he had not ascertained the vehicles' weights; and, he had not viewed the vehicles. Indeed, it was doubtful that he had even viewed pictures of the vehicles. Upon stronger facts, this court has held it to be prejudicial error to allow such testimony. *Gordon v. Hurtado*, 91 Nev. 641, 541 P.2d 533 (1975); *Choat v. McDorman*, 86 Nev. 332, 468 P.2d 354 (1970). Cf. *Levine v. Remolif,* 80 Nev. 168, 390 P.2d 718 (1964). (emphasis added).

*Powers*, 92 Nev. at 610, 555 P.2d at 1236.

Courts have long excluded speculative testimony regarding the speeds of vehicles at the time of accidents. The case of *Bailey v. Roads*, 276 P.2d 713 (Or. 1954), involved a Plaintiff's attempt to have a



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state police officer testify as to the speed of the vehicle at the time of the accident. The trial court allowed the officer to testify as to the speed of the vehicle at the time it left the roadway. Though the officer had arrived at the accident scene shortly after the accident, he had investigated all of the physical facts including debris, marks on the roadway, and the location of the vehicles following the accident, the Oregon Supreme Court reversed the decision of the trial judge and found admission of the officer's opinion testimony as to speed to be prejudicial error. The court described the officer's testimony as "pure speculation and conjecture." The court further pointed out that, though speculative, the testimony of a police officer would tend to have a decided affect upon the jury. *Id.* at 718. Where all the facts upon which the police officer based his opinion were clearly presented by the evidence, the jury was in a position to determine whether or not the vehicle in question was traveling at an excessive rate of speed under the circumstances and did not need the assistance of an expert. *Id.* at 719.

In the case of *Montgomery v. Hyatt*, 282 P.2d 277 (Wash. 1955), the Plaintiffs again attempted to introduce testimony from a police officer as to the speed of the vehicles at the time of the collision. As in the *Bailey* case, supra, the court held that the officer's testimony as to speed was simply opinion and was not based upon sufficient facts and investigation to qualify the testimony as expert in nature. *Id.* at 280. Admission of the officer's testimony regarding speed was found to be prejudicial error and the matter was reversed and remanded for a new trial.

Finally, an investigating police officer offered testimony with regard to speed of the vehicles in the case of *Flores v. Barlow*, 384 S.W.2d 173 (Tx. 1962). The *Flores* court held:

> Point one is that the Court erred in permitting the witness, [the police officer], to give his opinion of the speed of the vehicles at the time of their collision when such opinion was based entirely upon the damaged condition of the vehicles after the collision .

*Id.* at 174. The court went on to address the case of *Union Bus Lines v. Moulder*, 180 S.W.2d 509 and



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held:

> In *Moulder*, Justice Norvell, in rejecting opinion testimony of speed based on impact damage alone, and in reversing the case because of the admission of such testimony, noted that there was an absence of evidence of technical or scientific support for such opinion. There is a similar absence of evidence here.
>
> We follow the above decisions and hold that such opinion evidence was inadmissible.

*Id.* at 176. The *Flores* decision was reversed and remanded.

**Finally, in the recent case of *Hallmark v. Eldridge*, 189 P.3d 646 (2008), the Nevada Supreme Court made it exceptionally clear that before an expert can render an opinion regarding biomechanics, that expert, despite being qualified to do so, must have a sufficient foundation for offering such opinions. The Court found that the district court abused its discretion under NRS § 50.275 when it allowed the expert witness to testify because his biomechanical opinion was not based upon an adequate factual and scientific foundation. *Id.* The Court held that the district court abused its discretion because the expert's biomechanical testimony and report did not assist the jury in understanding the evidence or in determining a fact in issue. *Id.* That expert conducted no biomechanical analysis which would enable him to testify concerning biomechanics and offered insufficient foundation for the Court to take judicial notice of the scientific basis of the expert's conclusions regarding biomechanics. *Id.*** If the Supreme Court in *Hallmark* found reason to exclude that expert, **who was a biomechanical engineer**, and precluded the expert from testifying that the collision was minor and not sufficient enough to cause Plaintiff's injuries, then certainly this court **must prevent defense counsel and his medical experts**, with no supporting scientific evidence, from simply proclaiming to the jury that this crash was minor and not sufficient to cause Plaintiff's injuries.

Defendant's pain management IME expert, Dr. David Fish, noted in his reports that there was moderate damage to the vehicles in the accident. When asked at his deposition the significance of the



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damage, Dr. Fish stated that he intended to testify at trial regarding a correlation between the damage to the vehicles noted in the accident photos and the severity of Plaintiff's injuries. *See* Dr. Fish's Deposition Transcript at **Exhibit "2,"** p.16:23-25 through p.19. Dr. Fish noted his "expertise" in biomechanics based on treating accident victims in the emergency room, as well as having been involved in motor vehicle accidents in the past. This is precisely the type of testimony the Nevada Supreme Court precluded in *Hallmark.*

What is apparent from all of the decisions set forth above is that an expert, absent detailed investigation providing a significant scientific basis, may not offer opinion testimony at trial. Here, the defense has failed to designate **any** expert to provide opinions regarding the biomechanics of the crash and whether or not the forces imparted upon William were severe enough to cause his injuries and which will require future treatment. As such, without any foundation in the form of scientific evidence, neither defense counsel nor Dr. Fish may not "testify" at trial and suggest that the subject crash was not significant enough to cause William's injuries.

There is no question that testimony relating to the nature of the impact and the effect on the occupants must be provided by a qualified expert in the field of biomechanics and be based upon hard data. Consequently, without any expert testimony from a biomechanical engineer, the defense must be precluded from arguing, suggesting or insinuating that the motor vehicle collision in this case was a minor impact collision and not significant enough to cause William's claimed injuries.

### C. THE VEHICLE PROPERTY DAMAGE PHOTOS AND REPAIR INVOICE(S) SHOULD BE EXCLUDED

In like manner, because there is no qualified defense expert in this case who has formulated a biomechanical opinion regarding the nature of the forces imparted upon William and whether those forces were severe enough to cause his injury, Plaintiffs request that photographs of the property



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damage of the vehicles involved in this case and the repair invoice(s) be excluded at trial because without qualified expert testimony, there is no way for a jury to know and understand what the photographs or repair invoice(s) depict, or how they relate to William's injuries. Introduction of the photographs, which to a lay person may only show minor damage, would be substantially more prejudicial than probative to William in that it is likely that a lay juror would speculate and interpret the photographs to signify that William could not have been injured as a result of the impact. As the Court may be aware, there is no correlation between the extent of the vehicles' property damage and the nature and extent of injuries to the occupants. People can be involved in automobile crashes in which the vehicles are completely mangled but the occupants walk away without a scratch. The converse is also true. People can be involved in automobile collisions in which the property damage is slight or non-existent but the occupants sustain severe traumatic injuries. Too many factors are at play to be able to draw a correlation between the extent of property damage and an occupant's injury. These include the shock absorption of the bumpers, the material of the bumpers, where the vehicles were impacted, the street surface, whether conditions, the safety rating of the automobile, seatbelt use (which is also not admissible in a civil action), etc. As such, vehicle photographs and repair estimates are not relevant. NRS 48.025. Moreover, in Nevada, only a qualified expert can state with a reasonable degree of scientific certainty whether or not an impact could cause injury to a plaintiff. NRS § 50.275, *Hallmark, supra.* Thus, in order to preclude the jury from speculating as to what the photographs and repair estimates depict and how they relate to Brandon's injuries, said photographs and repair estimates must be excluded from trial. NRS § 48.025, 48.035.

Although Nevada has not spoken directly on this issue, other Courts exclude photographs when no expert testimony is introduced linking the vehicles' property damage to with the extent of the



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injuries sustained by the Plaintiff. *See Twal v. Hinds,* 2008 N.J. Super. Unpub. LEXIS 2666 (2008) (excluding vehicle photographs as more prejudicial than probative since no foundation existed to support the Defendant's argument that a relationship existed between the vehicle damage and the Plaintiff's injuries); *Davis v. Maute,* 770 A.2d 36, 40 (Del. 2001)(stating "[a]s a general rule, a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony on this issue").

The Supreme Court of Delaware explained that "[a]bsent such expert testimony, any inference by the jury that minimal damage to the plaintiff's car translates into minimal personal injuries to the plaintiff would necessarily amount to unguided speculation." *Davis*, 770 A.3d at 40. The *Davis* Court concluded that: "[A] party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of damage to the cars, unless the party can produce competent expert testimony on the issue." *Id.*, at 40; *see also, Eskin v. Carden,* 842 A.2d 1222, 1226 (Del. 2004); *DiCosola v. Bowman,* 342 Ill. App. 3d 530, 276 Ill. Dec. 625, 794 N.E.2d 875, *appeal denied,* 206 Ill. 2d 620, 806 N.E.2d 1065, 282 Ill. Dec. 477 (2003).

The *Davis* Court reasoned that "[c]ounsel may not argue by implication what counsel may not argue directly". *Id.* The *Davis* Court also stated that "defense counsel's characterization of the accident as a 'fender-bender' was improper". *Id.* In *DiCosola,* the trial court excluded photographs showing slight damage to plaintiff's vehicle and evidence of the dollar amount of the property damage, and further prohibited the defendant from arguing, without expert testimony, that a correlation existed between the amount of damage to the vehicle and the extent and origin of plaintiff's injuries. *Id.* The court in that case analogized the situation to a case requiring expert medical proof of causation when it



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is claimed that a pre-existing condition had been aggravated or exacerbated by injuries sustained in the subsequent accident at issue:

> This court has explained that the rationale for requiring a defendant to introduce this expert testimony is 'to avoid what amount[s] to the jury forming medical opinions.'
>
> The same principles apply to the relationship between damage to a plaintiff[']s vehicle and the nature and extent of a plaintiff[']s personal injuries.

*DiCosola, supra,* 276 Ill. Dec. 625, 797 N.E.2d at 880-81 (*quoting Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 785 N.E.2d 507, 518, 271 Ill. Dec. 575 (2003)).

Photographs and the dollar amount of property damage cannot provide definitive evidence that the physics of a particular accident did or did not cause a particular injury to a particular individual. A party's use of photographs depicting minimal vehicular damage to suggest a lack of a causative correlation with an injury encourages supposition and conjecture, without a basis in the evidence that the plaintiff's injuries could not have been caused by a relatively minor impact.

As such, Plaintiffs respectfully request that the photographs depicting the damage to the vehicles and the repair invoice(s) showing the dollar amount of the property damage be excluded at trial under NRS 48.025 and 48.035.



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V.

## CONCLUSION

Based upon the foregoing, Plaintiffs respectfully requests that this Honorable Court **GRANT** their Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; (2) Limit the Trial Testimony of Defendant's Expert, David Fish, M.D., and; (3) Exclude Evidence of Property Damage.

DATED this 16 day of February, 2011.

**MAINOR EGLET**

DAVID T. WALL, ESQ.

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# EXHIBIT "1"

Event Number: 050415-0773
Code Revision: 011404

# STATE OF NEVADA
# TRAFFIC ACCIDENT REPORT
## SCENE INFORMATION SHEET
Revised 1/14/04

Accident Number: NHP-L2005-003864
☐ Property ☒ Injury ☐ Fatal

☒ 1) Urban ☐ 2) Rural
☐ 1) Emergency Use ☐ 2) Office Report
☐ 1) Preliminary Report ☐ 3) Resubmission ☒ 2) Initial Report ☐ 4) Supplement Report
☐ 1) Hit and Run ☐ 2) Private Property
Agency Name: 1 - DPS NEVADA HIGHWAY PATROL

| Collision Date | Time | Day | Beat / Sector | ☐ County ☒ City |
|---|---|---|---|---|
| 4/15/2005 | 15:08 | FRIDAY | LG70 | NORTH LAS VEGAS |

| Mile Marker | # Vehicles | # Non Motorists | # Occupants | # Fatalities | # Injured | # Restrained |
|---|---|---|---|---|---|---|
| 45 | 2 | 0 | 7 | 0 | 1 | 4 |

Surface: ☐ 1) Asphalt ☒ 2) Concrete ☐ 3) Gravel ☐ 4) Dirt ☐ 5) Other
Intersection: ☐ 1) Four Way ☐ 2) > Four Way ☐ 3) T ☐ 4) Y ☐ 5) Roundabout ☐ 6) Other
Paddle Markers: ☒ 1) None ☐ 2) Left Side ☐ 3) Right Side ☐ 4) Both Side ☐ 5) Unknown

Occurred On: *(Highway # or Street Name)*
☐ 1) Parking Lot IR15

☐ 1) At Intersection With:
☒ 2) Or 750 ☒ 3) Feet ☐ 4) Miles ☒ 5) Approximate NORTH Of *(Cross Street)* IR15/CHEYENNE INTERCHANGE RAMP# 4

Access Control: ☐ 1) None ☒ 2) Full ☐ 3) Partial

**Roadway Character**
☐ 1) Curve & Grade ☐ 2) Curve & Hillcrest ☐ 3) Curve & Level ☐ 4) Straight & Grade ☐ 5) Straight & Hillcrest ☐ 6) Straight & Level ☐ 7) Unknown ☐ 8) Other

**Roadway Conditions**
☒ 1) Dry ☐ 2) Icy ☐ 3) Wet ☐ 4) Snow ☐ 5) Sand / Mud / Oil / Dirt / Gravel ☐ 6) Other ☐ 7) Slush ☐ 8) Standing Water ☐ 9) Moving Water ☐ 10) Unknown

**Total Thru Lanes**
Main Road: ☐ 1) One ☐ 2) Two ☒ 3) Three ☐ 4) Four ☐ 5) Five ☐ 6) > 5
Total All Lanes: 3

**Average Roadway Widths**
Travel Lane: 12 Ft
Storage / Turn Lane: 0 Ft
Median: 0 Ft
Paved Shoulder — Inside: 14 Outside: 10

**Roadway Grade**
☒ 1) Not Determined ☐ 2) Relatively Level Roadway ☐ 3) Up Slope (+) ☐ 4) Down Slope (-)
Relative To:
Grade: %

**Pavement Markings and Type**
1) Centerline, Broken Yellow
2) Centerline, Solid Yellow
3) Centerline, Double Yellow
4) Lane Line, Broken White: 4
5) Lane Line, Solid White
6) No Passing, Either Direction
7) Turn Arrow Symbols
8) Center Turn Lane Line
9) Edge Line, Left, Yellow
10) Edge Line, Right, White
11) Other
☐ 12) None ☐ 13) Unknown

**Highway Description**
☐ 1) Two-Way, Not Divided ☐ 2) Two-Way, Div.,Unpro.Median ☒ 3) Two-Way, Div.,Median Barrier ☐ 4) One-Way, Not Div. ☐ 5) Unknown ☐ 6) Off Road

**Weather Conditions**
☒ 1) Clear ☐ 2) Cloudy ☐ 3) Snow ☐ 4) Rain ☐ 5) Blowing Sand, Dirt, Soil, Snow ☐ 6) Other ☐ 7) Fog, Smog, Smoke, Ash ☐ 8) Severe Crosswinds ☐ 9) Sleet / Hail ☐ 10) Unknown

**Light Conditions**
☐ 1) Dusk ☐ 2) Dawn ☒ 3) Daylight ☐ 4) Unknown ☐ 5) Other ☐ 6) Dark - No Roadway Lighting ☐ 7) Dark - Spot Roadway Lighting ☐ 8) Dark - Continuous Roadway Lighting ☐ 9) Dark - Unknown Roadway Lighting

**Vehicle Collision Type**
☐ 1) Head On ☒ 2) Rear End ☐ 3) Backing ☐ 4) Angle ☐ 5) Rear to Rear ☐ 6) Sideswipe - Meeting ☐ 7) Sideswipe - Overtaking ☐ 8) Non - Collision ☐ 9) Unknown

**Location of First Event**
☒ 1) Travel Lane ☐ 2) Turn Lane ☐ 3) Gore ☐ 4) Median ☐ 5) Inside Shoulder ☐ 6) Outside Shoulder ☐ 7) Intersection ☐ 8) Private Property ☐ 9) Roadside ☐ 10) Other ☐ 11) Ramp ☐ 12) Unknown

**Highway / Environment Factors**
☒ 1) None ☐ 2) Weather ☐ 3) Debris ☐ 4) Glare ☐ 5) Other Highway ☐ 6) Other Environmental ☐ 7) Shoulders ☐ 8) Road Obstruction ☐ 9) Worn Traffic Surface ☐ 10) Wet, Icy, Snow, Slush ☐ 11) Ruts, Holes, Bumps ☐ 12) Active Work Zone ☐ 13) Inactive Work Zone ☐ 14) Animal In Roadway ☐ 15) Unknown

**Property Damage To Other Than Vehicle**
Describe Property Damage:
Owner's Name (Last First Middle): ☐ 1) Owner Notified
Owner's Address: (Street Address City, State Zip)

**First Harmful Event**
Code #: 217 Description: 217 SLOW / STOPPED VEHICLE

**Description of Accident / Narrative**
BOTH V-1 AND V-2 WERE TRAVELING SOUTHBOUND ON IR15, IN THE NUMBER ONE TRAVEL LANE. V-2 WAS IN FRONT OF V-1. V-2 SLOWED DOWN TO A COMPLETE STOP, DUE TO CONGESTED TRAFFIC. V-1 FAILED TO DECREASE HER SPEED AND STRUCK V-2'S REAR WITH V-1'S FRONT. BOTH VEHICLES WERE MOVED PRIOR TO NHP ARRIVAL.

| Investigation Complete | Photos Taken | Scene Diagram | Statements | Date Notified | Time Notified | Arrival Date | Arrival Time |
|---|---|---|---|---|---|---|---|
| ☒ 1) Yes ☐ 2) No | ☐ 1) Yes ☒ 2) No | ☐ 1) Yes ☒ 2) No | ☒ 1) Yes ☐ 2) No # 2 | 4/15/2005 | 15:10 | 4/15/2005 | 15:24 |

| Investigator(s) | ID Number | Date | Reviewed By | Date Reviewed | Page |
|---|---|---|---|---|---|
| 582 SHAWN HAGGSTROM | 582 | 4/15/2005 | 4/19 | 4-17-05 | SIMA000001 |

| Event Number: | STATE OF NEVADA<br>TRAFFIC ACCIDENT REPORT<br>SCENE INFORMATION SHEET<br>Revised 5/21/03 | Accident Number: |
|---|---|---|
| 050415-0773 | | NHP-L2005-003864 |
| | | Agency Name: |
| | | 1 - DPS NEVADA HIGHWAY PATROL |

**Description of Accident / Narrative Continuation**

Indicate North

A.I.C.:

Page 2 of 7

SIMA000002

000412

000412

# STATE OF NEVADA
# TRAFFIC ACCIDENT REPORT
## VEHICLE INFORMATION SHEET
Revised 1/14/04

Event Number: 050415-0773

Accident Number: NHP-L2005-003864

Agency Name: 1 - DPS NEVADA HIGHWAY PATROL

Vehicle #: 1 | # Occupants: 4 | ☒ 1) At Fault ☐ 2) Non Contact

Direction of Travel: ☐ 1) North ☐ 3) East ☐ 6) Unknown ☒ 2) South ☐ 4) West

Highway / Street Name: IR15

Travel Lane #: 1

Vehicle Action: ☒ 1) Straight ☐ 3) Left Turn ☐ 5) U-Turn ☐ 7) Wrong Way ☐ 9) Passing ☐ 11) Leaving Parked ☐ 13) Leaving Lane ☐ 15) Enter Parked ☐ 17) Lane Change ☐ 19) Unknown
☐ 2) Backing ☐ 4) Right Turn ☐ 6) Parked ☐ 8) Stopped (*) ☐ 10) Racing ☐ 12) Entering ☐ 14) Other Turning ☐ 16) Driverless Vehicle ☐ 18) (#)

**Driver:** (Last Name, First Name, Middle Name Suffix)
RISH JENNY

**Transported By:** ☒ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknown ☐ 5) Other

**Street Address:** 223 N. COTTONWOOD DR.

**Transported To:**

| City | State / Country | Zip Code |
|---|---|---|
| GILBERT | AZ ☐ 1) NV | 85234 |

| Person Type | Seating Position | Occupant Restraints |
|---|---|---|
| 1 | 01 | 7 |

☐ 1) Male ☐ 3) Unknown ☒ 2) Female | DOB: 5/7/1945 | Phone Number: 4805454874

| Injury Severity | Injury Location | | |
|---|---|---|---|
| 0 | 0 | | |

| OLN | State | | License Status |
|---|---|---|---|
| D04155603 | AZ ☐ 1) NV | ☐ 1) CDL ☒ 2) DL | 0 |

| Airbags | Airbag Switch | Ejected | Trapped |
|---|---|---|---|
| 2 | 1 | 0 | 0 |

**Compliance:** ☐ 1) Restrict ☐ 2) Endorse

**Endorsements** | **Restrictions**

**Alcohol/Drug Involvement**
☐ 1) Not Involved ☐ 2) Suspected Impairment ☐ 3) Alcohol ☐ 4) Drugs ☐ 5) Unknown

**Method of Determination** (check up to 2)
☐ 1) Field Sobriety Test ☐ 4) Urine Test ☐ 2) Evidentiary Breath ☐ 5) Blood Test ☐ 3) Driver Admission ☐ 6) Preliminary Breath

**Test Results:**

**Driver Factors**
☒ 1) Apparently Normal ☐ 2) Had Been Drinking ☐ 3) Drug Involvement ☐ 4) Apparently Fatigued / Asleep ☐ 5) Obstructed View ☐ 6) Driver Ill / Injured ☐ 7) Other Improper Driving ☐ 8) Driver Inattention / Distracted ☐ 9) Physical Impairment ☐ 10) Unknown

| Vehicle Year | Vehicle Make | Vehicle Model | Vehicle Type |
|---|---|---|---|
| 2001 | CHEVROLET | SUBURBAN | LL |

| Plate / Permit No. | State | Expiration Date | Vehicle Color |
|---|---|---|---|
| 886 VDX | UT ☐ 1) NV | 05/31/2005 | SILVER |

**Vehicle Identification Number:** 3GNFK16751G143851

**Registered Owner Name:** ☐ 1) Same As Driver RISH JAMES LINDA

**Registered Owner Address:** 3029 CONSTITUTION ST. APT. A HILL AFB,UT,84056

**Vehicle Factors**
☐ 1) Failed To Yield Right Of Way ☐ 2) Disregard Control Device ☐ 3) Too Fast For Conditions ☐ 4) Exceeding Speed Limit ☐ 5) Wrong Way / Direction ☐ 6) Mechanical Defects ☐ 7) Drove Left Of Center ☐ 8) Failed To Maintain Lane ☐ 9) Following Too Close ☐ 10) Unsafe Lane Change ☐ 11) Made Improper Turn ☐ 12) Over Correct/Steering ☐ 13) Other Improper Driving ☐ 14) Aggressive / Reckless / Careless ☐ 15) Driverless Vehicle ☐ 16) Unsafe Backing ☐ 17) Ran Off Road ☐ 18) Hit and Run ☐ 19) Road Defect (*) ☐ 20) Object Avoidance ☐ 21) Unknown (#)
8) Other: DUE CARE

**Insurance Company Name:** ☒ 1) Insured LIBERTY MUTUAL INS. CO.

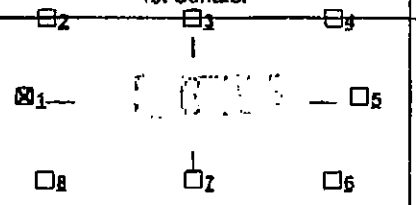
| Policy Number | Effective | To |
|---|---|---|
| A0226106579410 | 5/13/2004 | 4/14/2005 |

**Insurance Company Address or Phone Number:** 74 E. S. STE 104 BOUNTIFUL. UT 84010 1-800-365-2004

☐ 1) Vehicle Towed | Towed By:

**Removed To:** DRIVEN AWAY BY DRIVER

**1st Contact**



☐ 1) Override ☐ 2) Under Ride

**Damaged Areas**
☒ 1) Front ☐ 2) Right Side ☐ 3) Left Side ☐ 4) Rear ☐ 5) Right Front ☐ 6) Right Rear ☐ 7) Top ☐ 8) Under Carriage ☐ 9) Left Front ☐ 10) Left Rear ☐ 11) Unknown ☐ 12) Other

**Traffic Control**

| | | | |
|---|---|---|---|
| F | 1) Speed Zone | | 11) Stop Sign |
| | 2) Signal Light | | 12) Yield Sign |
| | 3) Flashing Light | | 13) R. R. Sign |
| | 4) School Zone | | 14) R. R. Gates |
| | 5) Ped. Signal | | 15) R. R. Signal (#) |
| | 6) No Passing | F | 16) Marked Lanes |
| | 7) No Controls | | 17) Tire Chains/Snow Req. |
| | 8) Warning Sign | | 18) Permissive Green |
| | 9) Turn Signal | ☐ | 19) Unknown |
| | 10) Other | | |

| Distance Traveled After Impact | Speed Estimate From | To | Limit |
|---|---|---|---|
| (7 - MOVED) | 20 | 20 | 65 |

**Extent Of Damage**
☐ 1) Minor ☒ 2) Moderate ☐ 3) Major ☐ 4) Total ☐ 5) None ☐ 6) Unknown

**Sequence Of Events**

| | Code # | Description | Collision With Fixed Object | Most Harmful Event |
|---|---|---|---|---|
| 1st | 217 | 217 SLOW / STOPPED VEHICLE | ☐ | ☒ |
| 2nd | | | ☐ | ☐ |
| 3rd | | | ☐ | ☐ |
| 4th | | | ☐ | ☐ |
| 5th | | | ☐ | ☐ |

| | Violation | NOC | Citation Number |
|---|---|---|---|
| ☒ 1) NRS ☐ 2) CFR ☐ 3) CC / MC ☐ 4) Pending (1) 484.363 | NRS FAILURE TO USE DUE CARE (N... | 01034 | 1S147408 |
| ☐ 1) NRS ☐ 2) CFR ☐ 3) CC / MC ☐ 4) Pending (2) | | | |

| Investigator(s) | ID Number | Date | Reviewed By | Date Reviewed | Page |
|---|---|---|---|---|---|
| 582 SHAWN HAGGSTROM | 582 | 4/15/2005 | [signature] 4/19 | 4-17-05 | SIMA000003 |

| Event Number: 050415-0773 | STATE OF NEVADA<br>TRAFFIC ACCIDENT REPORT<br>VEHICLE INFORMATION SHEET<br>Revised 5/21/03 | Accident Number: NHP-L2005-003864<br>Agency Name: 1 - DPS NEVADA HIGHWAY PATROL |
|---|---|---|

**Name:** (Last Name, First Name, Middle Name Suffix) RISH LINDA L.
**Transported By:** ☒1) Not Transported ☐2) EMS ☐3) Police ☐4) Unknown ☐5) Other
**Street Address:** 3029 A CONSTITUTION WAY
**Transported To:**
**City:** HILL AFB | **State / Country** ☐1) NV UT | **Zip Code:** 84056
**Person Type:** 2 | **Seating Position:** 03 | **Occupant Restraints:** 7
☐1) Male ☐3) Unknown ☒2) Female | **DOB:** 7/24/1965 | **Phone Number:** 8017749066
**Injury Severity:** 0 | **Injury Location:** 0
**Airbags:** 2 | **Airbag Switch:** 1 | **Ejected:** 0 | **Trapped:** 0

**Name:** (Last Name, First Name, Middle Name Suffix) RISH 3RD JAMES C.
**Transported By:** ☒1) Not Transported ☐2) EMS ☐3) Police ☐4) Unknown ☐5) Other
**Street Address:** 3029 CONSTITUTION WAY
**Transported To:**
**City:** HILL AFB | **State / Country** ☐1) NV UT | **Zip Code:** 84056
**Person Type:** 2 | **Seating Position:** 06 | **Occupant Restraints:** 7
☒1) Male ☐3) Unknown ☐2) Female | **DOB:** 4/6/1981 | **Phone Number:** 8017749066
**Injury Severity:** 0 | **Injury Location:** 0
**Airbags:** | **Airbag Switch:** | **Ejected:** 0 | **Trapped:** 0

**Name:** (Last Name, First Name, Middle Name Suffix) RISH CHRISTOPHER N.
**Transported By:** ☒1) Not Transported ☐2) EMS ☐3) Police ☐4) Unknown ☐5) Other
**Street Address:** 3029 CONSTITUTION WAY
**Transported To:**
**City:** HILL AFB | **State / Country** ☐1) NV UT | **Zip Code:** 84056
**Person Type:** 2 | **Seating Position:** 04 | **Occupant Restraints:** 7
☒1) Male ☐3) Unknown ☐2) Female | **DOB:** 10/15/1982 | **Phone Number:** 8017749066
**Injury Severity:** 0 | **Injury Location:** 0
**Airbags:** | **Airbag Switch:** | **Ejected:** 0 | **Trapped:** 0

| | | | |
|---|---|---|---|
| ☐1) Trailing Unit 1 VIN: | Plate: | State: ☐1) NV | Type: |
| ☐1) Trailing Unit 2 VIN: | Plate: | State: ☐1) NV | Type: |
| ☐1) Trailing Unit 3 VIN: | Plate: | State: ☐1) NV | Type: |

## Commercial Vehicle Configuration

☐1) Bus, 9 - 15 Occupants
☐2) Bus, > 15 Occupants
☐3) Single 2 Axle and 6 Tire
☐4) Single > 3 Axle
☐5) Any 4 Tire Vehicle
☐6) Tractor Only
☐7) Tractor / Trailer
☐8) Tractor / Doubles
☐9) Tractor / Triples
☐10) Truck with Trailer
☐11) Tractor / Semi Trailer
☐12) Passenger Vehicle, (Haz-Mat)
☐13) Light Truck, (Haz-Mat)
☐14) Other Heavy Vehicle

☐1) Commercial Vehicle ☐2) School Bus

**Source:** ☐1) Driver ☐2) Log Book ☐3) Shipping Papers / Trip Manifest ☐4) State Rep. ☐5) Side Of Vehicle ☐6) Other

**Carrier Name:**
**Power Unit GVWR:** ☐1) ≤ 10,000 Lbs ☐2) 10,000 - 26,000 Lbs ☐3) ≥ 26,000 Lbs ☐1) Haz-Mat ☐2) Released
**Carrier Street Address:** | **City:** | **State:** ☐1) NV | **Zip:**

## Cargo Body Type

☐1) Pole
☐2) Tank
☐3) Flatbed
☐4) Dump
☐5) Unknown
☐6) Van / Box
☐7) Concrete Mixer
☐8) Auto Carrier
☐9) Garbage/Refuse
☐10) Not Applicable
☐11) Grain, Gravel Chips
☐12) Bus, 9 - 15 Occupants
☐13) Bus, > 15 Occupants
☐14) Other

**Haz-Mat ID #:**
**Hazard Classification #:**

**Type of Carrier:** ☐1) Single State ☐2) USDOT ☐3) Canada ☐4) Mexico ☐5) None

**NAS Safety Report #:**
**Carrier Number:**



000414
000414
000414

Event Number: 050415-0773

# STATE OF NEVADA
# TRAFFIC ACCIDENT REPORT
## VEHICLE INFORMATION SHEET
Revised 1/14/04

Accident Number: NHP-L2005-003864

Agency Name: 1 - DPS NEVADA HIGHWAY PATROL

| Vehicle # | # Occupants | |
|---|---|---|
| 2 | 1 | ☐ 1) At Fault ☐ 2) Non Contact |

Direction of Travel: ☐ 1) North ☐ 3) East ☐ 5) Unknown ☒ 2) South ☐ 4) West

Highway / Street Name: IR15

Travel Lane #: 1

Vehicle Action: ☐ 1) Straight ☐ 3) Left Turn ☐ 5) U-Turn ☐ 7) Wrong Way ☐ 9) Passing ☐ 11) Leaving Parked ☐ 13) Lagging Lane ☐ 15) Enter Parked ☐ 17) Lane Change ☐ 19) Unkno ☐ 2) Backing ☐ 4) Right Turn ☐ 6) Parked ☒ 8) Stopped (*) ☐ 10) Racing ☐ 12) Entering ☐ 14) Other Turning ☐ 16) Driverless Vehicle ☐ 18) Other

**Driver:** (Last Name, First Name, Middle Name Suffix)
SIMAO WILLIAM JAY

Street Address: 5105 JEWEL CANYON DR.

City: LAS VEGAS | State / Country: ☒ 1) NV: NV | Zip Code: 89122

☒ 1) Male ☐ 3) Unknown ☐ 2) Female | DOB: 5/8/1963 | Phone Number: 7024369347

OLN: 1701633400 | State: ☒ 4) NV: NV | ☐ 1) CDL ☒ 2) DL | License Status: 0

Compliance: ☐ 1) Restrict ☐ 2) Endorse

Endorsements | Restrictions

Alcohol/Drug Involvement: ☐ 1) Not Involved ☐ 2) Suspected Impairment ☐ 3) Alcohol ☐ 4) Drugs ☐ 5) Unknown

Method of Determination (check up to 3): ☐ 1) Field Sobriety Test ☐ 2) Evidentiary Breath ☐ 3) Driver Admission ☐ 4) Urine Test ☐ 5) Blood Test ☐ 6) Preliminary Breath

Test Results:

**Transported By:** ☒ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknow ☐ 5) Other

Transported To:

| Person Type: | Seating Position: | Occupant Restraints: |
|---|---|---|
| 1 | 01 | 7 |

| Injury Severity: | Injury Location: | | |
|---|---|---|---|
| C | 1 | 3 | 7 |

| Airbags: | Airbag Switch: | Ejected: | Trapped: |
|---|---|---|---|
| 1 | | 0 | 0 |

**Driver Factors**
☒ 1) Apparently Normal ☐ 2) Had Been Drinking ☐ 3) Drug Involvement ☐ 4) Apparently Fatigued / Asleep ☐ 5) Obstructed View ☐ 6) Driver Ill / Injured ☐ 7) Other Improper Driving ☐ 8) Driver Inattention / Distracted ☐ 9) Physical Impairment ☐ 10) Unknown

| Vehicle Year: | Vehicle Make: | Vehicle Model: | Vehicle Type: |
|---|---|---|---|
| 1994 | FORD | ECONOLINE | VN |

| Plate / Permit No.: | State: ☒ 1) NV | Expiration Date: | Vehicle Color: |
|---|---|---|---|
| 573 NHG | NV | 05/08/2005 | RED |

Vehicle Identification Number: 1FTJE34H5RHA72334

Registered Owner Name: ☒ 1) Same As Driver

Registered Owner Address:

**Vehicle Factors**
☐ 1) Failed To Yield Right Of Way ☐ 2) Disregard Control Device ☐ 3) Too Fast For Conditions ☐ 4) Exceeding Speed Limit ☐ 5) Wrong Way / Direction ☐ 6) Mechanical Defects ☐ 7) Drove Left Of Center ☐ 8) Other ☐ 9) Failed To Maintain Lane ☐ 10) Following Too Close ☐ 11) Unsafe Lane Change ☐ 12) Made Improper Turn ☐ 13) Over Correct/Steering ☐ 14) Other Improper Driving ☐ 15) Aggressive / Reckless / Careless ☐ 16) Driverless Vehic ☐ 17) Unsafe Backing ☐ 18) Ran Off Road ☐ 19) Hit and Run ☐ 20) Road Defect (*) ☐ 21) Object Avoidanc ☐ 22) Unknown (#)

Insurance Company Name: AMERICAN FAMILY INS. CO. ☒ 1) Insured

Policy Number: 162479040285 | Effective: 2/1/2005 | To: 8/1/2005

surance Company Address or Phone Number: 702-454-0643

☐ 1) Vehicle Towed | Towed By:

Removed To: DRIVEN AWAY BY DRIVER

**1st Contact**
☐2 ☐3 ☐4 ☐1 ☒5 ☐8 ☐7 ☐6
☐ 1) Override ☐ 2) Under Ride

**Damaged Areas**
☐ 1) Front ☐ 2) Right Side ☐ 3) Left Side ☒ 4) Rear ☐ 5) Right Front ☐ 6) Right Rear ☐ 7) Top ☐ 8) Under Carriage ☐ 9) Left Front ☐ 10) Left Rear ☐ 11) Unknown ☐ 12) Other

**Traffic Control**

| | | | |
|---|---|---|---|
| F | 1) Speed Zone | | 11) Stop Sign |
| | 2) Signal Light | | 12) Yield Sign |
| | 3) Flashing Light | | 13) R. R. Sign |
| | 4) School Zone | | 14) R. R. Gates |
| | 5) Ped. Signal | | 15) R. R. Signal (#) |
| | 6) No Passing | F | 16) Marked Lanes |
| | 7) No Controls | | 17) Tire Chains/Snow Req. |
| | 8) Warning Sign | | 18) Permissive Green |
| | 9) Turn Signal | ☐ | 19) Unknown |
| | 10) Other | | |

| Distance Traveled After Impact | Speed Estimate From | To | Limit | Extent Of Damage |
|---|---|---|---|---|
| (7 - MOVED) | 0 | 0 | 65 | ☐ 1) Minor ☒ 2) Moderate ☐ 3) Major ☐ 4) Total ☐ 5) None ☐ 6) Unknown |

**Sequence Of Events**

| | Code # | Description | Collision With Fixed Object | Most Harmful Event |
|---|---|---|---|---|
| 1st | 214 | 214 MOTOR VEHICLE IN TRANSPORT | ☐ | ☐ |
| 2nd | | | ☐ | ☐ |
| 3rd | | | ☐ | ☐ |
| 4th | | | ☐ | ☐ |
| 5th | | | ☐ | ☐ |

| | Violation | NOC | Citation Number |
|---|---|---|---|
| ☐ 1) NRS ☐ 2) CFR ☐ 3) CC / MC ☐ 4) Pending (1) | | | |
| ☐ 1) NRS ☐ 2) CFR ☐ 3) CC / MC ☐ 4) Pending (2) | | | |

| Investigator(s) | ID Number | Date | Reviewed By | Date Reviewed | Page |
|---|---|---|---|---|---|
| 582 SHAWN HAGGSTROM | 582 | 4/15/2005 | [signature] 4/19 | 4.18.05 | SIMA00000E |

| Event Number: 050415-0773 | **STATE OF NEVADA**<br>**TRAFFIC ACCIDENT REPORT**<br>**VEHICLE INFORMATION SHEET**<br>Revised 5/21/03 | Accident Number: NHP-L2005-003864<br>Agency Name: 1 - DPS NEVADA HIGHWAY PATROL |
|---|---|---|

**Name:** (Last Name, First Name, Middle Name Suffix) | **Transported By:** ☐1) Not Transported ☐2) EMS ☐3) Police ☐4) Unknown ☐5) Other

**Street Address:** | **Transported To:**

**City:** | **State / Country** ☐1) NV | **Zip Code:** | **Person Type:** | **Seating Position:** | **Occupant Restraints:**

☐1) Male ☐3) Unknown ☐2) Female | **DOB:** | **Phone Number:** | **Injury Severity:** | **Injury Location:**

**Airbags:** | **Airbag Switch:** | **Ejected:** | **Trapped:**

---

**Name:** (Last Name, First Name, Middle Name Suffix) | **Transported By:** ☐1) Not Transported ☐2) EMS ☐3) Police ☐4) Unknown ☐5) Other

**Street Address:** | **Transported To:**

**City:** | **State / Country** ☐1) NV | **Zip Code:** | **Person Type:** | **Seating Position:** | **Occupant Restraints:**

☐1) Male ☐3) Unknown ☐2) Female | **DOB:** | **Phone Number:** | **Injury Severity:** | **Injury Location:**

**Airbags:** | **Airbag Switch:** | **Ejected:** | **Trapped:**

---

**Name:** (Last Name, First Name, Middle Name Suffix) | **Transported By:** ☐1) Not Transported ☐2) EMS ☐3) Police ☐4) Unknown ☐5) Other

**Street Address:** | **Transported To:**

**City:** | **State / Country** ☐1) NV | **Zip Code:** | **Person Type:** | **Seating Position:** | **Occupant Restraints:**

☐1) Male ☐3) Unknown ☐2) Female | **DOB:** | **Phone Number:** | **Injury Severity:** | **Injury Location:**

**Airbags:** | **Airbag Switch:** | **Ejected:** | **Trapped:**

---

| | | | |
|---|---|---|---|
| ☐1) Trailing Unit 1 **VIN:** | **Plate:** | **State:** ☐1) NV | **Type:** |
| ☐1) Trailing Unit 2 **VIN:** | **Plate:** | **State:** ☐1) NV | **Type:** |
| ☐1) Trailing Unit 3 **VIN:** | **Plate:** | **State:** ☐1) NV | **Type:** |

## Commercial Vehicle Configuration

☐1) Bus, 9 - 15 Occupants
☐2) Bus, > 15 Occupants
☐3) Single 2 Axle and 6 Tire
☐4) Single > 3 Axle
☐5) Any 4 Tire Vehicle
☐6) Tractor Only
☐7) Tractor / Trailer
☐8) Tractor / Doubles
☐9) Tractor / Triples
☐10) Truck with Trailer
☐11) Tractor / Semi Trailer
☐12) Passenger Vehicle, (Haz-Mat)
☐13) Light Truck, (Haz-Mat)
☐14) Other Heavy Vehicle

☐1) Commercial Vehicle ☐2) School Bus

**Source**
☐1) Driver
☐2) Log Book
☐3) Shipping Papers / Trip Manifest
☐4) State Reg.
☐5) Side Of Vehicle
☐6) Other

**Carrier Name:**

**Power Unit GVWR**
☐1) ≤ 10,000 Lbs ☐2) 10,000 - 26,000 Lbs ☐3) ≥ 26,000 Lbs
☐1) Haz-Mat ☐2) Released

**Carrier Street Address:** | **City:** | **State:** ☐1) NV | **Zip:**

## Cargo Body Type

☐1) Bole
☐2) Tank
☐3) Flatbed
☐4) Dump
☐5) Unknown
☐6) Van / Box
☐7) Concrete Mixer
☐8) Auto Carrier
☐9) Garbage/Refuse
☐10) Not Applicable
☐11) Grain, Gravel Chips
☐12) Bus, 9 - 15 Occupants
☐13) Bus, > 15 Occupants
☐14) Other

**Haz-Mat ID #:**

**Hazard Classification #:**

**Type of Carrier**
☐1) Single State
☐2) USDOT
☐3) Canada
☐4) Mexico
☐5) None

**NAS Safety Report #:**

**Carrier Number:**



SIMA000006

| Event Number: 050415-0773 | **STATE OF NEVADA TRAFFIC ACCIDENT REPORT** Occupant / Witness Supplement Revised 1/14/04 | Accident Number: NHP-L2005-003864 |
|---|---|---|
| | | Agency Name: 1 - DPS NEVADA HIGHWAY PATROL |

**V # 1**

Name: (Last Name, First Name, Middle Name Suffix): RISH KAYLEE L.

Transported By: ☒ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknown ☐ 5) Other

Street Address: 3029 CONSTITUTION

Transported To:

| City | State / Country | Zip Code |
|---|---|---|
| HILL AFB | ☐ 1) NV UT | 84056 |

| Person Type | Seating Position | Occupant Restraints |
|---|---|---|
| 2 | 05 | 7 |

☐ 1) Male ☐ 3) Unknown ☒ 2) Female

DOB: 10/28/1994

Phone Number: 8017749066

| Injury Severity | Injury Location | | |
|---|---|---|---|
| 0 | 0 | | |

| Airbags: | Airbag Switch: | Ejected: 0 | Trapped: 0 |
|---|---|---|---|
| | | | |

**V # 1**

Name: (Last Name, First Name, Middle Name Suffix): RISH NATHANEL

Transported By: ☒ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknown ☐ 5) Other

Street Address: 3029 CONSTITUTION

Transported To:

| City | State / Country | Zip Code |
|---|---|---|
| HILL AFB | ☐ 1) NV UT | 84056 |

| Person Type | Seating Position | Occupant Restraints |
|---|---|---|
| 2 | 03 | 2 |

☒ 1) Male ☐ 3) Unknown ☐ 2) Female

DOB: 09/21/2003

Phone Number: 8017749066

| Injury Severity | Injury Location | | |
|---|---|---|---|
| 0 | 0 | | |

| Airbags: | Airbag Switch: | Ejected: 0 | Trapped: 0 |
|---|---|---|---|
| | | | |

**V #**

Name: (Last Name, First Name, Middle Name Suffix):

Transported By: ☐ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknown ☐ 5) Other

Street Address:

Transported To:

| City | State / Country | Zip Code |
|---|---|---|
| | ☐ 1) NV | |

| Person Type | Seating Position | Occupant Restraints |
|---|---|---|
| | | |

☐ 1) Male ☐ 3) Unknown ☐ 2) Female

DOB:

Phone Number:

| Injury Severity | Injury Location | | |
|---|---|---|---|
| | | | |

| Airbags: | Airbag Switch: | Ejected: | Trapped: |
|---|---|---|---|
| | | | |

**V #**

Name: (Last Name, First Name, Middle Name Suffix):

Transported By: ☐ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknown ☐ 5) Other

Street Address:

Transported To:

| City | State / Country | Zip Code |
|---|---|---|
| | ☐ 1) NV | |

| Person Type | Seating Position | Occupant Restraints |
|---|---|---|
| | | |

☐ 1) Male ☐ 3) Unknown ☐ 2) Female

DOB:

Phone Number:

| Injury Severity | Injury Location | | |
|---|---|---|---|
| | | | |

| Airbags: | Airbag Switch: | Ejected: | Trapped: |
|---|---|---|---|
| | | | |

**V #**

Name: (Last Name, First Name, Middle Name Suffix):

Transported By: ☐ 1) Not Transported ☐ 2) EMS ☐ 3) Police ☐ 4) Unknown ☐ 5) Other

Street Address:

Transported To:

| City | State / Country | Zip Code |
|---|---|---|
| | ☐ 1) NV | |

| Person Type | Seating Position | Occupant Restraints |
|---|---|---|
| | | |

☐ 1) Male ☐ 3) Unknown ☐ 2) Female

DOB:

Phone Number:

| Injury Severity | Injury Location | | |
|---|---|---|---|
| | | | |

| Airbags: | Airbag Switch: | Ejected: | Trapped: |
|---|---|---|---|
| | | | |

| Investigator(s) | ID Number | Date | Reviewed By | Date Reviewed | Page |
|---|---|---|---|---|---|
| 582 SHAWN HAGGSTROM | 582 | 4/15/2005 | BRD 4151 | 4.18.05 | 7 of 7 |

SIMA000007

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INFORMAL STATEMENT BY:
☒ Driver ☐ Officer From Other Department
☐ Passenger ☐ Other
☐ Witness
V-1

**NEVADA HIGHWAY PATROL**

ACCIDENT NUMBER: L2005-003864
CITATION NUMBER: 15147408
OTHER NUMBER: 050415-0773

| DATE: | TIME: | FULL NAME: |
|---|---|---|
| 4-15-05 | 4: ☐ AM ☐ PM | Jenny Rish |

| RESIDENCE ADDRESS: | CITY: | STATE: | ZIP CODE: | TELEPHONE: |
|---|---|---|---|---|
| 223 N Cottonwood Dr | Gilbert | Az | 85234 | 480 545-4874 |

| SOCIAL SECURITY NUMBER: | DRIVER'S LICENSE NUMBER: | STATE: |
|---|---|---|
| [redacted] | D04155603 | Az |

| VEHICLE LICENSE NUMBER: | STATE: | YEAR AND MAKE OF VEHICLE: |
|---|---|---|
| 886 VDX | UT. | 2001 Chev SUV |

MY OBSERVATION OR INVOLVEMENT IN THIS MATTER WAS AS FOLLOWS:

Traffic slowing down and came to a stop didn't have time to stop.

Every one was wearing sit belt except Christopher and Nath, Nath was is in mothers arms going to sleep. Christopher was behind driver.

| | | | | | |
|---|---|---|---|---|---|
| Jenny Rish | 39 | 223 N Cotton Wood Dr Gilbert AZ 85234 | 480 545-4874 | Wife | S.B. |
| Linda L. Rish | 39 | 3029 A Constitution Way Hill AFB UT 84056 | 801 774-9066 RF | No | S.B. |
| James C. Rish III | 14 | 4-6-91 | 801 774-9066 RR | Yes | S.B. |
| Christopher N. Rish | 12 | 10-15-92 | 801 774-9066 LR | No | S.B. |
| Kaylee L. Rish | 10 | 10-28-94 | 801 774-9066 RM | Yes | S.B. |
| Nathanel L. Rish | 19 mos | 9-21-03 | 801 774-9066 NON POST. 3 | No | S.B. |

SIGNATURE OF PERSON WRITING STATEMENT:
Jenny Rish

SIMA000008

INFORMAL STATEMENT BY:
☒ Driver ☐ Officer From Other Department
☐ Passenger ☐ Other
☐ Witness
V-2

**NEVADA HIGHWAY PATROL**

ACCIDENT NUMBER: 2005-003864
CITATION NUMBER: 15147408
OTHER NUMBER: 050418-0773

| DATE: | TIME: | FULL NAME: |
|---|---|---|
| 4/15/05 | 3:00 ☐ AM ☒ PM | William Jay Simao |

| RESIDENCE ADDRESS: | CITY: | STATE: | ZIP CODE: | TELEPHONE: |
|---|---|---|---|---|
| 5105 Jewel Canyon Drive | LV | NV | 89122 | 702-436-9347 |

| SOCIAL SECURITY NUMBER: | DRIVER'S LICENSE NUMBER: | STATE: |
|---|---|---|
| [redacted] | 1701633400 | NV |

| VEHICLE LICENSE NUMBER: | STATE: | YEAR AND MAKE OF VEHICLE: |
|---|---|---|
| 573 NHG | NV | 1994 Ford E350 Van |

MY OBSERVATION OR INVOLVEMENT IN THIS MATTER WAS AS FOLLOWS:

I was heading south on hwy 15 a little past Cheyenne. Traffic was stop-n-go. The cars in front of me stopped, I stopped, the car behind me ran into the rear of my vehicle.

SIGNATURE OF PERSON WRITING STATEMENT:
William Simao 4/15/05

SIMA000009

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# EXHIBIT "2"

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>vs.<br><br>JENNY RISH; JAMES RISH; LINDA RISH, DOES I through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | ) | Case No. A539455 |

DEPOSITION OF DAVID E. FISH, M.D.

Santa Monica, CALIFORNIA

Thursday, February 10, 2011

Reported by:
Gideon Choi
CSR No. 13258



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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs. Case No. A539455

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

Defendants.

Deposition of DAVID E. FISH, M.D., taken on behalf of Plaintiffs, at 1250 16th Street, Tower Building, Room 745, Santa Monica, California, beginning at 2:17 p.m. and ending at 4:18 p.m., on Thursday, February 10, 2011, before Gideon Choi, Certified Shorthand Reporter No. 13258.



APPEARANCES

For the Plaintiffs:
MAINOR EGLET, LLP
BY: DAVID WALL, ESQ. (Appearing via video-conference)
400 South Fourth Street
Suite 600
Las Vegas, Nevada 89101
Telephone: (702) 450-5400
Facsimile: (702) 450-5451
E-mail: dwall@mainorlawyers.com

For the Defendant:
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
BY: STEPHEN H. ROGERS, ESQ. (Appearing via video-conference)
300 South Fourth Street
Suite 710
Las Vegas, Nevada 89101



INDEX

Witness: DAVID E. FISH, M.D.


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|---|---|
| By Mr. Wall | 6, 74 |
| By Mr. Rogers | 68 |


EXHIBITS


| Defendant's | Description | Page First Introduced |
|---|---|---|
| Exhibit 1 | Copy of curriculum vitae of David E. Fish, M.D. | 6 |
| Exhibit 2 | Copy of testimony history of David E. Fish, M.D. | 7 |
| Exhibit 3 | Copy of fee schedule of David E. Fish, M.D. | 7 |
| Exhibit 4 | Copy of entire file of David E. Fish, M.D. for subject case with billing records | 9 |
| Exhibit 5 | Copy of CD containing nine previous depositions of David E. Fish, M.D. | 10 |
| Exhibit 6 | Copy of report by David E. Fish, M.D., dated February 10th, 2009 | 19 |
| Exhibit 7 | Copy of Independent Record Review, Addendum No. 1 dated July 13th, 2010 | 20 |
| Exhibit 8 | Copy of Independent Record Review Addendum No. 4, dated October 18th, 2010 | 20 |
| Exhibit 9 | Copy of Independent Record Review Addendum No. 5 | 21 |


(Continued...)



INDEX (Continued...)

INFORMATION REQUESTED

| Page | Line |
|---|---|
| None. | |

QUESTIONS INSTRUCTED NOT TO ANSWER

| Page | Line |
|---|---|
| None. | |



HAHN & BOWERSOCK 800-660-3187 FAX 714-662-1398
151 KALMUS DRIVE, SUITE L1 COSTA MESA, CA 92626

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DAVID E. FISH, M.D.,
called as a witness by and on behalf of the Plaintiff, and having been first duly sworn by the Certified Shorthand Reporter, was examined and testified as follows:

EXAMINATION

BY MR. WALL:

Q All right. Could you state your name for the record, please?
A David Eli Fish.
Q Dr. Fish, just to kind of walk through some things, I have a -- do you have an updated CV?
A Yeah, but before you start, what's your name?
Q My name is David Wall. Thank you. W-a-l-l.
A It's nice to meet you, sir.
Q All right. Do you have a copy of your CV?
A Yes, I do.
Q Is that updated?
A Yes, it is.
Q All right. I'm not sure mine is, so we'll make that Exhibit 1 to the deposition.
A Okay.
(Plaintiff's Exhibit 1 was marked for identification by the Certified Shorthand Reporter, a copy of which is attached hereto.)



Q I have a list of cases, testimony history, but mine stops with 2008. Do you have a more recent one?
A Yes.
Q All right. Do you have that handy?
A I can print it up for Gideon after we're done if you want.
Q All right. We'll make that Exhibit 2. I have a fee schedule. I'm not sure whether it's updated. It shows -- actually, it says "2007 updated" in the lower left-hand corner. Is that still good?
A Probably not.
Q All right. Do you have an updated one available?
A Yes.
Q Will you be able to provide that to the court reporter as Exhibit 3?
A Yes.
Q On the list of cases since 2008, how many times do you think you've testified either in a deposition or in a trial or arbitration?
A Since 2008, and maybe 25 times.
Q And can you breakdown those 25 for me; roughly how many were on behalf of plaintiffs and how many were on behalf of the defense or as a treating doctor?
A Yes, no problem. Hold on a second. I can do that. So for 2008 --



Q I have 2008.
A Okay. So for 2009, as a treating doctor, I did two; as an expert witness, I did seventeen; and for the plaintiff, I did nine; and for the defense -- actually, sorry -- that would be seven; and for the defense it looks like ten.
Q Do you have the records from 2010 as well?
A Yes -- oh, and of the court appearances, I have three, and they were all for plaintiff. The other ones were depositions. And for 2010, there were eleven total depositions, one as treating; and of the ten that were left over, two were plaintiff, and eight were defense.
Q Can you estimate in 2009 and 2010, how many other cases besides this one involved Mr. Rogers or his firm?
A Five.
Q Is that who initially contacted you in this case?
A I don't remember. Most likely, but I don't remember.
Q Do you have correspondence that would reflect that?
A I don't know.
Q Do you know when you were first contacted on this case?
A Sometime at the beginning of 2008, because my first report was in February of 2008.
Q I show that your first report was February of 2009. Is that incorrect?
A Yeah, I apologize. 2009 -- no. Actually, no, it was in 2008. I may not have done a report until 2009.



Q When were you first contacted; do you know?
A Again, I'd say at the beginning of 2008.
Q Beginning of 2008?
A Correct.
Q What do you base that estimate on?
A I have my -- I have a billing statement from February 14th, 2008, and it looks like there was an expedited review of records that were needed that was dated around 2008.
Q Who did you bill?
A Rogers, Mastrangelo, Carvalho & Mitchell.
Q Your entire file, including the billing records, I'd like to have all of that provided to the court reporter and made an exhibit. I guess it would be Exhibit 4. Can you provide that after the conclusion of the deposition to the court reporter?
A Do you want it on disc or do you want it printed out or what do you want to do?
Q On disc.
A On disc?
Q On disc would be fine.
A I don't think I can get it to you today. I'd have to send it to you.
Q Okay. Do you know what your charges are to date in this case?
While you're looking for that, Doctor, you've had your





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14:25:07 1 deposition taken enough times that you'd waive all the normal
14:25:12 2 admonitions; is that right?
14:25:13 3 A Yes, sir.
14:25:14 4 MR. WALL: All right. And while you're looking for that,
14:25:34 5 Mr. Reporter, I'm going to provide to you a disc that we had
14:25:39 6 prepared that has nine previous depositions of Dr. Fish, and
14:25:47 7 that will be Exhibit 5.
14:25:51 8 THE COURT REPORTER: Okay, sir.
14:26:04 9 THE WITNESS: So I guess you did some light reading; is that
14:26:0810 true?
14:26:0811 BY MR. WALL:
14:26:1212 Q Do you have a total for me, Doctor?
14:26:1413 A I'm working on it. Okay. I got a number for
14:26:3814 you. $19,200.
14:26:4115 Q That's up to, but not including today?
14:26:4616 A That is correct.
14:26:4717 Q What did you do to prepare for your deposition?
14:26:5018 A I reviewed the records that I had previously reviewed
14:26:5519 and read my reports, and I looked over the records that I
14:27:0220 thought were pertinent for the questions I hoped you would ask
14:27:0521 me.
14:27:0522 Q Anything else?
14:27:0723 A No.
14:27:0824 Q Did you have any conversations with Mr. Rogers or
14:27:1325 anyone from his firm?



14:27:14 1 A Yes.
14:27:14 2 Q What was the nature of those -- how many?
14:27:23 3 A Well, when? Last week? Last year?
14:27:28 4 Q To prepare for your deposition.
14:27:30 5 A Oh, probably just one conversation just to make sure
14:27:33 6 that I had all of the documents that I needed and to make sure
14:27:39 7 that I had all the proper records that were needed.
14:27:44 8 Q When was that conversation?
14:27:45 9 A I think it was two days ago.
14:27:4910 Q You are board certified, Doctor; is that right?
14:27:5611 A Yes, sir.
14:27:5712 Q What specialty?
14:28:0013 A Physical medicine and rehabilitation and pain medicine.
14:28:0414 Q You're not a board certified spine surgeon; is that
14:28:1115 correct?
14:28:1116 A Well, I mean, define "spine surgery". I do some spine
14:28:1617 surgeries, so you have to be a little bit more --
14:28:2018 Q Are you board certified in any orthopedic surgery or
14:28:2319 spine surgery?
14:28:2420 A Well, yeah, I am.
14:28:2821 Q Okay. In what?
14:28:3022 A Well, I do spinal cord stimulators and morphine pumps,
14:28:3523 and so we do surgery to the spine in those cases as well as
14:28:3524 vertebroplasties and kyphoplasties which are also considered
14:28:4325 spine surgeries.



14:28:43 1
14:28:45 2 Q And have you ever done a fusion?
14:28:50 3 A No.
14:28:50 4 Q Ever assisted in a fusion?
14:28:57 5 A No.
14:28:57 6 Q Do you refer patients out to spine surgeons?
14:29:03 7 A Yes.
14:29:03 8 Q Have you referred any patients to any Las Vegas spine
14:29:11 9 surgeons?
14:29:1210 A Yes.
14:29:1211 Q Who would you have referred to?
14:29:1812 A Dr. Schifini. I've referred patients to Las Vegas
14:29:2913 surgeons quite a bit. It just depends. At UCLA our catchment
14:29:3714 area is very big so we get a lot of patients from
14:29:4115 Las Vegas, and so I try to keep them in Las Vegas as opposed to
14:29:4716 having surgery done here, if that needs be.
14:29:4817 Q So Dr. Schifini is not a spine surgeon; is that right?
14:29:5318 A No, no. That was the first person I thought about
14:29:5419 because I recently referred someone there. I can't tell you
14:29:5520 offhand who I did. There's a lot of surgeons in Las Vegas, so I
14:30:0021 can't tell you exactly who I referred to, but I know I've
14:30:0322 referred some patients over there.
14:30:0523 Q Do you know Dr. McNulty?
14:30:0724 A Not personally, no.
14:30:0925 Q Have you referred any patients to Dr. McNulty?



14:30:14 1 A I don't know.
14:30:14 2 Q You don't know?
14:30:16 3 A I may have. I don't know. It depends on the group
14:30:19 4 that the patients are coming from, and my office tends to try to
14:30:23 5 help them find a surgeon or find somebody in Las Vegas, so it's
14:30:27 6 possible that a referral has gone to him.
14:30:30 7 Q Are you a member of NASS, N-A-S-S?
14:30:34 8 A Yes.
14:30:35 9 Q Are you a member of ISIS?
14:30:4010 A Yes.
14:30:4611 Q I-S-I-S?
14:30:4712 A Yes.
14:30:4713 Q So are you familiar with the ISIS guidelines or
14:30:4914 criteria for pain management doctors?
14:30:5215 A Yes.
14:30:5216 Q Have you ever performed any discography?
14:31:0017 A Yes.
14:31:0118 Q I'm sorry?
14:31:0519 A Yes.
14:31:0620 Q Oh, the answer was yes. Cervical, lumbar, or both?
14:31:1021 A Cervical, thoracolumbar, and lumbar.
14:31:1922 Q Do you use those regularly?
14:31:2223 A Yes.
14:31:2224 Q When was the last time that you performed a cervical
14:31:2925 discography?





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14:31:30 1 A Two weeks ago.
14:31:32 2 Q Do you consider yourself to have expertise in the area
14:31:39 3 of biomechanics as it relates to motor vehicle accidents?
14:31:43 4 A If you mean am I certified by any governing body, no;
14:31:50 5 but do I have expertise in understanding mechanics and injuries,
14:31:54 6 yes.
14:31:55 7 Q Would it be your intention to testify as an expert in
14:31:59 8 the area of biomechanics or whether a certain type of impact
14:32:05 9 between two vehicles would be sufficient to cause a certain type
14:32:1010 of injury?
14:32:1111 A If I'm asked a question, I would answer it. I don't
14:32:1612 know if I've been asked to specifically do that as an expert.
14:32:2013 Q All right. Have you been asked to do that in this
14:32:2314 case?
14:32:2415 A Well, I mean, I think causation and the injury
14:32:3016 component and whether or not a person was injured in a specific
14:32:3317 car accident or if Mr. Simao had an injury occur from the car
14:32:4018 accident, I've been asked. I've made opinions as such, but I
14:32:4319 did not measure velocities or G-force or measurements of tire
14:32:4920 skid marks or anything like that, if that's what you're asking.
14:32:5221 Q So it wouldn't be your intention to offer testimony as
14:32:5622 an expert that the actual collision in this case based on --
14:33:0823 A Hello?
14:33:1124 Q – injury; would that be correct?
14:33:1325 A You're going to have to say it again. You cut out.



14:33:18 1 MR. ROGERS: Court Reporter, I'll lodge a compound
14:33:20 2 objection, and then go ahead, Doctor.
14:33:24 3 THE WITNESS: You have to say the question again. It got
14:33:27 4 cut off.
14:33:31 5 MR. WALL: Oh, it got cut off.
14:33:33 6 MR. STEPHENS: Oh, okay.
14:33:34 7 BY MR. WALL:
14:33:34 8 Q Is it your intention in this case to offer opinions at
14:33:39 9 trial regarding whether this accident was sufficient in the
14:33:4710 magnitude of the collision to cause a particular injury?
14:33:5311 A Yes. I mean, I'm going to make opinions based on the
14:33:5812 MRI, based on the records on whether or not the accident
14:34:0213 actually caused any injury to Mr. Simao.
14:34:0614 Q That's not my question. My question is: Are you going
14:34:0915 to do that from a biomechanical perspective; that is, looking at
14:34:1316 the damage to the vehicles and the nature of the collision to
14:34:1917 determine whether it was sufficiently severe to cause a
14:34:2318 particular injury?
14:34:2619 MR. STEPHENS: I object. Compound. Doctor, go ahead.
14:34:3020 THE WITNESS: I think I've answered the question. I mean,
14:34:3221 I'm not certified as a bioengineer. I'm not certified as
14:34:3622 somebody who can measure G-forces, but I can tell what an
14:34:4123 accident and what an MRI look like and whether or not a person
14:34:4624 has been injured based on the medical records and the medical
14:34:4925 complaints.



14:34:49 1 BY MR. WALL:
14:34:49 2 Q Doctor, do you understand my question?
14:34:52 3 A Probably not because you've asked it for the third
14:34:54 4 time, so I would say no, I don't understand your question.
14:34:57 5 Q There's a difference between looking at the MRI's or
14:35:00 6 the medical records to determine certain things surrounding
14:35:04 7 causation as compared to looking at the damage to the vehicles
14:35:08 8 and determining Delta V and whether or not that particular
14:35:13 9 collision with those two vehicles was sufficient to cause a
14:35:1610 particular injury from a biomechanical perspective.
14:35:2011 Is it your intent to offer an opinion based on the
14:35:2712 biomechanics of the accident?
14:35:2913 A I don't think so.
14:35:3014 Q Are you not sure?
14:35:3515 A Well, I mean, I don't know if I understand your
14:35:3816 question.
14:35:4017 Q Have you done any analysis of the vehicles or the
14:35:4418 photographs of the vehicles or the damage estimates to the
14:35:4819 vehicles in rendering your opinions?
14:35:4920 A I've looked at them so I've done an analysis of the
14:35:5421 pictures and the amount of damage as well as the cost to fix the
14:35:5922 damage.
14:36:0023 Q Is it your opinion that the damage to the vehicles or
14:36:0424 the amount to fix the vehicles is a significant consideration in
14:36:0925 forming the basis of any of your opinions?



14:36:12 1 A I don't know if I would say significant, but it is a
14:36:16 2 factor.
14:36:18 3 Q And what training do you have to correlate the amount
14:36:25 4 of damage to the vehicle to a specific injury?
14:36:36 5 A Let me see if I got it right. Correlate the amount of
14:36:40 6 damage to a specific injury?
14:36:44 7 Q Correct, the amount of damage to the vehicle.
14:36:45 8 A Well, it's experience. It's seeing many people who
14:36:49 9 have had significant car accidents. It's seeing people who were
14:36:5410 injured and people who have had injuries as well as reviewing
14:36:5711 previous cases and my patients that come through the door as
14:37:0112 well as come through the emergency room who have had significant
14:37:0513 accidents or non-significant accidents.
14:37:0714 Q When you say "non-significant", is it your experience
14:37:1015 that an accident has to have a significant amount of damage to
14:37:1416 the vehicles in order to cause injury to one of the parties
14:37:1917 inside?
14:37:1918 A Well, again, I think that depends on the complaints of
14:37:2319 the individual, where the individual may have – either the body
14:37:2720 struck or what kind of components of damage, where it is. I
14:37:3121 mean, obviously, if the damage was done on a rear end bumper,
14:37:3522 and a person is complaining of a wrist injury or an elbow injury
14:37:3923 on the right side, and there's nothing that the person struck,
14:37:4224 and it's a very slight injury, then obviously you make the
14:37:4625 correlation as to the medical components as well as the injury





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and the damage to the vehicle.
Q So is it your intention in this case to say, essentially, I looked at the damage to these vehicles, and it wasn't significant to cause an injury to Mr. Simao; is that your intention?
A Well, I think that's part of the whole evaluation of Mr. Simao, and looking at the records, I think that's part of it. I'm not saying that it's purely based on the actual pictures or purely based on the actual amount of damage, but it's a factor.
Q Okay. And you believe that the impact was not severe enough to cause any type of injury beyond a whiplash injury to Mr. Simao; is that your opinion?
A No. If you see in my subsequent reports, I abandon the whiplash injury as a diagnosis and felt that he had a non-specific myofascial complaint, and that based on the pain complaints from his initial visit and the subsequent six months, I don't think Mr. Simao had a significant injury to his neck.
Q Is that because the impact wasn't severe enough to cause it?
A Well, I think that's part of it. I also think it's the complaints that he had. He really was not complaining of neck pain after the May 5th -- I'm sorry -- the April 15th, 2005 accident. You know, his first visit to a provider on the 4th -- on that day, you know, he may have complained of neck pain, but

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after that he didn't really complain of neck pain, so there is a component of him not being injured to his neck.
Q But my question was: Is that based on your review of the photographs and the damage estimates of the vehicle?
A That is part of it, yes.
Q And what training do you have to measure or review photographs of an accident of the vehicles or the damage estimates and then to correlate that to whether or not someone could be injured either by whiplash or by some other mechanism; what training do you have in that?
A Well, I think I answered that before, but, you know, having been in two car accidents myself and experienced them as well as seeing patients through the emergency room at UCLA, at John Hopkins, and in the military, I've got a lot of experience with accidents and with injuries that were sustained as well as treating patients who have had accidents and what kind of injuries that were sustained. So it's part of my experience, part of my training, and part of my personal experience as well.
Q All right. I have what I think is your original report which shows a date of review of February 10th, 2009. Do you have a copy of that?
A Yes.
Q I'm going to have that -- if you have a copy of that -- and ask that that it be marked as Exhibit 6. I think that's the next in order.

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A I have an electronic copy. I don't have the --
Q All right. Would you be able to print out a copy to make it Exhibit 6?
A Well, I was going to give him the whole disc. I really can't print everything out.
Q All right. Well, that, I want printed out and made a separate exhibit. Can you do that?
A Yes, I will try.
Q All right. And then I have what we'll call Exhibit 7, "Independent Record Review, Addendum No. 1" that shows a date of review of July 13th, 2010. Do you have that available?
A Electronically, yes.
Q All right. I would ask that that be printed out after the deposition and made Exhibit 7. And then I have "Independent Record Review Addendum No. 4".
A Yes.
Q Which appears to have a date of October 18th, 2010. Do you have that available?
A Yes.
Q I would ask that that be made as Exhibit 8 to the deposition and printed out. Is there an Addendum 2 and 3?
A That's what I was trying to clarify. I think it was a clerical error, and that's why it came out to Addendum 4.
Q The answer is no, there is not?
A There is not.

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Q All right. Do these three reports contain a complete statement of all of your opinions that you have in this case?
A No. There's an Addendum 5.
Q Where is Addendum 5?
A Right here. (Indicating.)
Q Has that been produced to anyone? The record should reflect that you're showing me a copy over Skype?
A Yes. I've given it to Mr. Rogers.
Q I have not received No. 5.
MR. WALL: Mr. Rogers, have you received No. 5?
MR. ROGERS: I have not. When did you send it, Dr. Fish?
THE WITNESS: Yesterday.
MR. STEPHENS: Okay.
BY MR. WALL:
Q All right. I'm going to ask that a copy be made of that and made Exhibit 9. I guess that would be the next in order.
(Plaintiff's Exhibit 9 was marked for identification by the Certified Shorthand Reporter, a copy of which is attached hereto.)
I won't be able to see that, obviously, so I'm going to reserve now the opportunity, once I review No. 5, to reconvene the deposition in order to do that.
Let me ask you this. In No. 5, does it list the records that you reviewed since No. 4?





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14:44:14 1 A Yes.
14:44:17 2 Q What records are listed?
14:44:18 3 A The updated report of Kathleen Hartman dated 11/8/2010.
14:44:24 4 Q Is that it?
14:44:25 5 A Yes.
14:44:26 6 Q All right.
14:44:30 7 MR. STEPHENS: Dated what?
14:44:33 8 THE WITNESS: 11/8/2010.
14:44:39 9 BY MR. WALL:
14:44:3910 Q All right. Do all of those four reports which we've
14:44:4511 marked as 6, 7, 8, and 9 contain all the complete opinions you
14:44:5312 intend to express in this case?
14:44:5513 A Well, I tried to be as complete as possible. Since my
14:44:5914 review of the records in preparation for this deposition, I may
14:45:0315 make some other statements or opinions, so I'm hoping that it
14:45:0716 contains a lot of them, but I may have more.
14:45:1017 Q All right. Does it -- do the reports contain a
14:45:1418 complete statement of the basis for your opinions?
14:45:1819 A I don't know because I just got new records as well,
14:45:2420 and so that may not contain some of the records that I've
14:45:2821 received recently. Actually, in fact --
14:45:3022 Q At least as of the date of the report, does it?
14:45:3423 A As of the -- no, because I was not able to add the new
14:45:3924 records in on a new report, so it's probably missing some
14:45:4525 reports that I do not have. And I can list them for you, if you



14:45:49 1 want.
14:45:50 2 Q What are you listing for me?
14:45:53 3 A Well, I know I have not made any opinions or referenced
14:45:56 4 some records that I received. And so you said does this
14:46:04 5 report, No. 5, include all the things that I had, and I actually
14:46:06 6 have some records, but I have not made any opinions on them.
14:46:10 7 Q What records are those, and when did you receive them?
14:46:18 8 A This week or last week. Oh, I have them on disc.
14:46:27 9 Q February 2011?
14:46:2810 A Yeah. I forgot. I have a whole set of discs that I
14:46:3311 have. They're in my office, so I can bring them in if you want.
14:46:3712 I can show them to you on the Skype if you want.
14:46:4013 Q What records did you receive within the last two weeks?
14:46:4314 That's what I'm asking.
14:46:4415 A No, I know. I just realized that I had these other
14:46:4716 records. I apologize. The depositions of Britt Hill,
14:46:5817 Dr. Seibel, Officer Hagstrom, Dr. Rossler, Dr. Grover,
14:47:0518 Dr. McNulty, Jenny Rish -- R-i-s-h; a report from Dr. Winkler; a
14:47:1219 report from Dr. Wang, W-a-n-g; cervical spine X-rays, 4/15/05,
14:47:3020 10/18/05, 6/17/08, 1/11/10; a CT of the cervical spine,
14:47:3421 8/8/08, 08/11/09; a CT of the brain, 5/14/2005; MRI of the
14:47:4522 cervical spine, the actual images, 3/22/2010.
14:47:5023 Q Let me stop you for a minute. These are things that
14:47:5324 you just received in the last two weeks?
14:47:5525 A Well, I didn't have the actual images and so they were



14:47:59 1 sent to me, so I don't know if I've actually reviewed the images
14:48:03 2 in my previous reports and so -- I may have received them
14:48:07 3 beforehand, but I haven't had a chance to actually look at them
14:48:10 4 until the last two weeks.
14:48:11 5 Q And so all of those -- well, I'll let you finish the
14:48:17 6 list. Finish the list.
14:48:18 7 A Okay. MRI of the cervical spine, 9/24/2007; MRI of the
14:48:24 8 cervical spine, 4/30/2008; MRI of the cervical spine, 8/11/2009;
14:48:30 9 brain MRI of 5/23/2005, actual images. Oh, and vehicle photos.
14:48:3710 Sorry. I didn't have those before.
14:48:3911 Q And all of those things that you just listed you just
14:48:4412 received within the last two weeks?
14:48:4613 A I may have received them before, but I have not had a
14:48:4914 chance to look at them until the last two weeks, so in my mind I
14:48:5315 just received them in the last two weeks.
14:48:5616 Q Including those depositions? Did you receive those
14:48:5917 depositions within the last two weeks?
14:49:0318 A I believe so, yes.
14:49:0519 Q I didn't hear that Mr. Simao's deposition was listed in
14:49:1120 that group; is that correct?
14:49:1321 A I might not have seen that one. If I listed it on my
14:49:1922 reports, I may have had them, but I might not have seen his
14:49:2323 actual deposition.
14:49:2424 Q Well, Exhibit 6 which is your original report lists no
14:49:3025 depositions. Exhibit 7 which is your Addendum No. 1 lists the



14:49:35 1 deposition of Dr. Adam Arita, A-r-i-t-a, and no others. And
14:49:43 2 Addendum No. 4 doesn't list any depositions.
14:49:45 3 So would you have listed all of the documents that you
14:49:49 4 reviewed in preparation of your reports in that particular
14:49:53 5 report or addendum?
14:49:57 6 A Which particular report or addendum?
14:50:00 7 Q All of them as you did each one.
14:50:04 8 A I'm not sure I understand your question.
14:50:06 9 Q All right. When you did your original report in
14:50:1010 February of 2009, it listed records reviewed. Is that all of
14:50:1411 the records that you reviewed in preparation for that report?
14:50:1612 A Yes.
14:50:1713 Q Same thing for Addendum No. 1 where it lists records
14:50:2314 reviewed?
14:50:2315 A Yes.
14:50:2316 Q Same thing for Addendum No. 4?
14:50:2617 A Yes.
14:50:2718 Q And Addendum No. 5 apparently as well; is that right?
14:50:3119 A Correct.
14:50:3220 Q Same answer?
14:50:3421 A Correct.
14:50:3522 Q So you had -- the only deposition that you had that you
14:50:4123 reviewed until the last two weeks was the deposition of
14:50:4524 Dr. Arita; is that right?
14:50:4725 A I believe so, yes.





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14:50:48 1 Q And have you -- when did you review the depositions of
14:50:54 2 Dr. Hill, Dr. Seibel, Dr. Rossler, Dr. Grover and Dr. McNulty?
14:50:59 3 A Over the last two weeks.
14:51:01 4 Q I'm sorry?
14:51:06 5 A Over the last two weeks.
14:51:08 6 Q And is that because you've just received them?
14:51:15 7 A Like I said, I might have received them beforehand, but
14:51:18 8 I did not know that I had them until the last couple of weeks in
14:51:22 9 preparation for the deposition that was happening today.
14:51:25 10 Q If you had them, why wouldn't you have known that you
14:51:29 11 had them?
14:51:30 12 A I'm a busy man. I don't know what to tell you. I have
14:51:35 13 a lot of things going on on my plate. I've got research
14:51:39 14 projects that need to be taken care of. I have grants that I'm
14:51:42 15 submitting. You know, I've got a lot of things going on besides
14:51:45 16 this case, so it's possible that they were there, and I just
14:51:48 17 didn't have a chance to get to them.
14:51:51 18 Q How many --
14:51:51 19 A I hope you can appreciate that.
14:51:53 20 Q I'm sorry. Go ahead.
14:51:54 21 A I hope you can appreciate that.
14:51:57 22 Q How many depositions of Dr. McNulty did you have?
14:52:03 23 A What do you mean? From this case?
14:52:06 24 Q Yes.
14:52:07 25 A I think it's just one. Is there another? Oh, he had

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14:52:11 1 two; right?
14:52:14 2 Q Well, tell me how many transcripts you have?
14:52:17 3 A I believe I recall just one, but, actually, in thinking
14:52:21 4 about it, I think it wasn't completed, and he had to have a
14:52:24 5 second one.
14:52:27 6 Q So all of these documents that you've listed here that
14:52:37 7 you say you either didn't receive or at least didn't review
14:52:41 8 until the last two weeks, are any of those mentioned in
14:52:50 9 Addendum No. 5?
14:52:50 10 A I don't believe so.
14:52:51 11 Q Did any of those depositions that you reviewed or the
14:52:59 12 medical records that you've reviewed change any of your opinions
14:53:04 13 in this case?
14:53:06 14 A It reinforced them. The deposition by Dr. Seibel in
14:53:14 15 conjunction with the deposition of Mr. Hill and Dr. Arita really
14:53:19 16 enforced the -- a lot of my opinions and allowed me to actually
14:53:25 17 get a better grasp and picture of the case in general.
14:53:30 18 Q Your Addendum No. 1 -- I'm sorry -- Addendum No. 4 from
14:53:48 19 October of 2010, do you have access to that?
14:53:55 20 A Yes, sir.
14:53:56 21 Q On Page 4 in Paragraph No. 3, it says, "I have reviewed
14:54:08 22 the deposition testimony from Mr. Simao's treating physicians,"
14:54:14 23 and then it goes on to reference portions of Dr. Arita's
14:54:21 24 deposition.
14:54:22 25 When you said, "I have reviewed the deposition

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14:54:25 1 testimony of Mr. Simao's treating physicians," at that time was
14:54:31 2 Dr. Arita the only one that you had reviewed?
14:54:36 3 A I believe so, yes.
14:54:37 4 Q If, in fact, all of those other depositions were not
14:54:44 5 sent to you until the last two weeks, did you ever request them
14:54:52 6 previously?
14:54:52 7 A Well, I mean, I requested all the records, but they may
14:54:56 8 have come in earlier, and I just didn't look at them or I didn't
14:54:59 9 see them. There may have been a lot of different factors.
14:55:03 10 Q You would have wanted to see the deposition testimony
14:55:06 11 of the treating physicians and the surgeon who performed the
14:55:10 12 surgery; is that right?
14:55:11 13 A Well, I would want to see all the records.
14:55:13 14 Q What period of time do you understand that Dr. Arita
14:55:28 15 actually treated Mr. Simao?
14:55:30 16 A Do you think we could take a quick break? I just want
14:55:44 17 to get a drink. I'm starting to get dry here; okay?
14:55:48 18 MR. WALL: Sure.
14:55:48 19 (Recess taken from 2:55 p.m. to 2:57 p.m.)
14:57:58 20 MR. WALL: All right. Let's go back on the record.
14:57:58 21 BY MR. WALL:
14:58:00 22 Q Doctor, do you remember the question that was asked
14:58:02 23 before we took a break?
14:58:03 24 A Yes, I do.
14:58:04 25 Q What was the period of time that you understand

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14:58:07 1 Dr. Arita to have treated Mr. Simao?
14:58:10 2 A I think it's between 8/24/2006 to 3/22/2007.
14:58:18 3 Q Let me ask you: That list of things that you read to
14:58:26 4 me that you had just reviewed within the last two weeks, where
14:58:31 5 does that list come from? What were you reading from?
14:58:33 6 A Oh, well, I realized that I didn't have some of the
14:58:38 7 records, and so I just quickly put it together in my -- it's
14:58:42 8 just a summary, just a page.
14:58:47 9 Q When did do you that?
14:58:49 10 A In preparation for the deposition I realized that there
14:58:52 11 was records that I didn't have listed there so I wanted to make
14:58:56 12 sure that I had them.
14:58:58 13 Q And so did you contact Mr. Rogers's office to obtain
14:59:05 14 that information?
14:59:06 15 A No. I think I might have had them already, but I just
14:59:09 16 didn't -- I don't know if they, you know, sent everything to me
14:59:14 17 in the last couple of weeks or whether I had them already. I
14:59:18 18 mean, there's a lot of records for this case. That's the
14:59:21 19 thing.
14:59:22 20 Q A lot of the X-rays and CT scans that you talked about
14:59:27 21 seem to be referenced in your Addendum No. 1 as films that you
14:59:34 22 actually reviewed?
14:59:36 23 A Correct, but he's had some more since that time so I
14:59:45 24 wanted to make sure -- well, I received some more since that
14:59:49 25 time so I wanted to make sure that I was getting everything for



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14:59:52 1 you.
14:59:55 2 Q Your Addendum No. 4 on Page 3 says that "the accident
15:00:20 3 report noted moderate damage to the vehicles and both were
15:00:24 4 driven away." Is that a significant basis for any of your
15:00:30 5 opinions in this case?
15:00:31 6 MR. STEPHENS: I'm going to object. Vague as to
15:00:35 7 "significant", but go ahead, Doctor.
15:00:36 8 THE WITNESS: I don't see where you're at. What page?
15:00:36 9 BY MR. WALL:
15:00:39 10 Q Page 3 of Addendum No. 4 in the first full paragraph.
15:00:46 11 A The first full paragraph, so it's the top of Page 3?
15:00:54 12 Right. Okay. Well, at the time I don't think -- that was
15:00:58 13 basically from the reports, but I don't know if I can really say
15:01:02 14 that I had the actual images of the pictures or the estimates of
15:01:07 15 the damage at the time, so it may have just been taken from the
15:01:12 16 reports.
15:01:13 17 Q My question was: Did it play a part in forming your
15:01:17 18 opinions in this case?
15:01:25 19 A Maybe.
15:01:29 20 Q Could you elaborate on that a little bit?
15:01:33 21 A Well, I'm not really sure exactly how you want me to
15:01:37 22 determine this. I guess it's, you know, all the factors that go
15:01:42 23 into this case. It's seeing the initial records and seeing his
15:01:46 24 complaints at the time as well as looking at the photographs and
15:01:51 25 the actual damage of those photographs, and so it definitely



15:01:59 1 played a factor in the overall review of the case.
15:02:04 2 Q On the same page further down under Paragraph 1 it
15:02:12 3 says, "Mr. Simao had a significant history of headaches with
15:02:16 4 treatment prior to the motor vehicle accident of April 15th,
15:02:24 5 2005."
15:02:25 6 Did you review any records which predated -- medical
15:02:28 7 records which predated the accident?
15:02:30 8 A No.
15:02:32 9 Q Do you have any knowledge of the character or location
15:02:41 10 of those headings based on any medical records?
15:02:44 11 A Just from the recent records with his new neurologist
15:02:50 12 that he's been seeing in 2010 and him describing the history of
15:02:56 13 longstanding migraines as well as the other records that he
15:03:00 14 described to the Southwest Medical Associates when he presented
15:03:04 15 after the accident about his pre-existing migraines.
15:03:07 16 Q So what were Mr. Simao's presenting complaints on the
15:03:19 17 day of the motor vehicle accident?
15:03:21 18 A Neck pain, headache, left elbow pain.
15:03:45 19 Q Anything else?
15:03:47 20 A That's what the records say.
15:03:49 21 Q In Addendum No. 4 -- well, let me ask you this:
15:04:01 22 Addendum No. 4 -- you testified previously that since the time
15:04:05 23 of your original report until at least Addendum No. 4 or No. 5,
15:04:11 24 that you had abandoned certain conclusions; is that right?
15:04:16 25 A I modified them. I don't know if "abandoned" is the



15:04:20 1 right word, but I changed them.
15:04:22 2 Q I thought "abandoned" was the word you used earlier.
15:04:26 3 A Oh, was it? Okay. Abandon.
15:04:30 4 Q Should I disregard the first report and Addendum 4 or
15:04:37 5 Addendum 1?
15:04:38 6 A I wouldn't disregard any of the reports. I just was
15:04:42 7 looking at the diagnosis that I came up with, and I modified it
15:04:45 8 or abandoned it from the previous reports, but the opinions that
15:04:50 9 are in the earlier reports may not have been extended to the
15:04:55 10 next report.
15:05:00 11 Q In Addendum 4 you state that "Mr. Simao's care between
15:05:10 12 May and October of 2005 was sporadic and related to his
15:05:16 13 pre-existing headaches"; do you see that?
15:05:19 14 A No, but I that's what I recall writing.
15:05:24 15 Q What basis do you have to determine that any treatment
15:05:30 16 between May and October of 2005 was related to the pre-existing
15:05:35 17 headaches as opposed to something different that occurred in the
15:05:38 18 accident?
15:05:38 19 A Well, his admission on 5/4/2005, that he had a history
15:06:02 20 of migraine headaches; no change in the mental status, if you
15:06:11 21 will; and no weakness into his legs based on the examination;
15:06:14 22 there's no neurological complaints; the MRI of the brain being
15:06:19 23 unremarkable showing no structural abnormalities from 5/23/2005;
15:06:29 24 the treatment for migraine type headaches with standard
15:06:38 25 medication such as Topamax and Carisoprodol.



15:06:43 1
15:06:48 2 Q So my question was --
15:06:50 3 A I'm listing -- hold on. I'm not done. The listing of
15:06:54 4 X-rays of the cervical spine in the left shoulder from
15:07:00 5 10/8/2005; and the inconsistencies of him following up where he
15:07:07 6 doesn't have consistent follow-up on a weekly or bi-weekly
15:07:13 7 basis, but actually had gaps in care. That, to me, is
15:07:16 8 consistent with a pre-existing migraine condition.
15:07:21 9 Q Did you understand that Mr. Simao described any
15:07:24 10 headaches he had post-accident during that period as being
15:07:28 11 different from the migraines he may have suffered prior to the
15:07:32 12 accident?
15:07:32 13 A Yes, I read that.
15:07:34 14 Q And have you disregarded that?
15:07:37 15 A No, I didn't disregard it. That's fine. I understand
15:07:41 16 where he's coming from. I'm going by the records, and this is
15:07:44 17 my opinion based on the simplicity of the records and his
15:07:48 18 pre-existing condition, as well as if you look at the records
15:07:51 19 from 2010, that really kind of starts talking about only
15:07:57 20 migraine headaches.
15:08:05 21 Q You write in Addendum No. 4, Exhibit 8, that it was not
15:08:09 22 until October 2005 that his neck pain began to be an issue, but
15:08:14 23 in fact he presented with neck pain at the hospital; is that
15:08:16 24 correct?
15:08:16 25 A Yeah, but you have to understand the neck pain that he

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15:08:21 1 presented with was not something that he continued to complain
15:08:24 2 about. You know, if somebody has neck pain related to a
15:08:29 3 significant trauma, in my experience at a Level 1 trauma center
15:08:34 4 at UCLA, Johns Hopkins, and in the military, these individuals
15:08:40 5 have continuous pain complaints every single day, and they will
15:08:43 6 show up the following week.
15:08:45 7 I mean, he showed up on multiple visits between then
15:08:48 8 and October and had no neck pain. And, actually, if you look at
15:08:52 9 the physical exam, the range of motion of the neck was full
15:08:55 10 without any pain. So just because he had it on the first day,
15:08:59 11 obviously, doesn't mean that he had significant pain later on.
15:09:05 12 Q Well, that's a significant basis for your opinions in
15:09:08 13 this case, isn't it; that there wasn't neck pain from May to
15:09:11 14 October of 2005 documented in the records?
15:09:17 15 A It's not a significant basis. It's a portion of the
15:09:19 16 basis of my opinions. I have other opinions. The MRI's
15:09:24 17 actually being normal, reported as normal on subsequent MRI's
15:09:29 18 after the first one. The fact that Mr. Simao had no improvement
15:09:32 19 with his surgery for his neck condition, and the fact that he's
15:09:37 20 been complaining of headaches, not neck pain, for consistently
15:09:41 21 the last four years, five years.
15:09:44 22 Q Are you saying that the records suggest that he hasn't
15:09:48 23 been complaining of neck pain over the last four or five years?
15:09:52 24 A No, but what I'm saying is that the consistency of his
15:09:56 25 complaints appear to be related to a headache condition. The

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15:10:01 1 other factor being -- and Dr. Arita has already established this
15:10:06 2 -- that there may be no basis for his pain complaints. He
15:10:10 3 doesn't understand where the pain is coming from. The MRI's are
15:10:14 4 appearing normal. The discograms don't seem to make a
15:10:18 5 concordance sense. And Dr. Seibel and Dr. Arita both seem to
15:10:23 6 think that there may be no trauma that can explain the pain that
15:10:27 7 he has -- or I'm sorry -- no pathology that can explain the pain
15:10:30 8 that he has.
15:10:32 9 Q So if he had, hypothetically, constant pain complaints
15:10:39 10 in his neck from May to October of 2005, you're saying that
15:10:44 11 wouldn't change your opinions in this case?
15:10:46 12 A That's not what I'm saying. What I'm saying --
15:10:49 13 Q Does it change your opinion?
15:10:51 14 A No.
15:10:53 15 Q The hypothetical?
15:10:55 16 A No, it wouldn't change my opinions. You know, the
15:10:58 17 MRI's are normal. It doesn't explain his symptoms. It may show
15:11:03 18 a degenerative condition which is pre-existing, but his
15:11:07 19 complaints based on the records show that it's a headache that
15:11:10 20 he was complaining of, not neck pain, and the exam showed a
15:11:13 21 normal neck examination so I don't see how hypothetical can fit
15:11:17 22 in this case.
15:11:18 23 Q Okay. In your practice, do you ever see patients who
15:11:23 24 have multiple injuries or issues going on, issues of primary and
15:11:29 25 secondary pain?

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15:11:30 1 A Yes.
15:11:31 2 Q Have you ever seen it when the main focus of a pain
15:11:38 3 generator is addressed and treated and all of a sudden the
15:11:42 4 secondary pain generator becomes apparently where it hadn't been
15:11:47 5 thought of as symptomatic previously?
15:11:50 6 A I mean, we talk about that. I think as practitioners
15:11:50 7 we like to focus on one problem and try to solve it to go to the
15:11:54 8 next one, but I don't believe that. You know, if you're going
15:11:57 9 to have significant trauma, and it happens to a significant
15:12:01 10 portion of your body, you're going to complain of all of those
15:12:04 11 things, not just focus and pick and choose. So if it's
15:12:08 12 significant enough, you're going to complain of all the issues,
15:12:11 13 not just the one and forget the other.
15:12:13 14 Q Do you remember testifying a little bit contrary to
15:12:17 15 that previously in a deposition?
15:12:19 16 A Well, it depends on the case, you know. I think that
15:12:22 17 the issue may be that that case presented that the person was
15:12:28 18 having significant issues in one area and may not have thought
15:12:33 19 about the other areas, so it's a case-by-case basis. It's not
15:12:37 20 that it's unheard of, but, you know, it's something that you got
15:12:40 21 to consider when you're looking at all the facts in the case in
15:12:44 22 general.
15:12:44 23 Q In fact, you previously testified that -- and I quote
15:12:49 24 -- "A lot of times in the patient population that I see, the
15:12:53 25 main focus of the pain generator, once that's taken away, all of

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15:12:58 1 a sudden you kind of see the forest from the trees, you know,"
15:13:03 2 and so things kind of open up and you start seeing the other
15:13:07 3 areas that you haven't -- haven't been noticed before." And
15:13:10 4 then you go on to say, "Yeah, there's a primary and a secondary
15:13:14 5 pain." Do you recall testifying to that?
15:13:15 6 A Which case?
15:13:18 7 Q I believe it was the Gilbert case.
15:13:22 8 A I don't remember. When was it?
15:13:25 9 Q I believe 2007, and it was referenced again in a
15:13:30 10 Schultz case in June of last year.
15:13:32 11 A I think you have to look at the context of the
15:13:36 12 question. There's definitely issues like that. I'm not saying
15:13:39 13 that Mr. Simao couldn't have that as well. What I'm saying is
15:13:44 14 it depends on the case by case and what the question was. I
15:13:47 15 mean, you can pull out any quote you want, but unless you show
15:13:52 16 the flow of that questioning, I don't really understand the
15:13:55 17 relevance of your question.
15:13:56 18 Q Well, ultimately, is it your opinion that he doesn't
15:13:59 19 have neck pain or that he doesn't have neck pain that was caused
15:14:02 20 by the motor vehicle accident in April of 2005?
15:14:05 21 A My opinion is that he does not have neck pain that's
15:14:09 22 significant from the accident itself, and that he may have
15:14:13 23 presented on the first day with neck pain, but that had resolved
15:14:17 24 within the first two weeks. The MRI's are completely normal in
15:14:22 25 follow-ups, and you cannot relate any of the cervical spine



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15:14:27 1 pathology since there is none to any of the accident which is
15:14:30 2 why I decided to call this a non-specific muscle pain that had
15:14:36 3 resolved.
15:14:38 4 Q You had in your earlier reports in this case discussed
15:14:43 5 a whiplash injury, and you had indicated that you're abandoning
15:14:48 6 that theory; is that correct?
15:14:50 7 A Yeah. You have to look at all the records in general,
15:14:52 8 and based on that and based on Dr. Arita's testimony as well as
15:14:57 9 Dr. Seibel's testimony of possibly a secondary gain and possibly
15:15:01 10 not finding the source of the pain, that there has to be some
15:15:05 11 questions as to whether or not there was truly an injury to the
15:15:09 12 neck significant enough to warrant surgery.
15:15:12 13 Q Well, I'm not asking if you relate any whiplash injury
15:15:19 14 to the surgery.
15:15:20 15 I'm saying: Did he suffer, in your expert opinion, a
15:15:24 16 whiplash injury at the time of the accident?
15:15:26 17 A No.
15:15:26 18 Q You reference in your reports a prior motorcycle
15:15:37 19 accident suffered by Mr. Simao; do you recall that?
15:15:40 20 A Yes.
15:15:40 21 Q Do you know when it was?
15:15:44 22 A 2005.
15:15:45 23 Q The motorcycle was 2005?
15:15:49 24 A Oh, I'm sorry. I think it was the year before, 2004.
15:15:54 25 Q Are you aware of any facts surrounding the accident?



15:15:56 1 A Not other than what he had said to his providers.
15:16:02 2 Q Have you reviewed any records of any medical treatment
15:16:05 3 as a result of that particular accident?
15:16:07 4 A No.
15:16:07 5 Q It's your opinion that any treatment after the end of
15:16:18 6 May of 2005 is not related to the motor vehicle accident; is
15:16:21 7 that right?
15:16:21 8 A Correct.
15:16:22 9 Q You go on to criticize treatment that Mr. Simao
15:16:28 10 received for cervical issues in 2006 and beyond; is that right?
15:16:37 11 A Well, I'm asked to give an opinion on those treatments
15:16:40 12 and whether or not they are treatments that I would consider
15:16:44 13 performing and so -- I was also asked whether or not they were
15:16:48 14 reasonable, necessary, and related to the accident, so I made
15:16:52 15 opinions on them.
15:16:53 16 Q Once you determined that nothing after May of 2005 is
15:16:57 17 related to the motor vehicle accident, you went on to state
15:17:02 18 whether you thought treatment in 2006 and beyond was reasonable
15:17:07 19 and necessary?
15:17:09 20 A As it relates to the accident.
15:17:12 21 Q But you've already determined that it wasn't related to
15:17:16 22 the accident.
15:17:17 23 My question is: Taking out any question of causal
15:17:21 24 relationship, if you already determined that nothing beyond
15:17:26 25 May 2005 is related to the accident, why is it necessary to



15:17:30 1 render an opinion as to whether the subsequent treatment was
15:17:34 2 reasonable and necessary?
15:17:35 3 A Because I'm sure you're going to ask me about it.
15:17:39 4 Q And so that's why you rendered the opinion?
15:17:43 5 A Well, I mean, I'm asked to give an opinion on the
15:17:45 6 records, I'm asked to give an opinion on the procedures so --
15:17:50 7 I'm asked to give an opinion, so I gave an opinion.
15:17:53 8 Q The MRI from March of 2006, you have reviewed both the
15:17:58 9 report and the film; is that right?
15:18:02 10 A That is correct.
15:18:03 11 Q And do you agree that it showed a mild narrow left
15:18:09 12 neural foramina at C3 and C4?
15:18:13 13 A No, I don't.
15:18:14 14 Q Do you agree that it showed a small central disc
15:18:18 15 protrusion at C4 and 5?
15:18:21 16 A No, I don't.
15:18:22 17 Q If Dr. McNulty had -- well, assume that he disagreed
15:18:38 18 with you, would you agree that it was appropriate to send the
15:18:41 19 plaintiff for pain management treatment at that point?
15:18:47 20 A Well, you know, it's always appropriate to send someone
15:18:50 21 to pain management because I don't think there was a surgical
15:18:53 22 issue. So if the individual is -- if you're trying to figure
15:18:57 23 out where the source of the pain is coming from, you're going to
15:19:00 24 want to try to determine that on a more concrete basis as
15:19:05 25 opposed to trying to solidify and fix a disc, and so I think it



15:19:09 1 was definitely reasonable for Dr. McNulty to pass him on to
15:19:14 2 someone else for a second opinion and maybe even an evaluation
15:19:19 3 to determine where the source of the pain is coming from.
15:19:19 4 Q Do you agree that by the time Dr. McNulty saw Mr. Simao
15:19:23 5 again in September of 2007, that there was evidence of a pain
15:19:27 6 generator at C3-4 and/or C4-5?
15:19:31 7 A No, I don't agree with that.
15:19:35 8 Q Do you believe it was appropriate for Dr. McNulty to
15:19:39 9 order a new MRI in September of 2007?
15:19:43 10 A Appropriate, because he's trying to further determine
15:19:47 11 what's going on, sure. I mean, I don't think that that's
15:19:50 12 unreasonable for him to make a decision because he was confused.
15:19:54 13 There was no real good source for the pain, and yet he was still
15:19:58 14 complaining of pain, and Dr. McNulty's a spine surgeon so he
15:20:01 15 wants to try and fix the spine. Whether it's relevant and
15:20:05 16 related to the motor vehicle accident, no, it's not.
15:20:08 17 Q The September 2007 MRI, you reviewed both the report
15:20:14 18 and the film?
15:20:16 19 A Yes. I have it right here on my computer.
15:20:19 20 Q Do you see any differences between that and the
15:20:22 21 March 2006 MRI?
15:20:26 22 A You know, in general, it looks like it's improved which
15:20:42 23 is what happened in 2008 in August. It was reported as normal.
15:20:46 24 I mean, it looks like a very normal MRI for age
15:20:51 25 appropriateness.

15:20:51 1 Q I'm just asking you about September 2007 as compared to
15:20:56 2 March 2006, you're saying there's an improvement between those
15:20:59 3 two?
15:21:00 4 A Well, in my mind, it looks like it's about the same. I
15:21:04 5 mean, I don't know if you can really quantify it as improved,
15:21:07 6 but it's still considered, to me, to be an age-appropriate,
15:21:11 7 normal MRI.
15:21:13 8 Q Dr. McNulty testified in his deposition that it showed
15:21:17 9 the same findings, the September of 2007 one as the March 2006
15:21:2510 one. You may disagree with the findings, but do you disagree
15:21:2911 that they are essentially the same?
15:21:3112 A My feeling is that they're essentially the same.
15:21:3913 Q All right. Following that MRI, Dr. McNulty either did
15:21:5114 or ordered a left C3-4 and C4-5 transforaminal epidural
15:21:5815 injections. Do you agree or disagree with that process to
15:22:0116 determine the pain generator?
15:22:0317 A I disagree. I don't think it's necessary to perform
15:22:0618 those injections. He wasn't having pain in that distribution
15:22:0919 pattern, and when it was done, he didn't have any improvement
15:22:1320 either, so it was --
15:22:1521 Q Actually -- I'm sorry.
15:22:1722 A Well, again, that's the problem with the reports of
15:22:2123 pain. You know, you're going by a subjective report. Mr. Simao
15:22:2624 said he felt better, but obviously he didn't because he was
15:22:3025 still having symptoms afterwards.



15:22:33 1 Q He reported 80 percent relief. You think that that's
15:22:39 2 placebo or what do you think?
15:22:40 3 A Well, I don't know. That's the problem. I mean, it
15:22:43 4 could be placebo. It also could be that we're just not clear
15:22:46 5 because the pain generator has not really been established, and
15:22:51 6 it appears to me that it was more related to a migraine headache
15:22:56 7 cause.
15:22:59 8 Q In your Addendum No. 4 you state that "I agree with
15:23:10 9 Dr. Arita that cervical spine surgery was not necessary based
15:23:1710 upon the images and Mr. Simao's pain complaints." Do you recall
15:23:2111 that?
15:23:2112 A Yes.
15:23:2213 Q You understand that Dr. Arita didn't have any records
15:23:2714 post-June of 2007 and never saw Mr. Simao after June of 2007; is
15:23:3615 that right?
15:23:3616 A I don't know. You'd have to ask Dr. Arita.
15:23:4417 Q Well, we did.
15:23:5118 A So --
15:23:5319 Q Is that -- the period of time we already established
15:23:5720 from you is that that was the period of time that you believe
15:24:0021 Dr. Arita saw Mr. Simao; is that right?
15:24:0522 A Do you want to go over it again because I'm not sure I
15:24:0923 understand the dates.
15:24:1124 Q All right. Dr. Arita treated Mr. Simao roughly from
15:24:1825 October of 2006 until June of 2007; is that consistent with your



15:24:23 1 understanding?
15:24:23 2 A That's about right.
15:24:24 3 Q When do you understand that the surgery actually was
15:24:28 4 performed? Do you understand that the surgery was in the spring
15:25:46 5 of 2009?
15:25:48 6 A I'm looking. March 25th, 2009.
15:26:29 7 Q All right. So that would have been almost two years
15:26:33 8 after Dr. Arita stopped seeing Mr. Simao; is that right?
15:26:36 9 A Yes.
15:26:3710 Q There was a discography performed in this case in
15:26:4611 August of 2008 by Dr. Rossler. Are you aware of that?
15:26:4912 A Yes.
15:26:4913 Q Do you know Dr. Rossler?
15:26:5214 A No.
15:26:5215 Q Did you review his records?
15:26:5516 A Yes.
15:26:5517 Q Did you review his deposition?
15:26:5818 A Did I list it?
15:27:0419 Q You read it to me today. You listed it when you read
15:27:0720 off a list of things that you received within the last two
15:27:1021 weeks.
15:27:1122 A Well, if I read it and I listed it off, then yes, I
15:27:1623 reviewed it.
15:27:1624 Q It's not listed in any of your reports. It's just what
15:27:1925 you told me today.



15:27:20 1 A That's what I'm saying. That's why I got the list so I
15:27:25 2 could expound with you.
15:27:26 3 Q During a discography procedure, it's generally blind to
15:27:32 4 the patient; is that right?
15:27:34 5 A The level that's being tested is blind, yes.
15:27:37 6 Q Any reason that you would conclude that Dr. Rossler
15:27:41 7 would tell Mr. Simao what levels he's injecting?
15:27:44 8 A No, I have no reason to believe that.
15:27:47 9 Q And the result, according to Dr. Rossler, was positive
15:27:5210 at C3-4 and C4 and 5; is that your understanding?
15:27:5611 A Based on the report, yes.
15:27:5812 Q Do you have any reason to believe that the procedure
15:28:0113 was not properly performed?
15:28:0214 A No.
15:28:0315 Q Any reason to believe that it was a false positive?
15:28:0816 A Yes, I do have reason to believe that.
15:28:1117 Q And what is that reason?
15:28:1318 A He has a normal MRI. Normal discs do not usually give
15:28:1919 pain that are considered pathological. A disc that has pain
15:28:2720 that's a normal appearance on an MRI is not a disc that you want
15:28:3121 to replace or do surgery for, so that would be considered a
15:28:3422 positive control, so if you think it's positive and you do
15:28:3923 surgery and it doesn't help him, which it didn't, then it's
15:28:4324 considered a false positive.
15:28:4625 Q So since – let me just make sure I understand this,





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15:28:50 1 and please correct me if I'm wrong. Since you view the MRI to
15:28:56 2 be normal, and the discogram was positive for C3 and C4 -- or
15:29:06 3 C3-4 and C4-5, then you're rejecting the discogram and relying
15:29:18 4 on the MRI and, therefore, the discogram must be a false
15:29:23 5 positive?
15:29:23 6 A Almost. You're almost there. It's a little more
15:29:26 7 complex than that. I think, as you know -- I know you've
15:29:31 8 probably read up on discograms in general and whether or not
15:29:35 9 there's false positives, especially in cases of litigation and
15:29:39 10 secondary gain, and cervical discograms are noted to be even
15:29:46 11 more controversial and more considered to be false positives.
15:29:50 12 And you have to look at a lot of different factors.
15:29:53 13 You have to look at the MRI. You have to look at the previous
15:29:56 14 treatment. You have to look at the pain complaints. You have
15:29:58 15 to look at where the patterns of pain travel. You have to look
15:30:01 16 at the legitimacy of those complaints and what was previously
15:30:06 17 treated as well as the discogram and the confines of that
15:30:12 18 discogram and the MRI. So you're looking at a lot of different
15:30:16 19 factors in conjunction with this. And based on what appears to
15:30:19 20 be the pattern of pain for Mr. Simao as well as the disc
15:30:24 21 appearance on the MRI, he was not a candidate for discograms to
15:30:30 22 determine whether or not surgery was necessary or surgery would
15:30:32 23 be done because he was never a surgical candidate for a cervical
15:30:37 24 spine.
15:30:37 25 Q Which -- what's a more valuable tool to see, for



15:30:41 1 instance, an annular tear in a disc, an MRI or something else?
15:30:47 2 A Well, annular tears can happen with any kind of
15:30:52 3 degenerative component. Annular tears can be present and we
15:30:56 4 have no pain component of it. How do you determine what's a
15:30:58 5 more significant way of evaluating that annular tear? It's a
15:31:03 6 very difficult question, and we have not really found a positive
15:31:07 7 way of determining that.
15:31:08 8 Now, you can put contrast in a disc with discogram and
15:31:12 9 do a CT myelogram and see a tear or fissure, but that still may
15:31:17 10 not mean anything clinically. You could look at an MRI and see
15:31:21 11 that on the MRI, and it still may not make sense. So I don't
15:31:21 12 know if we have really great imaging components to say what is
15:31:24 13 the best way of looking at it.
15:31:27 14 Q Well, an annular tear can exist and not show up on an
15:31:32 15 MRI; is that correct or no?
15:31:34 16 A No, I don't believe that. I think you have to show
15:31:37 17 something on an MRI. If the MRI's our gold standard, you know,
15:31:42 18 you're hoping that you see something. And this idea of a
15:31:46 19 microtear or a microscopic tear that is only seen by you placing
15:31:52 20 a needle and shoving a bunch of fluid in there doesn't make much
15:31:54 21 sense to me.
15:31:54 22 Q Well, if it's your conclusion that it was a false
15:32:01 23 positive, but there's no reason to believe the procedure wasn't
15:32:05 24 properly performed or that the equipment malfunctioned, then
15:32:08 25 what would cause the false positive?



15:32:11 1 A Well, many factors. You know, I don't know if you've
15:32:16 2 undergone a procedure or have actually seen a procedure, but
15:32:20 3 they're not the funnest things to have done to you, and they are
15:32:24 4 quite traumatic. You're placing a very long needle into the
15:32:25 5 anterior part of your neck, and you're partly awake because you
15:32:29 6 have to give a response. It's not a pleasant procedure by any
15:32:32 7 means. And so just the sheer fact of placing the needle is a
15:32:37 8 component of pain, and people may misinterpret that.
15:32:40 9 The fact that you're pressurizing a disc, and if it's
15:32:44 10 not in the center of the disc and it's in the annulus or if it's
15:32:45 11 not in the nucleus, but somewhere off to the side, there's a
15:32:50 12 possibility that you get a false read, especially if you have a
15:32:53 13 higher pressure. The pressure component of that disc -- I
15:32:56 14 wasn't there, so I can't tell you exactly, but if you look at it
15:32:59 15 -- performing a disc, some of the times these discs are positive
15:33:02 16 for individuals, and we don't exactly know why they're positive,
15:33:05 17 but they can be, and the MRI is completely normal. That
15:33:09 18 definitely confuses you. So if you're seeing a positive disc
15:33:13 19 with an MRI that appears to be normal, you've got to conclude
15:33:17 20 that it's potentially a false positive disc.
15:33:21 21 Not only that, but you also have the psychological
15:33:23 22 components that need to be addressed, the secondary gain, the
15:33:25 23 components of where the pain is located, and where does the pain
15:33:28 24 travel? You know, are you saying that the disc is painful
15:33:31 25 because it's painful or are you saying that it's concordant with



15:33:34 1 the pain of where you normally have pain on a day-to-day basis?
15:33:38 2 That can also give you a false positive.
15:33:41 3 Q So is it your testimony and your opinion to a
15:33:44 4 reasonable degree of medical probability that the discography in
15:33:48 5 August of 2008 rendered a false positive?
15:33:51 6 A Yes.
15:33:51 7 Q And you obviously disagree with Dr. Rossler on that; is
15:34:06 8 that right?
15:34:07 9 A Well, he called it positive, so I guess I disagree.
15:34:10 10 Q And do you believe that under Propofol, that Mr. Simao
15:34:23 11 gave a response to a blind discogram that rendered the false
15:34:32 12 positive?
15:34:32 13 A Well, I think that's also a component. I didn't even
15:34:35 14 address that, but yes. I mean, if the person's out, and they're
15:34:39 15 on Propofol, and they can't really think clearly, and they don't
15:34:44 16 remember the treatment at all, absolutely anything can cause
15:34:47 17 pain. You could just pinch their skin on the side and that
15:34:50 18 could cause pain, so that's another component that I had not
15:34:54 19 brought up, but thank you for bringing that up.
15:34:54 20 Q Well, what do you use when you perform that? Do you
15:34:57 21 use Propofol? Do you use Versed? What do you use?
15:34:59 22 A Yeah, we use -- you know, we try to make the patient as
15:35:02 23 comfortable as possible. I've done it without any sedation, and
15:35:06 24 we've gotten through it. You know, patients have to be able to
15:35:10 25 tolerate this procedure. We can give a little Fentanyl to make



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15:35:14 1 sure they're somewhat comfortable, and then we give a little bit
15:35:18 2 of Versed to again make them relax. The way I perform these
15:35:22 3 tests is that I tell them up front that this is not going to be
15:35:26 4 a fun test to perform, and there's going to be some pain aspect
15:35:28 5 to it, but I need you fully awake so you can participate with
15:35:30 6 me. When you knock somebody out with Propofol and then try to
15:35:33 7 wake them up, it's a harder test.
15:35:37 8 Q Dr. Rossler testified in his deposition that the
15:35:41 9 procedure he used followed the guidelines from ISIS. Do you
15:35:46 10 agree with that or disagree?
15:35:49 11 A I have no reason to disagree that he didn't follow a
15:35:52 12 guideline, but like any guideline, it's a guide. I mean, it's
15:35:55 13 not the standard of care. It's not the way that everyone does
15:35:59 14 it. Everyone has a little different component of performing a
15:36:03 15 discogram.
15:36:07 16 Q In your fourth addendum, Addendum No. 4 which is
15:36:13 17 Exhibit 8 -- and I understand this was commenting on the life
15:36:23 18 care plan, but you wrote on Page 4: "To a medical probability,
15:36:31 19 injections were not necessary based on the motor vehicle
15:36:34 20 accident. The injections that were done did not resolve his
15:36:38 21 pain and did not confirm cervical involvement."
15:36:44 22 Is it your position -- setting aside the issue of
15:36:49 23 whether it's related to the accident, is it your position that
15:36:53 24 all of the injections that Mr. Simao has undergone were
15:37:01 25 unnecessary?



15:37:03 1 A Well, it's hard for me to make a blanket statement like
15:37:07 2 that. I guess what I was saying is that I didn't feel, based on
15:37:13 3 his pattern of his pain, that he needed to have selective nerve
15:37:19 4 root block and facet injections as well as facet rhizotomies.
15:37:24 5 His pain was obviously related to his migraine headaches in my
15:37:28 6 opinion.
15:37:28 7 Now, I'm not faulting Dr. Arita, but based on the --
15:37:30 8 and you told me not to base it on the accident, but I don't
15:37:33 9 think I would have done those procedures. I don't think they
15:37:36 10 would have really determined anything because the MRI was
15:37:38 11 appearing normal, so you're not going to get these kind of need
15:37:43 12 for an injection based on a normal appearing MRI and the pattern
15:37:48 13 of pain that he described.
15:37:50 14 Q So is that yes, you believed that the injections were
15:37:54 15 unnecessary?
15:37:55 16 A Again, I didn't want to make a blanket statement so I
15:37:58 17 tried to clarify that.
15:38:00 18 Q Well, you did make a blanket statement in your report.
15:38:04 19 That's why I'm asking.
15:38:05 20 A Well, I'm trying to hone it in on today's visit.
15:38:11 21 Q So is it yes, they were necessary; or no, they were
15:38:14 22 unnecessary -- strike that. Wait a minute. Let me -- I think I
15:38:18 23 just gave you a heads I win, tails you lose.
15:38:21 24 Is it your testimony that the injections were necessary
15:38:27 25 or unnecessary setting aside the issue of causation?



15:38:31 1 A Hey, is Rogers there?
15:38:37 2 MR. STEPHENS: Are you soliciting an objection?
15:38:41 3 THE WITNESS: Well, I mean, he corrected himself, so I
15:38:44 4 thought you might have at least known what he was saying.
15:39:01 5 THE WITNESS: Can you read the question back?
15:39:01 6 (The record was read by the reporter.)
15:39:04 7 THE WITNESS: Yeah, I don't think the injections were
15:39:06 8 necessary based on his pain complaints and based on what I saw
15:39:09 9 from the MRI, so no, it's not necessary.
15:39:13 10 BY MR. WALL:
15:39:13 11 Q Is it your opinion that none of the injections
15:39:18 12 confirmed cervical involvement?
15:39:22 13 A Yeah, I don't think any of the injections actually gave
15:39:25 14 him the relief that we're looking for to determine the source of
15:39:29 15 the pain, and I think that's why all the doctors were ordering
15:39:33 16 so many MRI's trying to figure out what was going on. I think
15:39:37 17 Dr. Arita was scratching his head trying to figure out why he
15:39:39 18 wasn't getting any better and why he wasn't improving.
15:39:39 19 Dr. Seibel is pretty much doing the same thing now. And
15:39:43 20 Dr. McNulty did surgery, and he's still not better and still has
15:39:48 21 pain. So I don't think the actual generator has been found
15:39:53 22 within the cervical spine. It's somewhere else.
15:39:56 23 Q All right. Do you believe that the surgery performed
15:40:00 24 was unnecessary?
15:40:00 25 A I don't want to say that it was unnecessary. I think



15:40:03 1 it was unreasonable: It didn't make sense based on the MRI.
15:40:08 2 Q If you used the word "unnecessary" in your report, are
15:40:16 3 you changing that opinion?
15:40:16 4 A You know, you guys have your lawyer thing about it, so
15:40:22 5 yes, I'll stick with what's in my report.
15:40:26 6 Q Do you believe the treatment by Dr. McNulty fell below
15:40:37 7 the standard of care?
15:40:38 8 A I was never asked to look at standard care. I have no
15:40:41 9 comments to make on standard of care so --
15:40:44 10 Q Would an unnecessary surgery be below the standard of
15:40:48 11 care?
15:40:48 12 A I was not asked to look at standard of care. I'm not
15:40:52 13 going to be able to comment on that question.
15:40:54 14 Q Well, do you have an opinion as to whether an
15:40:57 15 unnecessary surgery would be below the standard of care?
15:41:02 16 A I have no opinion on that topic.
15:41:04 17 Q You write in your -- I guess I'm looking at Addendum 1
15:41:17 18 now. Is Addendum 1 still valid or have we sort of moved on to
15:41:23 19 something else? Are your conclusions -- let me ask that a
15:41:26 20 better way.
15:41:27 21 Are your conclusions and statements in Addendum No. 1
15:41:31 22 still some of your opinions?
15:41:34 23 A We can go through them if you want.
15:41:39 24 Q You write on Page 8: "The lack of response by the
15:41:44 25 procedures done with Dr. Arita calls into question why the





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injections done by the spine surgeon, Dr. McNulty, were more successful."

Let me break that down. Is it your belief that the selective nerve root blocks done by Dr. Arita in October of 2006 evidenced a lack of response?

A Well, I think there's just inconsistencies with his response, and that's kind of the point of what I was saying is that how come you can have a good response with one provider and not with the other. I mean, you should be consistent. You know, you want to do a procedure by anybody and have the same result. Since you didn't get good success with these things, and then all of a sudden you get to another provider and you have good success, it doesn't make much sense. Plus, if you inject in different areas by one provider and you get results, and by another provider you don't, it just calls into question the inaccuracies and the inconsistencies of reporting by Mr. Simao.

Q So if Dr. Arita testified that there was a 50 to 75 percent improvement according to Mr. Simao from the selective nerve root blocks in October of 2006, what conclusion might you reach from that particular fact?

A I don't know. That's the problem. I don't think I can make one.

Q Well, would it be the lack of response by the procedure done by Dr. Arita? There was a response, and a positive



response, wasn't there?

A Well, that's what's reported, but I think it's inconsistent, you know. I mean, from the pattern of pain that he described, the response that was the response, it confuses me. It doesn't make sense. The MRI being normal and having no compression of any nerves. I mean, you're blocking a nerve that you assume is being compressed somewhere, and the MRI is not showing any compression anywhere, so it's -- why is it getting better? You just don't know.

Q Dr. Arita also did on at least two occasions a pulse radio frequency in the end of 2006, spring of 2007; do you recall that?

A Yes.

Q And Mr. Simao reported a temporary reduction of pain for several months from each procedure; is that your understanding?

A From the records, yes.

Q Well, given those, why would you say that it was a lack of response by the procedures done by Dr. Arita?

A Maybe I just wasn't making myself clear. There was a lack of any long term response, any clinically significant response. And, you know, Mr. Simao is saying that he's better for a couple of months, but he's still not improved. He never made progressive improvement. And an MRI that actually shows improvement to where you have an MRI in August of 2008 being



normal -- that's not how it works. I mean, that's not how you typically see these kind of patients.

Patients who get worse have MRI findings. They have findings that are consistent with what you expect the pain to be, and this is not what you see in this case, and that's why it's confusing. I mean, even Dr. McNulty did a secondary set of discograms to see if he could further anesthetize the disc and make it better so in his mind he knew what was going on, but, you know, obviously, Mr. Simao didn't even get relief from the surgery either. Nothing was working, so then you have to call into question why is that, especially when you have a normal MRI.

Q Is it your opinion that the pulse radio frequency should work for a long period of time, longer than a few months?

A Yeah. The pulse radio frequency should work for anywhere between six months to twelve months. If you look at the literature, it can actually last up to twelve months so you're expecting a long term benefit from it.

Q There's a difference between the pulse radio frequency that Dr. Arita did and a rhizotomy; right?

A You know, the rhizotomy is going to be a radio frequency ablation, and so a rhizotomy can be a pulsed rhizotomy or a continuous heat rhizotomy. I mean, your question doesn't really make sense to me in terms of the difference between the two. They're still rhizotomies.



Q Well, if Mr. Rossler testified that the pulse radio frequency procedure that he performed he expected to normally last for two to three months, would you disagree with that or have some question about what procedure he actually performed?

A No, I'm not disagreeing. What I'm saying is if you look at the literature, and you look at the procedure itself, the expected results are going to be six to twelve months is what you're hoping for, especially when you're performing those procedures. If Dr. Rossler --

Q And --

A I'm sorry. I apologize. If Dr. Rossler felt it only lasted for three months, maybe that's his experience. I'm just going by what the literature shows.

Q In your report that is Addendum No. 1, Exhibit 7, you say that "there is a possibility of a placebo effect with all injections and a bias by the performing injectionist who eventually performs surgical spine surgery." Do you recall writing that?

A Yes.

Q Is that still your opinion today?

A Well, I mean, I think Dr. Arita put it very eloquently in his deposition, and he said that, you know, if you're going to be doing a surgery, you may want an independent person performing the injections so that they're not biased, because if you know that you're going to be doing the surgery at that site,

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15:48:04 1 and you're hoping to get some kind of positive response so you
15:48:09 2 can perform the surgery, there is a maybe unconscious bias that
15:48:14 3 can happen in that case.
15:48:15 4 Q So do you believe that there is a bias by Dr. McNulty
15:48:23 5 resulting in him either ignoring a placebo effect or creating
15:48:38 6 out of cold cloth the need for the surgery that he performed?
15:48:42 7 MR. STEPHENS: Objection. Compound. Go ahead, Doctor.
15:48:45 8 THE WITNESS: Yeah, you're going to have to rephrase it.
15:48:49 9 BY MR. WALL:
15:48:49 10 Q Is it your opinion to a reasonable degree of medical
15:48:53 11 probability that Dr. McNulty was biased and performed a surgery
15:49:00 12 that wasn't medically necessary?
15:49:04 13 MR. STEPHENS: Again, compound. Go ahead.
15:49:06 14 THE WITNESS: You're going to have to be more specific.
15:49:11 15 He's done many procedures. Which procedure are you talking
15:49:14 16 about?
15:49:14 17 BY MR. WALL:
15:49:14 18 Q All right. The one you wrote about when you said,
15:49:17 19 "There's a bias by the performing injectionist," tell me that
15:49:21 20 bias that Dr. McNulty had to a reasonable degree of medical
15:49:25 21 probability?
15:49:25 22 A Well, now I got to back up. Which procedure was I
15:49:29 23 talking about because he had performed multiple procedures? Are
15:49:32 24 we talking about the discogram? Are we talking about the
15:49:35 25 surgery? What exactly are we talking about?

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15:49:38 1 Q You wrote: "The lack of response by the procedures
15:49:40 2 done by Dr. Arita calls into question why the injections done by
15:49:45 3 the spine surgeon, Dr. McNulty, were more successful. There is
15:49:50 4 a possibility of a placebo effect with all injections and a bias
15:49:54 5 by the performing injectionist who eventually performed cervical
15:50:00 6 spine surgery." Does that give you the context?
15:50:05 7 A Maybe, but now ask your question again? I'm not sure
15:50:09 8 what we're talking about.
15:50:10 9 Q Explain to me the bias that you see, to a reasonable
15:50:14 10 degree of medical probability, from Dr. McNulty?
15:50:17 11 A I thought I just did. I said that, you know, when
15:50:20 12 you're expecting a specific result, that you have an expectation
15:50:26 13 in your mind that this is where I'm going to be performing
15:50:30 14 surgery, so I hope this is where it works in terms of the pain,
15:50:33 15 so there's a possibility of a bias. That's what I'm saying.
15:50:39 16 You know, I'm bringing that up.
15:50:42 17 Q Well, is it your opinion to a reasonable degree of
15:50:44 18 medical probability, based on everything you've reviewed in this
15:50:48 19 case, that there was a bias on the part of Dr. McNulty when he
15:50:55 20 performed that surgery?
15:50:56 21 A Well, I think based on my statement, that's what I
15:50:59 22 said, that there's a possibility of a bias.
15:51:02 23 Q And you described it previously as -- I don't remember
15:51:06 24 if you said "unconscious" or "subconscious", but do you believe
15:51:10 25 that it's a conscious bias on the part of Dr. McNulty or not?

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15:51:15 1 A I don't know. I'm just bringing it up.
15:51:18 2 Q You write one sentence later that "Dr. McNulty chose to
15:51:24 3 perform a surgery with very limited chance of success." Is that
15:51:29 4 also a result of the bias that you discuss?
15:51:34 5 A I don't know. It's hard to know. I mean, that's the
15:51:36 6 confusing part with the case. I mean, Dr. McNulty had a normal
15:51:41 7 appearing MRI, and he obviously had the patient in his office,
15:51:44 8 and he was trying to do something proactive for him. I just
15:51:47 9 don't think you're going to have success with that kind of
15:51:51 10 surgery. And low and behold, you didn't. He didn't get any
15:51:56 11 better, especially when he's complaining of these migraine
15:51:59 12 headaches. That's really where his complaint was. He didn't
15:51:59 13 really have a pattern of neck pain complaints.
15:52:01 14 You know, again, we go back to the original thing that
15:52:04 15 you had said to me earlier which is that if everything after May
15:52:08 16 of 2005 is not related to the accident, then why am I even
15:52:13 17 giving an opinion anyway? And my response is exactly as before,
15:52:15 18 because I knew you were going to ask me about it.
15:52:18 19 Q Do you believe that choosing to perform a surgery with
15:52:24 20 a limited chance of success is below the standard of care?
15:52:29 21 A I think I've already told you that I've not got an
15:52:32 22 opinion on that. I was not asked to review the standard of
15:52:35 23 care.
15:52:35 24 Q Do you believe that you're qualified to give an opinion
15:52:38 25 on the necessity of spine surgery?

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15:52:42 1 A Yes.
15:52:42 2 Q More so than a spine surgeon?
15:52:46 3 A I don't know if more so, but I'm qualified to give an
15:52:51 4 opinion because I see a lot of patients that come through my
15:52:55 5 door who either had surgery, will have surgery, need surgery,
15:52:59 6 want surgery, don't want surgery, or are not candidates for
15:53:01 7 surgery, and I make that decision every day.
15:53:03 8 Q Now, your original report talked about myofascial pain?
15:53:09 9 A Right.
15:53:10 10 Q Define that for me?
15:53:13 11 A Well, I mean, that's just it. You're describing a
15:53:17 12 muscle in the connective tissue surrounding the muscle or where
15:53:23 13 the muscle connects as the source of the pain.
15:53:23 14 Q Do you --
15:53:26 15 A I hate to cut you off. So we only have fifteen more
15:53:30 16 minutes. I mean, I know we started a little bit late, but we're
15:53:33 17 sticking to two hours?
15:53:35 18 Q Myofascial pain doesn't appear in your No. 1 and
15:53:42 19 No. 4 Addendum. Is that a change in your opinion?
15:53:46 20 A What do you mean "doesn't appear", appear where?
15:53:51 21 Q It doesn't appear in your two subsequent reports as
15:53:55 22 being one of your opinions as to what Mr. Simao suffered from.
15:54:03 23 Do you believe now that he suffered -- well, what is your
15:54:04 24 opinion today?
15:54:06 25 A Well, as I said before, I thought it was -- I believe



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15:54:11 1 in medical probability that it's a non-specific myofascial pain.
15:54:14 2 It's just -- we don't know where it's coming from and that --
15:54:19 3 Q Is that --
15:54:20 4 A Say that again?
15:54:21 5 Q Is that non-specific myofascial pain from his
15:54:25 6 migraines?
15:54:26 7 A Well, I don't know. It's not quite clear. You know,
15:54:28 8 that's the problem. It's possible, in my mind, that it's coming
15:54:33 9 from his migraines, his pre-existing migraines. It's not quite
15:54:3710 clear where his pain's coming from, and I think that's the
15:54:4111 issue. You know, you've got questions from his treating
15:54:4312 providers, two of them, that call into question whether or not
15:54:4613 these are legitimate complaints so, you know, I'm not really
15:54:4914 sure where the pain is coming from. It doesn't make sense.
15:54:5215 But looking at the records from the initial six months,
15:54:5416 it's not a neck pain issue. Any treatment for his neck, any
15:54:5917 surgery, any injections, it's not from the car accident.
15:55:0218 Q What about his shoulder or trapezius?
15:55:0519 A Again, I don't think it's coming from the car accident.
15:55:0820 I mean, he was complaining -- he wasn't really complaining of
15:55:1121 that component at the time of the accident, and I just don't
15:55:1622 feel it's related to the accident, and I don't believe in
15:55:1923 medical probability that it is.
15:55:2124 Q And you believe that -- well, is it your opinion that
15:55:2525 he suffers from left shoulder or trapezial pain?



15:55:31 1 A Well, again, I think that's the problem. I'm not sure
15:55:33 2 what he suffers from. It's not quite clear. No one's been able
15:55:37 3 to clarify the actual pain generating source, so it's not clear.
15:55:43 4 Q You wrote in your report -- in fact, your initial
15:55:46 5 report, you refer to or reviewed surveillance video from, I
15:55:52 6 think, 2008; is that right?
15:55:54 7 A Yeah. You know, what I find interesting is that we
15:55:56 8 haven't brought that up, but he saw Dr. Kabins around that
15:56:00 9 timeframe, and Dr. Kabins was saying that he was at his wits end
15:56:0410 in terms of his pain, and yet on these video surveillance you
15:56:0611 see him moving his neck around with no pain behaviors
15:56:1012 whatsoever. It's a very inconsistent appearance based on the
15:56:1413 surveillance and based on what Dr. Kabins is noting.
15:56:1814 Q Mine is just a yes or no question. By the way, I don't
15:56:2115 think he ever saw Kabins, but if you want to produce a record
15:56:2316 for me, I'd appreciate that.
15:56:2517 A Oh, it wasn't Kabins? Maybe it was Grover. I
15:56:2918 apologize.
15:56:3019 Q The surveillance video, did you see any indication in
15:56:3320 the surveillance video of any pain Mr. Simao suffered in his
15:56:3721 neck or left shoulder?
15:56:5022 A It was Dr. Grover, not Dr. Kabins, I apologize.
15:56:5423 Q Did you hear my next question?
15:56:5824 A No. I was trying to figure out which surgeon I had
15:57:0025 talked about, and I misspoke, and I apologize. It was



15:57:02 1 Dr. Grover, not Dr. Kabins.
15:57:05 2 Q Did you see in a surveillance video in 2008 any
15:57:08 3 indication of pain in Mr. Simao's neck on the left side or in
15:57:12 4 his left shoulder?
15:57:13 5 A No.
15:57:13 6 Q Never saw him wincing from pain from his left shoulder
15:57:21 7 area?
15:57:22 8 A No.
15:57:23 9 Q During the same period in time, that 2008, in your
15:57:2910 original report you were claiming that Mr. Simao had a variety
15:57:3411 of symptoms that weren't related to the motor vehicle accident,
15:57:3812 like myofascial pain, degenerative cervical spine disease, left
15:57:4313 shoulder subacromial bursitis, and migraines; is that right?
15:57:4814 A That's what I authored at the time, yes.
15:57:5115 Q So has your opinion changed on those?
15:57:5516 A Well, now that I've got to see a better picture of the
15:57:5917 records and have a more broader scope of what's been going on
15:58:0418 since I've been preparing for this deposition, yeah, it's
15:58:0819 obviously changed. I mean, he has multiple pain complaints.
15:58:0820 It's not quite clear where it's coming from, and none of these
15:58:1221 are related to the motor vehicle accident.
15:58:1322 Q Is your opinion on the subacromial bursitis being the
15:58:1823 cause of his left shoulder pain, have you abandoned that
15:58:2224 conclusion?
15:58:2325 A Well, I mean, I'm trying to come up with a reason for



15:58:26 1 him to have the symptoms, but I don't think it's quite clear.
15:58:29 2 You know, I mean, what he displays on the videos, what he's
15:58:34 3 saying to his providers, it's just not clear, so I was trying to
15:58:34 4 come up with a diagnosis that makes sense.
15:58:38 5 But, you know, related to the motor vehicle accident
15:58:41 6 itself, I don't think he had any of these symptoms -- or any of
15:58:46 7 these diagnoses. Excuse me.
15:58:48 8 Q My question was have you abandoned or retreated from
15:58:55 9 your conclusion in your original report that he suffered from
15:59:0010 subacromial bursitis in his left shoulder?
15:59:0311 A Well, he may, so I don't know if I've abandoned it. He
15:59:0612 may, but it's not related to the motor vehicle accident.
15:59:0813 Q Do you believe or do you agree that there are
15:59:1114 degenerative changes in Mr. Simao's cervical spine?
15:59:1515 A Well, again, I think before I actually had a chance to
15:59:1916 see the reports -- I mean, Dr. Arita didn't really get a chance
15:59:2217 to see the films. He only went by reports. And now that I've
15:59:2618 actually seen the films, I disagree with that. I don't think he
15:59:2919 has degenerative changes. In fact, in 2008 of August, the MRI
15:59:3420 was reported as normal, so there aren't any degenerative
15:59:3721 changes.
15:59:3922 Q So you've reviewed the films, the MRI's from March of
15:59:4423 2006, September of 2007, and I want to say November of 2008, but
15:59:5024 I'm not sure of the exact date, and it's your testimony to a
15:59:5425 reasonable degree of medical probability that they do not show





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any degenerative changes in his cervical spine?
A Correct. There's an authored report on the very first film that there may be a change at the C2-3 level, but on the subsequent MRI's you can see that that actually improved, so it may be the technique of the MRI, a larger magnet. But the November -- or whatever the 2008 film -- I thought it was August, but if it's November of 2008, the film is normal. There is no degenerative change, so it may just be an incidental image variance on that first MRI.
Q So you disagree with any physician who has reviewed that and determined that there were degenerative changes in his cervical spine?
A I don't know if I disagree. My opinion is that there aren't any degenerative changes. If that's in disagreement, I guess, but I'm just telling you what I see personally.
Q All right. Are you aware of any record or any evidence that Mr. Simao suffered any cervical or neck pain prior to April 15th, 2005?
A Just from the reports of what he said to his providers. I don't think there's a record that I had been able to review.
Q Are you saying that he reported to a provider that he had left shoulder or neck pain prior to the accident?
A Well, he had that motorcycle accident, and he had a history of migraines, so he may have said to his providers that he may have had some symptoms in the shoulder, but I don't have



a specific record.
Q Are you aware of any complaint that Mr. Simao made to any medical provider indicating that he had left shoulder or neck pain prior to April 15th, 2005?
A Not offhand.
Q Do you feel that it's appropriate for a patient to follow a doctor's advice?
A Well, that's what it is, it's a doctor's advice. It's a recommendation, and I think it's important for a patient to understand what those recommendations are and make an informed decision.
Q Are you aware of any evidence of Mr. Simao during the course of his treatment being noncompliant?
A Noncompliant in what way?
Q With his doctor's advice?
A Well, you know, the doctors may recommend certain things, and he may not have followed them. I don't know how to answer that question.
Q Well, are you aware of any instances where he was noncompliant?
A I don't think there's evidence of him being noncompliant, but there may be recommendations that he did not follow. In your strict definition of noncompliant, it may be noncompliant.
MR. WALL: I don't have any other questions.



EXAMINATION
BY MR. STEPHENS:
Q Hello, Doc. I've got a few.
A Oh, great.
Q Dr. Seibel -- I may be --
MR. STEPHENS: Court Reporter, I may be mispronouncing it, Seibel. I believe it's S-i-e-b-e-l -- scratch that. S-e-i-b-e-l.
THE COURT REPORTER: Thank you.
BY MR. STEPHENS:
Q So let's start with the question. Dr. Seibel testified that in his opinion 50 percent relief from a diagnostic injection is not positive. Do you agree with that?
A That's a fair statement.
Q Okay. And you testified earlier in your deposition that you received films a week or two ago that in fact are cited in your July 13, 2010 report. If you look on Page 2 of that July 2010 report --
A Okay.
Q -- the first line reads, "Imaging and work up which I have personally reviewed the images."
A Okay.
Q Now, did you review those images when preparing this July 2010 report?
A Yes.



Q Okay. I want to walk through the bases for your opinions.
A Hey, you know what, you look older on video.
Q You want to see the other guy instead?
A Yeah.
Q All right. Do the diagnostic films show evidence of neck trauma?
A No.
Q Can the MRI findings be characterized as normal given the plaintiff's age?
A Yes.
Q You were asked just a few moments ago by Mr. Wall whether there were any degenerative findings in the MRI's. Would it be fair to say that those MRI's show age appropriate degeneration for the plaintiff?
A They may be age appropriate, but if you look at subsequent films, you're seeing a more normal picture. So the reason why I'm saying there's no degeneration is because by definition, each film should get worse and worse and worse or degenerated, and the fact that you're seeing a normal appearing MRI two years after the accident, in my mind, looking at the entire thing, well, it might make a change on the first film in terms of a degenerative appearance -- it's not what you're seeing. It should be consistent all through. That's why I was saying that there's really no evidence of degeneration on these





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films.
Q Well, there is a comment by the radiologist relating to C3-4 facet hypertrophy. Is that a traumatically induced condition or a product of a degenerative process?
A Well, it's not in a traumatic condition, but you may have a large or hypertrophied facet because that may be genetically how that facet started to develop. It may not be a degenerative process. It could just be a larger facet.
Q Okay. Are there any findings in any of the MRI's or CT scans or X-rays that, to a medical probability, result only from a single traumatic event like a car accident?
A No.
Q In your medical opinion, would plaintiff's complaints to his provider be consistent with traumatic injury to the cervical spine?
A No.
Q Now, you commented a few times in today's deposition about your work at the emergency room at UCLA. Do they have a Level I trauma center there?
A Yes.
Q Do you work in that trauma center?
A I'm not in the trauma center, but I've been asked to evaluate patients who come through the trauma center, and I have on occasion been asked to evaluate a patient who's in the trauma room or the ER.



Q Okay. Where, other than UCLA, have you worked in a trauma center?
A Johns Hopkins and the U.S. military as an officer at the Army, U.S. Army.
Q Did you treat traumatically induced neck injuries in the trauma centers where you've worked?
A Yeah. I was stationed at the M.A.S.H during the Iraz -- I'm sorry -- not the Iraq. I'm glad I'm not there -- in the Bosnian conflict in '96. I was stationed in the forward M.A.S.H. component, and we had a lot of injuries that had occurred from trauma ranging anywhere -- believe it or not -- from basketball injuries to shell injuries, so there was a wide range of traumatic events that happened in this M.A.S.H..
Q Okay. And in your experience treating traumatically induced cervical injuries, you've observed or reached the opinions that the plaintiff's clinical presentation doesn't match a trauma presentation?
A Correct.
Q Okay.
A Hey, we got to go.
Q Okay. Just give me one minute, Doctor. I'll go fast.
MR. STEPHENS: Court reporter, did he leave or go to the restroom?
THE WITNESS: There's another meeting here at 4:00, so we got to go.



BY MR. STEPHENS:
Q Okay. Let me just get through a couple of more points. What time is it right now?
A It's 4:10. We could probably sucker through another couple of minutes.
Q Okay. Then I'll move fast. Did the neck injections reveal traumatic injury?
A No, not at all.
Q Did the neck injections reveal a cause of the symptoms?
A No.
Q Is there a concern in the medical field about a surgeon doing neck injections and making surgical decisions on the injections?
A I don't know if it's in the medical -- well, I don't know how to answer that question. I just think that it's definitely a concern when you're performing injections to find a result when you're going to be doing surgery on that result.
Q Is it medically probable that the plaintiff's pre-existing migraines were aggravated by the accident?
A I don't think so. The evidence doesn't seem to show that. I think it's just his pre-existing migraines. There's a normal MRI. There's no evidence of a CT scan showing any trauma. There was maybe a little bruising -- or I'm sorry -- a little pain in the back of his occiput, but there does not appear to be a laceration or a contra coup injury, so I don't



see how the migraines would have been worsened by the accident.
Q Okay. Next, take the vehicle photos out of the equation altogether, does it change your opinion in any way about the plaintiff's condition?
A No, uh-uh.
Q All right. Now, next, you were asked questions about the discogram, and the plaintiffs average report of pain was seven of ten, yet at the discogram the reproduction was logged as one of ten. Is that concordant?
A Well, you know, obviously, you have to ask the patient, "Is this like your normal everyday pain?" I actually use the word "concordant" because I want to make sure that that's what we're relying on in saying that that's your concordant and equivocal pain. So I'm not so concerned about the numbers, but it's hard for me to say that the numbers one, three, seven, or five, whether or not it's concordant. It's really asking them, "Hey, is this like your normal pain in terms of the pattern of where it goes and where it generates?"
Q All right. You mentioned earlier that you prepared a supplemental report -- I haven't yet seen it -- on a Hartman report. I believe you said it was dated sometime in 2010. There's been a more recent report. Will you prepare a reply to her most recent supplemental report?
A Are you asking me?
Q I am now.

16:13:02 1 A Yes, I'd be happy to.
16:13:04 2 Q And if the plaintiffs produce records additional
16:13:10 3 injections or any other treatment, will you prepare a reply to
16:13:13 4 that treatment?
16:13:14 5 A Yes.
16:13:14 6 Q Okay. Now, finally, the plaintiff testified he's been
16:13:22 7 referred to a hand specialist who diagnosed carpal tunnel
16:13:26 8 syndrome, and he's been referred to a shoulder specialist. Have
16:13:33 9 you been supplied with any of those records?
16:13:35 10 A This is the first I've heard of it.
16:13:38 11 Q All right. All of your opinions that you and I have
16:13:42 12 discussed have been given to a reasonable degree of medical
16:13:46 13 probability; correct?
16:13:46 14 A Yes.
16:13:46 15 Q Thank you, sir.
16:13:46 16
16:13:46 17 FURTHER EXAMINATION
16:13:46 18 BY MR. WALL:
16:13:49 19 Q Doctor, just a follow-up. I need about 60 seconds of
16:13:52 20 your time. Let me just kind of compartmentalize this. You
16:13:57 21 believe that the only pain that Mr. Simao suffered post-accident
16:14:03 22 – let's even say after June or July of 2005 – is the same
16:14:10 23 migraines that he had before the accident?
16:14:14 24 A Based on the pattern of that pain, I would say yes.
16:14:19 25 Q And so there is no pain generator at C3-4 or C4-5 in



16:14:27 1 your opinion?
16:14:28 2 A Correct.
16:14:28 3 Q And the auto accident didn't even exaggerate or
16:14:36 4 exacerbate his migraine pain passed maybe two months; is that
16:14:41 5 your testimony?
16:14:42 6 A I don't know if I would say two months, but, you know,
16:14:55 7 from May 26th, 2005, was the last time he was seen until
16:15:01 8 October. I mean, that's five months. It wouldn't be anything
16:15:07 9 – you know, he didn't have any other problems at that point
16:15:12 10 related to any headaches, so yeah, I don't think it caused
16:15:15 11 anything.
16:15:16 12 Q And he doesn't have any cervical condition that should
16:15:20 13 be causing him pain?
16:15:22 14 A Well, again, I think we discussed that. I mean, it's a
16:15:25 15 normal MRI. They're not sure where the pain's coming from.
16:15:29 16 It's just not clear, you know.
16:15:32 17 Q So the answer is there is no objective reason for him
16:15:39 18 to be having pain?
16:15:40 19 A I don't see any objective evidence. The injections
16:15:43 20 don't seem to be helping him, and the surgery didn't help, and
16:15:46 21 the MRI was normal, so I don't see an objective component of
16:15:50 22 where the pain is coming from. There's no pain generator
16:15:53 23 that's been determined at this point.
16:15:58 24 Q Okay. That's all I have.
16:15:59 25 MR. STEPHENS: All right, Doc. Thanks for giving us the



16:16:02 1 extra time.
16:16:03 2 THE WITNESS: No problem.
16:16:58 3 MR. STEPHENS: Mr. Court Reporter, do you have my
16:16:58 4 information?
16:16:58 5 THE COURT REPORTER: Yes. I got it off the caption from my
16:16:58 6 office.
16:16:59 7 MR. STEPHENS: I want a copy with E-trans.
16:18:41 8 (Discussion was held off the record.)
16:18:41 9 MR. WALL: Okay. We'll stipulate to the doctor waiving
16:18:47 10 signature.
16:18:50 11 MR. STEPHENS: That's fine.
16:18:50 12 (Plaintiff's Exhibit 2, 3, 4, 5, 6, 7, and 8 were
16:18:50 13 marked for identification by the Certified Shorthand Reporter, a
16:18:50 14 copy of which is attached hereto.)
16:10:50 15 (Whereupon, the deposition of DAVID E. FISH, M.D.
16 concluded at 4:18 p.m.)
17 (Declaration under penalty of perjury on the
18 following page hereof.)
19
20
21
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23
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25



1
2
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4
5
6 I do solemnly declare under penalty of perjury that the
7 foregoing is my deposition under oath; that these are the
8 questions asked of me and my answers thereto; that I have read
9 same and have made the necessary corrections, additions, or
10 changes to my answers that I deem necessary.
11 In witness thereof, I hereby subscribe my name
12 this_____ day of _____, 20_____.
13
14
15 _____
16 DAVID E. FISH, M.D.
17
18
19
20
21
22
23
24
25





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CERTIFICATION
OF
CERTIFIED SHORTHAND REPORTER

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

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

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

IN WITNESS HEREOF, I have this date subscribed my name: Judson Chai

Dated:

Certificate Number 13258



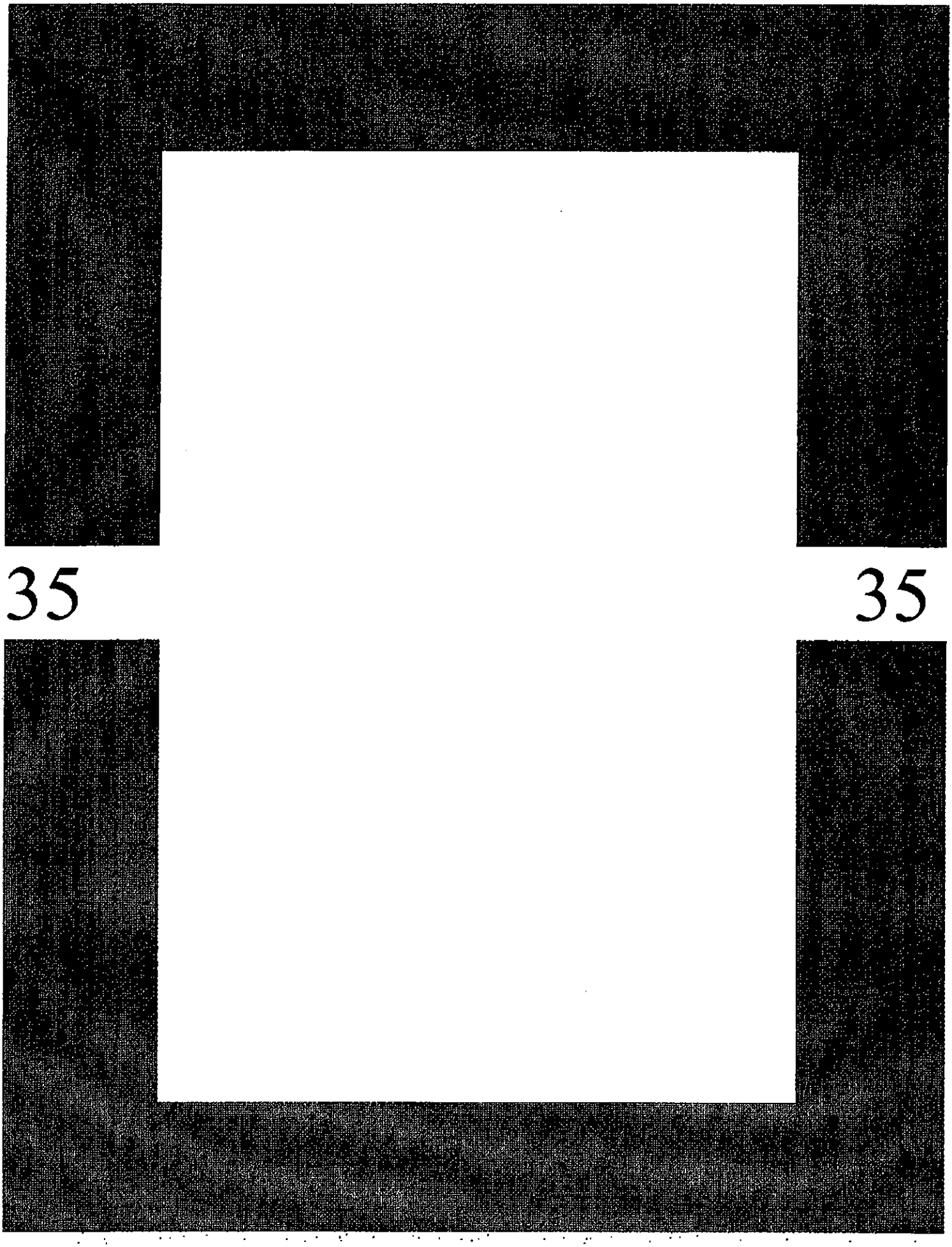
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151 KALMUS DRIVE, SUITE L1 COSTA MESA, CA 92626

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CLERK OF THE COURT

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*Attorneys for Defendant Jenny Rish*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiff,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I - V; and ROE CORPORATIONS I - V, inclusive,<br><br>Defendants. | CASE NO. A539455<br>DEPT. NO X |

**DEFENDANT JENNY RISH'S OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE SUB ROSA VIDEO**

COMES NOW Defendant JENNY RISH, by and through her attorney, Rogers, Mastrangelo,

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Carvalho & Mitchell, and hereby submits this Opposition to Plaintiff's Motion to Exclude Sub Rosa Video.

DATED this 18th day of February, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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## MEMORANDUM OF POINTS AND AUTHORITY

### I. Statement of Facts

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

During discovery, Defendant obtained sub rosa surveillance of Plaintiff. The surveillance was timely produced in Defendant's First Supplemental Early Case Conference Production, on September 8, 2008, and the NRCP 16.1(a)(3) disclosure. The surveillance is logically probative of the Plaintiff's alleged injuries. Defendant's medical experts incorporated the surveillance into their analysis, establishing the video's medical relevance. The law does not support Plaintiff's motion to exclude.

### II. Law and Argument

**A. Surveillance Video is Admissible To Assist the Jury in Assessing the Plaintiff's Claims**

Courts have long held that sub rosa videos are admissible to assist the trier of fact in assessing Plaintiff's alleged injuries. Courts also routinely admit sub rosa videos for impeachment. The rules of evidence "generally favor the admissibility of evidence which is logically probative of a material fact." *Shushereba v. R.B. Industries, Inc.*, 104 F.R.D. 524, 532 (Penn., 1985). Because the rules of evidence favor admissibility, "the validity of surveillance movies as evidence at a trial is well-settled." *Mathias v. Baltimore & O. R. Co.*, 93 Ill. App.2d 258, 263 (1968).



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First, the videos are "highly relevant" to assessing the plaintiff alleged injuries. *Elgelhoff v. Holt*, 875 S.W.2d 543, 550 (1994). In fact, this evidence is the "next best thing to allowing the jury to personally observe [the plaintiff's] movements at a time when she was not aware she was being observed." *Id.* Such evidence is "highly probative" of a material fact: the plaintiff's alleged injuries. *Shushereba,* at 532.

Further, sub rosa video is often necessary where the medical evidence is conflicting. In *Mathias,* the plaintiff's treating physicians and the defendant's experts disagreed regarding the plaintiff's ability to return to work. The plaintiff claimed inability to be around moving machinery. The video, which showed plaintiff mowing his 4 acre lawn, refuted this. In light of such conflict, the trial "court erred in not allowing the motion pictures to be shown." *Id.*, at 263. The jury could rely on the video to assess Plaintiff's credibility *and* the opinions of plaintiff's treating physicians.

In this case, on 05/06/08, Jaswinder Grover, M.D. reported that the Plaintiff's neck pain is "severe and intolerable." On 06/17/08, Dr. Grover reported that Plaintiff Mr. Simao was "at wits end" due to his neck and left shoulder pain. On 07/09/08, Dr. Rosler reported that the Plaintiff has had "no significant improvement of his cervical symptomatology with ongoing neck and interscapular pain that is radiating into his left arm." The surveillance video was taken on 07/18/08. It depicts the Plaintiff lifting heavy machinery and changing a tire on his truck. On 08/28/08, Dr. Rosler reported "Ongoing severe intractable neck pain, interscapular pain, and periscapular pain." On 09/02/08, Dr. Grover again reported that the Plaintiff "is at wits end" and is a cervical fusion candidate.

The surveillance video is logically probative of the Plaintiff's reports of pain to his medical providers. It is medically probative of the Plaintiff's providers' decision-making, based on the Plaintiff's reports of pain.

Plaintiff is free to repeat to the jury the arguments set forth in his Motion, i.e., that he never testified he could not perform these activities, none of his treating physicians instructed him to not perform these activities, etc. The video itself, however, meets Nevada's admissibility requirements because it makes several material facts (the severity of the symptoms, the necessity of surgery, etc.) more or less likely. The prejudicial value does not substantially outweigh the probative value.



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B. **Surveillance Videos is Admissible Even if the Plaintiff Did Admit He Could Perform the Activities Depicted in the Video**

First, Plaintiff Mr. Simao did not admit he could perform the activities depicted in the surveillance. On the contrary, he testified that he was unable to do many of his normal tasks at work due to pain. Accordingly, the video is admissible as impeachment evidence.

Even if the Plaintiff had admitted he could do the activities depicted in the video, the admissibility of the video is not contingent on his admissions. Sub rosa video is relevant for reasons beyond impeachment. As discussed above, the surveillance is probative of the extent of the alleged injuries, compliance or non-compliance with medical recommendations, and the reliability of the medical opinions, to name only a few. Sub rosa videos can also be used to impeach the plaintiff.

In *Marion County v. Cavanaugh*, 577 So. 2d 599 (Fla., 1991), the trial court excluded sub rosa surveillance obtained by the defendant. The appellate court reversed, and held that the trial court abused its discretion in excluding the video. The plaintiff objected to video because the plaintiff "never testified he could not do any of the activities performed on the tape." *Id.* at 600. The plaintiff argued that he admitted in testimony that he could perform some of the depicted activities. *Id.* Thus, the Plaintiff argued, the video could not be used for impeachment.

The *Marion* decision rejected plaintiff's position. In reversing and remanding for a new trial, the Court noted the various ways in which this video was admissible: to show the extent of the plaintiff's injuries, to show compliance (or non-compliance) with the recommendations of his treating physicians, and "contrary to [plaintiff's] argument, impeachment." *Id.*

Plaintiff Mr. Simao offers the same arguments presented and rejected in *Marion*. Mr. Simao argues the sub rosa video is improper impeachment because it does not discredit his testimony. As the *Marion* court established, the video is still admissible for impeachment, as well as probative of the extent of injury, compliance, and other medical issues.

Further, a defendant is not bound by the Plaintiff's admissions. In *Steele v. Goosen*, 329 S.W.2d. 703, 712 (1959), the plaintiff sought to exclude sub rosa video footage on the same grounds Plaintiff Mr. Simao offers. In rejecting this claim, the *Steele* court held that the defendant was not bound by the plaintiff's admissions. The defendant could therefore use the evidence he deemed most



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effective, including presenting surveillance of the plaintiff's activities *even if the plaintiff admits* he could perform the activities.

Defendant Mrs. Rish is entitled to the present the defense her best, most effective defense. Even if Plaintiff Mr. Simao chooses to admit that he can perform the activities depicted in the video, the evidence is admissible because he did not so admit before, and for many other probative reasons beyond mere impeachment. *Steele*, supra. Plaintiff's admissions, therefore, are insufficient to exclude the video.

**II. Conclusion**

The surveillance video is admissible. Courts routinely admit such video. Its relevance in aiding the jury has long been recognized. The Plaintiff has not cited any authority in support of his proposition that this video is improper impeachment evidence. Mr. Simao further fails to consider its relevance on matters aside from impeachment. The purpose of trial is to seek the truth. This process includes admitting the sub rosa videos. *Plaintiff's motion should therefore be denied.*

DATED this 8th day of February, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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# EXHIBIT A

# NEVADA SPINE CLINIC

**PATIENT NAME: SIMAO, WILLIAM** **DOB: 05/08/1963**
**DOS: 06/17/2008**

**HISTORY OF PRESENT ILLNESS:** William returns today. He has ongoing neck pain, left parascapular pain, and suboccipital headaches. Symptoms, which he finds to be intractable and severe at times.

**PHYSICAL EXAMINATION:** Clinically, he has Spurling sign positive on the left with left parascapular spasm and localized tenderness.

**RADIOGRAPHS AND TESTING:** MRI scan is suggestive of some subtle disc protrusion at C3-4 and C4-5. Flexion-extension x-rays reveal no gross instability, although there is some possible subtle subluxation at C4-5.

**IMPRESSION:** Ongoing neck pain, left parascapular, and suboccipital headache, potentially related to disc disruption versus facet mediated pathology at C3-4 and C4-5.

**RECOMMENDATIONS:** The patient is at wit's end with his symptoms. I would recommend that he proceed to discography CT scan of the cervical spine to better understand his condition.

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The risks of opioid medications were explained to the patient. The patient understands and agrees to use these medications only as prescribed. The patient agrees to obtain pain medications from this practice only. We have fully discussed the potential side effects of the medication with the patient, which include but are not limited to, constipation, drowsiness, addiction, impaired judgment and the risk of fatal overdose if not taken as prescribed. We have warned the patient that sharing medications is a felony. We have warned the patient against driving while taking sedating medications.

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7/30/08 CT disco sched 8/18/08 @ LV Radiology

Jaswinder S. Grover, M.D.
Diplomate, American Board of Orthopaedic Surgery
Fellowship Trained Spinal Surgeon

M2/B:pmj/ada
DT: 06/18/2008

SEP 02 2008

JUL 21 2008 NS

7140 Smoke Ranch Rd. Ste. 150, Las Vegas, NV. 89128
10001 S. Eastern Ave. Ste. 208, Henderson, NV. 89052
Ph. (702) 320-8111 Fax: (702) 320-8112

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# EXHIBIT B

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<br>Dept. No. X |

COPY

**DEPOSITION OF WILLIAM SIMAO**

Taken on Thursday, October 23, 2008
At 1:50 P.M.

At Rogers, Mastrangelo, Carvalho & Mitchell
300 South Fourth Street
Suite 710
Las Vegas, Nevada

Reported by: CAMEO KAYSER, RPR, CCR No. 569



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Q. When did you sell it?

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

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

A. Yes. Sit in a chair.

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

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

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

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

A. No.

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



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one. What else?

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

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

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

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

A. Yes.

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

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

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

A. I can stand up straighter with the



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

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

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

Q. Your son does that work now?

A. Yes. He does all of it.

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

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

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

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

Q. Are you seeing any doctors today other than Rosler and Grover?

A. No.



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# In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

Electronically Filed
Aug 14 2012 03:54 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

JENNY RISH,

Appellant,

*vs.*

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

Respondents.

**APPEAL**

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

**APPELLANT'S APPENDIX**
**VOLUME 2**
**PAGES 251-454**

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Docket 58504 Document 2012-25547

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| 45 | Order Regarding Plaintiffs' Omnibus Motion in Limine | 03/11/11 | 3 | 594-597 |
| 46 | Order Regarding Plaintiff's Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; (2) Limit the Trial Testimony of Defendant's Expert David Fish M.D. and; (3) Exclude Evidence of Property Damage | 03/14/11 | 3 | 598-600 |
| 47 | Notice of Association of Counsel | 03/14/11 | 3 | 601-603 |
| 48 | Trial Transcript | 03/14/11 | 3 | 604-705 |
| | | | 4 | 706-753 |
| 49 | Trial Transcript | 03/15/11 | 4 | 754-935 |
| 50 | Trial Transcript | 03/16/11 | 5 | 936-1102 |
| 51 | Trial Transcript | 03/17/11 | 5 | 1103-1186 |
| | | | 6 | 1187-1256 |
| 52 | Trial Transcript | 03/18/11 | 6 | 1257-1408 |
| 53 | Notice of Entry of Order Regarding Plaintiffs' Omnibus Motion in Limine | 03/18/11 | 6 | 1409-1415 |
| 54 | Trial Brief in Support of Oral Motion for Mistrial | 03/18/11 | 6 | 1416-1419 |
| 55 | Trial Brief on Percipient Testimony Regarding the Accident | 03/18/11 | 6 | 1420-1427 |
| 56 | Trial Transcript | 03/21/11 | 7 | 1428-1520 |

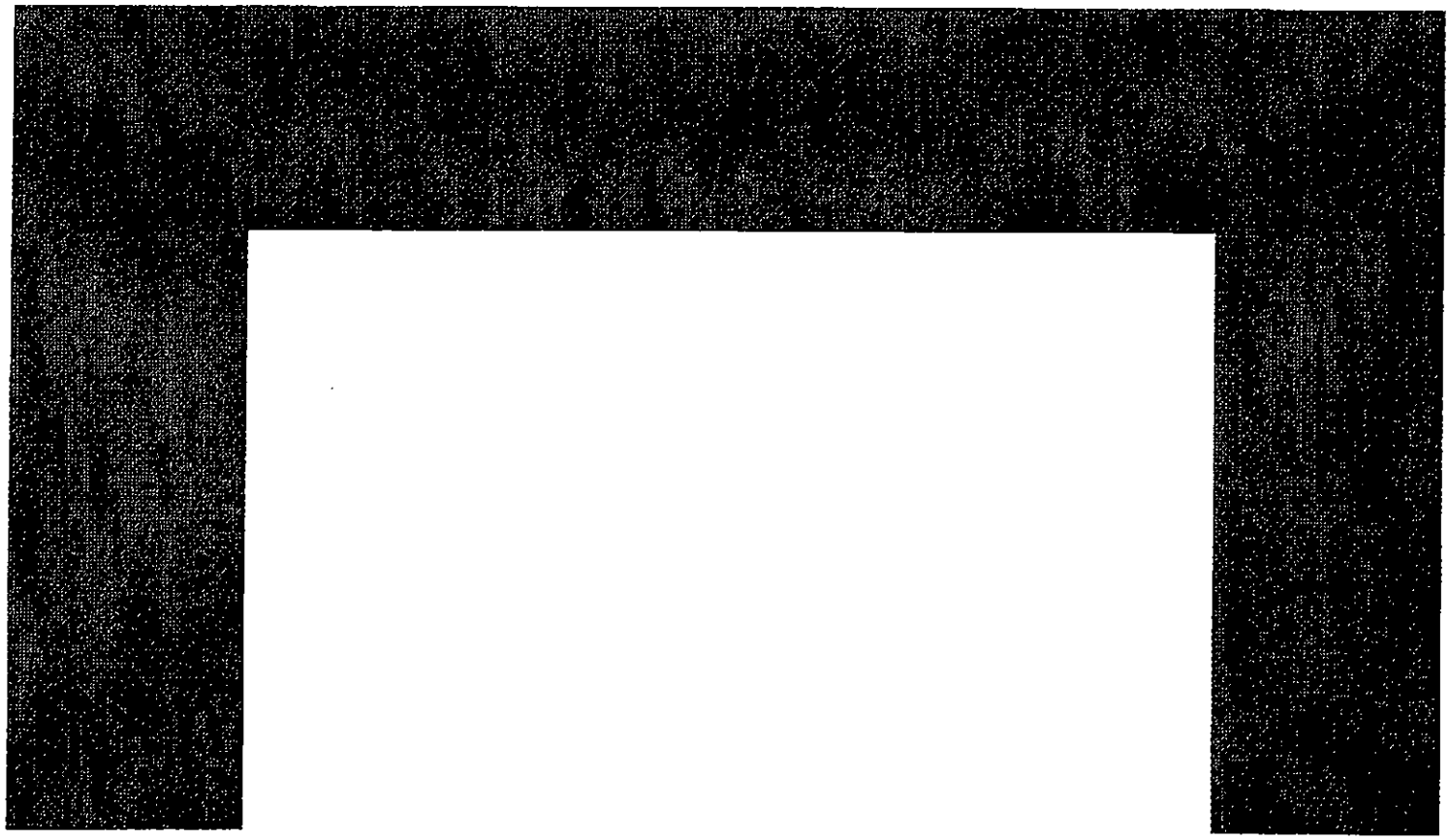
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| 57 | Trial Transcript | 03/22/11 | 7 | 1521-1662 |
| 58 | Plaintiffs' Opposition to Defendant's Trial Brief in Support of Oral Motion for Mistrial | 03/22/11 | 7 | 1663-1677 |
| 59 | Receipt of Copy of Plaintiffs' Opposition to Defendant's Trial Brief in Support of Oral Motion for Mistrial | 03/22/11 | 8 | 1678-1680 |
| 60 | Order Granting Motion to Exclude Traffic Accident Report and Investigating Officer's Conclusions | 03/22/11 | 8 | 1681-1683 |
| 61 | Order Regarding Plaintiffs' Second Omnibus Motion in Limine | 03/22/11 | 8 | 1684-1687 |
| 62 | Order Granting Motion to Exclude Life Care Expert, Kathleen Hartman, R.N. | 03/22/11 | 8 | 1688-1690 |
| 63 | Order Granting Motion to Exclude Witnesses from Testifying Regarding the Credibility or Veracity of Other Witnesses | 03/22/11 | 8 | 1691-1693 |
| 64 | Order Granting Motion to Exclude Graphic and Lurid Video of Surgery | 03/22/11 | 8 | 1694-1696 |
| 65 | Order Granting Motion to Exclude Duplicative and Cumulative Testimony | 03/22/11 | 8 | 1697-1699 |
| 66 | Order Granting Motion to Exclude Plaintiff's Accident Reconstructionist/Biomechanical Expert David Ingebretsen | 03/22/11 | 8 | 1700-1702 |
| 67 | Order Granting Motion to Exclude Argument of Case During Voir Dire | 03/22/11 | 8 | 1703-1705 |
| 68 | Order Granting Motion to Exclude Plaintiff's Economist, Stan Smith, for Lack of Foundation to Offer Expert Economist Opinion | 03/22/11 | 8 | 1706-1708 |
| 69 | Trial Transcript | 03/23/11 | 8 | 1709-1856 |
| 70 | Trial Transcript | 03/24/11 | 8 | 1857-1928 |
| | | | 9 | 1929-2023 |
| 71 | Plaintiffs' Amended Pre-Trial Memorandum | 03/24/11 | 9 | 2024-2042 |
| 72 | Trial Transcript | 03/25/11 | 9 | 2043-2179 |
| | | | 10 | 2180-2212 |
| 73 | Notice of Entry of Order Regarding Plaintiffs' Second Omnibus Motion in Limine | 03/25/11 | 10 | 2213-2220 |
| 74 | Trial Transcript | 03/28/11 | 10 | 2221-2372 |

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| 75 | Trial Transcript | 03/29/11 | 10 | 2373-2430 |
| | | | 11 | 2431-2549 |
| 76 | Trial Brief Regarding Exclusion of Future Surgery for Failure to Disclose Computation of Future Damages Under NRCP 16.1(a) | 03/29/11 | 11 | 2550-2555 |
| 77 | Trial Transcript | 03/30/11 | 11 | 2556-2681 |
| | | | 12 | 2682-2758 |
| 78 | Trial Transcript | 03/31/11 | 12 | 2759-2900 |
| 79 | Stipulation and Order for Dismissal With Prejudice | 03/31/11 | 12 | 2901-2904 |
| 80 | Trial Transcript | 04/01/11 | 13 | 2905-2936 |
| 81 | Minutes of Hearing on Prove-up of Damages | 04/01/11 | 13 | 2937-2938 |
| 82 | Plaintiffs' Confidential Trial Brief | 04/01/11 | 13 | 2939-3155 |
| | | | 14 | 3156-3223 |
| 83 | Plaintiffs' First Supplement to Their Confidential Trial Brief to Exclude Unqualified Testimony of Defendant's Medical Expert, Dr. Fish | 04/01/11 | 14 | 3224-3282 |
| 84 | Plaintiffs' Second Supplement to Their Confidential Trial Brief to Permit Dr. Grover to testify with Regard to all Issues Raised During his Deposition | 04/01/11 | 14 | 3283-3352 |
| 85 | Plaintiffs' Third Supplement to Their Confidential Trial Brief; There is No Surprise to the Defense Regarding Evidence of a Spinal Stimulator | 04/01/11 | 14 | 3353-3406 |
| 86 | Plaintiffs' Fourth Supplement to Their Confidential Trial Brief Regarding Cross Examination of Dr. Wang | 04/01/11 | 15 | 3407-3414 |
| 87 | Plaintiffs' Fifth Supplement to Their Confidential Trial Brief to Permit Stan Smith, Ph.D., to Testify Regarding, Evidence Made Known to Him During Trial | 04/01/11 | 15 | 3415-3531 |
| 88 | Stipulation and Order to Modify Briefing Schedule | 04/21/11 | 15 | 3532-3535 |
| 89 | Defendant's Response in Opposition to Plaintiff's Request for Attorney Fees | 04/22/11 | 15 | 3536-3552 |
| 90 | Defendant's Amended Response in Opposition to Plaintiffs' Request for Attorney Fees | 04/22/11 | 15 | 3553-3569 |
| 91 | Plaintiffs' Brief in Favor of an Award of Attorney's Fees Following Default Judgment | 04/22/11 | 15 | 3570-3624 |

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| 92 | Stipulation and Order to Modify Briefing Schedule | 04/22/11 | 15 | 3625-3627 |
| 93 | Decision and Order Regarding Plaintiffs' Motion to Strike Defendant's Answer | 04/22/11 | 16 | 3628-3662 |
| 94 | Notice of Entry of Order to Modify Briefing Schedule | 04/25/11 | 16 | 3663-3669 |
| 95 | Notice of Entry of Order to Modify Briefing Schedule | 04/26/11 | 16 | 3670-3674 |
| 96 | Notice of Entry of Order Regarding Motion to Strike | 04/26/11 | 16 | 3675-3714 |
| 97 | Plaintiffs' Memorandum of Costs and Disbursements | 04/26/11 | 16 | 3715-3807 |
| 98 | Minutes of Hearing Regarding Status Check | 04/28/11 | 16 | 3808-3809 |
| 99 | Judgment | 04/28/11 | 16 | 3810-3812 |
| 100 | Defendant's Motion to Retax Costs | 04/29/11 | 16 | 3813-3816 |
| 101 | Notice of Entry of Judgment | 05/03/11 | 16 | 3817-3822 |
| 102 | Stipulation and Order to Stay Execution of Judgment | 05/06/11 | 16 | 3823-3825 |
| 103 | Notice of Entry of Order to Stay Execution of Judgment | 05/09/11 | 16 | 3826-3830 |
| 104 | Plaintiffs' Opposition to Defendant's Motion to Retax Costs | 05/16/11 | 16 | 3831-3851 |
| 105 | Defendant's Motion for New Trial | 05/16/11 | 17 | 3852-4102 |
| | | | 18 | 4103-4144 |
| 106 | Certificate of Service | 05/17/11 | 18 | 4145-4147 |
| 107 | Subpoena Duces Tecum (Dr. Rosler) | 05/18/11 | 18 | 4148-4153 |
| 108 | Plaintiffs' Motion for Attorneys' Fees | 05/25/11 | 18 | 4154-4285 |
| 109 | Defendant's Reply to Opposition to Motion to Retax Costs | 05/26/11 | 18 | 4286-4290 |
| 110 | Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jan-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time | 05/26/11 | 18 | 4291-4305 |
| 111 | Notice of Appeal | 05/31/11 | 19 | 4306-4354 |
| 112 | Case Appeal Statement | 05/31/11 | 19 | 4355-4359 |
| 113 | Judgment | 06/01/11 | 19 | 4360-4373 |
| 114 | Defendant's Opposition to Motion to Quash | 06/01/11 | 19 | 4374-4378 |
| 115 | Minutes of Hearing Regarding Motion to Retax | 06/02/11 | 19 | 4379-4380 |
| 116 | Notice of Entry of Judgment | 06/02/11 | 19 | 4381-4397 |

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| 117 | Plaintiffs' Reply to Defendant's Opposition to Motion to Quash Defendants' Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Spine Institute on Order Shortening Time | 06/06/11 | 19 | 4398-4405 |
| 118 | Transcript of Hearing Regarding Motion to Quash | 06/07/11 | 19 | 4406-4411 |
| 119 | Defendant's Opposition to Motion for Attorney Fees | 06/13/11 | 19 | 4412-4419 |
| 120 | Order Denying Defendant's Motion to Retax Costs | 06/16/11 | 19 | 4420-4422 |
| 121 | Notice of Entry of Order Denying Motion to Retax Costs | 06/16/11 | 19 | 4423-4429 |
| 122 | Plaintiffs' Opposition to Defendant's Motion for New Trial | 06/24/11 | 19 | 4430-4556 |
| | | | 20 | 4557-4690 |
| 123 | Amended Notice of Appeal | 06/27/11 | 20 | 4691-4711 |
| 124 | Amended Case Appeal Statement | 06/27/11 | 20 | 4712-4716 |
| 125 | Defendant's Motion to Compel Production of Documents | 07/06/11 | 20 | 4717-4721 |
| 126 | Receipt of Appeal Bond | 07/06/11 | 20 | 4722-4723 |
| 127 | Defendant's Reply to Opposition to Motion for New Trial | 07/14/11 | 20 | 4724-4740 |
| 128 | Plaintiffs' Reply to Defendant's Opposition to Motion for Attorneys' Fees | 07/14/11 | 20 | 4741-4748 |
| 129 | Minutes of Hearings on Motions | 07/21/11 | 20 | 4749-4751 |
| 130 | Order Granting Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time | 07/25/11 | 20 | 4752-4754 |
| 131 | Notice of Entry of Order Granting Motion to Quash | 07/25/11 | 20 | 4755-4761 |
| 132 | Plaintiffs' Opposition to Defendant's Motion to Compel Production of Documents | 07/26/11 | 20 | 4762-4779 |
| 133 | Minutes of Hearing on Motion to Compel | 08/11/11 | 20 | 4780-4781 |
| 134 | Order Denying Defendant's Motion for New Trial | 08/24/11 | 20 | 4782-4784 |
| 135 | Notice of Entry of Order Denying Defendant's Motion for New Trial | 08/25/11 | 20 | 4785-4791 |
| 136 | Order Denying Defendant's Motion to Compel Production of Documents | 09/01/11 | 20 | 4792-4794 |
| 137 | Notice of Entry of Order Denying Defendant's Motion to Compel Production of Documents | 09/02/11 | 20 | 4795-4800 |
| 138 | Second Amended Notice of Appeal | 09/14/11 | 21 | 4801-4811 |

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| 139 | Second Amended Case Appeal Statement | 09/14/11 | 21 | 4812-4816 |
| 140 | Order Granting Plaintiffs' Motion for Attorney's Fees | 09/14/11 | 21 | 4817-4819 |
| 141 | Notice of Entry of Order Granting Plaintiffs' Motion for Attorney's Fees | 09/15/11 | 21 | 4820-4825 |
| 142 | Final Judgment | 09/23/11 | 21 | 4826-4829 |
| 143 | Notice of Entry of Final Judgment | 09/30/11 | 21 | 4830-4836 |
| 144 | Notice of Posting Supersedeas Bond | 09/30/11 | 21 | 4837-4845 |
| 145 | Request for Transcripts | 10/03/11 | 21 | 4846-4848 |
| 146 | Third Amended Notice of Appeal | 10/10/11 | 21 | 4849-4864 |
| 147 | Third Amended Case Appeal Statement | 10/10/11 | 21 | 4865-4869 |
| 148 | Portion of Jury Trial - Day 6 (Bench Conferences) | 03/21/11 | 21 | 4870-4883 |
| 149 | Portion of Jury Trial - Day 7 (Bench Conferences) | 03/22/11 | 21 | 4884-4900 |
| 150 | Portion of Jury Trial - Day 8 (Bench Conferences) | 03/23/11 | 21 | 4901-4920 |
| 151 | Portion of Jury Trial - Day 9 (Bench Conferences) | 03/24/11 | 21 | 4921-4957 |
| 152 | Portion of Jury Trial - Day 10 (Bench Conferences) | 03/25/11 | 21 | 4958-4998 |
| 153 | Portion of Jury Trial - Day 11 (Bench Conferences) | 03/28/11 | 21 | 4999-5016 |
| 154 | Portion of Jury Trial - Day 12 (Bench Conferences) | 03/29/11 | 22 | 5017-5056 |
| 155 | Portion of Jury Trial - Day 13 (Bench Conferences) | 03/30/11 | 22 | 5057-5089 |
| 156 | Portion of Jury Trial - Day 14 (Bench Conferences) | 03/31/11 | 22 | 5090-5105 |

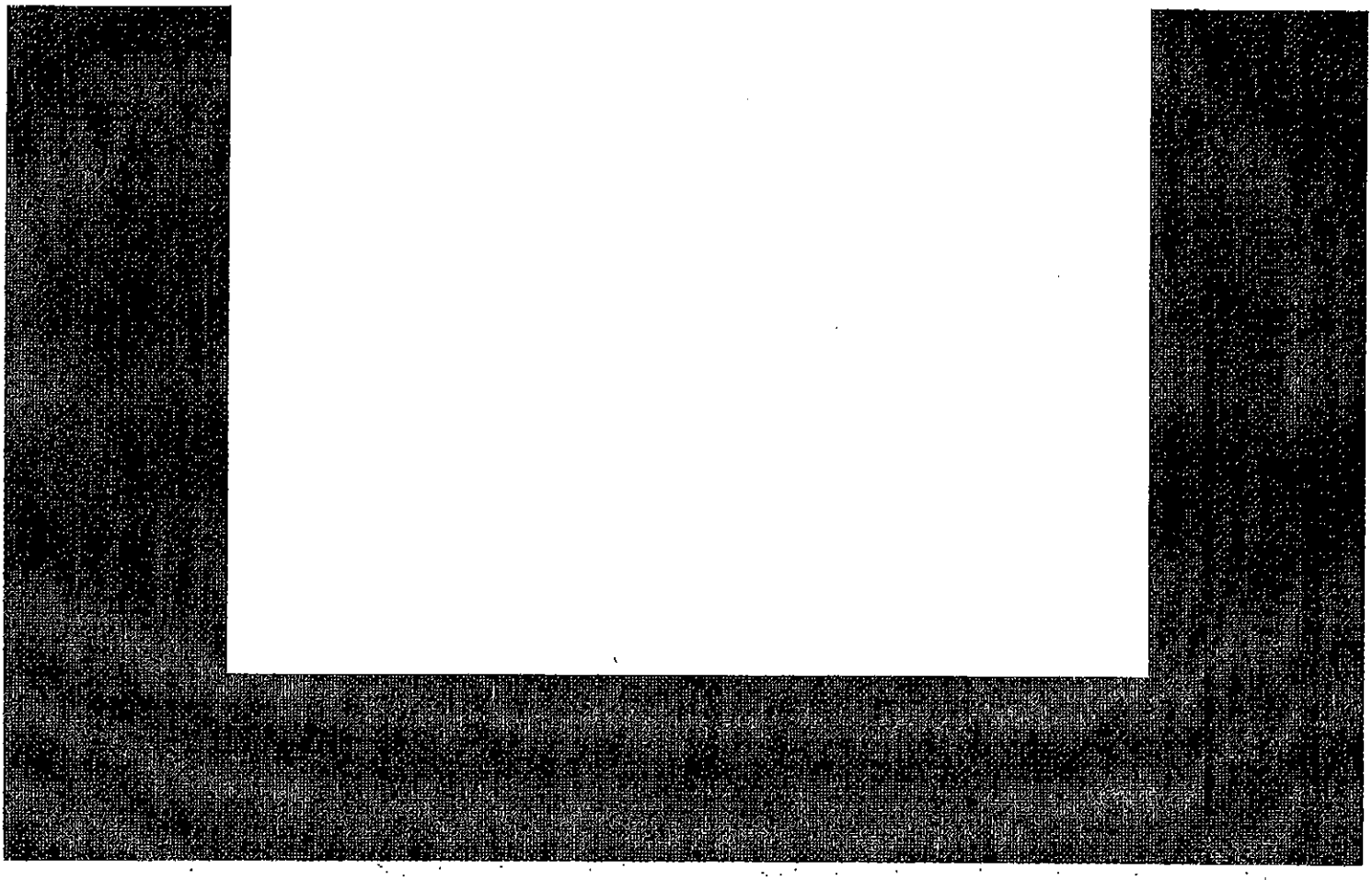


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CLERK OF THE COURT

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, | CASE NO. A539455 |
| Plaintiff, | DEPT. NO X |
| v. | |
| JENNY RISH; JAMES RISH; LINDA RISH; DOES I - V; and ROE CORPORATIONS I - V, inclusive, | |
| Defendants. | |

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

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits the following Reply Brief in Support of an Order Limiting the Testimony of Plaintiff's Treating Physicians. The Reasons in support of said Reply are contained in

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the attached Memorandum of Points and Authorities, all pleadings and papers on file, as well as arguments presented at the time of the hearing.

DATED this 8th day of February, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Law and Argument

Plaintiff's treating physicians are permitted to testify at trial. However, they must have proper foundation for any opinions offered. Thus, Plaintiff's treating physicians may not testify regarding the treatment rendered by other treating physicians unless (1) the treating physician reviewed all of Plaintiff's medical records from other providers whose treatment he wishes to opine about, and (2) Plaintiff has complied NRCP 26(e)(1) by disclosing all opinions each provider intends to offer at trial. If, and only if, these requirements are met can a treating physician testify about matters beyond the purview of directly rendered treatment.

#### A. Treating Medical Providers Must Have Sufficient Foundation Before Offering Opinions Regarding Plaintiff's Medical Treatment

Any witness intending to offer expert opinions must have sufficient foundation. It goes without saying that a treating medical provider who intends to testify regarding the treatment rendered by other treating physicians must establish knowledge of the Plaintiff's treatment with other providers. Plaintiff's opposition did not set forth which, if any, of his treating physicians reviewed the treatment of other treating physicians. Without satisfying the basic disclosure and foundation requirements, the testimony of Plaintiff's treating physicians will be limited to their reports.

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**B. Plaintiff Never Disclosed the Opinions Plaintiff's Treating Physicians Intend to Offer, Other Than Opinions Based on Their Own Treatment**

NRCP 26(e)(1) requires Plaintiff to advise the Defendant of all opinions his treating providers intend to provide at trial. This rule provides that a party must supplement its NRCP 16.1 disclosures, as well as discovery responses, at "appropriate intervals," when the information previously disclosed in incomplete. Further, NRCP 37(c)(1) provides that a party who "fails to disclose information by Rule 16.1, 16.2 or 26(e)(1)...is not, unless such error is harmless, permitted to use as evidence at a trial..."

A treating physician may not testify regarding the care rendered by other providers unless (1) that treating physician specifically offers this opinion in his medical records, which the Plaintiff produced, or (2) the Plaintiff otherwise disclosed the substance of the proferred opinion. Indeed, Plaintiff's Opposition concedes as much, stating "...Defendants...have been informed of these physicians' opinions regarding William's treatment." However, the Defendant has not been informed of any treating provider opinions other than those disclosed in the record production, or elicited at deposition. None of the Plaintiff's treating physicians offered opinions regarding the care rendered by other providers, the reasonableness of same, or needed future care. The Nevada Rules of Civil Procedure require the Plaintiff to advise the Defendant if a treating providers intends to offer such opinions. Plaintiff never provided such notice. His treating medical providers are therefore limited to the opinions previously disclosed.

**C. Plaintiff's Treating Physicians Have Not Testified to a Reasonable Degree of Medical Probability on the Issue of Necessary Future Treatment**

The Plaintiff's treating physicians are not permitted to offer opinions regarding future treatment because none have disclosed such opinions. The Plaintiff, himself, filed a motion to exclude evidence of medical conditions not attributed to the accident to a reasonable degree of medical probability. The Court enforces such rules equally. Because none of the treating physicians opine, to a reasonable degree of medical probability, that Plaintiff Mr. Simao needs a given future treatment (much less future treatment causally related to the subject accident), all testimony regarding future medical is inadmissible.



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## II. Conclusion

The treating providers' opinions are limited to those disclosed in their reports and depositions. Unfair surprise is prohibited by NRCP 26(e) and NRCP 37(c).

DATED this 8th day of February, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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*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 8th day of February, 2011, a true and correct copy of the foregoing **DEFENDANT JENNY RISH'S REPLY IN SUPPORT OF MOTION IN LIMINE TO LIMIT THE TESTIMONY OF PLAINTIFF'S TREATING PHYSICIANS** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

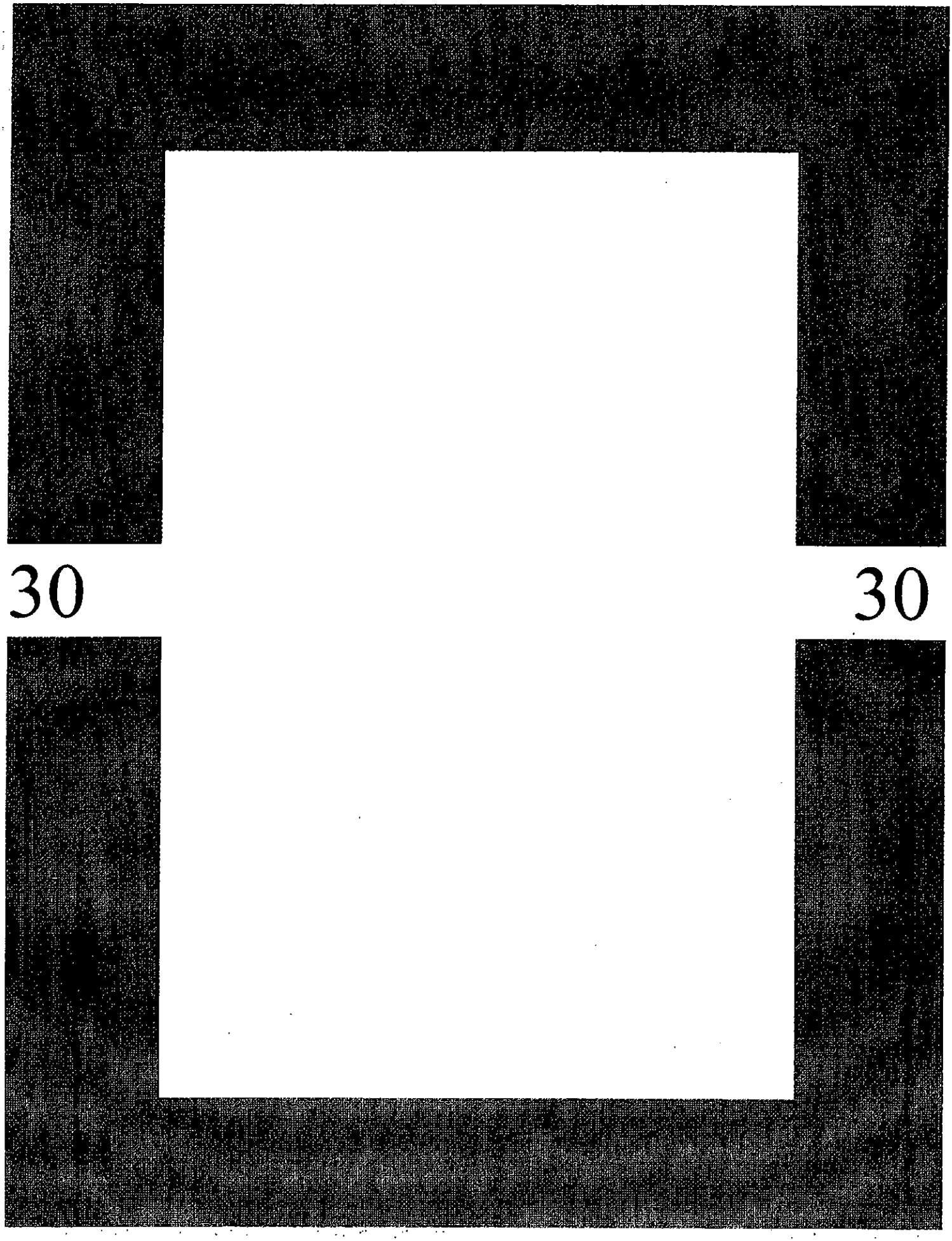
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CLERK OF THE COURT

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiff,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I - V; and ROE CORPORATIONS I - V, inclusive,<br><br>Defendants. | CASE NO. A539455<br>DEPT. NO X |

**DEFENDANT JENNY RISH'S REPLY IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE PLAINTIFFS' MEDICAL PROVIDERS AND EXPERTS FROM TESTIFYING REGARDING NEW OR UNDISCLOSED MEDICAL TREATMENT AND OPINIONS**

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits this Reply to Opposition to Motion for an Order Precluding Plaintiffs' Medical Providers and Experts from Testifying Regarding New or Previously Undisclosed Medical Treatment or Opinions.

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

DATED this 8th day of February, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Argument

Plaintiff's Opposition discloses that while no determination of future surgery has been made, it might be at the time of trial. This is the very ambush tactic the rules prohibit. The Court, of course, enforces the rule.

The Plaintiff has not disclosed any information suggesting a need for future surgery. The rules exclude claims for such undisclosed damages at the time of trial.

NRCP 26(b)(4) requires the parties to provide a description of the subject matter each witness will testify about, a statement of the substance of facts and opinions to which experts are expected to testify, and all bases for such opinions. Nevada law and this Court prohibit parties from changing opinions regarding medical treatment at the time of trial.

Other jurisdictions have echoed the same rule. In *Tetrault v. Fairchaild*, 799 So.2d 226 (Fla App. 2001) the Florida Court of Appeals reversed a verdict and remanded for a new trial when the Plaintiff gave new medical records to his expert witness and sought to elicit opinions based on those records just before trial. In that case, one of the Plaintiff's witnesses was given some MRIs which he had never seen at the time of his deposition. *Id.*. In filing a concurring opinion, Justice Harris noted:



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

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

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

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

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

**In this case, Plaintiff has presented no evidence that Plaintiff William Simao needs future surgery**. If any doctor's opinion has changed, Plaintiffs had the obligation to put Defendant Rish on notice. It would be an "ambush" and "tactical gamemanship" to allow Dr. McNulty, or any other doctor, to testify that the Plaintiff needs future surgery. By not advising the Defendants of an alleged future surgery, Plaintiffs deprived the independent medical experts the opportunity to review and respond to such new opinions.

Undisclosed evidence is never harmless if the evidence would necessitate "a new discovery order" and "re-open" discovery. *Hoffman*, 541 F.3d at 1180. In this case, permitting such testimony



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would necessitate new discovery to permit Defendant's experts the opportunity to review Dr. McNulty's new opinions. This new evidence is not harmless and should be excluded, as should any new or previously undisclosed opinion of any medical provider or expert.

**II. Conclusion**

For the reasons set forth above, Defendants ask this Honorable Court to grant the instant Motion in Limine, and enter an Order precluding Plaintiffs' medical providers and experts from testifying regarding new, previously undisclosed damages or opinions. It would be unfair to the Plaintiffs if the Defendant's medical experts offered new opinions at trial. Defendant Rish simply asks the Court to apply the rules equally to the Plaintiff's medical providers and experts.

DATED this 8th day of February, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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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 8TH day of February, 2011, a true and correct copy of the foregoing **DEFENDANT JENNY RISH'S REPLY IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE PLAINTIFFS' MEDICAL PROVIDERS AND EXPERTS FROM TESTIFYING REGARDING NEW OR UNDISCLOSED MEDICAL TREATMENT AND OPINIONS** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

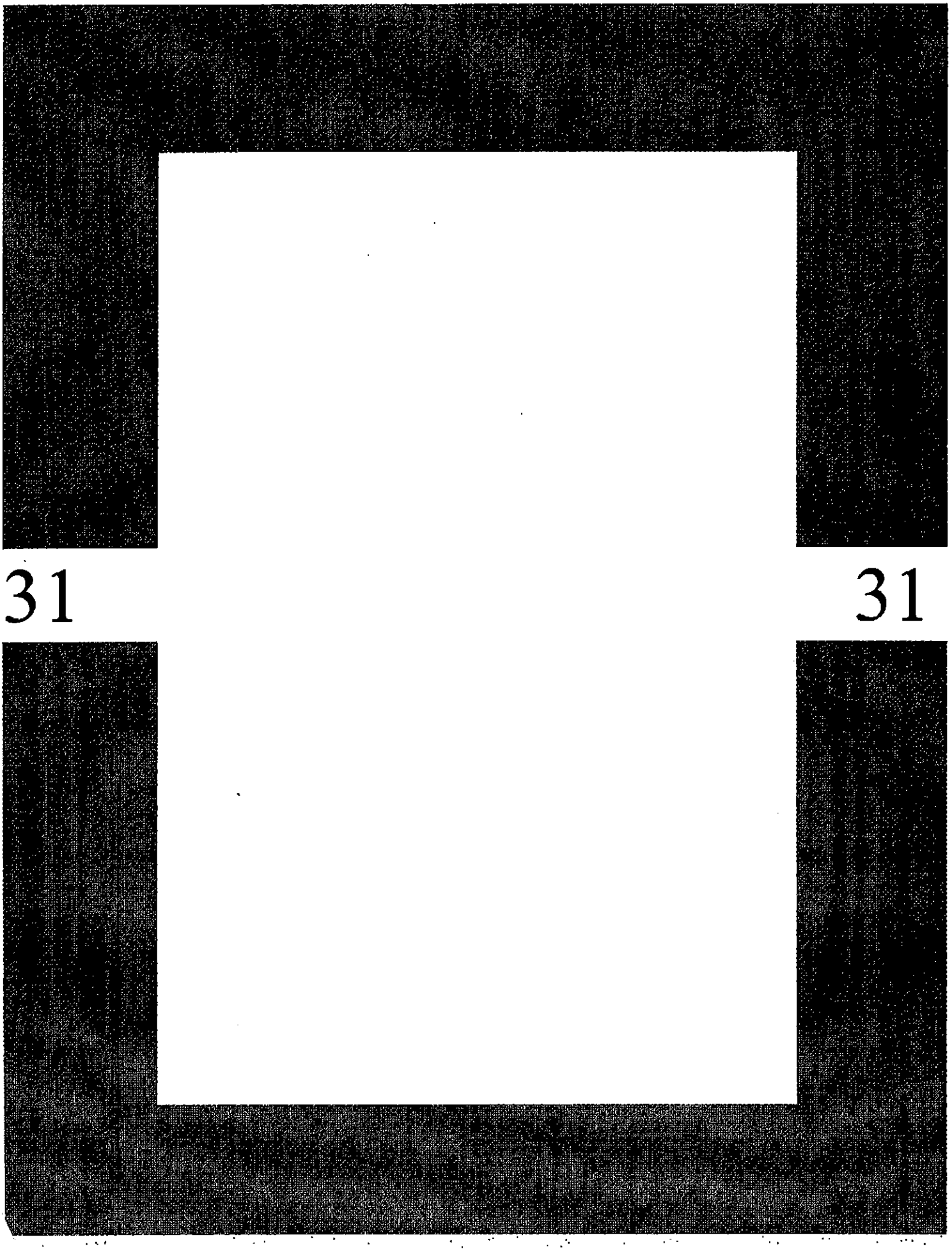
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**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455
DEPT. NO.: X

**PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' OMNIBUS MOTION IN LIMINE**

COME NOW, Plaintiffs, WILLIAM and CHERYL SIMAO, by and through their attorneys of record, ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT A.

ADAMS of the law firm of MAINOR EGLET, and hereby file this Reply to Defendants' Opposition to Plaintiffs' Omnibus Motion in Limine.

I.

ARGUMENT

1. **Prior and Subsequent Unrelated Accidents, Injuries and Medical Conditions and Prior and Subsequent Claims or Lawsuits.**

Plaintiffs' Motion sought to exclude accidents, injuries or medical conditions that are unrelated to the injuries in the instant case, including a 2003 minor motorcycle accident for which Plaintiff received a superficial injury to his right elbow and Plaintiff's treatment for high blood pressure and/or high cholesterol.

In Opposition, Defendants misconstrue the holding in *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153,111 P.3d 1112 (2005), and offer general statements to support admission into evidence of clearly unrelated injuries and medical conditions. Nowhere in Defendant's Opposition is there any reference to any record, testimony or document evidencing any relevance to the motorcycle accident or high blood pressure / high cholesterol.

Defendants claim that *Morsicato* is limited to medical malpractice cases, when in fact the Nevada Supreme Court specifically held:

> "We conclude that medical expert testimony regarding standard of care ***and causation*** must be stated to a reasonable degree of medical probability."

*Morsicato*, 121 Nev. at 158 (emphasis supplied).

Further, the Court in its analysis never mentions that this standard applies only in the context of medical malpractice actions:

> Since 1989, this court has held that 'a medical expert is expected to testify only to matters that conform to the reasonable degree of medical probability standard.' Furthermore, in dictum, this court has observed that expert testimony regarding causation must also rise to this level of certainty. As the Pennsylvania Supreme Court has recognized, one rationale for requiring such specificity with expert



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> opinions is that "if the plaintiff's medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment."

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

In fact, courts construing *Morsicato* have never found that the Nevada Supreme Court's analysis was limited to medical malpractice actions. *See, Roberts v. Albertson's LLC*, 2010 U.S. Dist. Lexis 63438, 9-10 (D. Nev. 2010); *Neal-Lomax v. Las Vegas Metropolitan Police Department*, 574 F.Supp.2d 1193, 1198 (D. Nev. 2008) (both citing *Morsicato* standard to establish causation in products liability action).

Defendants state that alternative causes for William's complained of injuries are certainly relevant and admissible, but apparently miss the point of the instant Motion. No evidence suggests that a minor motorcycle accident or high blood pressure caused the injuries for which Plaintiff now complains.

In a report, Defendants' medical expert Dr. David Fish reiterates what Plaintiff himself testified to in his deposition, namely that Plaintiff suffered from migraine headaches prior to the accident. That fact is not in dispute. However, Dr. Fish, without having ever reviewed a single medical record related to the 2003 motorcycle accident, opines that Plaintiff's migraines were exacerbated by that 2003 accident. This conclusion is precluded by the Nevada Supreme Court's holding in *Morsicato*. In fact, the defense expert in *Morsicato* tried an identical ploy, arguing that an auto-immune theory plausibly explained the plaintiff's injuries. Since there was no evidence to support any finding that the theory was offered to a reasonable degree of medical probability, the testimony was stricken. *Morsicato*, 121 Nev. at 157.

In their Opposition, Defendants do not direct the Court to a particular report or deposition that supports a claim that the 2003 minor motorcycle accident or the Plaintiff's high blood pressure are relevant to causation of any injury complained of in this accident, much less any



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witness saying so to a reasonable degree of medical probability. Instead, Defendants argue that any differential diagnosis involves ruling out certain causes, and as such those potential causes that might be ruled out can still be offered as admissible evidence. Such a theory is contrary to the Nevada Supreme Court's holding in *Morsicato* and contrary to all of the evidence in this case, as no treating physician has testified that the 2003 motorcycle incident or Plaintiff's high blood pressure were part of any differential diagnosis.

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

**2. Reference to Malingering, Magnifying Symptoms or Secondary Gain.**

In Opposition to Plaintiffs' Motion, Defendants seek to introduce testimony to establish some secondary gain motive on the part of William Simao. The type of testimony Defendants seek to introduce is exactly the testimony the law precludes, as set forth in the original Motion.

Defendants cite to the deposition testimony of Dr. Adam Arita, a pain management doctor who treated Plaintiff for a period from October of 2006 until June of 2007, years before Plaintiff underwent surgery on his cervical spine. In his deposition, Dr. Arita speculated on the necessity for surgery based on the limited information he had available to him while he treated Plaintiff. His opinions were not to a reasonable degree of medical probability, and are not admissible on the issue of secondary gain. Dr. Arita's highly speculative testimony was as follows:

> A. So directly answering your question in my opinion I don't believe that the facet hypertrophy is the result of the accident itself and I don't think that the pain that he was having in his left shoulder and his neck was a direct result of the accident. I think that it may have exacerbated that problem but it certainly didn't cause it and that's my opinion.
>
> Q. ...If he had this condition prior to the accident, would you expect him to have



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pain prior to the accident in his neck?

A. He may have been experiencing pain in his left shoulder and his neck even before this accident but it may have never really been brought to his attention to complain about it until something that precipitated this particular problem came about as in there can be some issues here that he's going to gain something if he mentions something with his neck and his arm because of the accident than if he didn't bring it up at all. I do think there's some secondary gain issue here.

Q. Right, but people get injured all the time and just because they seek recovery doesn't mean they are being dishonest about stuff even if they are going to gain or not gain. Wouldn't you agree even a substantial amount of money isn't worth having a significant pain or needing a surgery or anything like that?

...

A. You are right that somebody could not have a complaint and just say it's because I want to complain or there's some other kind of event to initiate the complaint like an accident but I think that pain is—is a very complicated thing and there's more issues than the physical things to explain it than the other issues as in psychological issues or these legal issues and I think those are equally as important if not more important than the physical things.

So when you say, okay, is this guy complaining because he had the accident or is he complaining because he's got some kind of psychological problem in him that makes him complain and my answer is it's both, it's because you have the psychological drive to say there's something to be gained like this accident and there may be some physical thing such as this, the facet hypertrophy that is causing the problem.

But again when it comes down to what is my opinion, my opinion is he didn't have this facet hypertrophy as a result of this particular accident that he was involved in in April of 2005 and I don't think that the pain problem was something that he would have been bringing up had he not had this accident, okay, but I think its not necessarily a direct result of the accident is what I'm saying.

*See* the Deposition of Dr. Arita at **Exhibit "1,"** p79:8 to 81:24.

As is clearly evidenced by reading the foregoing, Dr. Arita has no particular facts to support his generalities on secondary gain. No medical provider has labeled William as a malingerer.

Furthermore, the DSM-IV-TR, published by the American Psychiatric Association, defines malingering as the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as...obtaining financial compensation. In other words, malingering is faking or exaggerating symptoms for secondary gain motives. As no medical provider or expert has diagnosed William as a 'malingerer,' any



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evidence or argument related to secondary gain and/or malingering must be excluded. Moreover, diagnoses regarding these subjects must come from a qualified mental health expert, and therefore Dr. Arita's opinions regarding these subjects are wholly unqualified and he must be precluded from testifying regarding symptom magnification, malingering, or secondary gain issues as these are far beyond his area of expertise.

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

The testimony offered by Dr. Arita does not qualify under NRS 50.275 or under *Hallmark*. Dr. Arita's perceptions are formed during a small window of treatment of Plaintiff, long before the surgery was completed. Even his deposition testimony predates the surgery by several months. Between the date of his deposition and the date of William's surgery (and long after Dr. Arita's treatment of Plaintiff ceased), a number of other diagnostic tests were completed that rendered William a surgical candidate.

As set forth in Plaintiffs' original Motion, issues of secondary gain or malingering are not only issues left for a mental health expert, but under any circumstances invade the province of the jury as it is a commentary on the credibility of William without an evidentiary basis. It is essentially testimony that says that William is a liar, which is a subject wholly and solely in the province of the jury. *See, Dexter v. Hall*, 82 U.S. 9, 21 L.Ed. 73 (1873); Brendaes on Evidence, vol. 2 § 372; *Estate of Gould*, 188 Cal. 353, 205 P. 457 (1922); 22 C.J. § 807, p. 720.

There is no proper evidentiary basis upon which to allow testimony of William's malingering or secondary gain, and as such Plaintiff requests this Motion be granted.



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**3. Treating Physicians Do Not Need to Prepare Expert Reports Separate From and in Addition to Their Medical Records and Dictated Reports.**

Defendants do not disagree with Plaintiff's Motion to the extent it cites pertinent law holding that treating providers are not subject to the expert disclosure requirements of NRCP 16.1(a)(2)(B). Defendants take issue with the ability of treating providers to testify to the appropriateness of care from other treating physicians.

In the original Motion, Plaintiffs took care to point out the relevant precedents and the limits of such testimony by treating providers, such that a treating doctor may opine on the appropriateness of care from other treating providers to the extent that such care is pertinent to the testifying provider's own care and treatment of the patient. *See Omnibus Motion in Limine*, p. 14.

Defendants have the medical records pertaining to William's injuries and treatment, along with medical records from his other medical providers. Defendants have had, or will have, the opportunity to depose William's treating physicians and have been informed of these physicians' opinions regarding William's treatment. Defendants' anticipated argument that they would somehow be substantially prejudiced since they did not receive separate expert reports, or any potential argument concerning surprise, is unfounded since Defendants are well aware of these physicians' opinions and there is no risk of unfair surprise.

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



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

Defendant does not oppose Plaintiffs' Motion to preclude reference to Defense Medical Examiners as "Independent," thus Plaintiff's Motion should be granted.

**5. Argument That This Case is "Attorney Driven" or a "Medical-Buildup."** Defendant is not entitled to make arguments that are not based in fact, constitute pure speculation and are prejudicial to the Plaintiffs. *See* NRS § 48.025; *State of Nevada v. Kassabian*, 69 Nev. 146, 179 (1952); *Williams v. State of Nevada*, 103 Nev. 106, 110 (1987). By way of their Opposition, it is clear that Defendant is gearing up to try this case not on the facts but on pure speculation and conjecture. Evidence of bias and credibility are, to some degree, admissible however, it must be based on fact. The fact that the Plaintiff was referred to a physician by his attorney or that a physician confirmed that a particular case was still in litigation says absolutely nothing about Plaintiff's credibility and allows the jury to speculate as if there was foul play or wrong doing. This will no doubt result in unfair prejudice to Plaintiff and such reference must be excluded.

Lastly, allowing Defense counsel to argue that Plaintiff's treatment was "litigation driven," "attorney driven," or arguing there is some fictitious "medical build-up" is tantamount to arguing that Plaintiff's treating physicians committed medical malpractice – an allegation Defendant and Defendant's experts cannot and will not make. Such references are wholly prejudicial, lacking any probative value, and irrelevant in this case. Therefore, Plaintiff's Motion should be granted.

**6. References to Plaintiff's Liens.** The Nevada Supreme Court has spoken on this issue. Evidence of collateral sources is not admissible for any purpose. Any evidence relating to liens and how such liens will be satisfied is evidence which would violate *Proctor v. Castellini*, 112 Nev. 88 (1996) and *Bass-Davis v. Davis*, 2005 Nev. LEXIS 59; 121 Nev. Adv.Rep. 44.



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William was forced to treat on a lien because of Defendant's negligence. Now the Defendant wishes to use the fact that William was forced to treat on a lien against him, by claiming that evidence is relevant to the credibility of his doctors. This must not be permitted. Most jurors do not understand what liens are or why patients treat on a lien. Thus, such evidence may confuse the jury into thinking that William did not have health insurance, or that his health insurance only paid part of the bill. Consequently, evidence of liens is, therefore irrelevant, would violate the collateral source rule and would be unfairly prejudicial to Plaintiff. As the *Proctor* court stated, "there is no circumstance in which a district court can properly exercise its discretion in determining that collateral source evidence outweighs its prejudicial effect." *Proctor*, at 91. Therefore, Plaintiffs request that this Honorable Court bar Defendant from suggesting, referring, or insinuating that Plaintiff has received medical care by way of medical liens.

**7. Evidence of When Plaintiffs Retained Counsel.** In her Opposition, Defendant seems to combine her argument regarding reference to this case being "attorney driven" with her argument regarding evidence of when Plaintiffs retained counsel. If this is true, Defendant has failed to address the primary issue of Plaintiff's Motion: any testimony regarding when Plaintiff retained counsel is protected by the attorney-client privilege. All confidential communications between a client and his or her attorney are considered "privileged," and the client, or the attorney acting on behalf of the client, may refuse to divulge the nature of the communication. *Sloan v. State Bar*, 102 Nev. 436, 726 P.2d 330, 1986 Nev. LEXIS 1584 (1986). For that reason alone, Plaintiff's Motion should be granted.

**8. Closing Arguments.** Defendant as failed to effectively oppose Plaintiff's Motion in Limine, and, as such, pursuant to EDCR 2.20, Plaintiff's motion should be summarily granted.

Plaintiff is well aware that trial counsel is afforded wide latitude during closing argument



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to argue facts and draw **reasonable** inferences from the evidence, *Jain v. McFarland*, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993). However, Plaintiff fears that defense counsel is eager to go far beyond the realm of arguing reasonable inferences and engage in jury nullification by suggesting that Plaintiff's damages request is greater than he anticipates receiving. This argument would unfairly prejudice Plaintiff and should be precluded. This is not to say that the defense should be precluded from arguing the reasonableness and necessity of Plaintiff's medical treatment and costs but unfairness will occur should the defense be allowed to argue that Plaintiff is purposely requesting more than he reasonably expects to receive.

## II.

## CONCLUSION

Plaintiff respectfully requests that this Court GRANT the foregoing Motion in its entirety.

DATED this 11th day of February, 2011.

**MAINOR EGLET**

DAVID T. WALL, ESQ.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 11 day of February, 2011, service of the foregoing REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S OMNIBUS MOTION IN LIMINE was made via First Class mail, postage prepaid to the following counsel of record at their last known addresses as follows:

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

An employee of MAINOR EGLET



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# EXHIBIT "1"

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs. ) Case No. A539455

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

Defendants.

DEPOSITION OF ADAM A. ARITA, M.D.
Taken on Wednesday, November 5, 2008
At 4:28 o'clock p.m.
At 300 South Fourth Street, Suite 710
Las Vegas, Nevada

Reported by: Katherine M. Silva, CCR #203



APPEARANCES:
For the plaintiff:
JOHN E. PALMERO, ESQ.
Aaron & Paternoster, Ltd.
2300 West Sahara Avenue
Suite 650
Las Vegas, Nevada 89102
For the defendants:
STEPHEN H. ROGERS, ESQ.
Rogers, Mastrangelo, Carvalho & Mitchell
300 South Fourth Street
Suite 710
Las Vegas, Nevada 89101

I N D E X


| Witness | Direct | Cross | Red. | Rec. |
|---|---|---|---|---|
| Adam A. Arita, M.D. | | | | |
| (By Mr. Rogers) | 3 | | | |
| (By Mr. Palmero) | | 79 | | |


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Thereupon--
ADAM A. ARITA, M.D.
was called as a witness by the Defendants, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROGERS:

Q. Would you state your name please.
A. Yes, Adam Arita, A-r-i-t-a.
Q. Okay. And you are a physician, correct?
A. Yes.
Q. What kind?
A. A medical doctor, an M.D.
Q. But what is your specialty?
A. Anesthesiology and pain medicine.
Q. You didn't bring a C.V. with you, did you?
A. I don't have one with me, no.
Q. Okay. Give me a breakdown then of your educational background?
A. Okay. I finished college at University of Southern California in 1983, graduating with bachelor of science in business administration and I graduated from medical school also from the



same school, University of Southern California 1991 and an M.D. and then following that I entered internship at the Los Angeles County Medical Center which is also a USC-affiliated facility and that was between 1991 and 1992 and that was internal medicine.

And then in 1992 to 1995 I did my anesthesiology residency at USC which is also at the Los Angeles County Hospital and then following that I entered private practice and I worked in private practice for approximately one year in San Diego and that was a Sharp facility, Sharp Chula Vista.

And then following that I did a pain management fellowship at U Mass, University of Massachusetts, in Worcester and that was between '96 and '97 and I entered private practice in '97 and worked in Alaska, it was Anchorage, Alaska, Providence Alaska Medical Center and I did half pain management and half anesthesia and I did that until I did a cardiac anesthesia fellowship which was in 2002 to 2003 and during that time I was still employed at that facility but I went and did this fellowship in Houston at Texas Heart Institute so I finished that in 2003, went back





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to the same practice in Anchorage, Alaska and I worked there until 2005 and then in 2005 I came to Las Vegas and I was employed by Southwest Medical Associates.

Q. Okay.

A. And then I worked there until 2007, August and then following that I entered private practice here in Las Vegas and now I work with Physician Billing Services which is an office that does the billing but what they do is they kind of overflow patients and we all kind of share a similar patient pool in this office but they are not a group. Everybody is an independent practitioner in this office and then we just kind of share things back and forth between the different providers.

Q. Who are the other providers there?

A. There's 49 or so other people in this particular office. I mean some of the people that I work with are like Greg Porteous is one of the anesthesiologists that does a fair amount of private practice that I get overflow from and another friend is Don Montero and there's several others. I mean I don't know all of them right off the top of my head but there's other people

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that the office will say this person wants to ask you if you can cover this patient today, can you do that.

Q. Okay. I know that in some cases anesthesiologists informally partner up with surgeons who they commonly do procedures with. Are there any surgeons you commonly work with?

A. Yeah, there are a few that I have that I usually cover myself which is one that came to town about seven months ago his name is Ron Hillock, he's an orthopedic surgeon, he works with Desert Orthopedics.

Q. What kind of surgeries does he do?

A. His specialty is orthopedic oncology so he does cancer-related surgeries primarily but he does the regular orthopedic surgeries as well.

Q. Like what kind?

A. He does total knee replacement, total hip replacement and does the ACL reconstruction for knee injuries and does regular arthroscopies of the knee.

Q. Mostly joints?

A. Yeah.

Q. Okay. Any other doctors?

A. Yeah, cardiac surgeon Bashar Chowdhry.

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Q. Can you spell that for her?

A. C-h-o-w-d-h-r-y and the first name is B-a-s-h-a-r.

Q. Okay. And he's --

A. Cardiovascular surgeon and his partner is Nauman Jahangir, J-a-h-a-n-g-i-r and then N-a-u-m-a-n.

Q. How long -- what I've gotten so far is you work with an orthopedic surgeon who does mostly joints but he also does oncology work?

A. Right.

Q. A cardiovascular surgeon who you work with and any other kinds of surgeons?

A. I work with the urologist, his name is Wise, W-i-s-e and his first name is William and he does the prostate surgeries, does the open prostate resections, radical prostatectomy, lipotripsy and laser and the ones that remove stones with baskets.

Q. Do you do any work with spine surgeons?

A. Sometimes like Daniel Lee, he's one of the ones that I've worked with and when I was work at Southwest Medical I worked with McNulty.

Q. Okay.

A. Patrick McNulty.

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Q. And have you ever performed the anesthesia for a spine surgery?

A. Yeah.

Q. What kinds?

A. The type that they do anterior/posterior fusion of the lumbar spine like L3 through S1 and some of those interbody fusions that they do, L4-5.

Q. Any cervical?

A. Some, like they do -- I've done both the laminectomies just for decompression as well as the ones they do reconstruction, they put in the hardware to fuse their necks.

Q. Right. Have you done any of the pain management work such as discograms?

A. Not in the cervical area but in the lumbar area I have.

Q. Okay. Where did you get your training to do discography?

A. It was University of Massachusetts in my pain fellowship and I also when I was in that pain fellowship I went three months at Providence, Rhode Island, I worked at Rhode Island Hospital with Fredrick Burgess, B-u-r-g-e-s-s, he's the pain management doctor



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that worked there at that hospital and we worked our invasive training there so I did the discography primarily with him.

Q. Okay. Did you guys follow a particular guideline in your -- in the discograms you performed?

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

THE WITNESS: So I -- there is some general guidelines like from ASA which we follow but, you know, those kind of guidelines that are published don't always mean that we follow everything according to that specific guideline. We just use that as a general approach to try to get the information from the discography.

Q. (BY MR. ROGERS) Right. In other words, this is -- you regard ASA as sort of the foundation or the starting point?

A. Right, and so what I'm saying is I don't follow it by the letter according to how they put the guidelines out but it's used as part of the approach to how you go about doing it and collecting information.

Q. Okay. When did you last do discography?



A. Probably in July of '07.

Q. Okay. And your practice has simply taken a different turn since that time?

A. It's primarily anesthesiology because when I left that practice with Southwest Medical it requires a fair amount of start up to open your own office and hire your own staff and I didn't really want to get into that right after leaving employment with Southwest Medical so I didn't really think about opening a pain management practice at that point.

I considered joining another physician, Dr. Walter Kidwell, and I was going to go with him but then I decided it was probably better for me at that particular time when I left to just stick with anesthesia.

Q. Okay.

A. Because he wanted a pretty high percentage of the collection to pay for the office, that's why I decided not to go with him. He wanted 60 percent overhead.

Q. Right. Okay. Now, that gives me a fairly good insight into your background, your qualifications. Let me go back and start with something I normally start with and that is



before we went on the record you said you hadn't ever gone through a deposition before, is that right?

A. Yes.

Q. Okay. The main rule for a deposition is that you appreciate that the deposition or, pardon me, the oath that you just took is the same oath that you would take in court even though we are in my office, okay?

A. Right.

Q. Carries the obligation to tell the truth and penalties if you don't. Do you understand that?

A. Yes.

Q. All right. And you are doing a very good job so far in keeping your answers to a form that can be written.

What I encounter many times in a deposition is that someone will get comfortable enough that they'll start responding by nodding their head or saying uh-huh or unt-uh and that doesn't work with the court reporter so keep her in mind as we go through.

A. We actually talked about that before you came in the room.



Q. Okay. Good. And for now those are really the only ground rules that we need to cover. If something else comes up, I'll tell you as we go.

Now, before we went on the record I also told you we are going to cover some background and then get into the treatment. I'm going to finish up the background now and you can see I just have a litany of questions here that I normally ask physicians whose depositions I take and one is did you review any documents to prepare for your deposition?

A. No, I did not. I did not see any of these records that you put in front of me prior to today's date.

Q. Okay. And for the record the documents that you have in front of you are contained in the plaintiff's early case conference document production, that's just for her reference.

Did you meet or speak with any attorneys before today's deposition?

A. Not in regards to this particular case that you've put in front of me.

Q. Okay.

A. This patient, no.





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Q. Okay. Have you reviewed any documents at all to prepare for the deposition, medical records or otherwise?
A. No, not in regards to this patient and the only reason I say that is because I'm part of Consultants Medical Group which a legal medicine practice with Dr. Hugh Selznick so I work with attorneys and do some medical case reviews so I'm saying I don't -- I have not seen this patient's medical records but I have some experience in doing some of these legal reviews.
Q. I see.
A. So that's why I say that specifically.
Q. And what kind of reviews have you done in the past? Do you mean like records review?
A. Records review and I did have also -- there was one -- also one court appearance that I made in regards to being an expert witness for a patient that I treated at Southwest Medical before as well.
Q. So you were the treating physician and the testifying expert --
A. Correct.
Q. -- for that patient?
Is that the only time you've testified



in court?
A. Yes.
Q. Okay. When did you testify?
A. This was back I want to say June. I'm not sure exactly the date. I could get it for you if you need it but I think it was in June of this year.
Q. So June of 2008, correct?
A. Uh-huh.
Q. Is that a yes?
A. Yes.
Q. Now, back to the medical expert reviews you were referring to, have you ever conducted an independent medical examination?
A. No.
Q. Okay. But you have reviewed medical records and offered an opinion based on that review?
A. Correct, yes.
Q. And what kind of case have you done that?
A. One for a plaintiff and one was for a defendant.
Q. In personal injury cases?
A. Yes.



Q. So you performed two records reviews all total?
A. Yes.
Q. Okay.
A. Not including those other two things that I mentioned related to this practice of Southwest Medical which had to do with the one I made an appearance in court.
Q. Right, okay.
A. Because I had to review the records for that prior to going to court.
Q. Okay. What was the injury claim in the case that you did the records review for the plaintiff?
A. That one had to do with whether or not the injury in my opinion had something to do with that patient's condition. In other words, did the injury cause the patient's pain and suffering problem.
Q. Was it a car accident or what was the injury?
A. It was a car accident.
Q. Okay. And what was that patient's or plaintiff's injury complaint?
A. Neck pain.



Q. Okay. And in that case what opinion did you reach? Did the car accident cause the neck pain or not?
A. This is defendant or the plaintiff?
Q. Actually I was asking about the plaintiff case in which you reviewed records.
A. Yeah, the one that this particular gentleman was involved in a car accident complaining of neck pain as a plaintiff I felt in my opinion that that person had too many preexisting problems prior to his accident that was probably the cause of his pain rather than the accident itself.
Q. I see.
A. So I said it could be an exacerbation of his chronic pain but it certainly was not the cause of it.
Q. And what about the case where you reviewed records for the plaintiff, in other words, where the plaintiff retained you as an expert, what was the injury claimed in that case?
A. That the car accident was the cause of all his pain which wound up having him to go to surgery for the cervical fusion that he had to have.





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Q. Who was the surgeon in that case?
A. McNulty.
Q. Do you remember who the attorney was who represented the plaintiff?
A. Plaintiff's attorney. You know, I don't remember his name. I have all this information at home so if you would like to know it, I can look it up and get back to you on the information.
Q. Okay. Did either of these cases go to trial?
A. Not yet, no. I think -- one of them settled and I think the other one is still in the process of deciding if they are going to go to court or not.
Q. I see. Do you have any intention of being an expert in this case?
A. I'm not trying to recruit myself as being an expert but if you need me to be I can.
Q. Just so you understand the roles, I'm not even permitted to speak to you unless the plaintiff's counsel is present because you are a treating physician in this case. So it wouldn't be me who would retain you as an expert in this case, it would be the plaintiff.



A. Okay.
Q. It would be Mr. Simao or his counsel. Has Mr. Simao or his counsel asked you to be an expert in this case?
A. No.
Q. How many patients have you treated who are involved in personal injury claims?
A. When I was with Southwest Medical or in general since I've finished my pain fellowship?
Q. In general.
A. Since I finished my pain fellowship?
Q. Yes.
A. I would estimate probably about a hundred and fifty cases but I don't have the exact numbers in a log to say this is the exact number.
Q. And estimates are fine.
A. Okay.
Q. Okay. Have you ever treated a patient in a personal injury claim who was represented by the same law firm that represents Mr. Simao?
A. Is this Glen?
MR. PALMERO: Yes, Aaron and Paternoster.
THE WITNESS: No, I have not.



Q. (BY MR. ROGERS) Who referred Mr. Simao, the plaintiff, to you?
A. I believe it was one of the orthopedic surgeons but I don't remember specifically who it was. It was either McNulty -- I think it was McNulty that actually referred him.
Q. Okay. Was your treatment done on a lien?
A. No.
Q. When was the last time you saw the plaintiff?
A. I believe it was in August of 2007. It was right before I finished that. I'm pretty sure he came in the week right before I actually finished my time. I finished on August 10th and I think I saw him that week right before that.
Q. So you left your employment at Southwest Medical on August 10, 2007?
A. Correct.
Q. Okay. Now, when was the first time you saw the plaintiff?
A. I believe it was in October of 2006. There may have been somebody else that saw him in the office before me because they may -- for example, Doug Young may have actually seen the



patient before in the office but I didn't see him before October of 2006.
Q. Okay. Well, just in your review of the Southwest records which you have in front of you, you may have seen that the plaintiff treated there from April 15, 2005 up through roughly the last time you saw him and then he stopped treating there.
Now, you testified a moment ago that an orthopedic surgeon, likely McNulty, referred the plaintiff to you. The records reflect that Dr. McNulty referred the plaintiff to pain management.
A. Okay.
Q. And that Southwest Medical had a pain management center that appears to be multi disciplinary in that the plaintiff went to a psychiatrist?
A. Psychologist.
Q. Okay. A psychologist?
A. Yes.
Q. And a pain management physician, is that correct?
A. Yes.
Q. Okay. Have you ever worked with this

psychologist?
A. Donna?
Q. Donna, yes?
A. Bar-Novan.
Q. I got it as B-a-r-N-o-v-a-n?
A. Yes.
Q. What is her role in the pain management at Southwest Medical?
A. She's the one that takes the psychological history of the patient to determine how many sort of other factors are involved in that patient's pain problem such as depression, anxiety, past psychiatric problems that may be influencing their current pain presentation.
So she helps to determine if other means of treatment may be helpful in conjunction with medications and injections.
Q. Okay. And this is stuff that would include biofeedback and things of that nature?
A. She didn't do biofeedback because she didn't have the machine that have the lights that go off or did heart rate determination, she didn't have a machine that did that with her session so she didn't have biofeedback but she did do cognitive behavioral-type assessments,



treatments, and she did relaxation training. So those are the kind of things she did more.
Biofeedback is specifically when you hook somebody up to some kind of machine and help counsel them and work with them on controlling a physiological parameter such as heart rate, trying to keep it slower or within a certain range and then help relax the patient. That's the machine you use the biofeedback with.
Q. Okay. And the object of a psychologist's work in the pain management field is to determine whether there are non physiologic ways to address pain or non physiologic causes of pain, is that right?
A. Yeah, as in psychological, yes.
Q. Yes.
A. Correct.
Q. Now, from the records that I've seen from that Southwest Medical, it appears that the plaintiff consulted with the psychologist once and then never returned. Am I correct?
A. Yes.
Q. Why is that?
A. The purpose of having the psychologist in the clinic is to do an intake evaluation to



determine whether they would, A, like to have psychological sessions as part of their treatment and, B, whether they are at risk of committing suicide or are at risk of doing something to them self that may be harmful and if those things aren't present as in the patient doesn't want psychological sessions and they don't present a risk to themselves as in committing suicide or doing something harmful, then they have the option of not doing any further psychological sessions because it's up to them plus it's not a risk for them to go on with just the medical treatments as in, you know, prescribing medications or doing injections.
Q. Right.
A. So if this patient was a candidate meaning he, A, wants to have the treatment or was at some kind of psychological risk then obviously that would continue, the psychological treatment would continue.
Q. Of the patients in Southwest Medical's pain management program at the time the plaintiff treated there, how many who were referred to the psychologist treated with that psychologist?
A. It was a small percentage. I would say



out of a hundred patients that probably five to seven patients out of the hundred would actually continue seeing her on a regular basis of some kind and regular meaning it was possibly every month to two months, not necessarily every other day or every week.
Q. I see.
A. And that's because most of the patients that came to the clinic were specifically going to have an injection or they wanted some kind of medication-type treatment plan as opposed to anything psychological.
Q. I see.
In your experience did the psychological care offered at Southwest Medical prove beneficial to the patients who accepted it?
A. I think it was a wonderful resource to have but I think in today's healthcare with expense being one of the issues I don't think that it's going to be something that can be long term offered. I don't think that basically most practices could afford a psychologist to be a part of their treatment on a regular basis.
So I think it's a luxury more than it is a necessity and I think it's a great thing to

have as part of a multi-disciplinary practice but in a private practice it's not something you really are going to find is going to be very characteristic. I mean I don't think it's something you are going to see in most practices.

Q. Something that I've seen quite regularly in Las Vegas is that spine surgeons will refer patients for whom surgery is a consideration to a psychologist for screening to determine whether the patient is a good surgical candidate. Have you observed this as well?

A. Yes.

Q. And is there a difference between that pre surgical screening role of a psychologist versus what Dr. Bar-Novan did?

A. Even though she could do that specifically for McNulty, for example, because McNulty is one of the providers for Southwest Medical, he's one of the contracted providers for spine surgery, he did rarely refer patients specifically for that purpose.

If Dr. Bar-Novan was to see a patient, it was generally part of that intake of new patients that she saw and then the ones that elected to see her on a regular basis because



they felt she would offer them a valuable service.

So to answer your question it's not something that this particular clinic that was practiced in that way of screening for a specific surgery but if the patients were -- decided upon to become candidates for implantable devices such as spinal cord stimulation implants, then that patient would have to go see Dr. Bar-Novan to be screened for that.

So in that way she was used specifically for a implantable device but not necessarily spine surgeon, you know, screening them for surgery and it was very rare for this particular practice to put implantable devices as far as a spinal cord stimulator or pump because most of the patients either wound up having surgery or went somewhere else to get their implants done, they didn't stay with the clinic to do that because there's so many other patients to be seen it couldn't be done specifically for that purpose for the implant.

Q. Okay. All right. Now, shifting then to the medical doctors in the Southwest Medical pain management center, the plaintiff started



with Dr. Seibel, S-e-i-b-e-l?

A. Right.

Q. And then he started treating with you. Why did he leave Seibel and go to you?

A. I don't think he necessarily left him, I think what happened was Seibel was busy when he needed another injection so he went and saw me for the next one and then the following time I saw him as a follow-up patient in the clinic after he had the injection and then he said, well, is it possible just to follow with you if you are the one that can do both the injection and the treatments because what he had seen before me was he saw Doug Young the PA and then he saw Seibel for the injection and then went back to Doug Young as a follow up and he asked if the physician could see both and I said yes, I could do you as far as the procedures and the follow up.

And then he said he would rather do that than to see Seibel for the injection and then Doug Young in the clinic as a follow up. But I also told him he could have done that with Seibel too but he said the last person he saw was me so that's why he asked and requested that he



see me specifically to do his injections and follow up.

Q. Okay. Now, I see that on June 7, 2006 Dr. Seibel did a C3-4 epidural and the follow-up report represented that he had a good response and a decrease in his headaches and pain?

A. Okay.

Q. Now, when was the first time he saw you again, in October?

A. He saw Doug Young as a follow up and scheduled for a selected nerve root block and that's when I saw him on October 3rd for a selective nerve root block.

Q. That was your first visit with the plaintiff?

A. Yes.

Q. Okay. Now, just before the plaintiff comes to you he had a visit with a physician assistant there?

A. Doug Young, yes.

Q. On August 24, 2006.

A. Yes.

Q. And there Mr. Young wrote that the plaintiff had an exacerbation of his pain. Do you know what the exacerbation was?





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A. The left trapezial pain it says. That's the exacerbation that he had. It was left trapezial pain and according to this visit, it says that sometimes you may get a worsening of your pain problem from an injection and then it may get better over a longer period of time so what happens --

I believe what this is referring to is the steroid effect so when you inject a steroid into an epidural space, it can work its way into the nerve root and it can actually cause an inflammatory reaction initially to the nerve meaning the nerve will become more painful and then after it becomes less inflamed because the steroid works that it may come a period of time where there's less pain.

Q. Right, now this report of August 24 is two-and-a-half months after the last injection, the epidural. So we are well past the original inflammatory reaction, right?

A. Okay. Yes. Usually it's within the first week after the injection that you get that response so, you are right, this would probably just be the pain has come back or it has gotten worse since the injection.



Q. Okay. Well, the word exacerbation is used differently by different people. In some cases I've seen the word exacerbation used in the context of a recent event, like an aggravating event.

Do you know if the physician assistant's use of exacerbation on August 24, 2006 is in reference to an event that caused pain?

A. I don't know. I don't know what that is reference to based on this note and I don't think I remember anything specifically after seeing the patient mention anything that I can think of that might have exacerbated this.

So this August 24th that you are referring to is prior to my seeing him and I don't know anything after I saw him that this may have been referred to as far as was it related to an accident or something that happened after that event where let's say, you know, his car accident was August 15, 2005 did he have another event since that time and that's what he's referring to, I don't know.

Q. Okay. All right. Well, when the plaintiff came to see you and I recognize that



the initial visit was actually the injection but did he give you a history?

A. That's one thing about this practice I didn't like it was we were -- we were sort of required as a mid-level provider to take the information that most of the time they were able to get but sometimes the details and the specifics of a patient's problem were not relayed to us. We are almost like technicians because once we saw the patient we never really knew all the details other than what was written in the record.

So, for example, if this patient was seen by me I may have been able to ask more specific questions about what happened in the past that may have related it to the injury and, therefore, had a better idea of what specific levels I may have injected and occasionally when I would have the time I would go back and look at the records that the mid levels would take like Doug Young and figure out, well, is it really the level that he scheduled the patient for to get injected or do I want to do an additional level besides the one that was scheduled or do I want to change the level then the one that's



scheduled.

For example, if this left C4 nerve that I did the procedure and injected was maybe not necessarily the one that I would have felt based on his history and his exam and his MRI results, I may have felt differently about then had I actually, you know, just gone there and did the procedure that was scheduled but sometimes it didn't work that way and I had to do just basically what was scheduled because it was just a long list of patients to see that day in the surgery center and, therefore, some of the details and some of the treatment may not have been what I would have done had I saw that patient in the beginning.

So when you are referring back to this date August of 2006 when he came back for an exacerbation, I may have changed the plan based on information I took if I saw him versus what I did on that October 3rd, the first time I did the injection.

So I'm not saying that that is specifically what would have happened in this patient's care but I'm just telling you that on this practice that we relied on mid-level





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providers to take the information history wise, do an exam and then collect the lab reports and then come up with an idea of what should be done as in doing one of these injections, it might have been different had I been the one taking that information rather than the mid-level provider.

Q. I see.

Okay. In short you didn't get a history from the plaintiff, you relied on the history taken by the physician's assistant?

A. That's correct.

Q. Did you review the histories taken by the physician assistants?

A. Yes, so I did look at the last note that the patient was seen on the August 24th prior to doing the injection on October 3rd and I use that information to base my procedure on.

Q. All right. Did you ever go back in time back to April of 2005 to look at the histories the plaintiff had provided on the previous visits with Southwest Medical?

A. Prior to -- on October 3rd or after that or --

Q. At any time?



MR. PALMERO: Objection, vague and ambiguous, confusing. You can answer though.

THE WITNESS: I did not look at that information prior to I believe even up to this date to be honest. I don't think I actually saw the specifics of that accident on October 15th, 2005 until you presented me with the records today.

Q. (BY MR. ROGERS) Okay.

A. And the reason why I can tell you that is some of that information even though it's in our system in the computer is not always accessible for various reasons or it could be just the simple reason that there isn't enough time to actually go back and check on that stuff because supposedly it was the information that we relied on from the mid level that we took the information to begin with.

So specifically to answer about this patient, no, I did not review any of the information that was taken at the time of the accident such as October 15th, 2005 when he was seen in the urgent care center, I didn't see that information before today.

Q. Okay. In the time that you treated the



plaintiff did he ever tell you about the April 15, 2005 motor vehicle accident?

A. The details, no. He mentioned at least on one occasion that he was involved in a car accident but that was about the extent of how much information I had from him in regards to that. I didn't know anything specifically about him being hit or anything like that.

Q. So during the time that you treated the plaintiff you didn't know whether he lost consciousness as a result of that car accident?

A. That's correct.

Q. You didn't know whether he was taken by ambulance?

A. Yes, I did not know that.

Q. You didn't know whether he had any bumps or bruises?

A. No.

Q. Did he ever tell you whether he was in any accidents before April 15, 2005?

A. He didn't tell me that nor did I ask him about that.

Q. Did he ever tell you about any symptoms he had before April of 2005?

A. He mentioned that he did have headaches



but he told me that the headaches were something that came and went -- they come and go. They weren't something that he said he had continuously and that was a serious enough problem that he had to seek medical treatment for the headache that he had before the accident.

Q. You weren't aware then that he treated for migraines at Southwest Medical Associates before April 2005?

A. No, I was not aware of that.

Q. Did the plaintiff ever tell you about any injuries he had after April 15, 2005?

A. No.

Q. What were the plaintiff's complaints to you?

A. His main complaint was neck and arm pain but he did mention he had headaches and back pain but his chief complaint was neck pain and arm pain.

Q. Which arm?

A. Left.

Q. How far down the arm?

A. He said that it was primarily the shoulder blade and it went into his upper arm so shoulder to upper arm, that was his main area of

complaint.
Q. Okay. So basically the back of the shoulder around to the bicep area?
A. Yes.
Q. What was his reported pain level to you and for this question I want to focus on the first time you saw him in October of 2006.
A. No, the pain level was not something I asked him about at that visit. They may have asked that question at the surgery center to get a baseline level of pain but I did not specifically ask him what his pain level was when I did the injection so on October 3rd, 2006 when he had the injection with me he did not report nor did I record a pain level. He may have given it to the pre-op nurse prior to the procedure.
Q. All right. Look at the October 11 note.
A. He rated it seven to eight out of ten.
Q. Was he rating it at seven to eight out of ten pre or post selective nerve root block?
A. This would have been that day that he saw me on October 11th. So this is after the injection was done so this is about a week -- a little more than a week after the injection is



done that he's rating the pain at that level.
Q. And at the same time he's telling you that the injection provided 50 to 75 percent relief?
A. And what he's referring to is the immediate period of time following the injection on October 3rd, not that day that he saw me on October 11th. What he's relating is the information that he experienced this relief immediately following the injection on October 3rd.
Q. And then his pain returned?
A. Yes.
Q. And then you discussed was it rhizotomy?
A. No, it was actually a pulsed radiofrequency -- it's a procedure that we warm the nerve basically to a temperature of about 40 degrees, 41 degrees -- actually up to 43 but usually below 43 degrees Celsius and that will affect how the nerve transmits information so it tends to quiet the nerve down by pulsing it and warming it to a 43 degrees Celsius temperature.
Q. Okay.
A. So it's not an ablated procedure or



rhizotomy-type procedure, it's more of a -- it's a little different than a steroid effect but it does work to minimize pain transmission of the nerve.
Q. And did you decide to attempt this pulsed radiofrequency because the collective nerve root block provided only temporary relief?
A. Right, because if he had a better result from the sterold affect I would have been more, you know, likely to continue that course of treatment where we just did the transforaminal epidural steroid injection but because he got only the immediate affect from the local anesthetic that we injected with the steroid at the time in the surgery center and it wore off after the initial steroid wore off, I figured it is going to be necessary to do something more to allow the nerve to decrease the transmission of pain other than with just treating him with steroid so that's why I elected to offer him that treatment the pulsed radiofrequency.
Q. Now, the plaintiff seemed to have had a -- well, two months or more of pain relief from the C3-4 epidural that Dr. Seibel did on 6/7/06. Did you consider going back to doing epidurals?



A. It's certainly something you consider if you had an improvement from the procedure but when I did the procedure, that selective nerve root block, I was trying to be more specific than the C3-4 transforaminal epidural and the reason why I was being more specific is I was trying to numb one specific nerve root and not necessarily spread the medicine in the general area at that level and possibly involve more than just that nerve root itself.
So my approach was to try to be as specific as I could be to say this is the exact level, this is the exact nerve and if it were, then that would be a more specific treatment than doing the C3-4 transforaminal epidural.
Q. Right. No, I get that that's why you attempted the selective nerve root block but did you consider doing the epidural before suggesting the radiofrequency?
A. Right, and the answer to that question is when I did the selective nerve root block I did put steroid in that level as well so not only did I do a selective nerve root block itself I did the steroid injection as in C3-4 transforaminal epidural at the same time.






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Q. I see. And also the radiofrequency?
A. Yes.
Q. So you did the three --
A. For one, yes.
Q. Okay. Got it.
A. So I think that the pain problem was starting to progress as in it wasn't becoming as responsive to that type of treatment because it's not that I didn't do what he originally had good results with, I did that in addition to the specific treatment which was the selective nerve root block and the pulsed radiofrequency.
Q. Got it.
Now, when the plaintiff was treating with you, was he disabled?
A. No.
Q. What do you generally take a pain rating of seven to eight of ten to mean?
A. It's severe and it is definitely a distraction to their every day living so they may not be able to function fully based on that level of pain.
Q. Do you do anything to translate the numbers seven to eight of ten into the terms you just described so the patient understands, okay,



if I put my pain level at these numbers this is how it will be translated by my doctors?
A. No, and the reason is it's a subjective rating and if you were to try to explain it in the terms I just gave to you on how disabling it is to somebody's function every day, it isn't something as subjective, it's more something that the physician is trying to put into some kind of relative scale that is different for a patient.
So a patient gives you a self report of this and the physician is giving this idea of what that level really means to them as in this is an observation and that's different so you have to have a subjective pain rating and if you want to make some kind of observation, you can make that in your physical examination and then make an impression based on what your overall -- you know, putting it together with their pain rating subjectively along with their actual physical ability along with what they are able to do at work and then you can make an impression to decide if they need more treatment or if they need, you know, a disability rating or some other kind of assessment or an evaluation.
Q. I see.



See, sometimes I'll ask providers that same question and they will say, well, I might tell the patient that a zero means no pain and ten is unbearable and nine would be something like childbirth. In other words, they are giving the patient some sort of loose guideline. Do you ever do that with your patients?
A. The first time I see a patient I will generally use some kind of scale and put some reference to it like you've described so what I usually tell patients is zero is no pain, ten is the most severe pain that you could possibly experience, five is sort of moderate or medium level of pain and I say where is your pain in this scale and that's pretty much how I do it.
Q. I get it.
You don't want to lead your patient, you just want to leave it up to them to give you their subjective --
A. Correct.
Q. -- independent response?
A. Yes.
Q. Okay. But at the time that the plaintiff was treating with you he was still working?



A. Yes, I believe he was working.
Q. Do you know what kind of work he was doing?
A. No, I don't.
Q. Take a look at the notes and see if anything in there refreshes your memory on it.
A. Bus management full time.
Q. You mean business management?
A. It's b-u-s management so it could mean business management but it says b-u-s management.
MR. PALMERO: More like business management.
Q. (BY MR. ROGERS) I recently took the plaintiff's deposition, his testimony that he works as a carpet and flooring cleaner.
MR. PALMERO: I think he owns his own business or at some point remember he bought the business.
MR. ROGERS: He owns it.
MR. PALMERO: He may do some of the work but he had his son and some employees working, too.
Q. (BY MR. ROGERS) True, true.
But in other words, his isn't just a desk job, he's working as well as managing this

business.

Now, did you do a physical exam of the plaintiff?

A. Not initially. I may have examined him on some of the follow ups and done a specific exam targeted to a neurological assessment but I didn't do a full physical so I would say, no, I have not done a full physical examination on him. The most I may have done is just limited neurological assessment. I think on January -- on January 10th I did a neurological exam on him.

Q. What did you find in the neurological exam?

A. That basically he had some deficit on the C4 dermatome but otherwise it seemed to be improving and that was the overall assessment that I made on that visit on January 10th.

Q. Reflecting on that same note there's a section of your report entitled physical exam and in there it reads no acute distress, exhibits no significant pain behaviors, he had no tenderness to palpation, he had I believe full cervical range of motion without pain.

A. Right.

Q. And axial loading did not illicit a



pain response.

A. Right.

Q. Despite those findings on physical exam, his subjective pain rating was again seven to eight of ten.

A. Right.

Q. Is there an inconsistency between the subjective complaint and your findings?

A. Yes.

Q. What is it?

A. That basically all these things in the physical exam are pretty normal and the findings of having a slightly decreased dermatomal C4 level is minor and would not explain on a physical how much pain he's reporting.

So there is an inconsistency between the level of pain and the physical examination at that time but I could tell you that a lot of these patients come into the office and they give you a number and they tell you that number based on it's easier just to blurt that number out because they say it on each visit rather than giving you a true assessment of what they really feel at the exact instantaneous moment you ask the question.



So it's kind of like a habit. They say, okay, pain seven or eight instead of saying, well, today it's two or three but usually it's a seven/eight. For them it's very routine to come up to the number that they fix in their mind that this is how they feel overall, this is their kind of overall level that they feel in the day as opposed to what is it at this exact moment when I saw that patient at that time at eight a.m. on January 10th.

So I don't take that too seriously but specifically your question was does that coincide with that level of pain, no. The answer is at this particular time his physical exam was relatively normal and his pain level was reported at that high level of seven to eight and I would not say based on that there's a consistency but I'm telling you the real thing of how patients will tell you a certain level and it's kind of fixed in their mind that this is what they experience and I don't take it too seriously.

And I would say in this particular patient that it may not be that he really had the seven to eight level of pain at that time when I put that score in there as a recorded number but



he -- you know, he's not somebody I would say is out of the ordinary to give you a higher number than what they are exactly experiencing at the moment you are seeing them in that office right then and there.

Q. Okay. Well, at any time while the plaintiff was seeing you did he have less than full cervical range of motion?

A. And I would have to say I don't remember if there was one specific time that he might have had less. The one that I can see there documented is that he had a full range but whether or not he had an actual limitation on a previous visit I don't know.

Q. Well, take the time to look through your records so that you can answer that question based on what is found in the reports.

A. Okay. Here's another thing I'll tell you about that particular practice. Sometimes you'll notice that there's no significant change and no significant change means they didn't have time to really do an exam so in actuality it may not have been that an exam was performed on that visit even though there's no significant change.

So I could just tell you that there's a

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

Q. Okay.

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

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



strength and, number eight, intact sensory exam?

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

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

MR. PALMERO: Same objection and compound.

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

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

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

A. 2007.

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

A. After I reviewed everything from



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

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

A. Correct.

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

MR. PALMERO: Objection, vague and ambiguous.

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

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

MR. PALMERO: Same objection. You can answer.

THE WITNESS: He complained of left



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

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

A. Okay.

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

A. Right, yes.

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

MR. PALMERO: What were the dates again?
MR. ROGERS: April 15 to October 6.
MR. PALMERO: I think there were complaints the first day.
THE WITNESS: Yeah, on April 15th he did specifically mention neck and left shoulder pain.
Q. (BY MR. ROGERS) Right, and if I didn't make it clear, that may be my fault.
A. But following April 15th.
Q. My question is following that date up through April 15th I don't think there's a record of neck or arm complaints.
A. Well, on October 6, you are excluding that date?
Q. That's the first date that I see it after the April 15 visit.
A. Okay. So like on May 26th, 2005.
Q. There's May 12, there's May 23, May 26 --
A. Oh, yes. Okay. May 26, I'm looking at that right now. It doesn't mention anything about his neck or shoulder, it just says headaches and then on May 12th it says occipital



headache. Yes, it doesn't mention any neck or shoulder on that date of May 12th. On May 4th, occipital headache, it does not mention any neck or shoulder.
So that's correct, between those dates -- an April 15th. So the following visit he didn't say anything about a neck pain or a shoulder pain up until October 6th.
Q. Right.
A. Okay.
Q. Do you know what was causing the arm symptoms?
A. It's my impression from reviewing his information and his MRI findings that it may have been due to a facet hypertrophy at C3-4 causing some compression of the C4 nerve root, that's my impression and that would go along with the trapezial pain.
C4 does not usually involve the biceps, that muscle is typically involved with C5 and so I can't explain the biceps being involved because it doesn't seem to be that C5 has any involvement as far as there being compression on the nerve root either by a disc or facet hypertrophy or some kind of degenerative change.



Q. Okay.
A. So when you ask about arm specifically as in bicep area I cannot explain that but if you are asking about why is he having trapezial pain I would say it's possibly due to compression of that C4 nerve root at C3-4 from the facet hypertrophy.
Q. On the subject of the MRI studies, which one did you review or which ones, if more than one.
A. I did see a copy of this report as well. Let me see if I can find it again. Okay. One of these MRIs are dated March 22nd, 2006.
Q. Right, and actually you'll see that the findings on that MRI basically are exactly what you just said your opinion was.
A. Yeah.
Q. Now, did you see the September 24, 2007 MRI?
A. No. Let me see if I can find that report. That would have been after I saw him. I mean I would have never seen him, I would not have seen that because I was no longer employed by Southwest Medical so I wasn't seeing him.
Q. Okay.



A. Do you have a copy of that if I can look at? Here it is, is it September 24th?
Q. Yes.
A. MRI cervical spine.
Q. Is there a difference in the findings in the September 2007 MRI than compared to the March 2006?
A. Yes, I mean clearly because it's basically saying that it is a normal MRI, there's negative changes of the cervical spine it says here. It reads that C2-3, C3-4, C4-5, C5-6, C6-7, C7-T1 are unremarkable without evidence of disc herniation or spinal stenosis. There's no foraminal stenosis.
So looking at this copy, you would say everything looks normal.
Q. Well, in the year and a half since the March 2006 MRI, can those conditions observed heal?
A. Sometimes you can get improvement in MRI findings so the answer is yes, you can get a disc herniation that may no longer appear to be herniated with time. It may actually normalize or heal so it can happen but typically facet hypertrophy and degenerative changes like that

don't necessarily get better and I would say it would be unlikely to find one get better over time.

Q. Okay.

A. So that would be something I would like to see the two actual MRI --

Q. Films?

A. Yes, as opposed to just reading a report.

Q. Okay.

A. I mean this could be within a certain variation about the radiologist, there may be a little different view of one impression from one radiologist versus another because it was read by two different radiologists, too.

Q. Now, can the conditions seen on the March 22, 2006 MRI, the one that appears to be consistent with your opinion about the cause of the symptoms, can those conditions be caused by something other than a trauma?

A. Yes.

Q. What can it be caused by?

A. Degenerative changes in the spine can lead to these kind of findings on his exam as well as complaints which has nothing to do with



an accident or could have been due to something unrelated to that specific accident or he could be just born with that and it may have nothing to do with an accident at all.

Q. Okay. Would it be fair to say that given Mr. Simao's age that the findings in the March 22, 2006 MRI are consistent with age-appropriate degeneration?

MR. PALMERO: Objection, vague and ambiguous as to form. You can answer.

THE WITNESS: I think that these kinds of findings can be found in anyone in his age group and not necessarily be a physical problem as in causing these kind of findings that we find with this particular patient.

So, in other words, if you scan a hundred people as this gentleman 40 plus age group you'll find these kind of findings pretty typically. I mean maybe in about 15 percent of the people you scan they'll come up with these kind of findings that this March 22nd, 2006 findings show. But out of those 15 percent of the people that come up with this kind of evaluation on the MRI there may only be one or two percent of people that have any kind of



problems as a result of these kind of findings so that it may not be symptomatic is what I'm saying.

Q. Right. The opinion that you expressed earlier about the cause of pain being the facet hypertrophy, was that based on the MRI and the complaints of pain into the trapezius?

A. I try to put the two things together and say how can I explain based on this patient's complaint and the MRI findings on what is the most likely reason and this is what I came up with so putting the two things together is why I made that impression.

Q. Okay. All right. Well, we covered your October 3, 2006 injection and we briefly touched on the October 11, 2006 plan for the pulsed radiofrequency.

A. Right.

Q. And we didn't discuss the plaintiff's response to that pulsed radiofrequency, what you called the three for one.

A. Okay.

Q. What was the response?

A. Are we talking about January 10th, 2007?



Q. Actually the follow-up record I have after October 11 is the -- oh, no, you are right. There was a follow up on November 8 and then the procedure was done on November 18, correct?

A. Correct, yes.

Q. Yes, let's go I guess now to January and there I guess we'll find what his response to the injection was, right?

A. Right. So he did find it beneficial. It did seem to help during that period of two months from that pulsed radiofrequency procedure and -- and the other things that we tried to treat him with which included the antidepressant called Cymbalta did not seem to make any difference one way or the other and he has not had any problems with the migraines or requiring the usage of Fiorinal.

So actually on that last January 10th visit that was the one that had the physical exam which basically said that it was normal, that there wasn't any significant findings on it.

Q. Okay. And at that time your plan was to follow up in three months?

A. Uh-huh.

Q. And I see that he returned March 22,

2007.
A. Right.
Q. What happened at that visit?
A. So it was a little sooner than three months but not unusual in the sense that typically these injections or these procedures -- I should say the pulsed radiofrequency can last two or three months so that it's not surprising that it wore off after two months. Actually it lasted longer than two months because it was done in November so it was really quite good actually.
Q. It was actually four months?
A. Yeah.
Q. So what happened on the March 22 visit?
A. On March 22nd he said that basically he wants to try to repeat it, that procedure, the pulsed radiofrequency since it did work and if he didn't have any benefit he would consider having surgery to fix the problem but he didn't really want to have surgery so we went ahead and scheduled the pulsed radiofrequency procedure again and that was on March 27th, 2007.
Q. All right. And what was the plaintiff's response to that repeat?
A. He was seen in follow up on April 9th,



2007 and it improved his left shoulder and trapezial area. He rated his pain at three out of ten instead and now he specifically stated a very discreet area of pain along the left medial scapula and paravertebral area at C2 but I felt that that was unrelated to the C4 procedure that we did the pulsed radiofrequency, that it was more of a muscle problem as in a trigger point.
Q. Okay. What was your plan after examining him?
A. Well, we did go ahead and do the trigger point injection on that visit and I was going to go ahead and give him some medication to take care of other break-through pain he may have been experiencing besides that specific C4 procedure pain or trapezial pain.
Q. Do you know what caused that muscle pain?
A. Sometimes it can be just by the fact that you relieve the other more significant intense pain that it comes out. It may have been there all long but he just didn't notice it because the other pain was so much stronger.
So I don't know if it was anything to do with the initial impression of the C3-4 facet



hypertrophy, it may have nothing to do with that. It may just be he's got chronic tension in his neck and, therefore, those muscles became trigger points. So the short answer is I don't know.
Q. Okay.
A. The description of why it may be is because of that reason though is that he may have these points underlying the problem and it just became more clear to him that these were becoming a problem because the other pain was gone.
Q. I see. All right. So you gave him the trigger point injections?
A. And prescribed some pain medications.
Q. And told him to follow up?
A. Come back in two months so he did come back in two months on June 4th, 2007 and he said he stopped the pain medication because of side effects. Usually it's because of nausea or constipation or being confused, that's typically why people will stop and I think that's probably what he was experiencing, some or all of those symptoms, and he pretty much knew what to do as far as trying to do physical exercises because he didn't want to go back to physical therapy and the idea was to go ahead and schedule a repeat



since it worked well and it was starting to wear off.
Q. Repeat the --
A. Pulsed radiofrequency left C4, yes.
Q. Okay. And that was done --
A. June 12th.
Q. What was the plaintiff's response to the June 12 injection?
A. According to the follow-up note it was better and supposedly according to this follow-up phone call it was 20 to 30 percent better on the June 13th and then he was seen it looks like June 18th he was complaining of four to five out of ten neck and shoulder pain on the left and it was decided that because the pain was coming back and, you know, he didn't want to keep doing these every two or three months that he would consider having surgery done so that's when Dr. McNulty's office was called back and he did have trigger point injection it looks like as well on that visit, June 18th, 2007.
Q. Did you ever see him after the June 19th referral to McNulty?
A. I thought I saw him in August before I left and I don't see the note from that and so





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I'm not sure if he made it or not but I thought I saw him before I left so as far as the records go it stops there.

Q. Okay.

A. But I thought I had him scheduled there for the last day I was supposed to be there or the week before, I can't remember that exactly but I thought I had him scheduled for one more visit before I left in August. Do you have any more records?

MR. PALMERO: That's what I have.

THE WITNESS: Okay.

Q. (BY MR. ROGERS) What can be done to repair facet hypertrophy?

A. Nothing to repair it. Surgically you would basically remove it. You would take that facet out so you just cut the bone away and then you may or may not fuse that level depending on how much you have to remove and what the underlying disc is. If the disc is also bulging, they would typically do a diskectomy and remove that facet and also do a fusion.

Q. Okay.

A. That gets into the orthopedic surgery or spine surgery specialty which I don't really



have any expertise in but that's typically what is done.

Q. Have you ever participated in a surgery in which part of the facet is removed without fusing the disc?

A. No, I've not seen that ever done --

Q. Okay.

A. -- where they take just the facet out. I think it creates some instability in the neck and, therefore, they feel obligated to fuse it.

Q. Okay. As of the last time you saw the plaintiff, what was your opinion about his future treatment?

A. I warned him that if he has surgery it still may be a problem for him as in the pain, that it may not completely relieve the pain and I told him that I looked at his MRI and noticed that there were these findings but I again explained to him the same thing I told to you how these can be normal findings for people and not necessarily be problems and the best thing he could do is work through what pain he had rather than seeking a surgical option and he agreed to a certain extent.

But then again he thought he was young



enough that he didn't want to keep on doing injections or take medications and he wanted to try to get a fix and I said, well, the only chance there may be for a fix is surgery but again it still may not take care of the problem so that's what I did explain to him and exactly what he wound up doing I don't know but I did give him the option of going to see Dr. McNulty to see if there was a surgery that could fix the problem.

Q. Okay. Now, at the outset of the deposition you commented that you've done discograms before but only on the lumbar spine.

A. Yes.

Q. Why not on the cervical spine?

A. There's a significant amount of risk in doing a cervical discography in that the spinal cord is so much closer to that disc as opposed to the lumbar level.

Anatomically there's much less room for error to put a needle in that space and I didn't get a lot of training in my fellowship program on doing that specific procedure nor did I seek additional course or seminar work to try to get that training. So I didn't feel that I would be



qualified to do that procedure.

Q. Are you aware of any studies that conclude that cervical discography is less reliable than lumbar discography?

A. My partner or the director, Dr. Selbel, had the opinion that there was less likeliness to have a correlation between doing a discography in the neck and having an adequate result to indicate that surgery was a better option based on that result.

So he did not believe that we should be doing cervical discography for the specific purpose of identifying levels for surgery to fuse because there was lack of evidence to support that those levels they have identified on cervical discography correlated with the levels that should be done surgically and long-term benefit from that result being that they identified the correct level and the patient didn't have a problem anymore after they fused that level.

Q. Right. Are you aware of any similar opinions in studies published by ASA?

A. I don't specifically read that literature anymore so I don't know those studies

well enough to say yes, I know that's true.
Q. Are you aware of risk factors that a discographer should take into account before performing a procedure?
A. Risk factors as in overall risk for having a procedure or specifically just for discography?
Q. For discography?
A. Well, you wouldn't want to do discography on a patient that had a metastatic vertebral-type lesion because that could potentially cause paraplegia, you could get a bleed in that level if you stick the needle close to that level that has cancer in it so that would be one risk factor that you would identify and wouldn't do discography.
Q. Okay.
A. The other risk factor may be bleeding where somebody has a bleeding disorder and cause that – again could wind up causing paraplegia or quadriplegia because someone could bleed into the spine and cause lack of circulation in the spinal cord so that would be another factor that you wouldn't do discography.
A local infection in the area that you



are planning to do the discography would be another risk factor that you wouldn't do it. Some kind of skin or abscess at the back where that level is being targeted.
Q. Let me redirect your attention to issues more akin to the case at hand.
Are you aware of any studies of false positives among people involved in litigation when it comes to discography?
A. From what I know in general about pain management I would say that there is a significant amount of secondary gain issues that can come into these kinds of cases where you do have a lawsuit and doing that procedure in support of doing surgery or something else to get some kind of settlement or some kind of outcome in favor of that patient's case, yes, I am familiar with some of those studies.
Q. Okay. Were you doing discograms back at the time you were treating the plaintiff?
A. Yes, in the lumbar area.
Q. Is there any concern in the medical community with surgeons doing their own epidurals? I mean a surgeon doing an epidural on a patient and then making a surgical decision



based on that epidural?
A. There's two ways to look at that. One way is to say it should be an independent provider that is uninfluenced by the outcome of that particular treatment modality as an epidural or discography or what have you.
Other side of that is that the orthopedic surgeon may know that patient better than anyone else and if they are able to get the information directly based on their intervention of doing that epidural or discography, that may be a better indication of whether they should do the surgery to begin with or not. They may have a better appreciation of the result is what I'm saying based on their doing the procedure than having an independent person do the procedure.
So that's the two sides and if you are asking my opinion about which way is the better way to do it I would have to say have an independent person that specializes in doing those procedures is a better way to do it than to have a person that may have an influence of doing it because it may be viewed as financially in their advantage to do the procedure itself because then they can justify them doing the



surgery.
Q. Is there any code or rule of ethics in the medical community that would prohibit a surgeon from doing his own epidural to base his decision?
A. I'm not aware of anything like that as far as a code of ethics in medicine that says they can't do it.
Q. Okay.
A. I know that lately Dr. McNulty has been doing some of his own discographies and epidural injections and facet joint injections and that topic was brought up but that was the response that he may know those patients better than the person that he refers them to to do those kind of procedures and they don't always do exactly what he asks them to do as far as the kind of procedure that's ordered.
Q. Okay. All right. Now, I've asked you to look at the medical records that Southwest has and just so you know, since the plaintiff treated with you he went with Dr. McNulty for a time and then left him and went to Dr. Grover. Do you know Dr. Grover?
A. I know -- I don't know him personally






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but I know of him.
Q. Okay.
A. So I have not done anesthesia for him but I know he's a spine surgeon and I know -- I've seen him around.
Q. Okay. And the plaintiff testified recently that he isn't certain what his future plans are but that he will consider undergoing neck surgery and Dr. Grover has found that the plaintiff is a candidate for a two-level cervical fusion at C3-4 and C4-5. So at the time we are uncertain where the plaintiff is going to go.
Now, based on the treatment that you've provided and you may have already answered this, would you have any concerns about recommending a two-level fusion to this patient being treated?
A. Yes, because if that MRI that you showed the result for, September 2007, I think it was September 24th, that being a normal MRI would to me mean that there may be some question as to whether or not there really is any kind of pathology that can be remedied with surgery but again, there may be some interpretation differences between one radiologist and another and without seeing the films myself I couldn't



make an opinion like that but just going by what records you have shown me I would have some reservation about saying that that would be an appropriate surgery.
Q. Now, you testified earlier about concerns you had about surgery in a more generic sense involving this plaintiff and your conversation with him near the end of treatment. Would those same concerns that you expressed to your patient apply to this two-level fusion --
A. Yes.
Q. -- as it would to any procedure?
A. Especially this specific patient and the information that we've gone over, I would definitely have a reservation on recommending surgery to him.
Q. Okay. There's some patients who medical providers deem to be more appropriately handled by ongoing pain management.
A. Right.
Q. When you last saw the plaintiff, what was your opinion about the appropriate future care?
A. I think that pain management would probably be a better option for him than having a



surgical procedure.
Q. And have you already given the bases for that opinion or is there something you would add to that in addition to what you already said?
A. I think that having the benefit of knowing that this is a legal matter now would even more likely give -- would allow me to give the opinion that it would probably be in his best interest not to have surgery because I think that there are some secondary-type gains that are being sought by considering surgery in this particular legal case.
It almost validates some kind of injury that took place as opposed to, well, this may have been something that he had all long and has nothing to do with this accident that took place on April 15, 2005.
Q. On that front I want to ask you some questions about the incident itself. Do you know anything about the car accident?
A. The details, no, other than him being struck from behind like it said in the note on April 15th, I don't know anything more than that.
Q. Okay. Now, the records reflect the property damage to my client's car was roughly



$780 and consisted of a bent bumper.
MR. PALMERO: Just for the record there was some -- we may not want to get into it just so it's not misleading remember the cage behind his car.
MR. ROGERS: I'll get into it, I'm talking about my client's car here.
MR. PALMERO: Okay.
Q. (BY MR. ROGERS) And I'll add to this and include what plaintiff's counsel just mentioned. Now, the records further demonstrate that the plaintiff reports that nothing was broken in his car, no glass or anything like that, that he didn't lose consciousness, that he hit his head on a cage behind his seat in the car but the medical records show no signs of a scalp hematoma.
MR. PALMERO: I'll object as far as misstating what the medical records are saying but you can answer.
Q. (BY MR. ROGERS) All right. There's a CT of the head taken that was normal.
A. Right.
Q. You saw that --
A. I saw that.

Q. -- in the Southwest records and then a follow-up brain MRI that was normal?
A. Yes, I saw both those records.
Q. The cervical and shoulder x-rays that were taken --
A. Were normal.
Q. -- were normal.
And in your opinion -- oh, pardon me, let me add to that, there's this delay in reporting of these symptoms?
MR. PALMERO: I object to that as well because testimony in the medical records are my client's testimony and the medical records aren't exactly the same. My client indicated that he had pain but he was more worried about the occipital pain in his head at that point and not his neck pain.
Q. (BY MR. ROGERS) Okay. So the plaintiff says. The medical records, however, show that there were no complaints for that six-month period we earlier discussed of neck and shoulder symptoms.
Now, your opinion in this case is that the plaintiff's complaints are likely related to a facet hypertrophy?



A. Yes.
Q. Now, taking this information into account in your opinion did this car accident cause the facet hypertrophy?
A. No, it is in my opinion that his facet hypertrophy was either preexisting or has no relation to this particular accident.
Q. Okay.
A. And the reason that I think the facet hypertrophy is not related to the accident is I don't think you are going to find that kind of degenerative change take place in such a short period of time. I think that was already there and I also think that if you want to explain the occipital headache as a possibility of this accident, there may be some cause and effect to that.
I think there is some possibility that he may have suffered the occipital lesion as a result of hitting his head on the cage and, therefore, that may have resulted in like I say occipital neuralgia or something along those lines but the fact is that was never really much of a major complaint later in the times that I saw him as opposed to when he first presented.



I think in the first presentation in April and maybe even through May or later up until maybe six months after that may have been directly something related to the accident but then after that first six months it didn't seem to be as much of a problem, those occipital pains that he first mentioned on that accident date.
So directly answering your question in my opinion I don't believe that the facet hypertrophy is the result of the accident itself and I don't think that the pain that he was having in his left shoulder and his neck was a direct result of the accident. I think that it may have exacerbated that problem but it certainly didn't cause it and that's my opinion.
Q. Okay. Let me take a look here.
MR. PALMERO: Mind if I ask you a quick question while you are reviewing?
MR. ROGERS: No, go ahead.
CROSS-EXAMINATION
BY MR. PALMERO:
Q. If he had this condition prior to the accident, would you expect him to have pain prior to the accident in his neck?
A. He may have been experiencing pain in



his left shoulder and his neck even before this accident but it may have never really been brought to his attention to complain about it until something that precipitated this particular problem came about as in there can be some issues here that he's going to gain something if he mentions something with his neck and his arm because of the accident than if he didn't bring it up at all. I do think there's some secondary gain issue here.
Q. Right, but people get injured all the time and just because they seek recovery doesn't mean they are being dishonest about stuff even if they are going to gain or not gain. Wouldn't you agree even a substantial amount of money isn't worth having a significant pain or needing a surgery or anything like that?
MR. ROGERS: Just one moment. Objection, compound but go ahead and answer.
THE WITNESS: You are right that somebody could not have a complaint and just say it's because I want to complain or there's some other kind of event to initiate the complaint like an accident but I think that pain is -- is a very complicated thing and there's more issues

than the physical things to explain it than the other issues as in psychological issues or these legal issues and I think those are equally as important if not more important than the physical things.

So when you say, okay, is this guy complaining because he had the accident or is he complaining because he's got some kind of psychological problem in him that makes him complain and my answer is it's both, it's because you have the psychological drive to say there's something to be gained like this accident and there may be some physical thing such as this, the facet hypertrophy that is causing the problem.

But again when it comes down to what is my opinion, my opinion is he didn't have this facet hypertrophy as a result of this particular accident that he was involved in in April of 2005 and I don't think that the pain problem was something that he would have been bringing up had he not had this accident, okay, but I think it's not necessarily a direct result of the accident is what I'm saying.

Q. Now, today you've only reviewed the



records of Southwest Medical, is that correct?

A. And that is limited, yeah, by what happened right around April 15th, yes, Southwest Medical.

MR. ROGERS: Let me just interject really quickly that he's reviewed all of exhibit --

MR. PALMERO: Are we attaching it as an exhibit?

MR. ROGERS: No, it's Exhibit 4 to the plaintiff's ECC production.

MR. PALMERO: But he hasn't looked at everything you've given him.

MR. ROGERS: Just Exhibit 4 I think.

THE WITNESS: Right. I don't know if just Exhibit 4.

MR. ROGERS: So whatever radiology reports and things are in there, too?

THE WITNESS: Right.

Q. (BY MR. PALMERO) And you indicated you personally didn't take a history about this car accident --

A. Correct.

Q. -- of my client, correct?

A. Yes.



Q. And you also indicated you didn't do a full physical examination of my client, correct?

A. Yes.

MR. PALMERO: Okay.

MR. ROGERS: Yes, I don't have anymore questions. So let's go off. That's it.

THE COURT REPORTER: Do you want a copy?

MR. PALMERO: Yes, of course.

(Thereupon the taking of the deposition was concluded at 6:32 o'clock p.m.)

* * * *



CERTIFICATE OF DEPONENT

SIGNATURE WAIVED

CERTIFICATE OF REPORTER

STATE OF NEVADA )
SS:
COUNTY OF CLARK )

I, Katherine M. Silva, a certified court reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of the witness, Adam A. Arita, M.D., commencing on Wednesday, November 5, 2008, at 4:28 o'clock p.m.

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

I further certify that I am not a relative or employee of an attorney or counsel of any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada; this 18th day of November, 2008.

_____
Katherine M. Silva, CCR #203





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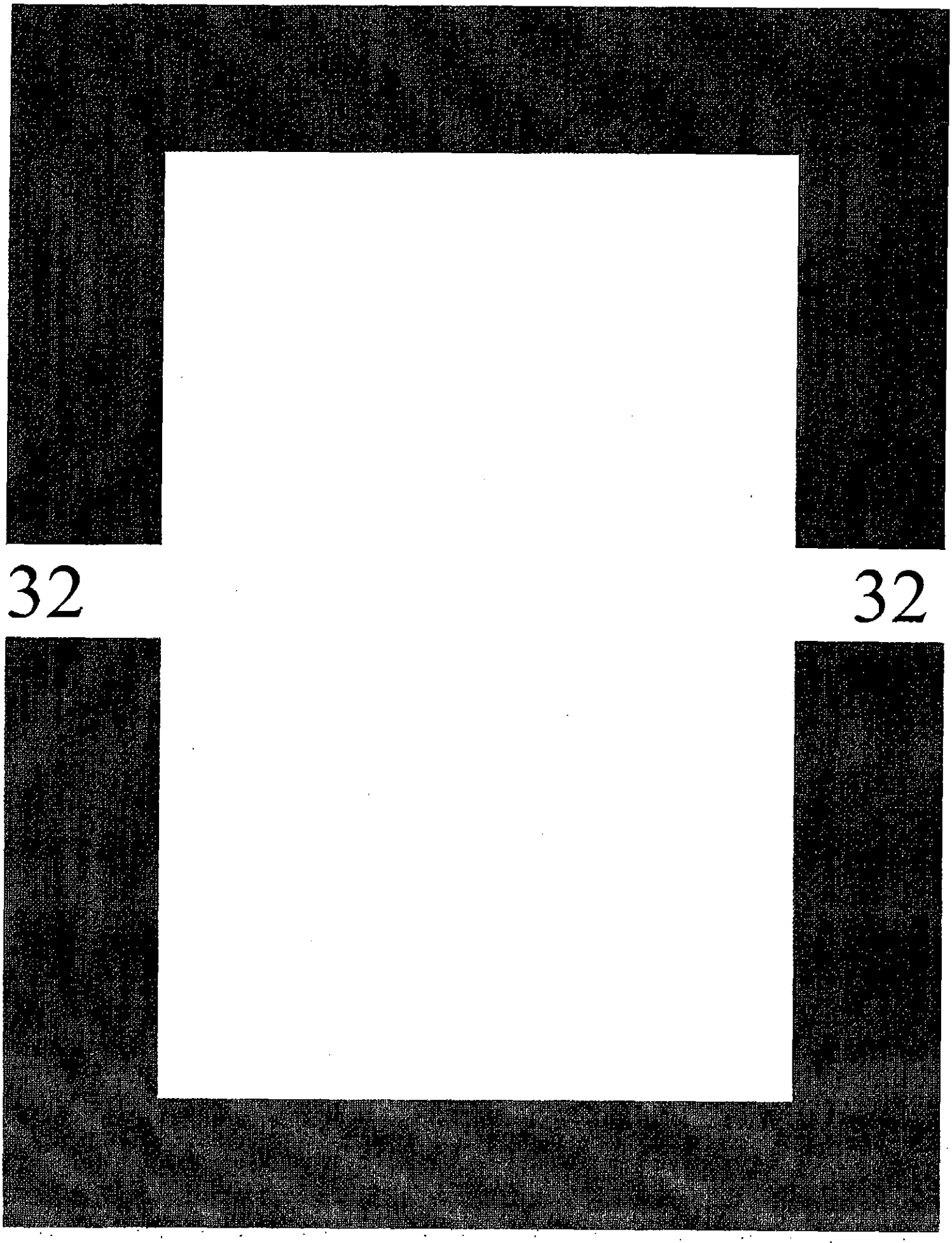
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DEPARTMENT X
NOTICE OF HEARING
DATE 2/22 TIME 8:30 am
APPROVED BY jav

MAINOR EGLET

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**ROBERT T. EGLET, ESQ.**
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*Attorneys for Plaintiffs*

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

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455
DEPT. NO.: X

**PLAINTIFF'S MOTION TO EXCLUDE SUB ROSA VIDEO**

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MEXC
Motion to Exclude
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firm of MAINOR EGLET, and hereby file this Motion in Limine to Preclude Defendant from Raising a "Minor" or "Low Impact" Defense.

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 11 day of February, 2011.

**MAINOR EGLET**

DAVID T. WALL, ESQ.

**ORDER SHORTENING TIME**

It appearing to the satisfaction of the Court, and good cause appearing therefore, IT IS HEREBY ORDERED that the time for hearing on **MOTION TO EXCLUDE SUB ROSA VIDEO** for hearing on the 22 day of February, 2011, at the hour of 9:30 a.m., in Department X, in the above-entitled Court, or as soon thereafter as counsel can be heard.

DATED this 14 day of February, 2011.

DISTRICT COURT JUDGE

Respectfully submitted by:

DAVID T. WALL, ESQ.



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**AFFIDAVIT OF DAVID T. WALL, ESQ. IN SUPPORT OF PLAINTIFFS' MOTION ON AN ORDER SHORTENING TIME**

STATE OF NEVADA )
) ss.:
COUNTY OF CLARK )

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

1. Affiant is an attorney licensed to practice law in the State of Nevada and a partner with the law firm of **MAINOR EGLET**, counsel for Plaintiffs in this matter;

2. Trial of this matter is currently set to go forward on March 14, 2011;

3. That because the trial date is quickly approaching and because the instant motion concerns matters that are central to trial, 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.

FURTHER, AFFIANT SAYETH NAUGHT.

DAVID T. WALL, ESQ.

SUBSCRIBED AND SWORN to before me

This 11 day of February, 2011.

NOTARY PUBLIC

Ashley M. Ganier
Notary Public, State of Nevada
My Commission Expires: April 7, 2014
Certificate No: 10-1950-1

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**FACTUAL BACKGROUND**

On or about April 15, 2005, Plaintiff, WILLIAM SIMAO, was driving his vehicle on southbound Interstate 15 in the #1 travel lane near the Cheyenne interchange in Las Vegas,



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Nevada. William had slowed his vehicle to a complete stop for congested traffic when Defendant, JENNY RISH, failed to decrease her speed and collided with the rear end of William's vehicle. As a result of the crash, William suffered severe and debilitating injuries.

During discovery Defendants produced video, secretly taken of William performing activities of daily living. William never testified that he was absolutely prohibited from performing the functions shown in the video. All activities in the video are consistent with William's injuries and within the prophylactic restrictions set forth by his doctors. As such, use of the video would be improper as it does not "impeach" William and should not be used.

**II.**

**RELIEF REQUESTED**

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

**III.**

**ARGUMENT**

**The use of the Sub Rosa Video and subsequent report is an improper method of impeachment**. Impeachment evidence is "that which is offered to 'discredit a witness ... to reduce the effectiveness of [his] testimony by bringing forth evidence which explains why the jury should not put faith in [the witness's] testimony.'" *Chiasson v. Zapata Golf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993).



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Defendants hired an investigator to conduct surveillance of Jon beginning on June 4, 2008 and ending on July 18, 2008. A review of the surveillance footage presents William conducting activities of daily living; activities in which he has never represented that he absolutely could not do. In fact, at his deposition, Defense specifically asked, "So are there any activities that you used to do that you cannot do at all," to which William responded, "No." *See* William's Deposition Transcript at **Exhibit "1,"** p. 92, ll:20-22. Furthermore, William's treating physicians have not restricted him from continuing his employment and routine activities within his daily life. **The surveillance video is devoid of any footage showing that William was not telling the truth. Therefore, because the video does not in any way discredit William's testimony, it would be improper to use this video to impeach William.**

Although Defense has not produced an investigative report in addition to the surveillance videos, Plaintiffs also request that any existing, but undisclosed report(s) be excluded for the very same reasons; it is improper impeachment evidence. Not only would the production of an investigative report be untimely, but the investigative report would be offered to prove the truth of the matter asserted and, therefore, is hearsay not falling within any of the exceptions to the hearsay rule. NRS §51.035.

Therefore, Plaintiffs request that this Court issue an order granting the instant Motion to exclude the sub rosa video and any existing, but undisclosed report(s) as such evidence is improper impeachment evidence and the report is hearsay not within any of the recognized hearsay exceptions to the hearsay rule.



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## IV.

## CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that this Motion to Exclude Defendant's Sub Rosa Video from trial be **GRANTED**.

RESPECTFULLY SUBMITTED this 11 day of February, 2011.

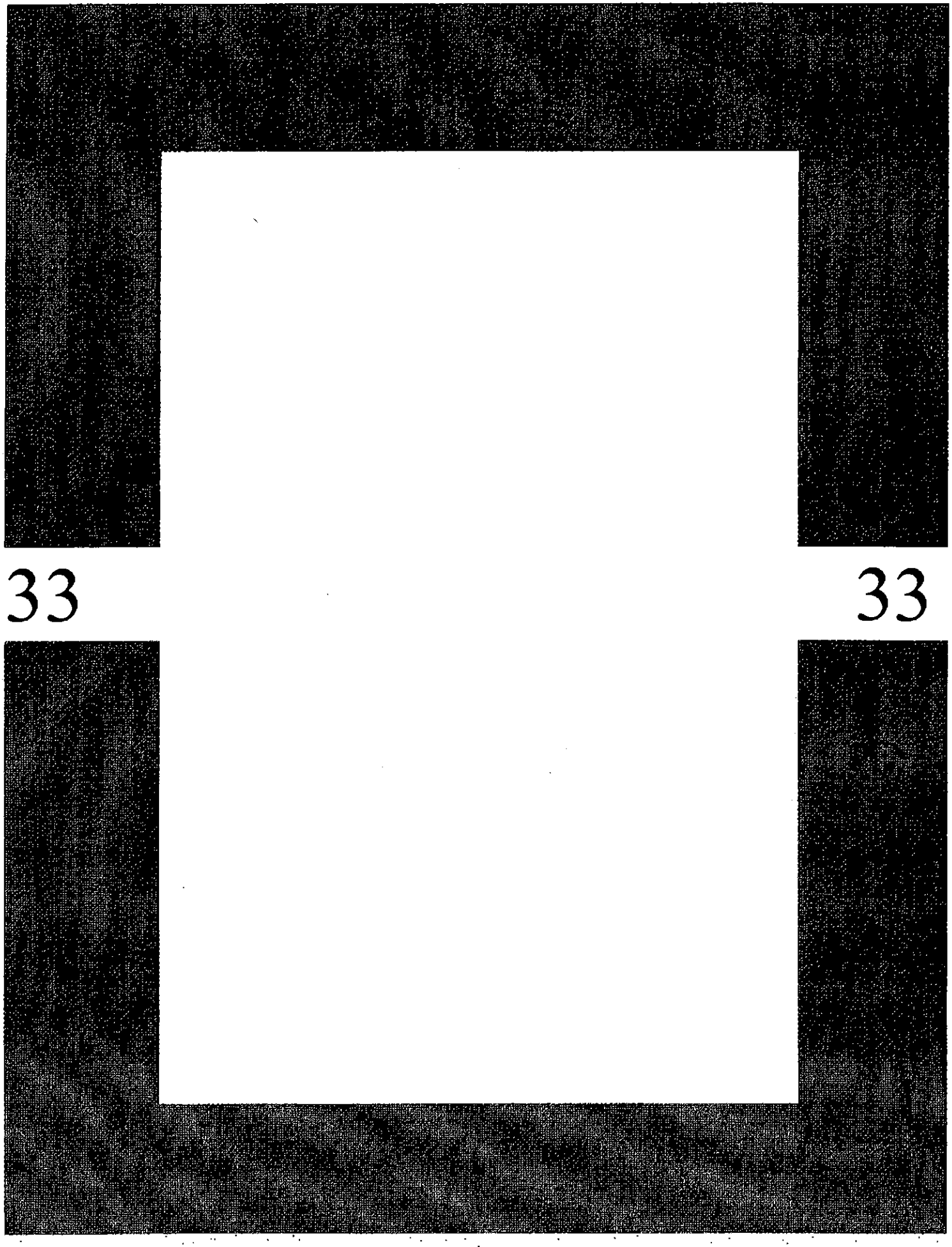
**MAINOR EGLET**

DAVID T. WALL, ESQ.

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHERYL SIMAO,
WILLIAM SIMAO,

Plaintiffs,

v.

LINDA RISH,
JAMES RISH,
JENNY RISH,

Defendants.

CASE NO. A-539455

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, FEBRARY 15, 2011

**REPORTER'S TRANSCRIPT**
**MOTIONS HEARING**

APPEARANCES:

For the Plaintiffs: DAVID T. WALL, ESQ.
Mainor Eglet, LLP

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

BRYAN W. LEWIS, ESQ.
Lewis and Associates, LLC

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TUESDAY, FEBRUARY 15, 2011 AT 9:03 A.M.

MR. WALL: Hi, would you like to take them section by section?

THE COURT: Sure. It's easier --

MR. WALL: All right.

THE COURT: -- for the clerk, as well.

MR. WALL: Yeah, I think so. Thank you.

The first section is prior and subsequent unrelated accidents, injuries, and medical conditions. I didn't get a sense from the opposition that as a general course, unrelated accidents, injuries, or conditions would be admissible. The contention that we raised is that there was two things specifically: One a 2003 motorcycle accident; and, two, the plaintiff's high blood pressure and high cholesterol.

I'm not aware of a record, anywhere, from any provider, or from defendant's experts that said that the high blood pressure or high cholesterol contributed to or was related to any of the injuries we've claimed here. And I didn't see a reference to any in the opposition.

With respect to the 2003 motorcycle accident, the plaintiff, in his deposition testified that he basically had to lay it down, I think against a curb, as he was riding a motorcycle. It's two years before this took place. He received some superficial injuries to his right elbow. There's no right elbow claim in this case. The only reference



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that I've seen to it really is the deposition of Dr. Fish (phonetic throughout) the defendant's pain management medical expert. He made a comment in his deposition last Thursday that the plaintiff told him that the migraines that he had, predating our accident, became somewhat worse after the 2003 motorcycle accident. We're not disputing the fact that he had migraines at whatever level they were at the time of this accident, but the fact that they were -- whatever you want to call it -- at a level 5 and went to a level 6, yeah, it doesn't matter. We're not disputing the fact that there were migraines the predated this accident. So beyond that, I'm not aware of any record or any witness who somehow relates the 2003 motorcycle accident to the injuries claimed in this case.

So we'd ask for an order precluding those, as well as the general order precluding unrelated conditions, injuries, or treatment.

THE COURT: Mr. Rogers.

MR. ROGERS: Yes. Factually, what's going on in the case is, there's a 2005 car accident and the plaintiff claims that the accident aggravated his preexisting migraines, which in turn, masked a new injury of cervical problems for which he later had surgery. And nobody contends that high blood pressure contributed to that condition.

Where the motorcycle accident seems to have come into play is this aggravation of migraine issue, because the

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plaintiff, it seems, is now going to use this as the reason for which there was a delayed onset in neck pain. What happens is, right after the accident, the plaintiff goes in to a medical center and the day of the incident he complains of neck pain, but then he doesn't complain of it again for six months, a long time passes. Naturally, we're asking how could that be if it's a traumatic injury. And his response, now, is, well, it's migraines.

And that makes the motorcycle incident relevant because, Dr. Fish, at his deposition testified that this car accident did not likely aggravate migraines. It didn't have anything to do with it. And if the plaintiff's doctors are going to get on the stand and testify that in some fashion, this car accident aggravated migraines, well, then the question is how. What kind of migraine is it; where does it come from; what's the generator; and if this accident could do it, did the motorcycle accident do it; and if the motorcycle accident did it, what's the difference between the two? We need to, now, explore this masking claim that's being made.

So the migraine claim and the motorcycle accident have become relevant.

THE COURT: Let me ask you a question.

MR. ROGERS: Yes.

THE COURT: Does the defense have a witness who is going to link the issue that you have described?

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MR. ROGERS: Well, actually, this is what just surfaced on Thursday in this deposition that Dave was explaining, Dr. Fish's deposition. The questioning from plaintiff's counsel is what suggested that it would be migraines as a masking phenomenon, that it explains the six month delay in onset. That's where it comes from. In other words, it seems that the plaintiff's own doctors are going to be using it.

THE COURT: Is that right, Mr. Wall?

MR. WALL: No, that's not, Judge. And this whole claim of masking -- here's what takes place: He has migraines, admittedly, before the April 2005 accident that we're here for. He's had them. He's had them, in some of the records they say, they go back ten years. Whether they're a little worse after the motorcycle accident or not, he has them and he seeks treatment for them before our accident. I have no problem with that. He then goes to the hospital the date of the -- maybe urgent care, the day of the accident; complains of head pain, neck pain, and left shoulder pain. They treat him maybe four or five different times, over the next two months or so, focusing on the head pain, which is the worst. They give us that period of time, all of the defense experts, that two month period. Now, they stop it after that, but they do give us that. They did a scan of his head looking for intracranial lesions and things like that, and finally told him, everything looks fine. You're good to go, come back and

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talk to us in six months.

The plaintiff's testimony will be, I continued to have head pain and neck pain during that period of time. I came back in four months, and not six, complaining of this neck pain, and here I am, and he's had mountains of treatment since then.

There is no record that Dr. Fish looked at, any medical record, after this motorcycle accident to say, hum, I can relate some of his symptoms there to this. Nothing. He has reviewed nothing in conjunction with that motorcycle accident, except that during the IME itself, he talked to plaintiff who said, apparently, I had this motorcycle accident in 2003. My migraines may have gotten worse. We're not disputing that he had migraines, but the accident itself it not a cause. There's no alternate theory that the defense is posing that's related to those -- to that motorcycle accident that has any foundation, and more staccato, or any reasonable degree of medical probability.

So I don't see why the accident would come in. Migraines, absolutely; preexisting, no question. The accident itself, the high blood pressure, I don't see what the relevance would be. They're not related.

And it's not going to be our position that he suffered from migraines in lieu of the neck complaints, that it was migraines and not a serious cervical injury. That is



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Dr. Fish's perspective, but I'll submit it on that.

THE COURT: The motion is granted, although if plaintiff's expert witness testified as Mr. Rogers has indicated, then I think that that's probably fair game for purposes of cross-examination.

MR. WALL: He was referring to his expert. That's the deposition we were talking about.

THE COURT: Well, I thought he said it was the plaintiff's expert, but it was his expert?

MR. WALL: No, it was my questions, but it was their expert.

MR. ROGERS: I may have misspoke, Your Honor, and I can clarify it, I think, now. The defense has never contended that the motorcycle accident caused a cervical injury. The defense is that, there is no cervical injury and that the pain is actually a referral pain from the migraines. That's where the migraines become so central to everything. And we do see, from the medical records, an increased incidents of treatment for migraines following the motorcycle accident, and that's really what makes it relevant, is now we're wondering, okay, what's causing these migraines; how did the motorcycle accident aggravate them; and now you're saying that this subject car accident aggravated them and that's the reason you didn't feel your neck pain for so long.

So this isn't about the defense saying, hey, didn't



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that motorcycle accident cause your neck problems. It's not like that. The defense doesn't have any intention of trying to mislead the jury in that fashion. It's really the migraines we're focusing on.

THE COURT: And it looks like the migraines is a fair issue for you to explore during the course of trial, and the jury can sort it all out, and come to their own conclusions with respect their evaluation of the respective expert witnesses.

MR. ROGERS: Okay.

THE COURT: All right. Next motion.

MR. WALL: The second part of that one was, issues a malingering magnifying symptoms are secondary gain. To my knowledge, there isn't any witness who says that there's an issue of malingering, that there's an intentional action of -- by Mr. Simao. The -- really, symptom magnification hadn't -- didn't come up in either of the IMEs. Now, understand that one of the expert doctors is being deposed in about four hours, but from his three reports that I've seen so far, there's nothing about symptom magnification.

The issue, then, is this issue of secondary gain. And what's brought up in the opposition is the deposition of a Dr. Adam Arita who is a treating physician. He was a pain management doctor who treated Mr. Simao from the fall of 2006 to about the summer of 2007; did some of the injection

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therapy, not only to try to manage the pain, but also to determine what the pain generator was as a diagnostic tool going forward. This issue of secondary gain, and I know the Court is familiar with it, you know, the inference is, when you bring that up that somehow Mr. Simao is faking it; that this is a product of the litigation that has him making these complaints; that he went through dozens, and dozens, maybe up to a hundred medical appointments, I would say at least a dozen injection procedures, and two-legged fusion, apparently, as a result of trying to enhance his ability obtain money at litigation. I know the Court is aware how highly prejudicial that type of evidence is.

Dr. Arita made that statement in his deposition -- and I don't remember entirely, but I think his deposition was in the beginning of 2008. Yeah, November of 2008. He treated the plaintiff from, let's say, mid-'06 to mid-'07. The surgery isn't until 2009. In between the time that Dr. Arita treated him and the surgery, there's multiple doctors doing multiple things trying to identify pain generators. There is sympathetic root blocks. There's probably facet blocks. There's a discogram procedure, which the surgeon ultimately rely upon, among the other things, to make a decision along with Mr. Simao to undergo surgery in March of 2009.

Now, Dr. Arita, in his deposition, before any of that has happened, says he didn't think surgery was indicated



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when he treated Mr. Simao. And then he launches into this, what I would call a highly speculative stream of consciousness on secondary gain. And after it was raised in the opposition, we tried to quote as completely as we could in the reply, beginning on page 4 of our reply, and what he says is, I don't believe that the facet hypertrophy is the result of the accident itself. And I don't think that the pain that he was having in his left shoulder and his neck was a direct result of the accident. I think it may have exacerbated that problem, but it didn't cause it. That's my opinion.

You know, he can have that opinion if he wants, that's not -- it doesn't matter, because even if it's a preexisting condition that's exacerbated it still obviously comes before the jury. Then he said -- oh, on to page 5, he may have been experiencing pain in his left shoulder and in his neck, even before the accident. Now, there isn't one record anywhere that suggests that there was left shoulder or neck pain prior to the accident.

He goes on to say, it may have never really been brought to his attention to complain about it until something that precipitated this particular problem came about. As in, there can be some issues here that he's going to gain something if he mentions, something with his neck and his arm, because of the accident, than if he didn't bring it up at all. I do think there's some secondary gain issue here.

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He goes on to say, after the next question, you are right that somebody could not have a complaint and just say it's because I want to complain or there's some other kind of event to initiate the complaint like an accident. But I think that pain is, is a very complicated thing and there's more issues than the physical things to explain, than the other issues as in psychological issues or these legal issues, and I think those are equally as important, if not, more important than the physical things. Appears to be talking in great generalities at that point.

He goes on to say, so when you say, okay, is this guy complaining because he had the accident or is he complaining because he's got some kind of psychological problem in him that makes him complain. And my answer is, it's both; it's because you have the psychological drive to say there's something to be gained like this accident and there may be some physical thing, such as this, the facet hypertrophy that is causing the problem. Still, to me, appears to be very general, not specific.

And then he says, but again, when it comes down to what my -- what is my opinion, my opinion is, he didn't have this facet hypertrophy as a result of this particular accident that he was involved in, in April of 2005. And I don't think that the pain problem was something that he would have been bringing up had he not had this accident, okay. But I think



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it's not necessarily a direct result of the accident, is what I'm saying.

So if there's a problem with his cervical spine, Dr. Arita says, it may have been preexisting, then the issue is whether it's symptomatic or not symptomatic, and whether the accident, the trauma of the accident, brought it on. But for him to just sort of take a shot in the dark and say, I think that it could -- you know, you never know, it could be psychological, it could be pain, maybe he would have brought it up, or wouldn't have brought it up if it hadn't been for the accident; because of the prejudicial affect of this kind of testimony and the fact that it's really within the domain of a psychological expert, which the defense does not have, I would ask the Court, if nothing else, to balance the probative value of that -- those generalities against the prejudicial affect it would have to have Dr. Arita come into court four years after he treated my client to suddenly say, yeah, I guess I said it was, you know, potentially secondary gain, so it must be. All right. He -- it is complete speculation, what he talks about. It's based on zero documentary evidence. He doesn't explain, in any way, what led him to some finding that there was a psychological problem leading to secondary gain. It's a matter for expert witness testimony. I don't think the defense experts even really say that, other than to say Dr. Arita noted secondary gain, at least that's



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essentially what Dr. Fish said. There isn't a shred of evidence to support it. It's more prejudicial than probative and I -- well, I'd submit it on that at this point.

THE COURT: Okay. Mr. Rogers.

MR. ROGERS: Thank you. The plaintiff argues that only a mental health professional can diagnose secondary gain, but they cite no authority for such a proposition. You've presided over plenty of these cases, and you've observed how physical medicine specialists, spine surgeons, pain management, and so forth will do all sorts of tests to fair out secondary gain: They will take MRIs and do other diagnostic studies; they'll compare it to the clinical presentation; then they'll do injection therapy and they're trying to see does this symptom match the physiology, what's going on in the body. If it doesn't, red flags go up. This is what plaintiff is calling speculation. It's everything, but. This is what these doctors do every day.

You've heard of some specific tests that they administer to determine whether there might be potential secondary gain, such as Waddell's tests. What happened in Dr. Arita's deposition, which goes on for something like a hundred pages, is, he comes in and he says, these are all the injections I performed. He's a pain management guy. And he did the vast majority of the plaintiff's injections: Epidurals, selective nerve root blocks, risodomies, and so forth. And then as he

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examined the case more forensically at the deposition -- right on the eve of the surgery really, he'd -- the plaintiff had already been recommended for surgery, he just hadn't done it yet -- Dr. Arita is looking at everything and he says, there's a real problem here. None of this matches up. And when none of it matches up, there's a real potential, or in this case he said, there's a real issue of secondary gain. You know, counsel is talking about facet hypertrophy and all those things, Dr. Arita had examined all of those parts of the spine, and he said, after I examined them all, none of it matched up. And that's the concern here.

Of course, there's foundation for it. It's not speculative. If it were speculative, I'm sure the plaintiff could have found some expert to come in and say so, but no one has. Counsel can't just come in and argue that this doctor is basing his opinion on something that medicine doesn't recognize, bring in an expert to say that.

THE COURT: Well --

MR. ROGERS: But anyhow, in this case, the real problem is the inverse of the plaintiff's position, because, of course it hurts the plaintiff to have a treating medical provider say, listen, you've got some inconsistencies here.

The other medical providers who the plaintiff will call to the stand will all say, I didn't see any inconsistencies. No, I don't know anything about this car accident, but in my



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medical opinion, in my expert opinion, that car accident caused these problems. What's your foundation for that? It's the plaintiff's say so. In other words, the treating doctors could be vouching for the plaintiff.

So a ruling granting this motion would permit some doctors to comment on the plaintiff's credibility, and the ones who disagree with those, would be excluded. And that simply would be a misleading way to present this case completely and factually to the jury.

THE COURT: Mr. Rogers, is there anything specific that Dr. Arita points to when he uses the term secondary gain?

MR. ROGERS: If I could pull my brief, I remember quoting something to that effect, and it was, at least in the excerpt that I gave the Court. It was the inconsistencies between the complaints, and what was observed in his injections, where he said the problem is -- for example, he's complaining of a ridiculer symptom into his arm, but the only thing we see on the films, the MRIs, is an overgrowth, and arthritis at a joint that's affecting a nerve root that doesn't innervate that area. That's what they call a dermatome. So that nerve doesn't go there, and if that's the only problem that we see on the films, well, that doesn't explain this complaint of his. So I'm doing these other injections, now, to see, is there something we're not observing on the films, and they don't provide the relief that could be characterized as

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diagnostic.

In other words, everything we're doing on all these levels of the spine to try to figure out why he's complaining of what he's complaining of, don't bear out the complaints at all. So, yes, he goes on at length through his depo about how it is that there are these inconsistencies, and these inconsistencies, he says, are the basis for his conclusion that there are issues of potential secondary gain.

And don't be misled by the reply to the briefs. It cites an excerpt from the DSN, that has a very loaded definition of secondary gain. Secondary gain is something of a complexity far more than conscious misrepresentation. You've heard, I'm sure, and seen of instances where there are citations to publications in the medical field about real problems in worker's compensation settings, where the doctors are saying, we don't know what's going on. We don't know why there are these inconsistencies. We don't know why this patient is complaining of things that physical medicine can't help. We call that secondary gain, but we're not calling that patient a liar. None of these doctors have said that Mr. Simao is a liar. Some have simply said, it looks like there's issues of secondary gain; meaning, inconsistencies that medicine and these diagnostic studies won't explain.

THE COURT: Well, if your witness isn't calling him a liar, then what do you mean by secondary gain?



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MR. ROGERS: Well, that's the subtlety, that's the complexity that I was talking about with secondary gain. I'm sure any doctor who would get on the stand and explain the phenomenon would say that, in many instances, secondary gain is not a conscientious move, it's something that can happen to people who get involved in -- in many instances, in this worker's compensation claims and claims where there's a potential for gain. And they seem to, for reasons sometimes out of their own conscious control, begin to complain of things that simply have no foundation, have no basis at all. And performing invasive procedures on such patients is invariably a poor decision.

In this case, the evidence is going to show that an invasive procedure was performed, and it was a poor decision, it turned out badly. The problem never was what the plaintiff claimed it was and was his doctors ultimately decided to operate on. Well, the jury is naturally going to wonder why is that. If you went in and you did this treatment, why isn't the plaintiff better? This dovetails with issues of secondary gain. I will not call the plaintiff a liar. I understand my limitations, but the jury is entitled to be educated on this medically known phenomenon and how it impacts this case.

THE COURT: A couple of questions. Does Dr. Arita go into great detail about the complexity of this issue of secondary gain as you've described?



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MR. ROGERS: I wish I knew that off the top of my head. I --

THE COURT: In his deposition?

MR. ROGERS: I could look it over and, you know, supplement a briefing on it. But, yeah, as I understand it, he never once called the plaintiff a liar.

THE COURT: The second question: Was it a recent deposition of Dr. Arita or it's been some time ago?

MR. ROGERS: Yeah, his deposition was at the end of 2008, is -- as Dave pointed out. The arc of the treatment was that the plaintiff underwent a whole bunch of injections -- remember the accident is '05 -- and then he undergoes all these injections, and then he gets a surgical recommendation from Dr. McNulty. And he decides, you know, I -- for reasons of my own -- I don't mean to embarrass Dr. McNulty or anybody. He says, I'm not going to stay with this guy. I'm going to move to other doctors. And it was during that move, at the end of 2008, that we deposed Dr. Arita, and laid out the whole case in front of him, and said here are the films, here are the studied, here's everything, what's your opinion. And that was the last we heard from him.

THE COURT: Okay.

MR. WALL: Judge, just a couple things. This --

THE COURT: Mr. Wall.

MR. WALL: Basically, these doctors talk on sort of a



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continuum. At one end of the continuum, they have what they call a malingering, which is -- it's intentional. You know this. You know, you're intentionally faking this. And the middle is sort of symptom magnification. You're making your symptoms seem worse, it may not be entirely intentional. And then at the far end, they've got this secondary gain. This is the term itself. You're going to gain something. But they all say, it's not intentional. It's not even conscious. We all have issues of secondary gain. I mean, the classic, you know, comments from the doctors is, you know what, I get sick, I stay home, there's a secondary gain there because I'm going to get some attention from my wife, I hope.

THE COURT: Maybe, maybe not.

MR. WALL: On the record I'm going to say I absolutely would get some attention. I may get chicken soup. That's secondary gain. When every time you go to the doctor, you get medicine. That's secondary gain. And so there will all kind of often put people into that category, but connotation to the non-medical person or the people who don't deal with this every day in terms of litigation, is that the plaintiff is trying to gain something as a result of claiming that there's pain.

If Dr. Arita or anybody else wants to say, I don't see how this matches up medically, or we did this test and it should have shown this, but it showed this, or I don't think



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the MRIs show a problem. That's fine. But to take that extra step and say that it's a psychological, subconscious issue of trying to gain something, is what's so prejudicial to the jury.

I would love to accept Mr. Rogers' invitation to bring an expert in to say, there's no secondary gain here. It would probably have to be a psychiatrist. It would essentially be an expert who says my client is telling the truth, would be impermissible.

I would note that, that of all the motions on today, the one that we filed the non-opposition to is the defendant's motion to preclude witnesses from offering testimony as to the credibility or veracity of a witness, because he's right, and that's exactly what this type of testimony would do.

THE COURT: Well, I'm inclined to agree. I think the motion should be granted. That's not to say, however, that Dr. Arita cannot come in here and testify that he didn't think William needed any surgery or future medical care. I think he can point out any inconsistency thinks -- any inconsistencies he sees in his evaluation, but I don't think there's -- from what I've seen and what I've heard, I don't think there's any evidence to support Dr. Arita talking about secondary gain or talking about the Plaintiff a malingerer, so he should stay away from those terms.

MR. WALL: Thank you, Judge.



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MR. ROGERS: May I just follow up on -- the risk in this one obviously is that the next step is that the Plaintiff will ask the Defense medical experts, basically how else then do you explain these symptoms? And that is an invitation to this very discussion and it would force the question to remain unanswered when these doctors know very well how else someone could have symptoms that can't be explained by any physical means and why this surgery in the end did not work

In other words, this is a generic motion that sort of invites confusion because of the potential questions from Plaintiff's counsel. The reason I bring this up is I anticipate that may happen, not on purpose. I think Dave's an honorable guy, but something could, you know, just in the heat of trial, you could get lost in the thing and all of a sudden this door is going to be open because there is an explanation for why the symptoms are there, even though there's no physical basis for it.

THE COURT: Well, I think counsel can conduct proper and effective direct examination and cross-examination without violating the Court's order and that's why I specifically stated that this doctor should stay away from the term secondary gain or malingerer.

MR. ROGERS: Okay.

MR. WALL: Thank you, Judge. The next part of it is -- it's entitled treating physicians do not need to prepare



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expert witness reports. I don't know if we want to include in here, for now, the Defendant's motion in limine to limit testimony of treating doctors? Our opposition to that, we basically attached our brief for this section of our omnibus motion in limine, but essentially I don't think there's really a disagreement on the basics of the exception under 16.1(a)(2) whatever about treating doctors.

I guess the crux of the issue is that for -- that the -- according to the Defense, the treating doctors shouldn't be able to testify to the appropriateness of another doctor's care, although I guess they want Dr. Arita to be able to testify that the surgery was unnecessary, but certainly as it relates to my understanding of the way that we've handled this rule is to the -- as it relates to what was done that certainly proceeded that doctor, the surgeon for instance can testify to all the things that were done prior to the surgery, most of them went into his decision ultimately and his discussions with Mr. Simao to have the surgery. Certainly, Mr. Simao can testify that we went through all of these various things and this is what they told me it showed and I finally sat down with Dr. McNulty in 2009 and decided to have the surgery.

I don't know specifically what it is they're asking to keep out. There isn't a specific reference to anything that they're asking be kept out. They say there's not a

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disagreement on the actual rule, but then they say that the testimony of Plaintiff's treating doctors is just limited to their treatment and that's not the law. As we set forth certainly in the reply, the treating physicians under Elgess [phonetic] and under -- I think it's Harnishfager [phonetic], can testify to issues of causation, necessity of medical treatment, the things that basically preceded them.

Now, I wouldn't ask a doctor who saw him in 2005 to testify about the surgery in 2009, but the things that they did and the reasons they did them, Dr. McNulty and other -- Dr. Grover as well, the spine surgeons referred him out to these pain management doctors to do certain things, try to isolate, all of that. The spine surgeon can certainly testify to that and Elgess allows it. They don't have to prepare a report that says why those were necessary. They can certainly testify to all of that treatment that proceeded -- that went into their decision that they had available to them. I'd submit it on that.

THE COURT: You know, Mr. Wall, I was wondering the same thing as I was reading the pleadings, what it was that they were seeking to keep out, given the law in Nevada, and I didn't know if what they were trying to keep out was future care or medical treatment, as you have basically described. Mr. Rogers?

MR. ROGERS: Yes, it seems that the opposition to this



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motion and then the Defendant's motion in limine kind of overrun one another. And if we will limit the issue in this motion and opposition to what it is the treating providers can testify about, that's fine with me, and then we can get into futures later on the motion. I'll address it however you like, but what we're looking to exclude, in terms of what the treating providers can say with respect to what other doctors have done, Elgess, as Mr. Wall has cited, ruled that a treating provider is not allowed to render a medical opinion based on factors not learned in the course of his treatment.

And what is developing now with the newer rules of civil procedure is more of an equal or level playing field. For years, up until the amendments, the only reporting requirement was on the Defense medical experts or other specially retained experts. They had to produce reports. And there were instances where a treating physician, for example, would get on the stand and discuss things that were a surprise to the Defense because they'd say look, I deposed him and I've seen his records and he never discussed any of those issues and here he is surprising the Defense and this is prejudicial, this is hurting the Defendant's case.

Notice, in other words, just give us notice of what's going on. And so, in this case for example, who is the Plaintiff going to call to discuss all of this Dr. Arita treatment, for example, and how are we to be prepared to

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cross-examine this expert because we've deposed most, if not all, the treating providers and we don't know what their response is going to be on everything.

And then the rules were amended and now they read, under Rule 26[e], you have to describe what your witness is going to say. And then you have to amend it if he hasn't said what he's going to say. You have to supplement it, you have to supplement it timely, and the entire reason is to avoid and prohibit unfair surprise. So, in other words, if the Plaintiff wants to tell the Defense okay, these are the doctors we're going to bring in and these are the subjects they're going to testify about, just tell us and then we'll be ready. And if we need to conduct additional discovery, then we can ask you for that, but at least there won't be any unfair surprise. That's really what this is about.

There's no specific example of what it's about because we don't know yet who's going to be called to testify about what given the witness descriptions.

THE COURT: But didn't you just say you had an opportunity to depose the Plaintiff's expert -- or treating doctors and you did so?

MR. ROGERS: Yes.

THE COURT: Mr. Wall?

MR. WALL: Well, they basically testified about the treatment they rendered, the things they did, if they were



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referred by -- like the pain management guys, if a surgeon referred the Plaintiff to them, they explained that they were referred, that they were told, you know, to do this, to try to isolate this, they did these things, either as part of conservative care or as diagnostic tools and then back to the surgeon. The surgeon looks at it, maybe sends him out to somebody else, it's still not clear to me, blah, blah, blah. Does this nerve root block and such and such?

And they've deposed each of those treating doctors on what they did and then Dr. McNulty ultimately -- or actually Dr. Grover at one point recommended -- I don't know if he recommended, said that the Plaintiff was a candidate for surgery. Ultimately he ends up back with Dr. McNulty who has all of this information from other providers, does some more himself to try to isolate it before he goes through the surgery, and they deposed him on that. They've deposed him twice, once before the surgery, once after the surgery.

So they have all the information from each provider on what they did and they even have from Dr. McNulty how he relied on those previous things, the MRIs and there's four -- there's at least three MRIs before the surgery and how he relied on those and what he saw in those and what he didn't see, and if he saw something he referred him out for some more diagnostic injections and things. So they have all that.

So I don't know entirely what it is they're asking



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to keep out at this point. There is no report requirement. We've been supplementing with medical records as he continues to treat -- that's the subject of another motion, but we've provided them with everything that was done, they deposed all those doctors, so I don't -- there is no 26[e] reporting requirement for the treating doctors to seasonably supplement their report because there's no report requirement.

So -- and I will say that Elgess case is the one that says, since a treating physician's opinions on matters such as causation, future treatment, extent of disability and the like are part of the ordinary care of a patient, the treating physician may testify to such an opinion without being subject to the extensive reporting requirements under Rule 26, and that's what we've relied upon.

THE COURT: Any final thoughts, Mr. Rogers?

MR. ROGERS: Yes, thank you. Thank you. Actually, Mr. Wall points to the perfect example of what this problem is. It is -- Dr. McNulty we're prepared for because he incorporated everything into his opinions. So when we examined him, as we do with all treating medical providers, did you look at anything else, do you have any other opinions? Yes. Okay, well let's finish that up then and then ultimately no, okay we're done now with this deposition.

So while he took on a mantle of something a little different than the simple treating provider in that



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deposition, at least we have notice and we're prepared for it. The problem is whether some doctor who didn't disclose something in his deposition, let's say for example, Dr. Grover or Dr. Rosler, both from the same group who were also deposed in this case, that they didn't comment on any of these things when I asked them, do you have any other opinions? Did you look at anything else? And they said no.

Okay. Are they allowed then to come into trial with new opinions, new bases? That's what these rules say you can't do. This is -- I mean, 26[e] isn't limited to expert reports, it's all evidence. It's whatever witness is going to get on the stand and whatever they're going to say and whatever you've produced during the course of discovery, if there's something new you have to supplement it and you have to supplement it timely so that the Defense is prepared for it.

THE COURT: Mr. Wall?

MR. WALL: It's -- I guess I go back to the actual motion itself, which was strictly that the Court rule pursuant to Elgess and Harnishfager -- Piper versus Harnishfager, the treating physicians do not need to prepare expert report separate from and in addition to their medical records and dictated reports, which we've provided.

THE COURT: The motion as it was drafted, and as it was argued, is granted, but I will say that obviously Plaintiffs



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