LONG LINE OF PRECEDENT ESTABLISHING THAT ATTORNEY FEES AND COSTS CAN BE AWARDED FOR A DEFAULT JUDGMENT

- Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592; (Nev 2010)
- Foster v. Dingwall, 227 P.3d 1042; (Nev 2010)
- Durango Fire Prot., Inc. v. Troncoso, 120 Nev. 658; (Nev 2004)
- Tri-Pacific Commerce v. Boreta, 113 Nev. 203; (Nev 1997)
- Eversole v. Sunrise Villas, 112 Nev. 1255; (Nev 1996)
- Kahn v. Orme, 108 Nev. 510; (Nev 1992)
- Young v. Johnny Ribeiro Bldg., 106 Nev. 88; (Nev 1990)
- Yochum v. Davis, 98 Nev. 484; (Nev 1982)
- Harris v. Shell Dev. Corp., 95 Nev. 348; (Nev 1979)
- Bruno v. Schoch, 94 Nev. 712; (Nev 1978)
- Lentz v. Boles, 84 Nev. 197; (Nev 1968)
- Bromberg v. Anthis, 75 Nev. 120; (Nev 1959)

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ATTORNEY FEES

- Total damages = $3,394,427.96
- 40% Attorney fees based on contingency fee agreement
- Attorney fee = $1,357,771.18

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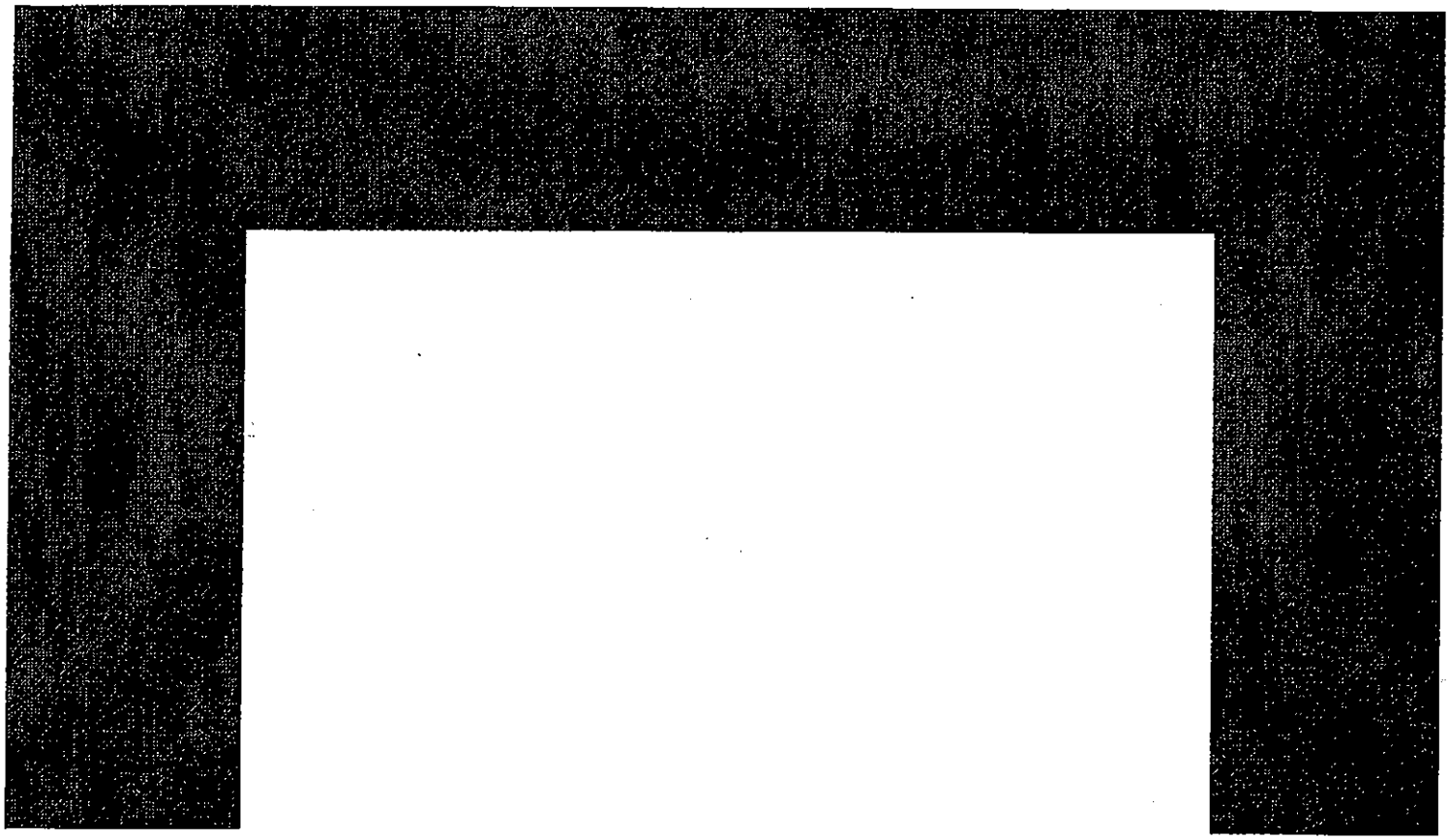

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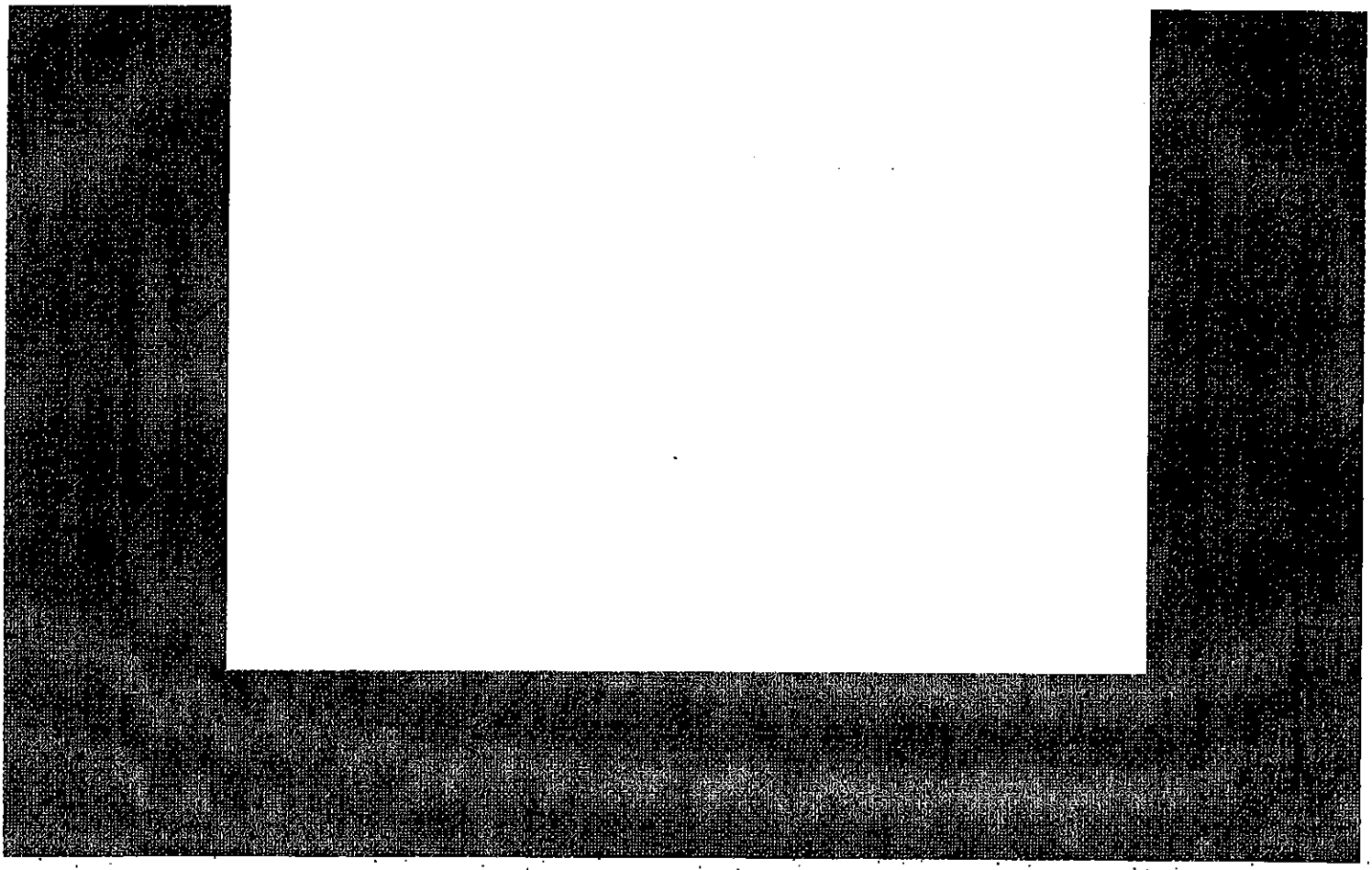

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

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

DEFENDANT'S AMENDED RESPONSE IN OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY FEES AND COSTS

During the prove up hearing, on April 1, 2011, plaintiffs requested an award of attorney fees, based only on the argument that there is a "long line of precedent establishing that attorney fees and cost can be awarded for a default judgment[.]" (*See* excerpt of plaintiff's PowerPoint presentation, attached as Exhibit "A.") Plaintiff cited 12 cases that purportedly supported that argument. (*Id.*) But, the proposition is false; a default judgment, of itself, does *not* justify an award of fees. All of the cases

cited by plaintiffs, moreover, deal with an award of fees based upon "statute, rule, or contract"—*not* on the mere fact that a default judgment was entered.

At this point, no basis exists for an award of attorney fees. While it is true that plaintiff served an offer of judgment in this case—so, too, did the defendant—the court has not yet entered any award in excess of any offer. Nor has plaintiff made even a *prima facie* showing pursuant to the factors in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), that an award of fees would be appropriate. Thus, on the current district court record, any award of fees based on Rule 68 would be premature and erroneous.

(Note: If plaintiffs disclosed any offer of judgment in their moving papers, before this court enters judgment, such premature disclosure is improper, barring a recovery. *See* NRS 48.105 (1)(b); *Morrison v. Beach City, LLC*, 116 Nev. 34, 991 P.2d 982 (2000).)

Costs

As far as defense counsel has been notified, plaintiffs have yet to submit a memorandum of costs. Thus, defendant is unable to assess the propriety of any potential award of costs. Defendant reserves the right to move to retax any inappropriate costs that may be requested.

I.

FEES MUST BE AUTHORIZED BY A STATUTE, RULE OR AGREEMENT

Under Nevada law, a district court cannot award attorney's fees unless authorized by statute, rule, or agreement between the parties. *See* NRS § 18.010; *see also Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d 1022, 1028 (2006); *State, Dep't of Human Resources v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993); *Woods v. Label Inv. Corp.*, 107 Nev. 419, 812 P.2d 1293 (1991). Within this stated criteria, the decision to award attorney's fees is left within the sound discretion of the district court. *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993). However, a district court may abuse its discretion when it disregards guiding legal

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principles. *Franklin v. Bartsas Realty Inc.*, 95 Nev. 559, 562-73, 598 P.2d 1147, 1149 (1979). District courts do not have the inherent power to impose attorney's fees without statutory authorization. *See Sun Realty v. Dist. Ct.*, 91 Nev. 774, 542 P.2d 1072 (1975).

In this case, Plaintiffs are not entitled to attorney's fees because none of the above avenues for obtaining fees apply. Plaintiffs' assertion that a long line of precedent establishes that attorney's fees and costs can be awarded for default judgments ignores the fact that the awards in the cases they cited are all based on either "statute, rule, or contract"—***not*** on the mere fact that a default judgment was entered. As discussed below, all of the cases cited by Plaintiffs in their presentation to this Court (*see* Exhibit "A") are distinguishable from the current matter. Plaintiffs are not entitled to an attorney's fee award merely based on entry of a default judgment. On the contrary, the Court can award fees only if specifically authorized by statute, rule or contract—none of which apply here.

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II.

THERE IS NO BASIS IN THIS CASE FOR AN AWARD OF FEES

A. Plaintiffs are Not Entitled to Fees Pursuant to an Agreement Between the Parties

Pursuant to NRS § 18.010(1) and (4), attorney's fees are recoverable only where an express or implied agreement between the parties provides for such recovery. *See also Singer v. Chase Manhattan Bank*, 111 Nev. 289, 890 P.2d 1305 (1995). This personal injury action does not involve any agreement between the parties entitling Plaintiffs to attorney's fees.

Ignoring this obvious distinction, Plaintiffs cited in their presentation to the Court *Tri-Pacific Commer. Brokerage, Inc. v. Boreta*, 113 Nev. 203, 931 P.2d 726 (1997). In *Boreta*, the district court awarded attorney's fees pursuant to a contractual provision in the promissory note sued upon. Ultimately, the court of appeals reversed the judgment, including the fee award, after finding the guaranty unenforceable

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pursuant to the statute of frauds. *Id.* at 206, 931 P.2d at 729. Contrary to Plaintiffs' assertion, *Boreta* does not stand for the proposition that a default judgment in and of itself can be a basis for an award of attorney's fees.

Similarly, the award of fees in *Foster v. Dingwall*, 126 Nev. ___, 227 P.3d 1042 (2010), was justified not by the default judgment, but by the underlying contract.

B. Plaintiffs Are Not Entitled to Fees Pursuant to a Statute or Rule

1. *NRS 18.010(2)(a) Does Not Apply*

NRS § 18.010(2)(a) permits a prevailing party who obtained a monetary judgment of less than $20,000 to seek attorney's fees. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 93-94, 127 P.3d 1057, 1065 (1996) (holding that attorney's fees cannot be awarded pursuant to NRS § 18.010(2)(a) where no monetary judgment was obtained). The monetary limit applies to the total judgment, not to separate claims. *See Peterson v. Freeman*, 86 Nev. 850, 855-56, 477 P.2d 876 (1970).

Plaintiffs do not fall within NRS § 18.010(2)(a), as they are seeking a default judgment well in excess of $20,000. As such, this provision is inapplicable and the cases cited by Plaintiffs awarding attorney's fees in the default judgment context pursuant to this statute are equally inapposite. *See Yochum v. Davis*, 98 Nev. 484, 633 P.2d 1215 (1982) (while district court awarded attorney's fees to plaintiff upon entry of default judgment, the award was authorized by NRS § 18.010(2)(a) because the plaintiff obtained less than $20,000); *Harris v. Shell Dev. Corp.*, 95 Nev. 348, 594 P.2d 731 (1979) (attorney's fees were awarded but they were authorized under NRS § 18.010(2)(a) because plaintiff's recovery was under $20,000); *Bruno v. Schroch*, 94 Nev. 712, 582 P.2d 796 (1978) (default judgment entered by the district court was reversed on appeal and was for a figure of less than $20,000); *Bromberg v. Anthis*, 75 Nev. 120, 335 P.2d 777 (1959) (awarding attorney's fees to plaintiff where judgment was for less than $20,000); *Lentz v. Boles*, 84 Nev. 197, 438 P.2d 254 (1968) (district court originally granted a default judgment and awarded attorney's fees where

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judgment was for less than $20,000 and thus valid pursuant to NRS § 18.010(2)(a)); *Durango Fire Protection v. Troncoso*, 120 Nev. 658, 98 P.3d 691 (2004) (judgment was for less than $20,000).

Again, contrary to Plaintiffs' assertion, these cases do not stand for the proposition that a default judgment in and of itself can be a basis for an award of attorney's fees.

2. *NRS § 18.010(2)(b) Would Not Justify an Award of Fees*

Under N.R.S. § 18.010(2)(b), a district court can award attorney's fees if a claim or defense was "brought without reasonable grounds to harass the prevailing party." *See Rodriguez v. Primadonna Co.*, 125 Nev. __, 216 P.3d 793, 800 (2009); *United Ins. Co. of Am. v. Chapman Indus.*, 120 Nev. 745, 748, 100 P.3d 664 (2004). Although a district court has discretion to award attorney fees under NRS § 18.010(2)(b), there must be evidence in the record supporting the district court's finding that the claim or defense was unreasonable or brought to harass. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995).

Even assuming the Court had a justifiable reason for its default order—which defendant contends it did not—the plain language of NRS § 18.010(2)(b) and Nevada case law interpreting it do not permit an award of attorney's fees based on an allegation or finding that a party acted maliciously or engaged in unacceptable tactics in the case. *See Frantz v. Johnson*, 116 Nev. 455, 472, 999 P.2d 351, 361-62 (2000) (award of fees under NRS § 18.010(2)(b) is not permitted "for acting maliciously or engaging in unacceptable discovery tactics"); *see also Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 851 P.2d 459 (1993); *Semenza*, 111 Nev. at 1096, 901 P.2d at 688. In other words, the fact that the Court entered default against Defendants based on its findings regarding tactics employed at trial does not authorize an award of fees under NRS § 18.010(2)(b).

Rather, NRS § 18.010(2)(b) allows an award of attorney's fees to the prevailing party only when a party has alleged a groundless claim or defense that is not

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supported by any credible evidence. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993) (emphasis added). Here, there are no bases to support a finding that the defense was frivolous or groundless. If there were, plaintiff would have succeeded on a motion for summary judgment. No award of fees can be made under NRS § 18.010(2)(b).

3. *Plaintiffs Cannot Recover Fees Pursuant to a Personal-Injury, Fee-Shifting Statute or any Other Fee-Shifting Statute*

There are no fee-shifting statutes in Nevada authorizing awards of attorney's fees in personal injury actions. Plaintiffs' citation to *Eversole v. Sunrise Villas Homeowners*, 112 Nev. 1255, 925 P.2d 505 (1996), *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992), *and Young v. Johnn Ribeiro Bldg.*, 106 Nev. 88, 787 P.2d 777 (1990), are all inapposite.

In *Eversole* the district court awarded attorney's fees pursuant to NRS § 116.4117, the Common-Interest Ownership Uniform Act. *Eversole*, 112 Nev. at 1258. Under that statute, the court was authorized to award the prevailing party attorney's fees in actions involving community associations. That statute is clearly not applicable to this personal injury action.

The court in *Kahn*, after entering default judgment, awarded the plaintiff his attorney's fees incurred in defending against a separate criminal complaint as a component of damages pursuant to his malicious prosecution claim. The court in *Kahn* did not award the plaintiff the attorney's fees he incurred in litigating the malicious prosecution action itself. As such, *Kahn* has no applicability to this case.

Lastly, Plaintiffs' reliance on *Young* for the proposition that attorney's fees are recoverable in default judgment cases is equally misplaced. In *Young* the only attorney's fees awarded were those incurred by the defendant in filing its discovery sanctions motion pursuant to NRCP 37(b)(2). Although, the court sanctioned the plaintiff for willfully fabricating evidence by dismissing the complaint with prejudice and adopting the final accounting as a form of default judgment, the court did not

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award the defendant all of its attorney's fees. Instead, as punishment for the discovery abuses the court awarded defendant its attorney's fees for filing the motion. As such, *Young* does not stand for the proposition that attorney's fees for an entire case are recoverable when a default judgment is obtained.

C. Plaintiffs Are Not Entitled to Fees Under Rule 68 or NRS 17.115

The Court lacks grounds to award fees under Rule 68 or NRS 17.115. While it is true that plaintiff served an offer of judgment in this case, the current record cannot support an award of fees. First, it would be premature, as the Court has not yet entered any award in excess of plaintiff's offer of judgment. Secondly, and more importantly, plaintiffs have not demonstrated even a *prima facie* justification for fees pursuant to the *Beattie v. Thomas* factors.

Furthermore, if fees are awarded, they are strictly limited to those fees actually incurred from the time of service of the offer of judgment forward. NRCP 68(f)(2); NRS § 17.115(4)(d)(3).

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1. *An Award Based on NRCP 68 and NRS § 17.115 Would Be Premature*

The Court has yet to enter a judgment on the default. For purposes of the statute and rule governing offers of judgment, permitting fee-shifting penalties to be assessed against an offeree who "rejects an offer and fails to obtain a more favorable judgment," the word "judgment" connotes a final judgment. *In re Estate and Living Trust of Miller*, 125 Nev. 42, 216 P.3d 239, 125 Nev. 42 (2009). In this matter, there has yet to be a "final judgment" entered by the court. Thus, an award of fees under NRCP 68 and NRS § 17.115 would be premature.

2. *Plaintiffs Have Not Made the Requisite Showing Under* Beattie v. Thomas

Plaintiffs would not be entitled to an award of fees even if this Court's judgment exceeds plaintiffs' offer of judgment. NRCP 68 and NRS 17.115 provide that when a party wins a more favorable judgment than offered, the offeror may recover fees incurred from the date of the offer. However, an award of fees is not

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automatic. It may follow only from a sound and thorough exercise of the Court's discretion. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). And, "the failure to exercise discretion when required is [itself] an abuse of discretion." Rex A. Jemison, *A Practical Guide to Judicial Discretion*, NEVADA CIVIL PRACTICE MANUAL § 29.05 (5th ed. 2010), *citing Massey v. Sunrise Hosp.*, 102 Nev. 367, 724 P.2d 208 (1986).

Before this Court could award fees based on an offer of judgment, full and transparent briefing would be required to enable this Court to fulfill its duty to "carefully weigh" at least the following factors:

(1) Whether the plaintiff's claim was brought in good faith:

(2) Whether the offer of judgment was reasonable and in good faith in both its timing and amount;

(3) Whether the decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and

(4) Whether the fees sought by the offeror are reasonable and justified in amount.

Yamaha Motor Co., U.S.A. v. Arnoult, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998) (*citing Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)); *see also Wynn v. Smith*, 117 Nev. 6, 13-14, 16 P.3d 424, 428-29 (2001). Plaintiff has made no showing to demonstrate that an award of fees is appropriate under Rule 68.

(If plaintiff endeavors to address these issues for the first time in the brief that will be filed simultaneously with this paper, defendant will have a right to respond. While plaintiffs may continue to insist that defendant has no right to file opposition papers based on this court's default order, this notion is not supported by law. Importantly, parties have an ongoing duty to alert the district court to errors they foresee as being possible grounds for reversal. *C.f., Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299-300, 757 P.2d 361, 362-63 (1988).)

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3. *A Contingency Fee is Not Appropriate in the Offer-of-Judgment Context*

Even if the Court were to find at some later time than an award of fees is appropriate under NRCP 68 and NRS 117.115, the award cannot be in the amount of their contingency fee.

Fees are awarded differently under Rule 68 than pursuant to a fee-shifting statute or contract provision. It is true that this Court has discretion in the manner of calculating fees pursuant to a fee-shifting statute. *See, e.g., Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005) (fees awarded under Chapter 40). However, under fee-shifting statutes, plaintiff's fees from the entire action are imposed. Rule 68 and NRS 17.115, on the other hand, authorize fees only for part of the litigation, after the offer of judgment is rejected. *See* NRCP 68(f)(2) (fees are limited to those fees actually incurred from the time of service of the offer of judgment forward); NRS § 17.115(4)(d)(3) (same); *see also Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 884, 822 P.2d 1100, 1107 (1992); *Panicaro v. Robertson*, 113 Nev. 667, 941 P.2d 485 (1997) (stating that an award of attorney's fees under NRS 17.115 is restricted to fees accrued after the offer of judgment). Thus, awarding a contingency fee in the offer-of-judgment context is inappropriate because it disregards the limited nature of the fees that are awardable. In the offer-of-judgment context, courts use the lodestar approach (multiplying the actual hours spent by a reasonable market rate) because it provides the court with the control necessary to enforce that temporal line.

CONCLUSION

Plaintiffs' contention that there is a long line of precedent establishing that attorney fees and costs can be awarded for a default judgment is misleading. Plaintiffs are not entitled to an award of attorney's fees merely because they obtained a default judgment. They are entitled to attorney's fees only if a "statute, rule, or contract"

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authorizes the award. In this matter, no such grounds exist authorizing an attorney's fee award. While an award of fees may eventually be authorized under NRCP 68 and NRS § 117.115, such an award would be premature at this time because no final judgment has been entered. In addition, any fee award under Rule 68 and NRS § 117.115 must be limited to those fees actually incurred from the time of service of the offer of judgment forward (here, February 9, 2009 forward). An award of plaintiffs' counsel's contingent fee is impermissible.

DATED this 15th day of April 2011.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I HEREBY CERTIFY that on the 22nd day of April, 2011, I served the foregoing DEFENDANT'S AMENDED RESPONSE IN OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY FEES by depositing a copy for mailing, first-class mail, postage prepaid, at Las Vegas, Nevada, to the following:

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s/ Mary Kay Carlton
An Employee of Lewis and Roca LLP

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EXHIBIT A

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EXHIBIT A

ATTORNEY FEES

- Whether to award attorney fees is left to the sound discretion of the court.
  - -Laforge v. State of Nev., 997 P.2d 130 (2000)
  - -Uniroyal Goodrich Tire Co. v. Mercer, 111 Nev. 318 (1995)
- Here, Plaintiff's contingency fee agreement with their counsel is 40% of all amounts recovered.
- Nevada recognizes the validity of contingency fee agreements.

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ATTORNEY FEES

- District courts, in the Eighth Judicial District have awarded attorney fees based upon contingency fee amount.
- The method upon which attorney fees are determined is left to the discretion of the court.
- In determining the amount of attorney fees, the court is not limited to one specific approach. -Shuette v. Beazer Homes Holding Corp., 121 Nev. 837 (Nev 2005)
- Long line of precedent establishing an award of attorney fees on a default judgment.

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LONG LINE OF PRECEDENT ESTABLISHING THAT ATTORNEY FEES AND COSTS CAN BE AWARDED FOR A DEFAULT JUDGMENT

- Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592; (Nev 2010)
- Foster v. Dingwall, 227 P.3d 1042; (Nev 2010)
- Durango Fire Prot., Inc. v. Troncoso, 120 Nev. 658; (Nev 2004)
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- Young v. Johnny Ribeiro Bldg., 106 Nev. 88; (Nev 1990)
- Yochum v. Davis, 98 Nev. 484; (Nev 1982)
- Harris v. Shell Dev. Corp., 95 Nev. 348; (Nev 1979)
- Bruno v. Schoch, 94 Nev. 712; (Nev 1978)
- Lentz v. Boles, 84 Nev. 197; (Nev 1968)
- Bromberg v. Anthis, 75 Nev. 120; (Nev 1959)

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ATTORNEY FEES

- Total damages = $3,394,427.96
- 40% Attorney fees based on contingency fee agreement
- Attorney fee = $1,357,771.18

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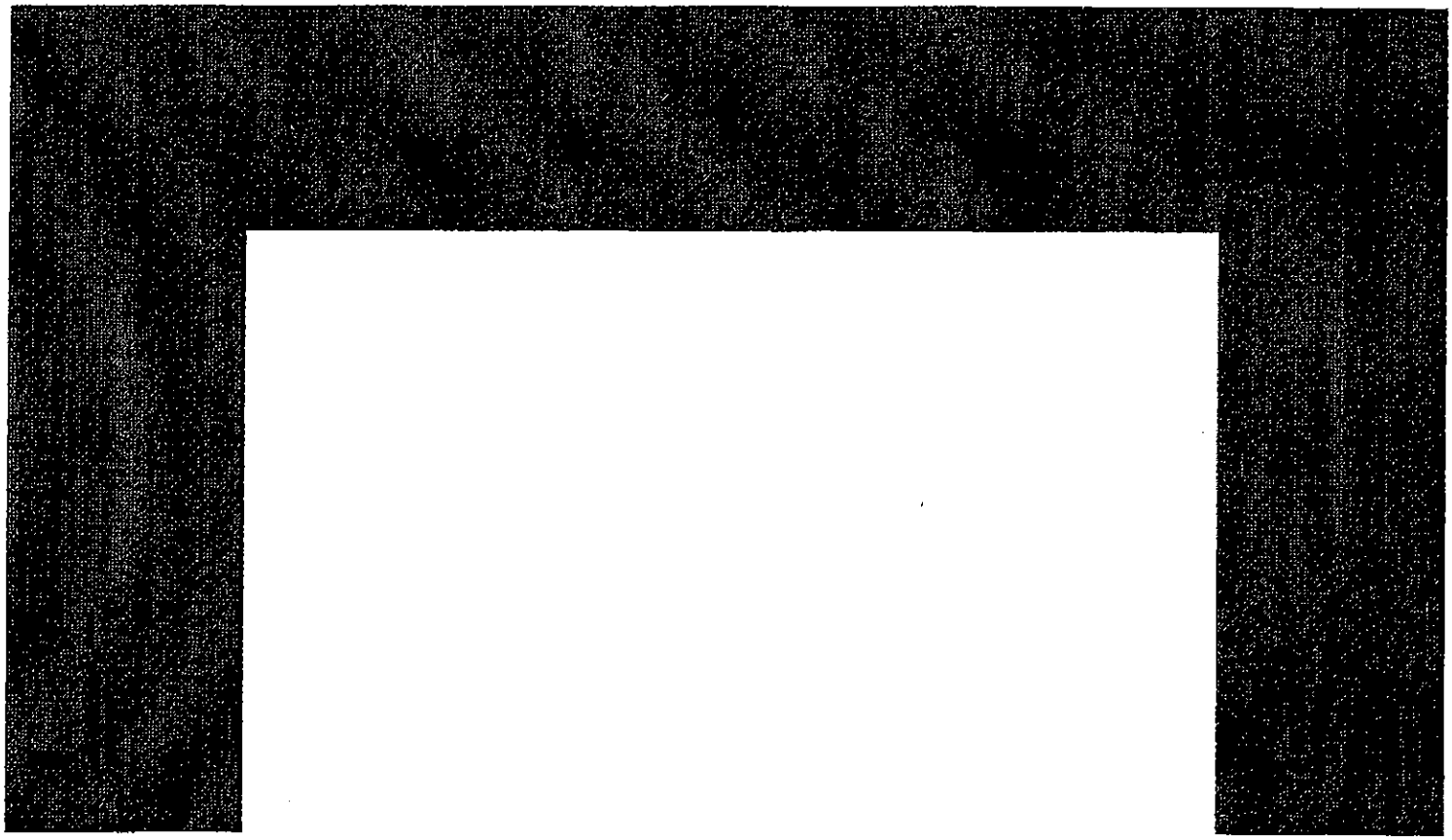

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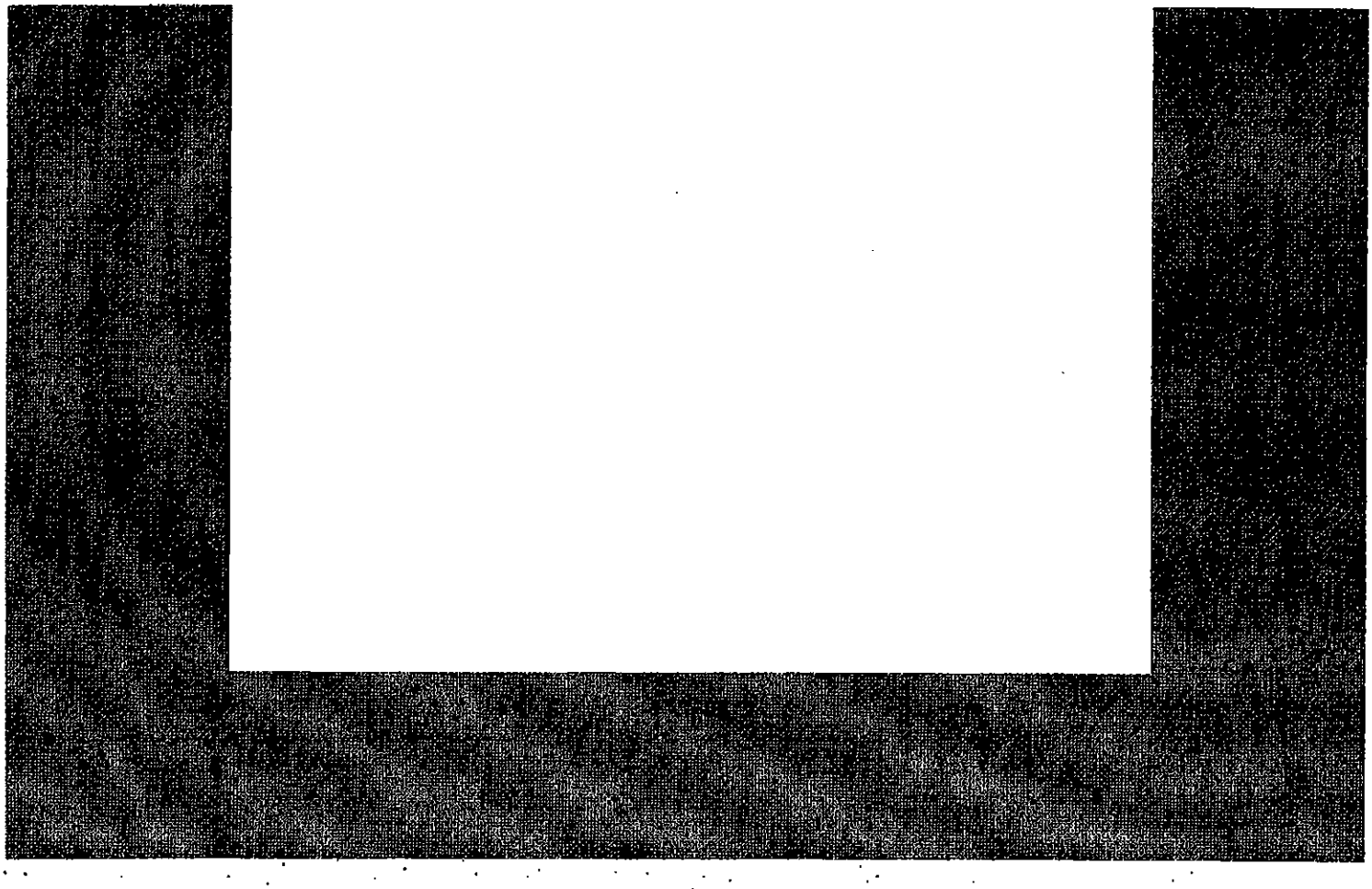

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, 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' BRIEF IN FAVOR OF AN AWARD OF ATTORNEY'S FEES FOLLOWING DEFAULT JUDGMENT**

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 submits their instant Brief in Favor of an Award of Attorney's Fees.

This Brief is made and based upon the pleadings and papers on file herein and the attached Points and Authorities.

DATED this 22 day of April, 2011.

MAINOR EGLET

DAVID T. WALL, ESQ.
Nevada Bar No. 2805
Attorney for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

For a more complete factual statement, Plaintiff refers this Court to the Order submitted by Plaintiffs and signed by your Honor on April 21, 2011 on Plaintiffs' oral motion to strike Defendant's Answer (*See* **Exhibit "1"**) and states briefly:

This case involves a motor vehicle accident occurring on April 15, 2005. The Plaintiff, WILLIAM SIMAO, was driving southbound on Interstate 15 when he was rear-ended by a vehicle driven by the Defendant, JENNY RISH. Defendant did not deny causing the accident. Plaintiff WILLIAM SIMAO was injured in the accident and brought the instant action, which included a claim for loss of consortium by WILLIAM SIMAO's wife, Plaintiff CHERYL SIMAO.

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This matter was presented for jury trial beginning on March 14, 2011, and the trial had nearly been completed before Plaintiffs were forced to move to strike Defendant's Answer after Defendant's counsel's repeated and willful violations of this Court's pre-trial orders. The Plaintiffs' oral motion to strike the Defendant's Answer was rooted primarily in the Defendant's repeated violations of the Court's Order granting the Plaintiffs' Motion in Limine to Preclude Defendant From Raising a Minor Impact Defense. However, Defendant violated other Orders of this Court during the trial, and the cumulative effect of such violations was material to the Court's analysis. These other violations included violations of this Court's pre-trial orders excluding prior and subsequent accidents and injuries and medical build-up/attorney driven litigation arguments. Due to all of these violations, and only after progressive sanctions had been issued against the Defendant to no avail, this Court struck Defendant's Answer, converting this litigation into a default judgment under NRCP 55. The case proceeded to a prove-up hearing on damages only, which took place on Friday, April 1, 2011.

At the prove-up hearing, in addition to monetary damages to compensate Plaintiffs for the harms and losses sustained by them as a result of Defendant's negligence, Plaintiffs also requested an award of attorney's fees and costs, which request ultimately necessitated the instant Brief due to Defendant's objection that such an award was improper. Based upon the following, however, it is clear that an award of attorney's fees and costs is justified and will not constitute an abuse of this Court's broad discretion and wide latitude to award such fees and costs.

II.

LEGAL AUTHORITY AND ARGUMENT

A. Attorney's Fees are Routinely Awarded Following a Default Judgment

As stated above, due to Defendant's Counsel's repetitive violations of this Court's pre-trial rulings, progressive sanctions were issued which eventually led to the striking of

Defendant's Answer, converting the subject litigation into a default judgment pursuant to NRCP 55 and requiring a prove-up hearing for damages only.

At the prove-up hearing, Plaintiffs' counsel requested monetary damages in the amount of $3,394,427.96, and also requested attorney's fees in the amount of $1,357,771.18, which represents forty percent (40%) of the damages award and also represents the percentage agreed to be paid by Plaintiffs for their counsel's services. (*See* PowerPoint Slide of Judgment Form at **Exhibit "2"**). In addition, Plaintiffs requested an award of costs, which will be supported by a separate and subsequent Motion.

Although Defendant's counsel objected to Plaintiffs' request for attorney's fees and costs claiming that NRCP 55(b) does not set forth that attorney's fees are recoverable after a default judgment, there is ample authority which unequivocally demonstrates that attorney's fees and costs are routinely awarded in default judgment proceedings. *See Bahena v. Goodyear Tire*, 235 P.3d 592, 597 (Nev. 2010)(noting precedent where Court upheld district court's order for attorney's fees and costs subsequent to dismissing a party's pleading with prejudice and adopting evidence as a form of default judgment); *Foster v. Dingwall*, 227 P.3d 1042, 1052-53 (Nev. 2010)(upholding district court's decision to strike pleadings and enter default judgment with attorney's fees and costs as a sanction for repetitive, abusive, and recalcitrant misconduct); *Durango Fire Prot., Inc. v. Troncoso*, 120 Nev. 658, 660-63 (Nev. 2004)(affirming district court's order to strike Answer and enter default judgment with an award of attorney's fees and costs); *Tri-Pacific Commerce v. Boreta*, 113 Nev. 203, 205-206 (Nev. 1997)(noting the district court's decision to enter default and award attorney's fees and costs; district court reversed on grounds unrelated to attorney's fees); *Eversole v. Sunrise Villas*, 112 Nev. 1255, 1258 (Nev. 1996)(noting the district court's decision to enter default and award fees and costs against certain defendants who failed to answer plaintiff's complaint; district court was reversed on grounds

unrelated to attorney's fees); *Kahn v. Orme*, 108 Nev. 510, 512 (Nev. 1992)(affirming district court's decision to enter default judgment and award of attorney's fees and costs); *Young v. Johnny Ribiero Bldg.*, 106 Nev. 88, 94-5 (Nev. 1990)(affirming district court's order striking the pleadings, entering default judgment, and awarding attorney's fees and costs, citing to NRCP 55(b); *Yochum v. Davis*, 98 Nev. 484, 486-8 (Nev. 1982)(default judgment entered against party who failed to answer with an award of attorney's fees and costs; district court reversed on grounds unrelated to attorney's fees as default should have been set aside for public policy considerations as service may have been insufficient); *Bruno v. Schoch*, 94 Nev. 712, 713-14 (Nev. 1978)(default judgment entered with an award of attorney's fees and costs; district court reversed on grounds unrelated to the award of attorney's fees as default should have been set aside); *Lentz v. Boles*, 84 Nev. 197, 198 (Nev. 1968)(noting district court's order entering default judgment and awarding attorney's fees and costs after a defendant failed to file an answer); and, *Bromberg v. Anthis*, 75 Nev. 120, 121 (noting district court's order entering default judgment and awarding attorney's fees and costs)(Nev. 1959).

Although the defense will likely argue that the cases cited above are factually distinct from those of the instant matter, the factual distinctions should bear no consequence to the relevancy of these cases as they are not being offered to show factual similarities but instead to demonstrate the unquestionably long-standing principle that a district judge has inherent authority to award attorney's fees as a result of a default judgment. In fact, Plaintiff's counsel has been unable to locate a single case where a district court's authority to award attorney's fees after a default judgment has even been questioned. This is not surprising considering the fact that district courts are given considerable discretion to award attorney's fees and costs and to decide the amount to be awarded and whether such amounts are reasonable. *Laforge v. State of Nevada*, 116 Nev. 415, 997 P.2d 130, 135-136 (2000); *Uniroyal Goodrich Tire Co. v. Mercer*,

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Mercer, 111 Nev. 318, 890 P.2d at 785 (1995). In fact, while not specifically prescribed by NRCP 55, Chapter 10 of the Nevada Civil Practice Manual, Defaults and Default Judgments, § 10.04[7] states:

> Where permitted by law, the court may award attorney's fees and tax costs in the default judgment. Because fees are discretionary with the court the default judgment form should contain a blank for the judge to fill in the appropriate amount of attorney's fees.[1]

Accordingly, it cannot be questioned that attorney's fees and costs can be, and routinely are, awarded in a default judgment. Due to the unexpected events that led to the striking of Defendant's answer and default judgment proceedings, this Court is well justified in awarding attorneys fees and costs as a result.

B. Defendant's Counsel's Improper Conduct at Trial Warrants an Award of Attorney's Fees

The Supreme Court of Nevada has held in clear and certain terms that courts have inherent equitable powers to dismiss actions or enter default judgment for abusive litigation practices. *See Bahena*, 235 P.3d at 598(citing to *Young*, 106 Nev. at 92). Importantly, these powers permit sanctions for litigation abuses not necessarily proscribed by statute. *Bahena* at 598; *Young* at 92.

As set forth in *Bahena*, an award of attorney's fees, in addition to default sanctions, is reviewed under an abuse of discretion standard. *Id.* at 599 (citing to *Foster*, 227 P.3d at 1052; *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417 (Nev. 2006)). The *Bahena* Court noted that the Supreme Court in *Foster* upheld an award of attorney's fees in addition to striking

[1] While the Civil Practice Manual also states that the amount of the fees should be presented by the court by affidavit detailing the fees charged, such an affidavit is unnecessary in this instance where the fees to be charged are set by contract pursuant to the agreement entered into by Plaintiffs and their counsel, which is 40% of the amounts recovered. (*See* Contingency Fee Agreement at **Exhibit "3"**).

the pleadings and entering default judgment, finding that this was not an abuse of discretion. *See Bahena* at 599.

Importantly in *Foster*, the district court ordered stricken a defendant's Answer and entered default after said defendant was found to have engaged in "repetitive, abusive, and recalcitrant" conduct during discovery. *Foster*, 227 P.3d. at 1045. The case thereafter proceeded to an NRCP 55(b)(2) prove-up hearing to determine the amount of damages which were to be awarded. *Id.* at 1047. Subsequent to the prove-up hearing, the district court entered judgment and awarded both compensatory and punitive damages, as well as an award for attorney's fees and costs. *Id.*

On appeal, defendants argued, among other things, that the district court's award of attorney's fees was improper pursuant to NRS 18.010(2)(a) because the plaintiff's recovered more than $20,000.00. *Id.* at 1052. The Supreme Court rejected this argument, acknowledging that the award of attorney's fees was proper due to the repetitive, abusive, and recalcitrant actions of the wrongdoers. Specifically, the Court stated:

> We conclude that the award of attorney's fees was proper. In a lengthy and exhaustive judgment, the district court expressly recited the repetitive, abusive and recalcitrant actions of Dornan, Foster and Cochrane and found that their claims and defenses were not based in law or fact and as such were frivolous and asserted in bad faith. First, appellants failed to cooperate and comply with the district court's discovery order. NRCP 37(b)(2) permits the district court to require the offending party to pay reasonable attorney fees as sanctions for discovery abuses. Second, appellants' claims and defenses were frivolous and not based in law or fact. NRS 18.010(2)(b) permits a district court to award attorney fee when a party's claims or defenses are brought without a reasonable ground or to harass the prevailing party. After reviewing the judgment and record, we conclude that the district court did not abuse its discretion in awarding attorney fees. Because the district court did not abuse its discretion, we affirm the district court's award of attorney fees.

Id. at 1052-3.

NRS 18.010(2) states:

> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
>
> (a) When the prevailing party has not recovered more than $20,000; **or**
>
> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

Nev. Rev. Stat. Ann. § 18.010. [Emphasis Added].

Further, NRCP 11(b) provides:

> Representations to court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

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A violation of NRCP 11 will often result in sanctions to pay attorney fees as set forth by NRCP 11(c)(2).

Accordingly, pursuant to NRS 18.010(2)(b) and NRCP 11, as well as *Foster* and *Bahena, supra,* a attorney's fees are a proper sanction against abusive litigation practices. Here, as the Court is well aware, there was a continuous and repetitive pattern of misconduct by Defendant during trial in violation of several pre-trial orders regarding the exclusion of certain evidence. (*See* **Exhibit "1"**). The most deliberate violations related to a "minor impact" defense and Defendant's desire to argue (without a qualified expert) that the collision in question was not sufficient to cause the serious injuries sustained by Mr. Simao. In preventing such an unqualified and foundationally deficient argument, the Court made it clear that Defendant's claim on this ground was unsupported and inadmissible. Notwithstanding, the defense persisted in trying to circumvent this Court's Order and present a "minor impact" defense through improper questioning of virtually every witnesses that took the stand at trial. (*See* **Exhibit "1"**). This repetitive and abusive conduct certainly amounts to maintaining a defense without reasonable ground, which NRS 18.010(2)(b) and NRCP 11 stand to prevent and to punish. Accordingly, as these rules are to be "liberally construe[d]...in favor of awarding attorney's fees in all appropriate situations" the subject violations invoke the penalties of these rules, and an award of attorney's fees is warranted. *See* NRS 18.010(2)(b).

While the Defendant may have disagreed with this Court's pre-trial rulings regarding the defenses and arguments she was able to present at trial, the Defendant was still obligated to conform to this Court's pre-trial rulings rather than blatantly ignore them, forever tainting the jury. Because the Defendant chose an attempt to circumvent this Court's Orders rather than comply with them, Defendant must face the consequences prescribed by statute and supported by

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a vast amount of legal precedent. *See* NRS 18.010(2)(); NRCP 11; and *Bahena* and *Foster, supra.*

Based upon the foregoing, an award of attorney's fees and costs in this case, considering all that has transpired, would be a proper exercise of court discretion. Plaintiff, therefore, respectfully requests that an award of fees and costs be granted pursuant to the facts and law set forth above.

C. Attorney's Fees Should be Awarded Pursuant to the Contingency Fee Agreement Entered into Between the Simao's and their Counsel

The amount of attorney fees to be awarded, and whether such fees are reasonable, is left to the sound discretion of this Court. *Laforge v. State of Nevada,* 116 Nev. 415, 997 P.2d 130, 135-136 (2000); *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d at 785 (1995). While many courts have discussed the reasonableness of attorney fees, it is important to recognize that Plaintiffs' contingency fee agreement with their counsel sets attorney fees at 40% of all amounts recovered in this matter. As this Court is aware, Nevada recognizes the validity of such agreements and the Nevada District Court has awarded attorney fees based upon the contingent fee amount.

It has been held that attorney's fees may be calculated by the equivalent to the contingency fee. See, *Glendora Comm. Redevelopment Agency v. John P. Deneter, Jr.*, 155 Cal.App.3d 465; 202 Cal.Rptr. 389 (1984) (contingent fee) and *PLCM Group, Inc. v. David Drexler*, 22 Cal. 4th 1084, 997 P.2d 511 (2000) (lodestar analysis).

In Nevada, the method upon which a reasonable fee is determined is subject to the discretion of the court, which is tempered only by reason and fairness. Accordingly, in determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount,

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including based on a contingency fee. *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 864, 865, 124 P.3d 530, 549 (2005). In making that finding, the *Shuette* Court emphasized that whichever method is chosen, the court must continue its analysis by considering the requested amount in light of the following factors: (1) the advocate's professional qualities, including the advocate's ability, training, education, experience, professional standing and skill; (2) the nature of the litigation or character of the work performed, including its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed, and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer, including the skill, time and attention given to the work; and, (4) the result. *Id.*, quoting *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144, 146 (1959). In that manner, whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination.

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1. <u>An Award of Attorney Fees in the Amount of the Contingent Fee is Reasonable and Justified</u>:

Plaintiffs entered into a contingency fee agreement, allowing for an attorney fee in the amount of 40% of the recovery obtained in this case and any award of attorney's fees in this case should be consistent with the fees that Plaintiffs' counsel is contractually entitled to receive. In *Glendora Comm. Redevelopment Agency vs. John P. Deneter, Jr.*, 155 Cal.App. 3d 465; 202 Cal.Rptr. 389 (1984), a California court of appeal affirmed the trial court's determination that the attorney fees established by a contingency fee agreement were reasonable. Concluding that the trial court was able to observe and consider the conduct at the trial and related proceedings, the appellate court held that the contingency fee agreement, in light of all other factors, was reasonable. In that case, the appellate court affirmed an award of attorney fees in the amount of $734,395.76. *Id.* at 480.

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In doing so, the reviewing court stated:

> It follows from the *Vella* decision that while a trial court, in the exercise of its discretion, is not bound by the terms of an attorney fee contract, it should, nevertheless, consider those terms and even award attorney fees in the same amount as would be called for by the terms thereof so long as other factors also bearing on reasonableness are considered as well. . . .
>
> While we conclude that a trial court, in the proper exercise of its discretion, should consider the terms of an attorney fee agreement, and may even award attorney fees in the same amount as would be called for by those terms, we rule that the trial court may not do so without considering whether an award in the amount set by the agreement is reasonable in the context of all of the factors which we have set forth. However, we are not equating the contingency fee agreement with reasonable attorney fees. . . .
>
> The rule with respect to attorney fees is that the amount to be awarded as attorney's fees is left to the sound discretion of the trial court. The trial judge is in the best position to evaluate the services rendered by an attorney in his courtroom; his judgment will not be disturbed on review unless it is clearly wrong. Citing *Mandel v. Hodges*, (1976) 54 Cal.App. 3d 596, 624, 127 Cal.Rptr. 244, 90 A.L.R. 728; *Vella v. Hudgins, supra*, 151 Cal.App. 3d 515, 522.

The *Glendora* Court further reasoned:

> With respect to 'reasonableness,' the trial court relied, in part, upon California Rules of Professional Conduct, Rule 2-107, which sets forth guidelines for determining reasonableness of attorney fees.
>
> Rule 2-107, as quoted in the trial court's statement of decision, provides in part: "B. . .Reasonableness shall be determined on the basis of circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered where appropriate, in determining the reasonableness of a fee are the following:
>
> (1) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
>
> (3) The amount involved and the results obtained;
>
> (4) The time limitations imposed by the client or by the circumstances;

> (5) The nature and length of the professional relationship with the client;
>
> (6) The experience, reputation, and ability of the lawyer or lawyers performing the service;
>
> (7) Whether the fee is fixed or contingent;
>
> (8) The time and labor required;
>
> (9) The informed consent of the client to the fee agreement. . . .
>
> The Court is aware that the use of contingency fee arrangements is widespread in the general field of civil law. Many such contracts provide for percentage fees greater than 25% of the total recovery. Such contracts do not limit fees to a proportionate share of the excess recovery over the offer. This Court is not called upon to condemn or condone such practice, but it is a fact which cannot escape notice. Occasionally, the result is a considerable fee. Occasionally, there is no fee at all and no recovery by the client. Sharing the benefits to the client produced by the attorney's service is a recognized method of pricing legal fees. It is no less a logical method in the instant case.
>
> The trial court here weighed and considered many factors in determining the reasonable value of Hafif's services. The court was able to observe the conduct at the trial and related proceedings and in consideration thereof determined that the contingency fee arrangement, in light of all the other factors, was reasonable. On this record, the trial court did not abuse its discretion.
>
> *Id.*, at 473-481.

The *Glendora* opinion is precisely on point. The factors enumerated in the opinion, derived from the California Rules of Professional Conduct, are practically identical to Nevada Supreme Court Rule 155 factors including the complex nature of the case; the impact on other employment; the amount involved and results obtained; the experience and reputation of the trial counsel; the nature of the contingent fee; the time and labor involved; and, the informed consent of the client.

This Court, having an opportunity to observe the conduct at the trial and other pre-trial proceedings, and upon considering and weighing the many factors set forth above, can reach but

one conclusion – an award of attorney's fees in the amount of the contingent fee in this case, is reasonable, and should be awarded.

The majority of jurisdictions require trial courts to consider the contingent risk involved in a case when assessing reasonableness of attorney's fees. Indeed, provided that the Court carefully evaluates all factors bearing on reasonableness, a determination equating reasonable fees with the contingency fee will be upheld. See, e.g., *Stimac. v. Montana*, 812 P.2d 1246 (1991) (attorney fees upheld in full amount of contingency fee.); *Shorewood v. Steinberg*, 174 Wis.2d 191, 496 N.W.2d 57 (1992) (upholding trial court's use of contingency fee agreement as a guide); *Michigan DOT v. Randolph*, 461 Mich. 757, 610 N.W. 2d 893 (2000) (existence of contingency fee contract to be considered); *Allard v. First Interstate Bank*, 112 Wash. 2d 145, 768 P.2d 998 (1989) (trial court acted reasonably when it considered the contingency fee before awarding attorney's fees); *Coulter v. James*, 160 Ore. App. 390, 981 P.2d 395 (1999) (contingency fee must be considered in assessing reasonableness, and trial court has discretion to award full amount of contingent fee).

Nevada trial courts are vested with much broader discretion to award attorney fees. In Nevada, a trial court is free to award attorney fees in any amount it deems to be "reasonable and justified." *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983); *Uniroyal Goodyear Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995), and *Laforge*, 116 Nev. Adv. Op. 45, 997 P.2d at 135-136 (2000). Therefore, this Court is free to award any amount of attorney fees it feels is reasonable and justified, including an amount equivalent to Plaintiffs' contingency fee agreement. The Plaintiffs will be paying attorney fees equivalent to 40% of all money received. In the context of this case, and supported by opinions in a multitude of jurisdictions, Plaintiffs should be awarded attorney fees in the full amount of the fees they will actually incur, which is 40% of the damages award which is to be determined by this Court.

III.

CONCLUSION

Plaintiffs respectfully submit the instant brief in support of their request for attorney's fees and costs.

DATED this 22 day of April, 2011.

MAINOR EGLET

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EXHIBIT "1"

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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, Defendant.	CASE NO.: A539455 DEPT. NO.: X

DECISION AND ORDER REGARDING PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S ANSWER

This matter having come before the Court on March 31, 2011, on Plaintiffs' oral Motion to Strike Defendant's Answer, ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT M. ADAMS, ESQ. present for Plaintiffs, WILLIAM SIMAO and CHERYL SIMAO,

STEPHEN H. ROGERS, ESQ. and DANIEL F. POLSENBERG, ESQ. present for Defendant, JENNY RISH, and following the Court's oral pronouncement from the bench GRANTING Plaintiffs' Motion, the Court hereby enters the following written Decision and Order:

I. Factual and Procedural Background

This case involves a motor vehicle accident occurring on April 15, 2005. The Plaintiff, WILLIAM SIMAO, was driving southbound on Interstate 15 when he was rear-ended by a vehicle driven by the Defendant, JENNY RISH. Defendant did not deny causing the accident. Plaintiff WILLIAM SIMAO was injured in the accident and brought the instant action, which included a claim for loss of consortium by WILLIAM SIMAO's wife, Plaintiff CHERYL SIMAO.

This matter was presented for jury trial beginning on March 14, 2011, and the trial had nearly been completed before the instant Motion was made. However, the facts supporting the Motion and the grounds upon which to analyze the Motion include rulings made by this Court before the trial commenced. The Plaintiffs' oral motion to strike the Defendant's Answer is rooted primarily in the Defendant's repeated violations of this Court's Order granting the Plaintiffs' Motion in Limine to Preclude Defendant From Raising a Minor Impact Defense. However, this Court recognizes that Defendant violated other Orders of this Court during the trial, and the cumulative effect of such violations is material to the Court's analysis. Before itemizing and analyzing the violations of this Court's Order on "minor impact," it is necessary to consider the violations of other Court orders by the Defendant.

A. Violation of Order Precluding Evidence of Unrelated Accidents, Injuries or Medical Conditions

1. Plaintiffs' Motion in Limine

On January 7, 2011, Plaintiffs brought an Omnibus Motion in Limine, which included a

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request to preclude the Defendant from introducing evidence of Prior and Subsequent Unrelated Accidents, Injuries and Medical Conditions and Prior and Subsequent Claims or Lawsuits. This portion of the Omnibus Motion in Limine specifically asked this Court to preclude evidence of an unrelated 2003 motorcycle accident involving the Plaintiff, since no medical provider had connected any of the minor injuries sustained by the Plaintiff in the 2003 motorcycle accident to any injuries suffered in the instant accident. In short, the evidence established that the motorcycle accident was irrelevant.

The Defendant filed an Opposition to Plaintiffs' Omnibus Motion in Limine, and the matter was heard by this Court on February 15, 2011, at which time this Court GRANTED Plaintiffs' request. On March 9, 2011, this Court entered a written Order which stated in pertinent part as follows:

> "**IT IS HEREBY ORDERED** that Plaintiffs' request to exclude prior and subsequent unrelated accidents, injuries and medical conditions, and prior and subsequent claims or lawsuits is GRANTED in all respects."

Following the entry of the foregoing Order, all parties were on notice that this Court had specifically precluded the Defendant from introducing evidence of unrelated accidents, including the 2003 motorcycle accident.

2. Defendant's Clear Violation in Opening Statement

In his Opening Statement, counsel for the Defendant presented to the jury a Power Point slide referencing William Simao's 2003 motorcycle accident. The Plaintiffs objected, asked that the slide be shielded from the jury, and approached for a sidebar conference.

The slide clearly and unambiguously violated the Order of this Court on the Plaintiffs' Omnibus Motion in Limine, which Motion specifically referenced the 2003 motorcycle accident as an accident *unrelated* to any issue in the instant case. The jury was directed to disregard the

slide and was further admonished that a pretrial ruling of the Court excluded evidence of the 2003 motorcycle accident.

The Plaintiffs' objection was sustained.

Following this admonition, this Court held a hearing outside the presence of the jury to allow the Defendant's counsel and the Plaintiffs' counsel to review the remaining slides accompanying the defense Opening Statement to determine if any of them violated court orders. Several of them violated orders and were removed (RTP, March 21, 2011, p. 75). Notably, the Plaintiffs' counsel made the following statement outside the presence of the jury:

> There were multiple other slides that had the same type of problems in them. Most of them Mr. Rogers agreed with and took those statements out of the slides, but again, if we hadn't done that, there would have been three to four more clear violations of ... this Court's pretrial orders.
>
> As Mr. Wall [Plaintiffs' co-counsel] said at the bench, I think it's clear – I think it's abundantly clear that Mr. Rogers is going to try to mistry this case. I think it is abundantly clear that that's what's going on.
>
> I told the Court at the last bench conference that that was two. If there were any additional ones, we were going to start asking for monetary sanctions *and other potential sanctions* in this case for this type of *systematic refusal to comply with pretrial court orders.*
>
> *I expect his experts are going to do it as well.* I can assure this Court that they are going to violate a number of the orders in their testimony, just like Mr. Rogers did up there....
>
> (RTP, March 21, 2011, p. 75) (emphasis supplied).

B. Violations of Order Precluding Evidence That This is a "Medical Build-up" Case

1. Plaintiffs' Motion in Limine

Within the afore-mentioned Omnibus Motion in Limine, the Plaintiffs also sought to preclude any evidence or argument that the case was "attorney driven" or a "medical build-up" case. This section of the Plaintiffs' Omnibus Motion in Limine was also heard by this Court on February 15, 2011, at which time this Court GRANTED the Plaintiffs' request. During the hearing on this Motion, counsel for the Defendant conceded he had no evidence of any kind suggesting that this case was "attorney driven" or a "medical build-up" case. This Court's written Order of March 9, 2011, also stated as follows:

> **"IT IS FURTHER ORDERED** that Plaintiffs' request to preclude argument that this case is 'attorney driven' or a 'medical build-up' case is GRANTED."

Following the entry of the foregoing Order, all parties were on notice that this Court had specifically precluded the Defendant from arguing or presenting evidence that the instant case was a "medical build-up" case, in large measure as a result of the Defendant having no such evidence to present.

2. Defendant's Clear Violation During Opening Statement

In his Opening Statement, counsel for the Defendant made the following statement when discussing the testimony of the Plaintiff's treating physicians:

> "And we are going to hear from various different kinds of doctors in this case. One of them are doctors who appear down here regularly in court, as often, if not more than trial lawyers. Doctors McNulty, and Grover..."
>
> (RTP March 21, 2011, p. 72).

Defense counsel's statement was interrupted by an objection from the Plaintiffs, who additionally asked that the Power Point slide that accompanied the defense's Opening Statement

be shielded from the jury. The slide referenced the Plaintiff's treating physicians as "Trial Doctors."

At the sidebar conference that followed, the Plaintiffs objected to the statements of counsel and the "Trial Doctors" slide as violating this Court's Order precluding any argument that the case was "attorney driven" or a "medical build-up" case. Since no other purpose for the statement or the slide was forthcoming from counsel for the Defendant at the sidebar, the jury was directed to disregard the slide.

The Plaintiffs' objection was sustained.

3. Defendant's Clear Violation During Cross-Examination of Dr. Patrick McNulty

Despite this Court's ruling during the Defendant's Opening Statement on the issue of medical build-up and "Trial Doctors," counsel for the Defendant asked the following question of Dr. McNulty, one of the Plaintiff's treating doctors:

> "Now, Doctor, yesterday there was a discussion about the testimony history of a doctor. I don't broach this topic with you to be insensitive, but I want to touch on it since that issue has been raised. You testified under oath, whether it be in trial or in deposition, somewhere around 100 times; is that right?"
>
> (RTP, March 25, 2011, pp. 21-22).

Counsel for the Plaintiffs immediately objected and approached the Court for a sidebar bench conference. There, the Court heard argument regarding the "discussion" "yesterday" which was the Plaintiffs' use of specific prior deposition testimony to impeach the Defendant's expert witness during cross-examination. Further, the Court heard argument that this line of questioning could only be presented to create an inference of "medical build-up." Counsel for the Defendant did not sufficiently explain to this Court how this line of questioning was not a violation of the pretrial order precluding evidence of "medical build-up," especially in light of

the fact that the Defendant admittedly had no evidence to support a "medical build-up" defense.

The Plaintiffs' objection was sustained.

C. Violations of Pretrial Order Precluding "Minor Impact" Defense

As set forth above, the Plaintiffs' ultimate motion to strike the Defendant's Answer was based primarily on repeated violations of this Court's pretrial Order on the issue of a "minor impact" defense.

1. Plaintiff's Motion in Limine

On February 17, 2011, Plaintiffs brought a 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. The Motion set out the fact that the Nevada Highway Patrol Trooper who completed the Accident Report referred to the vehicle damage as "moderate." Specifically, the Motion asked the Court to preclude the Defendant 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." The Motion was primarily based on *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008), coupled with the fact that Defendant did not have any expert qualified to testify whether the impact in the instant collision was sufficient to cause the injuries complained of. Conversely, the Plaintiffs had disclosed a biomechanical expert who was prepared to testify that the accident was of the type to have proximately caused injury to the Plaintiff. The Motion further sought to limit Defendant's pain management expert, Dr. David Fish, from testifying to opinions rooted in biomechanical science, as he lacks the qualifications to testify to such opinions under the standard announced in *Hallmark*.

On February 25, 2011, Defendant filed an Opposition to the Motion and the matter was heard by this Court on March 1, 2011, at which time the Court GRANTED Plaintiffs' Motion in

its entirety. Defendants provided no evidence or information to correlate the amount of damage to a vehicle in a collision to the severity of the injury suffered by a passenger. Defendants had no expert witness on biomechanics to support an argument or inference that this accident was too minor to cause the injuries alleged to have been suffered by the Plaintiff. Based on the Nevada Supreme Court's rulings in *Hallmark, supra, Levine v. Remolif*, 80 Nev. 168 (1964) and *Choat v. McDorman*, 86 Nev. 332 (1970), this Court found that issues of accident reconstruction and biomechanics are not within the common knowledge of laypersons and require expert witness testimony. As such, this Court found no evidentiary or factual foundation upon which the Defendant could argue or infer that the accident was too minor to cause the Plaintiff's injuries.

On March 8, 2011, this Court entered a written Order which stated in pertinent part as follows:

> **"IT IS HEREBY ORDERED** that Plaintiffs' request to preclude Defendant from Raising a "Minor" or "Low Impact" Defense is **GRANTED.**
>
> **IT IS FURTHER ORDERED** that Plaintiffs' request to limit the trial testimony of Defendant's expert, David Fish, M.D., to those areas of expertise that he is qualified to testify in regards to is **GRANTED.** Neither Dr. Fish nor any other defense expert shall opine regarding biomechanics or the nature of the impact of the subject crash at trial.
>
> **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude the property damage photos and repair invoice(s) is **GRANTED.**"

Following the entry of the foregoing Order, all parties were on notice that this Court had specifically precluded a defense (or even an argument) that the accident was too minor to cause the injuries for which Plaintiff sought to recover damages.

Despite a clear and unambiguous Order precluding the Defendant from raising as a defense that the impact of the accident was too minor to cause the Plaintiff's injuries, counsel for

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the Defendant persisted in violating this Court's order, ultimately leading to the sanction imposed herein. There can be no question or argument that the Defendant was on notice of this Court's Order, based on the following:

a) Hearing Outside the Presence of the Jury on March 18, 2011

After jury selection had been completed and before Opening Statements, this Court held a hearing outside the presence of the jury to discuss, among other things, the issue of a minor impact defense. The discussion on the record was extensive and comprises seventeen (17) pages of the transcript (See, RTP, March 18, 2011, pp. 112-129).

During this hearing, the Plaintiffs' counsel brought to this Court's attention the fact that counsel for the Defendant, in his Opening Statement, might broach the subject of minor impact by referring to the Defendant's deposition testimony that the impact of the accident was merely "a tap." Counsel for the Defendant conceded that it was his impression that this Court had not precluded such an argument:

> "What happened was, there was a motion to exclude a defense that a minor impact cannot cause injury. The Plaintiffs' argument in the motion was because the defense did not retain a biomechanical engineer they would not be able to argue the general proposition that minor impacts cannot cause injury.
>
> The defense appeared at the hearing and said, 'This is not a biomechanical case. The defense is not going to argue that no minor impact can cause injury. *The defense is that this minor impact did not cause injury.*"
>
> (RTP, March 18, 2011, p. 114)(emphasis supplied).

It became clear to this Court that the Defendant intended to present a minor impact defense, despite the Order of this Court to the contrary. Plaintiffs' counsel was allowed to once again state on the record their position on the original Motion in Limine, outlining that the

Defendant had no expert witness to opine that the accident was too minor to cause the claimed injuries, and further that the Order of this Court on the Motion in Limine precluded a "minor impact" defense at trial.

By the conclusion of the hearing outside the presence of the jury, this Court reiterated its ruling on the Motion in Limine precluding a "minor impact" defense (RTP March 18, 2011, p. 125-26). Likewise, this Court precluded counsel for the Defendant from referencing in his Opening Statement that it was a minor impact, or simply "a tap," for the purpose of raising an inference that the accident was too minor to cause the Plaintiff's injuries (RTP March 18, 2011, pp. 127-28). This Court further reminded counsel for the Defendant to review the Order entered on this issue to avoid violating it in the future (RTP March 18, 2011, p. 126, 127).

b) Hearing Outside the Presence of the Jury on March 21, 2011

On the first court day following the hearing set forth above, the issue of "minor impact" was again raised outside the presence of the jury immediately following the Plaintiffs' Opening Statement. At this hearing, the Defendant sought permission to claim a "minor impact" defense based on the door allegedly being opened by the Plaintiffs in their Opening Statement when counsel referred to the accident as a "motor vehicle crash." This Court noted that the Plaintiffs in their Opening Statement did not refer to the nature of the impact, the severity of the impact, the fact that the impact was significant enough to cause the Plaintiff's injuries nor any violence associated with the impact. In fact, this Court noted that Plaintiffs' counsel did not describe the impact of the vehicles in any way.

Based on that finding, the Court denied the Defendant's renewed request to be able to raise a "minor impact" defense. Again, the Defendant was clearly and unequivocally on notice that such a defense was precluded.

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2. Reference to Minor Impact during Defendant's Opening Statement

Immediately following the foregoing discussion outside the presence of the jury, counsel for the Defendant delivered his Opening Statement. He described the stop and go traffic the Defendant encountered before the accident, and stated that the Defendant was nearly stopped before the impact (RTP, March 21, 2011, p. 63). Plaintiffs did not object to this statement, although it arguably raises an inference of a minor impact.

Thereafter, counsel for the Defendant proceeded to attempt to play selected portions of his client's videotaped deposition regarding the nature of the accident, which drew an objection from the Plaintiffs. After a bench conference, this Court determined that not only was the Defendant's deposition hearsay when offered on her own behalf, but also that testimony regarding the nature of the accident, if offered to show it was a minor impact, would be in violation of this Court's pretrial Order.

The Plaintiffs' objection was sustained.

3. Clear Violation of Order During Cross-Examination of Dr. Jorg Rosler

During the testimony of Dr. Rosler, one of the Plaintiff's treating pain management physicians, counsel for the Defendant asked the following question:

> "Do you know anything about what happened to [Defendant] Jenny Rish and her passengers in this accident?"
>
> (RPT, March 22, 2011, p. 84)

Before the witness could answer, the Plaintiffs objected, citing this Court's pretrial motion ruling.

The only potential relevance of such an inquiry would be to raise an inference that since the Defendant or her passengers were not injured (or that the Plaintiff's treating physician was unaware of any injury), the accident must not have been significant enough to injure the Plaintiff.

There is no other potential purpose in obtaining an answer from this witness to that question. Such an inference would be directly contrary to this Court's Order precluding a "minor impact" defense.

The Plaintiffs' objection was sustained.

4. Clear Violation During Cross-Examination of Dr. Patrick McNulty

Despite the fact that the Court sustained the Plaintiffs' objection to the improper question of Dr. Rosler, counsel for Defendant asked an almost identical question of the next treating physician to testify for Plaintiff. Within the first two minutes of the Defendant's cross-examination of Dr. McNulty, the following questions were asked:

[Defense Counsel] And you don't know anything about the car accident other than what [Plaintiff] told you?

[Dr. McNulty] It was simply he said he had a car accident and that's when he – his problems started.

[Defense Counsel] Okay. But did you discuss with him whether he was able to drive from the scene of the accident?

[Dr. McNulty] No, I really didn't go into the other – into the other details. No, I did not discuss that.

[Defense Counsel] *Do you know anything about the folks in Jenny Rish's car?* (RTP 3/25/11, p. 4) (Emphasis supplied).

Counsel for the Plaintiffs immediately objected and a bench conference ensued. At the bench conference, counsel for the Defendant indicated his position on the relevance of the question:

[Defense Counsel] The relevance is that if one of them were injured or were not, that would be relevant or probative to whether the others were injured.

(RTP 3/25/11, p. 5).

In fact, based on this Court's prior rulings, such a position is untenable. As stated in the authority supporting the grant of the Plaintiffs' pretrial Motion in Limine, there is no correlation between the size of the impact and the potential for injury to the Plaintiff. There is no correlation between whether the Defendant or one of her passengers was injured and the potential for injury to the Plaintiff. The Defendant had no credible or admissible evidence suggesting such a correlation and no expert testimony to support such a proposition.

Further, since the question asked on cross-examination of Dr. McNulty was exactly the same question precluded during the cross-examination of Dr. Rosler, the Defendant was clearly on notice that this area of inquiry was improper.

The Plaintiffs' objection was sustained.

5. Clear Violation During Cross-Examination of Dr. Jaswinder Grover

On the very same afternoon as Dr. McNulty's cross-examination, the Defendant had the opportunity to cross-examine Dr. Grover, another of the Plaintiff's treating physicians. During that cross-examination, counsel for the Defendant *again* asked the very same type of question precluded during the cross-examination of Drs. Rosler and McNulty:

> [Defense Counsel] You know the Plaintiff wasn't transported by ambulance.
>
> [Dr. Grover] Yes, sir.
>
> [Defense Counsel] *You know [whether] Jenny Rish –*
>
> [Plaintiff's Counsel] Objection, Your Honor.
>
> [Defense Counsel] – *was lifted from the scene?*

(RTP 3/25/11, p. 141).

After all of the previous hearings on the issue of a "minor impact" defense, and after the objections to the same type of question were sustained by this Court, such a question of Dr.

Grover is simply inexplicable. Again, there is no potential relevance to a question asked of one of the Plaintiff's treating doctors (who didn't treat the Plaintiff until almost three years after the accident) about any injuries to the Defendant, other than to attempt to infer that the accident was too minor to injure the Plaintiff if the Defendant was not injured. That inference is precluded, based on the fact that the Defendant had no expert witness or admissible evidence to support that inference.

The Plaintiffs' objection was sustained and the jury was directed to disregard the last question.

6. Hearing Outside the Presence of the Jury on March 25, 2011

Following the testimony of Dr. Grover, at a hearing outside the presence of the jury, counsel for the Plaintiffs made the following record regarding the pervasive and continuous violations of this Court's Orders on pretrial Motions by counsel for the Defendant:

> [Plaintiffs' Counsel] Despite the ruling of the Court, despite the arguments we've had outside the presence on the issue of minor impact, in Opening Statement and with each and every witness so far, there's been a question which leads to a conclusion or an argument about minor impact, whether the Defendant was injured in – whether the doctor knows whether the Defendant was injured in the accident, which could only potentially be relevant to some argument that the accident was too minor to have caused injury, because she wasn't injured.
>
> Each time we've objected. Each time the Court has sustained the objection. I would look for, frankly, some guidance from the Court on what we can do from here out, because it – I can only assume that it will continue to occur. And so, *I don't know whether a progressive sanction that we'd ask for,* that there should be a warning from the Court before this should happen again. But those are my concerns, and I don't know

what other potential relevance there could be to asking a treating physician whether he's aware of whether or not the Defendant was injured in the accident.

(RTP 3/25/11, pp. 164-65) (emphasis supplied).

Thereafter, a discussion ensued on the record regarding the Court's pretrial ruling and the fact that the Defendant had repeatedly violated it. At the conclusion of the hearing outside the presence of the jury, this Court attempted, once again, to make it clear that the violations were continuous and that the Court would take necessary measures if the violations occurred again. To the Plaintiffs' counsel's suggestion of a progressive sanction, the Court responded thusly:

> [Court] I think you're right, and I think that *the defense is on notice. I think the Order is very clear. I think it clearly has been violated.* I was really surprised to hear a question posed of [Dr. Grover] regarding Ms. Rish when the Court sustained a previous question regarding Ms. Rish of another witness and ruled that that was not relevant. So I was really surprised to hear that very same question posed as to Ms. Rish.
>
> ...
>
> So I don't know. *It does seem to be at this point to be deliberate, Mr. Rogers. And so, I'm inclined to agree that you're on notice. The Court will consider progressive sanctions.* I don't know what they will be. I hope there won't have to be any assessed. *But I don't know what else to do to try to get you to comply with the Court's previous Orders.*
>
> (RTP 3/25/11, pp. 166-67) (emphasis supplied).

7. Testimony of Defendant's Expert Witness, Dr. David Fish

a) Voir Dire Examination Prior to Direct Examination

Defense expert Dr. Fish testified out of order during the Plaintiffs' case-in-chief as an accommodation by the Plaintiff to the Defendant and her expert. At request of the Plaintiffs'

counsel immediately prior to Dr. Fish's testimony to the jury, this Court held a hearing outside the presence of the jury to allow the Plaintiffs' counsel to take Dr. Fish on *voir dire* to ensure he was aware of the Court's previous rulings (including an Order granting the Plaintiffs' Motion in Limine to Limit the Testimony of Dr. Fish). Dr. Fish's testimony outside the presence of the jury comprises eighteen pages of the record (See, RTP March 24, 2011, pp. 12-30).

This questioning of Dr. Fish revealed that he was unaware of virtually every pretrial Order entered by this Court, including the Order limiting his testimony. He was unaware of this Court's Order precluding:

1) Plaintiff's unrelated 2003 motorcycle accident;

2) Plaintiff's unrelated 2008 motor vehicle accident;

3) Plaintiff's unrelated medical conditions;

4) Any suggestion of secondary gain, symptom magnification or malingering;

5) Sub rosa video surveillance of Plaintiff (ruling deferred until the conclusion of Plaintiff's direct examination);

6) Dr. Fish's testimony regarding biomechanical opinions related to the accident.

Of obvious concern to this Court was the fact that despite the voluminous pretrial motions, the thorough and even repetitious hearings and arguments entertained by this Court on the issues and the consistency of the enforcement of those rulings by this Court, the Defendant had not properly prepared her expert witness. When Dr. Fish volunteered that he thought some of the impediments to his testimony were "strange," the Court responded:

> [Court] You know what seems strange to me? That this witness obviously doesn't have any idea what the Court has ruled prior to these motions in limine.
>
> (RTP March 24, 2011, p. 24).

The Court unambiguously placed Dr. Fish and the Defendant on notice that violations of

the Court's pretrial Orders carried the possibility of sanctions, including striking the testimony of Dr. Fish in its entirety (RTP March 24, 2011, p. 15).

b) Violation During Cross-Examination

Nevertheless, during cross-examination, Dr. Fish persisted in failing to respond to pertinent questions from the Plaintiffs' counsel and on more than one occasion responded to questions by stating, inferring or insinuating that he was unfairly prohibited from answering the questions based on this Court's prior rulings (RTP March 24, 2011, p. 106, 133).

Despite the repeated and systematic violations of the pretrial Orders in this case and the Court's efforts to cure and prevent the same, Dr. Fish violated rulings on "minor impact" during cross-examination.

When presented with contrary testimony on issues of medicine in prior depositions from other cases, Dr. Fish responded by suggesting that the instant accident was not a "significant accident." The Plaintiffs' oral Motion to Strike was Granted by this Court (RTP March 28, 2011, p.71-72).

c) Violation During Redirect Examination

At the end of the Defendant's redirect examination of Dr. Fish, counsel for the Defendant in a conclusory fashion asked Dr. Fish to summarize his opinions on causation.

> [Defense Counsel] ...Doctor, how is it that you can reach an opinion to a medical probability that this accident didn't cause the pain that [the Plaintiff] complained of following this accident?
>
> [Dr. Fish] Well, it's based on multiple factors. It's based on the actual – looking at the images of the MRI. It's looking at the discogram and the results of the discogram. It's looking at the pattern of pain. It's looking at the notes that were taken of the events that happened *and it's knowing about the accident itself.*

(RTP March 28, 2011, p.87) (Emphasis supplied).

Based on this Court's observation of Dr. Fish's testimony, there is no question that Dr. Fish's response, clearly in violation of this Court's Order, was deliberate. The Plaintiff's objection was sustained, and the jury was admonished to disregard the final statement in Dr. Fish's response.

D. Irrebuttable Presumption Instruction to the Jury

1. Plaintiffs' Request for a Special Instruction to the Jury

Following the testimony of Dr. Fish, the Court conducted a hearing outside the presence of the jury at the request of counsel for the Plaintiffs to consider a progressive sanction against the Defendant for the continuous and systematic violations of this Court's Orders on pretrial motions. The Plaintiff offered, as an alternative to striking Defendant's Answer, a special instruction to the jury directing them to presume that the accident in question was of a sufficient quality to have caused the injuries of which Plaintiff complained. The entire hearing on this issue outside the jury's presence comprises twenty-three (23) pages of transcript, which includes a recess by the Court to consider the appropriate language of an adverse inference instruction (See, RTP March 28, 2011, pp. 89-112).

During the hearing, the Plaintiffs' counsel correctly identified the factual and procedural history of the issue of a "minor impact" defense in this case (much of which is set forth above), including the rulings on pretrial motions, the numerous hearings outside the presence of the jury on this issue, the repeated violations of this Court's Order on "minor impact" and the records made establishing notice to the Defendant of possible progressive sanctions for any further violations (RTP March 28, 2011, pp. 89-93).

Counsel for the Plaintiffs then made a further record outlining the proper standard for consideration by this Court under *Young v. Ribeiro Building, Inc.*, 106 Nev. 88 (1990).

2. This Court's Consideration of the *Young* Factors

In *Young*, the Nevada Supreme Court reiterated that trial courts have inherent equitable powers to issue sanctions for abusive litigation practices. *Id.* at 92. Before issuing such sanctions, a trial court should carefully consider the factors announced in *Young*, although no single factor is necessarily dispositive and each of the non-exhaustive factors should be examined in the light of the case before the trial court. *Id.* As outlined during the hearing by counsel for the Plaintiffs, this Court considered the following factors set forth in *Young* before addressing the language of the special instruction to the jury.[1]

a) Degree of willfulness of the violations

The violations of this Court's pretrial Orders were continuous and systematic. As set forth above, the Defendant was clearly on notice of the Court's Order regarding this "minor impact" defense yet the Defendant violated this particular Order on numerous occasions. Based on the sheer number of violations of the same order in the same fashion, this Court can only conclude that such violations were willful in nature.

b) The extent to which the non-offending party would be prejudiced by a lesser sanction

To date, no lesser sanction had been successful in precluding future violations. This Court has consistently sustained the Plaintiffs' objections and stricken offending questions and answers. At some point, simply directing jurors to disregard continuous violations of pretrial Orders is insufficient.

Counsel for the Plaintiffs indicated that the violations to this point were sufficient to

[1] **In considering non-case concluding sanctions, a trial court shall hold such hearing as it reasonably deems necessary to consider matters that are pertinent to the imposition of appropriate sanctions *Bahena v. Goodyear Tire & Rubber Co.*, 245 P.3d 1182, 1185 (Nev. 2010) This court heard extensive arguments from the Plaintiffs and the Defendant before granting the Plaintiffs' request for a progressive sanction. While an "express, careful and preferably written" order is required by the Nevada Supreme Court for case concluding sanctions only, *Young, supra at 93; Foster v. Dingwall*, 227 P.3d 1042, 1048-49 (Nev. 2010), this Court outlines herein its analysis of the *Young* factors that supported the imposition of the non-case concluding sanction of an irrebuttable presumption instruction.**

warrant a request that this Court impose a case concluding sanction of striking the Defendant's Answer, but that in harmonizing this particular factor from *Young* it might be necessary for this Court to consider a lesser sanction of a presumption instruction.

c) The severity of a sanction of dismissal relative to the severity of the abuse

This Court considered, at the time of imposing the sanction of an irrebuttable presumption instruction to the jury, whether the alternative request of striking Defendant's Answer would be an appropriate response to Defendant's continuous violations of this Court's pretrial Orders. While the abuse to this point was systematic and severe, this Court determined that a progressive sanction would be appropriate before consideration of a case concluding sanction.

d) The feasibility and fairness of an alternative, lesser sanction

Again, against the backdrop of the Plaintiffs' alternative request to strike Defendant's Answer, this Court considered the feasibility and fairness of a lesser sanction and determined that the irrebuttable presumption instruction requested by Plaintiff appropriately addressed the nature of the violations of the Court's Order precluding evidence to support a "minor impact" defense.

An irrebuttable presumption is a presumption that cannot be overcome by any additional evidence or argument. *Employers Insurance Co. of Nevada v. Daniels*, 122 Nev. 1009, 1015-16, fn. 15 (2006), quoting *Black's Law Dictionary* 1223 (8th ed. 2004). As this Court noted during the sanction hearing, the Order granting the Motion in Limine was based on the Defendant's complete lack of evidence bearing on a "minor impact" defense:

> [Court] But the point of the matter was that Defense had no witness who could testify that this was a minor impact and no witness who could testify that this was a minor impact that could not have caused the injuries to Plaintiff, that Plaintiff sustained.

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Defense simply didn't have any witnesses to so testify. That's why the motion in limine was granted.

(RTP March 28, 2011, p. 104).

Given that the Defendant had no admissible, credible evidence to offer to support this "minor impact" defense, an irrebuttable presumption instruction was appropriate to communicate to the jury what the Defendant failed to comprehend throughout the trial: namely, that there is no evidence to suggest that the impact in this accident was too minor to cause the injuries the Plaintiff claims to have suffered. An alternative adverse inference instruction or a rebuttable presumption instruction would have given the Defendant exactly what was precluded in the Order on the pretrial motions: namely, an opportunity to rebut the contention that the accident was of sufficient character to have caused injury. Again, the Defendant had no evidence with which to rebut that contention.

e) The policy favoring adjudication on the merits

Mindful of this policy, the Court declined at this point to grant the Plaintiffs' request to strike the Defendant's Answer and instead issued the irrebuttable presumption instruction.

Given the Defendant's concession of responsibility for the accident, the "merits" of this case for the trier of fact to adjudicate were limited to the amount of damages suffered as a result of the accident. Since the Defendant had no evidence to support a contention that the nature of the impact in the accident was relevant to the amount of damages, the issues for the trier of fact were not materially affected by the irrebuttable presumption instruction.

f) Whether sanctions unfairly penalize a party for the misconduct of her attorney

In this Court's view, the key to this factor from *Young* is whether the Defendant is **unfairly** penalized for her attorney's misconduct. However, the irrebuttable presumption instruction imposed as a sanction by the Court did not unfairly penalize the Defendant. It simply

allowed the jury to irrebuttably presume the very fact that Defendant had no admissible evidence to rebut – that the motor vehicle accident was sufficient in character and quality to have caused the injuries suffered by the Plaintiff.

Additionally, as set forth below, it must be noted that the special instruction to the jury still allowed them to consider whether the accident in question actually and proximately caused Plaintiff's injuries. The only presumption was that the accident was sufficient in character and quality to have potentially done so. The only issue eliminated or restricted by the irrebuttable presumption instruction was the "minor impact" defense for which Defendant had no evidence to support.

g) The need to deter parties and future litigants

As set forth in great detail above, the sanctions employed by the Court to deter this conduct had proven unsuccessful. Although this particular factor was not the overriding factor in determining that the special instruction to the jury was warranted, this Court hoped that this progressive sanction would at least deter the Defendant from continuing to violate the Orders of this Court.

3. The Irrebuttable Presumption Instruction

This Court took a recess to allow the Plaintiffs' counsel to draft a proposed instruction and then heard argument from both sides regarding the exact language of the instruction. After considering the proposed language and making some amendments thereto, as well as considering the necessity of instructing the jury immediately as a curative measure, the Court read the following instruction to the jury:

> [Court] Furthermore, ladies and gentlemen of the jury, the Defendant has, on numerous occasions, attempted to introduce evidence that the accident of April 15, 2005, was too minor to cause the injuries complained of. This type of evidence has previously

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been precluded by this Court.

In view of that, this Court instructs the members of the jury that there is an irrebuttable presumption that the motor vehicle accident of April 15, 2005, was sufficient to cause the type of injuries sustained by the Plaintiff. Whether it proximately caused those injuries remains a question for the jury to determine.

(RTP March 28, 2011, p. 113, 149-50).

Before making the discretionary ruling to issue that curative instruction to the jury, this Court examined the relevant facts, applied a proper standard of law and used a demonstratively rational process to reach a reasonable conclusion. *See, Bass-Davis v. Davis*, 122 Nev. 442, 447-48 (2006).

E. Plaintiffs' Request to Strike Defendant's Answer Based on Repeated Violations of This Court's Pretrial Orders

During the hearing on March 28, 2011, wherein this Court considered the above-quoted special instruction in lieu of the Plaintiffs' request to strike Defendant's Answer, counsel for the Plaintiffs made clear that a further violation of this Court's Orders would be met with the Plaintiffs' renewed request of the Court to strike the Defendant's Answer (RTP March 28, 2011, p. 97).

1. Cross-Examination of Plaintiff, William Simao

During the Defendant's cross-examination of Plaintiff WILLIAM SIMAO, counsel asked about circumstances surrounding the accident, including questions regarding the stop-and-go nature of traffic on the freeway before the accident took place. The Plaintiffs objected, and a bench conference ensued.

At the bench conference, the Plaintiffs asked for an offer of proof of what potential relevance the speed of the vehicles would have, other than to suggest an inference that the

impact of the collision was insufficient to cause the Plaintiff's injuries (RTP March 28, 2011, pp. 92-95). Counsel for the Defendant failed to offer during the bench conference a sufficient explanation of how the speed of the vehicles prior to the collision has a tendency to make the existence of any fact of consequence more or less probable, *see*, NRS 48.015, other than to suggest a minor impact (RTP March 28, 2011, p. 94-96).

The Plaintiffs' objection was sustained.

What then followed can only be described by this Court as an intentional attempt to further violate this Court's clear and unambiguous Order.

Regarding the post-accident response by law enforcement and medical personnel, counsel for the Defendant asked the following questions of Mr. Simao:

> [Defense Counsel] Now, we've heard several times through this trial that an ambulance came to the scene.
>
> [Mr. Simao] Yes.
>
> [Defense Counsel] And that you declined treatment.
>
> [Mr. Simao] I did.
>
> [Defense Counsel] *And the paramedics didn't transport anyone from Mrs. Rish's car?*

(RTP March 28, 2011, p. 98) (Emphasis supplied).

An immediate objection was interposed by Plaintiffs' counsel and a brief bench conference was convened before this Court excused the jury and addressed the matter on the record outside their presence.

2. Plaintiff's Request to Strike Defendant's Answer

During the hearing outside the jury's presence, counsel for the Plaintiffs again made an exhaustive record of all of the occasions this Court had to direct and admonish Defendant not to

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address "minor impact" issues as a result of this Court's previous Orders. A significant record was made of the notice provided to the Defendants that not only was the conduct violative of this Court's Order, but further that the Plaintiffs would be asking the Court to strike the Defendant's Answer as a sanction therefore (RTP March 28, 2011, pp. 101-05).

The response from the Defendant was essentially that she should not be precluded from any discussion of the accident in question. Such an argument, this Court noted, misses the point and unfairly and incorrectly broadens the scope of the pretrial Order. An incorrect summary of the Court's Order that any and all discussion of the accident in question is precluded is vastly different from questioning four separate witnesses as to whether anyone from the Defendant's vehicle was injured in the crash. On this issue, the Court's prior pronouncements could not have been clearer.

While inclined to grant the Plaintiffs' motion to strike the Defendant's Answer at the conclusion of the hearing outside the presence of the jury, this Court instead took the opportunity to recess to again review the appropriate law, including the Nevada Supreme Court's opinion in *Young v. Ribeiro Building, Inc.*, on the issue of case concluding sanctions for abusive litigation practices and continuous violations of Orders of the Court.

3. This Court's Consideration of the Law as Applied to the Facts of This Case

As set forth above, the Nevada Supreme Court in *Young* reiterated that trial courts have inherent equitable powers to issue sanctions for abusive litigation practices, including case concluding sanctions such as dismissal or the striking of pleadings. *Young, supra* at 92. Case concluding sanctions are subject to a "somewhat heightened standard of review," *Id.; Foster v. Dingwall*, 227 P.3d 1042, 1048 (Nev. 2010), to determine if the sanctions are just and relate to the claims at issue.

Before issuing such sanctions, a trial court should carefully consider the factors

announced in *Young*, although no single factor is necessarily dispositive and each of the non-exhaustive factors should be examined in the light of the case before the trial court. *Young, supra* at 92. Additionally, case concluding sanctions shall be supported by an express, careful and preferably written explanation of the trial court's analysis of the *Young* factors. *Id.* at 93; *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 598 (Nev. 2010), *rehearing denied*, 245 P.3d 1182 (2010).

This Court carefully considered the plethora of violations of Court Orders before granting the Plaintiffs' request to strike the Defendant's Answer. The hearing outside the presence of the jury encompasses fifteen pages (15), which does not include the independent research and analysis conducted by this Court during a lengthy recess in the proceedings. The Court's consideration of the *Young* factors, although similar in many respects to the consideration of the same factors three days earlier at the time of the irrebuttable presumption sanction, includes the following:

a) Degree of willfulness of the violations

A violation of an Order on a motion in limine may serve as a basis for some type of sanction if the Order is specific in its prohibition and the violation is clear. *BMW v. Roth*, 127 Nev.Ad.Op. 11, p.12, citing to *Black v. Schultz*, 530 F.3d 702, 706 (8th Cir. 2008). As set forth previously, the violations of this Court's clear and unambiguous Orders were continuous, systematic and pervasive. Such violations include, but are not limited to, the following:

i. Violation of Order precluding evidence of "medical build-up" during Opening Statement;

ii. Violation of Order precluding evidence of "medical build-up" during the testimony of Dr. Patrick McNulty;

iii. Violation of Order precluding evidence of unrelated accidents during Opening

Statement;

iv. Violation of Order precluding evidence or argument in support of "minor impact" defense during Opening Statement;

v. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. Jorg Rosler (question regarding injuries to the Defendant or her passengers);

vi. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. Patrick McNulty (question regarding injuries to Defendant or her passengers);

vii. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. Jaswinder Grover (question regarding injuries to Defendant or her passengers);

viii. Defendant's abject failure to apprise defense expert Dr. David Fish of court's rulings on all motions in limine;

ix. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. David Fish (question and answer regarding the nature of the accident);

x. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Plaintiff William Simao (question regarding injuries to the Defendant or her passengers);

These violations of the Court's Order precluding the "minor impact" defense are considered by this Court to be even more egregious given the numerous hearings outside the presence of the jury wherein this Court repeatedly and unequivocally prohibited the areas of inquiry subsequently broached by counsel for Defendant. Those hearings include:

i. Hearing on the Plaintiffs' Motion in Limine, March 1, 2011;

ii. Hearing outside the presence of jury to discuss "minor impact," March 18, 2011;

iii. Hearing outside the presence of jury to discuss whether the Plaintiffs opened the door to "minor impact" defense during Opening Statement, March 21, 2011;

iv. Objection sustained to counsel for the Defendant's question of Dr. Rosler regarding injuries to occupants of the Defendant's vehicle, March 22, 2011;

v. Objection sustained to counsel for the Defendant's question of Dr. McNulty regarding injuries to occupants of the Defendant's vehicle, March 25, 2011;

vi. Objection sustained to counsel for the Defendant's question of Dr. Grover regarding injuries to occupants of the Defendant's vehicle, March 25, 2011;

vii. Hearing outside the presence of the jury to discuss "minor impact" defense and the Plaintiffs' notice of seeking progressive sanctions, March 25, 2011;

viii. Objection sustained to counsel for the Defendant's question of Dr. Fish which resulted in response citing to the nature of the impact, March 28, 2011;

ix. Hearing outside the presence of the jury to discuss "minor impact" defense and the Plaintiffs' request for irrebuttable presumption instruction for the Defendant's continued violations of Court's Order, March 28, 2011;

x. Objection sustained to counsel for the Defendant's question of Plaintiff William Simao regarding injuries to occupants of the Defendant's vehicle, March 31, 2011;

At the hearing on the Plaintiffs' oral motion to strike the Defendant's Answer, this Court characterized the continuing violations as having been "willfull, deliberate, [and] abusive," (RTP March 31, 2011, pp. 111-12), based on the fact that counsel for Defendant "refuses to comply

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with this Court's rulings" (RTP March 31, 2011, p. 112). Particularly disturbing was counsel for Defendant's systematic insistence upon asking the Plaintiff and three separate treating doctors whether they were aware of any injuries to passengers in the Defendant's vehicle, despite this Court's clear preclusion of that inquiry after each instance of misconduct.

b) The extent to which the non-offending party would be prejudiced by a lesser sanction

As set forth previously, the imposition of lesser sanctions did not act to curb the Defendant's violations of this Court's pretrial Orders. An attorney's violation of an Order on a motion in limine is misconduct which justifies evidentiary sanctions or even a new trial. *See, BMW v. Roth*, 127 Nev.Ad.Op. 11, p.12; *Lioce v. Cohen*, 124 Nev. 1 (2008). Although Nevada precedent does not follow the federal model of requiring progressive sanctions before imposing a case concluding sanction, *see, Bahena v. Goodyear Tire & Rubber*, *supra*, 245 P.3d at 1184-85, this Court nevertheless imposed progressive sanctions against the Defendant including the irrebuttable presumption instruction to no avail. Nothing this Court could fashion, short of a case concluding sanction, was successful to halt violations of this Court's pretrial Orders.

Given the frequency of the Defendant's violations of this Court's Order precluding a "minor impact" defense, all of which occurred in front of the jury, the Plaintiffs were prejudiced by having this issue repeatedly brought to the jury's attention. In the eyes of the jury, the Plaintiffs were repeatedly preventing the jury from hearing about the significance of the impact, when in fact this Court had determined that a "minor impact" defense was unavailable to the Defendants given the lack of evidence (and expert testimony) to support such a defense. In reliance upon this Court's Order granting the Plaintiffs' Motion in Limine, the Plaintiffs had released their biomechanical expert and had neither mentioned his name nor offered his opinions in Opening Statement. The Plaintiffs had relied on this Court's Order that no "minor impact" defense would be presented to the jury. The Plaintiffs had further relied on the fact that such a

ruling would be upheld by this Court during the course of trial. The unfair prejudice to the Plaintiffs was clearly shown. *See, Roth, supra.*

This Court also recognizes the prejudice to the Plaintiffs in making objection after objection to the Defendant's inappropriate questions. "[W]hen...an attorney must continuously object to repeated or persistent misconduct, the non-offending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point." *Lioce v. Cohen*, 174 P3d 970, 981 (Nev. 2008).

As such, it is the finding of this Court that the Plaintiffs would be unfairly prejudiced by the continuous introduction of questions, evidence and argument designed to create an inference that the subject motor vehicle accident was too minor to cause the Plaintiff's injuries.

c) The severity of a sanction of striking Defendant's Answer relative to the severity of the abuse

Again, the pervasive and continuous nature of these violations warrants the sanction ultimately imposed. Every litigant has the right to disagree with any ruling made or Order entered by a trial court. His remedy is with an appellate court, based upon reasonable grounds as the law requires. His remedy is never to just continue violating the Orders unchecked.

d) The feasibility and fairness of an alternative, lesser sanction

As set forth above, alternative lesser sanctions were apparently rejected by the Defendant in favor of continuing to violate the Orders of the Court. When the Plaintiffs first asked this Court to strike the Defendant's Answer on March 28, 2011, the Court considered this factor from the *Young* decision to impose an alternative sanction of an irrebuttable presumption instruction.

As this Court indicated at the hearing on the Plaintiffs' second oral request to the strike Defendant's Answer:

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[Court] Regarding the feasibility and fairness of an alternative, lesser sanction, you know, the only thing I can say is less severe sanctions were imposed to no avail. (RPT March 31, 2011, p. 113).

This analysis is bolstered by the fact that the Plaintiffs requested that the Court strike the Defendant's Answer three days earlier and put the Defendant on notice that they would seek to strike the Defendant's Answer should any future violations occur.

e) The policy favoring adjudication on the merits

As set forth above, this Court opted for less severe sanctions for all of the violations prior to March 31, 2011, in large measure because of the policy favoring adjudication on the merits. Even the irrebuttable presumption instruction given as a lesser, alternative sanction did not prevent the Defendant from presenting any defense that they actually had evidence to present. It is also worth noting that the Defendant had already agreed on the record not to challenge liability for the accident.

Further, this Court recognizes that the Nevada Supreme Court has upheld the striking of pleadings for a party's failure to attend his deposition, *Foster v. Dingwall, supra*; for repetitive, abusive and recalcitrant conduct during discovery, *Young, supra; Hamlett v. Reynolds*, 114 Nev. 863 (1998) (upholding the trial court's strike order where the defaulting party's constant failure to follow the court's orders was unexplained and unwarranted); for a party's continued failure to appear at scheduled court proceedings, *Durango Fire Protection, Inc. v. Troncoso*, 120 Nev. 658, 662 (2004); and for the failure to abide by rulings of the Discovery Commissioner, *Bahena v. Goodyear Tire & Rubber, supra.* Additionally, the Nevada Supreme Court has approved consideration of the *Young* factors as a guide to trial courts for sanctions grounded in violations of court orders at trial. *See, Romo v. Keplinger*, 115 Nev. 94, 97 (1999).

The willful and deliberate violations of this Court's Orders are equally as egregious as

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any discovery violation, especially given the fact that the repeated violations in the instant case occurred in front of the jury.

f) The need to deter parties and future litigants

Given its inherent powers derived from the Nevada Constitution and strong case precedent, this Court simply cannot allow litigants to openly and deliberately abuse the litigation process by disregarding Orders of the Court when convenient or tactically advantageous to do so, especially when unfair prejudice to the non-offending party results. Such an allowance would render courts of justice meaningless in the State of Nevada.

In the final analysis, after review and consideration of all of the various factors announced in Young, it is the determination of this Court that the intentional, deliberate, abusive and unfairly prejudicial conduct of the Defendant in repeatedly violating clear Orders of this Court warrants the ultimate sanction of striking the Defendant's Answer.

It is immaterial whether, as the Plaintiffs suggested several times during the trial, it was the true intention of the Defendant to force or goad the Plaintiffs to seek a mistrial. What is material is that the deliberate conduct of counsel for the Defendant in disregarding and violating Court Orders could not be halted by this Court with any other sanction.

Neither sustained objections, a multitude of hearings outside the presence of the jury, nor progressive sanctions deterred the Defendant's ignorance of Orders of this Court.

Having carefully and thoughtfully considered the available remedies, it is the decision of this Court, for all of the reasons set forth above, that striking the Defendant's Answer is appropriate under the particular circumstances presented herein.

II. Plaintiffs' Request for a Prove-Up Hearing to Establish Damages

By the time of the last violation of this Court's Orders by the Defendant, most of the Plaintiffs' evidence had been presented to the Court over the first ten (10) days of testimony.

Counsel for the Plaintiffs requested a hearing the following day for essentially a prove-up hearing similar to the entry of a default judgment under NRCP 55b.

Counsel for the Defendant then requested the ability to be heard at the argument on damages, pursuant to *Hamlett v. Reynolds*, 114 Nev. 863 (1998). In *Hamlett*, the Nevada Supreme Court struck Hamlett's Answer as a sanction for his continued failure to comply with discovery orders pursuant to *Young v. Ribeiro Building, supra*. Hamlett claimed the trial court erred in restricting his participation in the prove-up hearing to cross-examining Reynolds' witnesses. In analyzing this issue under NRCP 55(b)(2), the Court stated:

> The language of NRCP 55(b)(2) that the "court may conduct such hearings or order such references as it deems necessary and proper" suggests to us an intent to give trial courts broad discretion in determining how prove-up hearings should be conducted. Thus, we conclude that the extent to which a defaulting party will participate in prove-up is a decision properly delegated to the trial courts. The trial courts should make this determination on a case-by-case basis and not according to static rules implemented by this court.
>
> In deciding the extent to which a defaulted party will be permitted to participate in prove-up, if at all, trial courts should remember that the purpose of conducting a hearing after default, according to NRCP 55(b)(2), is to determine the amount of damages and establish the truth of any averment. To that end, trial courts should determine the extent to which full participation by the defaulted party will facilitate the truth-seeking process.

Hamlett, supra at 866-67.

In *Foster v. Dingwall, supra*, the Nevada Supreme Court clearly stated the standard for proving up damages after a default is entered as a sanction. During the prove-up hearing, this Court shall consider the allegations deemed admitted by the fact of the default to determine if the Plaintiff has established a *prima facie* case for liability. *Foster, supra*, 227 P.3d at 1049-50. A *prima facie* case is defined as sufficiency of evidence in order to send the question to the jury. *Id.* at 1050. In the instant case, Defendant Rish admitted responsibility for the accident and stipulated to liability. What was left was a determination of the Plaintiffs' damages, and the Plaintiffs requested that this Court take notice of the evidence that had been presented in the

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preceding ten (10) days of testimony. Even though allegations in the pleadings are deemed admitted as a result of the entry of default, the admission does not relieve the non-offending party's obligation to present substantial evidence of the amount of damages suffered by both of the Plaintiffs. *Id.* Having reviewed the evidence and concluding that a *prima facie* case had been established by both Plaintiffs, this Court determined that the Plaintiffs are entitled to damages for the harms proximately caused by the motor vehicle accident.

In determining the level of participation of the Defendant in the prove-up hearing, this Court was mindful of the Nevada Supreme Court's pronouncement in *Foster* and *Young* that because the default was entered as a result of the Defendant's abusive litigation practices, the Defendant "forfeited his right to object to all but the most patent and fundamental defects" in the prove-up. *Foster, supra* at 1050; *Young, supra* at 95.

Nevertheless, in an exercise of discretion authorized by *Hamlett*, this Court determined that the Defendant would be allowed to address the Plaintiffs' brief final argument on damages in an argument of her own, to be followed by a brief rebuttal argument on behalf of the Plaintiffs.

Based on all of the foregoing, **THIS COURT HEREBY ORDERS** that Plaintiffs' oral Motion to Strike Defendant's Answer is **GRANTED**.

This matter stands submitted following the arguments of counsel and the prove-up hearing of April 1, 2011, pending further Order of this Court.

DATED this 21st day of April, 2011.

DISTRICT COURT JUDGE

Submitted by:

DAVID T. WALL, ESQ.
Nevada Bar No. 2805
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101

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EXHIBIT "2"

DISTRICT COURT

CLARK COUNTY, NEVADA

JUDGMENT

William Simao's past medical and related expenses	$194,380.96
William Simao's pain and suffering:	
- Past pain and suffering	$473,040.00
- Future pain and suffering	$1,140,552.00
- Loss of Enjoyment of Life	$905,169.00
Cheryl Simao's loss of consortium (Society and Relationship)	$681,286.00
Attorneys' fees, 40% based upon contingency fee agreement	$1,357,771.18
Reasonable litigation costs	$To Be Provided
TOTAL	$4,752,199.14 Plus Costs

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EXHIBIT "3"

RETAINER AGREEMENT (CONTINGENCY FEE)

I/We ("**Client**") hereby retain Mainor Eglet Cottle, Lawyers ("**the Firm**") to prosecute a claim in behalf of WILLIAM J. SIMAO RISH against JENNY RISH, JAMES RISH, LINDA and any person, entity or insurance company who may be liable for damages as a result of an incident occurring on: 4-15-2005 at LAS VEGAS, NV ("**the Claim**"), and agree as follows:

ATTORNEYS' FEE shall be either Thirty Three and One-Third Percent (**33 1/3%**) or Forty Percent (**40%**) of all amounts recovered. The fee shall be Thirty Three and One-Third Percent (**33 1/3%**) of all amounts recovered for the Claim by settlement **before** filing "suit" (defined as filing a complaint in any court or Medical Legal Screening Panel, or entering into an agreement for arbitration). The fee shall be Forty Percent (**40%**) of all amounts recovered for the Claim by settlement, judgment or award **after** suit, as defined above. Attorney's fee is calculated on the **gross** recovery **before** deducting costs, medical bills, third party loans or liens of any kind.

COSTS advanced by the Firm are expenses necessary to prosecute the Claim and are to be deducted from the Recovery after Attorneys' Fee. In the event there is no Recovery, the Firm shall receive no reimbursement for costs. Client specifically grants the Firm authority to make all decisions regarding incurring costs which the Firm, in its best judgment, believes will benefit Client's case. Costs include, but are not limited to, fees and expenses for: photocopies; long distance telephone; facsimile: postage: overnight mail; photography and video; messenger; power point or computer presentation; computer legal research; internet data access; investigation; evidence storage; filing; service of process; bond(s); records; outside legal research and writing; travel; arbitration: mediation; jury fees; sanctions; outsourced exhibit preparation; mock trial and/or jury sampling: expert witnesses; expert and non-expert consultants which include, but are not limited to, medical, nursing, economists, accountants, vocational rehabilitation, product defects, security, safety, engineering, mechanics, construction and jury consultants. Costs will include a minimum charge of Two Hundred fifty dollars ($250.00) as reimbursement for general office expenses such as photocopies (less than 100 copies), long distance , facsimile and postage. Client understands that depending upon the value and/or complexity of the case, Costs can, and often do, total hundreds of thousand of dollars, and on occasion can exceed $1,000,000.00. Client acknowledges and agrees that the Firm may borrow funds from time to time to pay certain costs referred to above and agrees that, in addition to reimbursing the Firm for the amount of such costs, client also will reimburse the Firm for any interest charges and related expenses the Firm incurs in connection with such borrowing.

WITHDRAWAL AND DISCHARGE. Withdrawal by the Firm may be made at any time for any reason upon written notice to Client's last known address. The Firm's discharge by Client prior to settlement of the Claim shall be upon written notice to the Firm. Upon discharge of the Firm, Client shall immediately pay the Firm all costs advanced, and fees of Five Hundred Dollars ($500.00) per hour, or a reasonable fee, or Thirty Three and One-Third Percent (33 1/3%) (Forty Percent (40%) after filing suit as defined above) of the latest offer of settlement, whichever is more.

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OTHER COUNSEL within the Firm, or outside counsel, may be associated or employed at the Firm's discretion and expense to prosecute the Claim. Client acknowledges and agrees that if Client was referred to the Firm by another attorney, there will be a division of the Attorney's fee between the Firm and referring counsel, with each attorney assuming join responsibility.

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GUARANTEES concerning success, value, or time to conclude the Claim cannot be made. In the event of an unsuccessful lawsuit, **Client may be liable for opposing party's attorney's fees and will be liable for opposing party's costs as required by law.**

LOANS OR ADVANCES to Client by the Firm **cannot** be made prior to settlement of the Claim.

SETTLEMENT of the Claim will not be made without Client's consent, but Client agrees to accept a reasonable settlement offer or an offer of available insurance policy limits. Client also agrees, at the Firm's discretion, to a bench trial or mini-jury trial, alternative dispute resolution, such as arbitration and mediation, to facilitate a timely resolution of the Claim.

LIMITED POWER OF ATTORNEY is expressly given by Client to the Firm to sign Client's name to authorizations, checks, drafts, releases and dismissals incident to the Claim.

COOPERATION by Client is essential. Client agrees to promptly provide the Firm with all requested information, give notice of change of address and submit medical bills to Client's insurance companies and pay medical expenses as they are incurred unless other arrangements are made with medical providers. Client understands that in the event of Client's bankruptcy, the Firm must turn over Client's portion of the Claim recovery to the bankruptcy Trustee.

VALID CLAIM. Client understands that a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Dated this 31st day of March, 2010

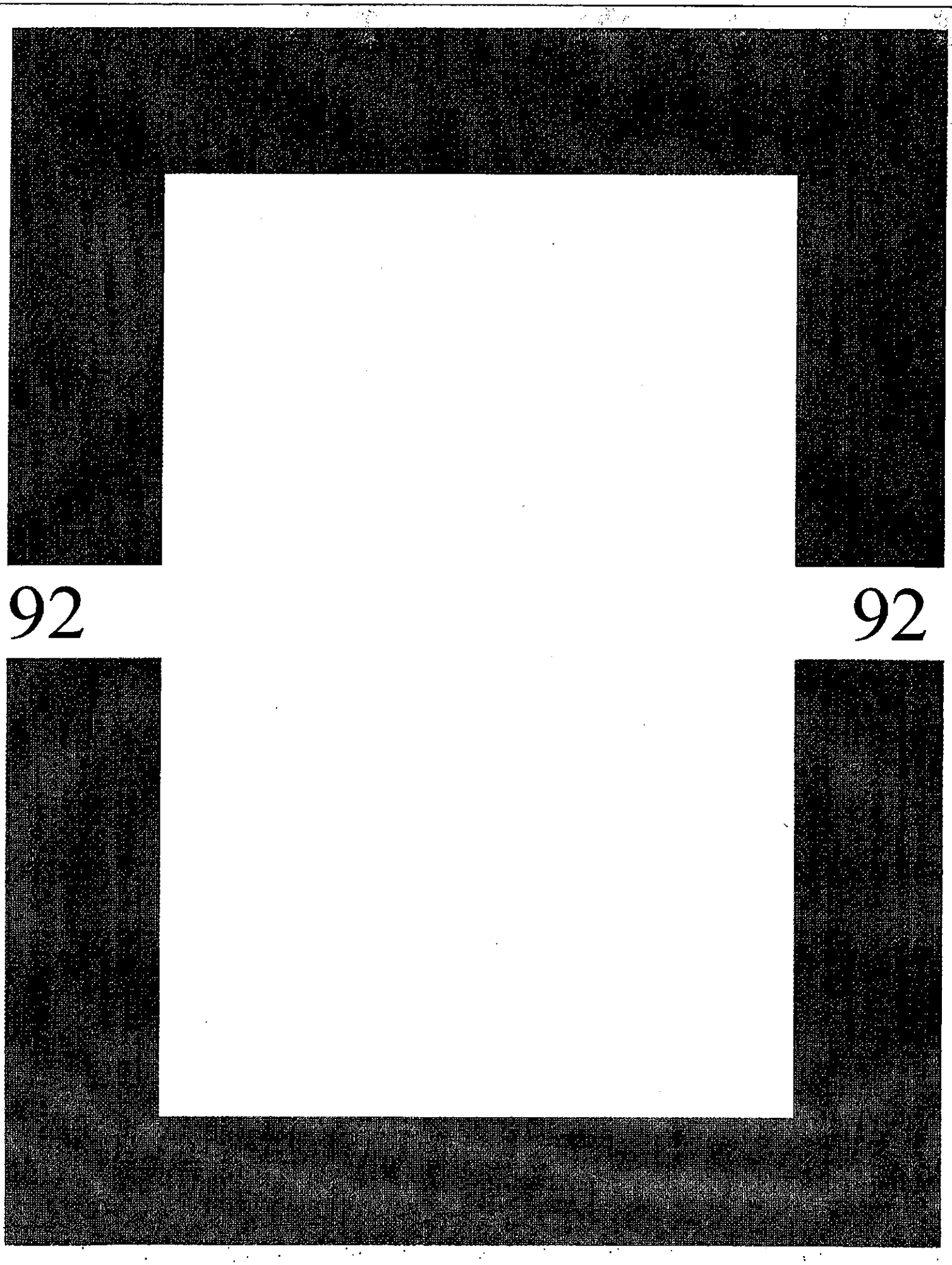
MAINOR EGLET COTTLE

FOR THE FIRM

CLIENT

CLIENT

Revised 07/28/05



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CLERK OF THE COURT

SAO
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
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(702) 383-3400

Attorneys for Defendant Jenny Rish

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. A539455

Dept. No. ~~XX~~ 10

STIPULATION AND ORDER TO MODIFY BRIEFING SCHEDULE

THE PARTIES STIPULATE to extend the due date for their briefs regarding

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attorneys fees from April 15, 2011 to April 20, 2011.

Dated this 15th day of April, 2011.

MAINOR EGLET

#6551

DAVID T. WALL
Nevada Bar No. 2805
ROBERT M. ADAMS
Nevada Bar No. 6551
400 S. Fourth Street, Sixth Floor
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

Dated this 14th day of April, 2011.

LEWIS AND ROCA LLP

DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169

-and-

STEPHEN H. ROGERS
Nevada Bar No. 5755
CHARLES A. MICHALEK
Nevada Bar No. 5721
ROGERS, MASTRANGELO, CARVELHO & MITCHELL
300 S. Fourth Street, #710
Las Vegas, Nevada 89101

Attorneys for Defendant Jenny Rish

IT IS SO ORDERED:

By _____
DISTRICT JUDGE

Dated: Apr 19, 2011

LEWIS AND ROCA LLP LAWYERS

93 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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SUMMARY OF LOSSES FOR WILLIAM SIMAO

TABLE	DESCRIPTION	ESTIMATE
	HOUSEHOLD/FAMILY REPLACEMENT SERVICES	
6A	LOSS OF HOUSEHOLD/FAMILY HOUSEKEEPING AND HOME MANAGEMENT SERVICES	$ 167,196
	LOSS OF ENJOYMENT OF LIFE	
	REDUCTION IN VALUE OF LIFE	
9A	Lower impairment rating	$ 603,454
12A	Upper impairment rating	$1,206,884
	LOSS OF SOCIETY AND RELATIONSHIP	
	LOSS OF RELATIONSHIP	
15A	Cheryl Simao	$ 681,286
	PRESENT VALUE OF FUTURE LIFE CARE	
	COST OF FUTURE LIFE CARE	
16A	See Page 4 of Life Care Plan	$2,608,897

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

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Table 4A

LOSS OF PAST HOUSEHOLD SERVICES
2005 - 2011

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

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Table 5A

PRESENT VALUE OF FUTURE HOUSEHOLD SERVICES
2011 - 2042

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

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Table 6A

PRESENT VALUE OF NET HOUSEHOLD SERVICES LOSS
2005 - 2042

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

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Table 7A

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

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

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Table 8A

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

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

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Table 9A

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

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

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Table 10A

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

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

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Table 11A

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

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

WILLIAM SIMAO $987,979

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Table 12A

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

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

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Table 13A

LOSS OF PAST RELATIONSHIP TO CHERYL
2005 - 2011

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

CHERYL SIMAO $109,453

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Table 14A

PRESENT VALUE OF FUTURE RELATIONSHIP TO CHERYL
2011 - 2048

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

Table 15A

PRESENT VALUE OF NET RELATIONSHIP LOSS TO CHERYL
2005 - 2048

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

CHERYL SIMAO $681,286

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TABLE 16A

LIFE CARE PLAN CALCULATION		MEDICAL SERVICES							(MS = MED SERVICES)	2.20%
									(MC = MED COMMODITIES)	0.75%
NAME:	William Simao	ADOT:	47.9						(NMS = NON-MED SVCS)	1.05%
DOI :	04/15/05	RLEDOT:	30.9						(NON-MC = NON-MED COMM)	0.00%
DOT:	04/01/11	LEDOT:	78.8						(D = DISCOUNT RATE)	1.45%
# OF DAYS FROM DOT TO EOY =		274								
FIRST YEAR FRACTION		0.75								
END OF LE:		02/23/42								

ITEM	COST PER UNIT	# OF UNITS USED	per	# OF YEARS	# OF UNITS PER YEAR	ANNUAL COST	INITIAL YEAR OF COST	LAST YEAR OF COST
Trial Stimulator	*$84,000*	*1*		*1*	*1.00*	*$84,000*	*2011*	*2011*
Permanent Placement Stimulator	$212,000	1		1	1.00	$212,000	2011	2011
Stimulator Replacement	$141,000	1		5	0.20	$28,200	2016	2042
Leads Revision	$103,000	2		5	0.40	$41,200	2013	2042
Follow Up Visits - First 3mos	$1,000	2		1	2.00	$2,000	2011	2011
Follow Up Visits Thereafter	$1,000	2		1	2.00	$2,000	2012	2042

TABLE 16A

	TRIAL YEAR													
ITEM	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Trial Stimulator	$83,097													
Permanent Placement Stimulator	$209,721													
Stimulator Replacement						$28,943	$29,157	$29,373	$29,590	$29,809	$30,029	$30,251	$30,475	$30,700
Leads Revision			$41,362	$41,668	$41,976	$42,286	$42,599	$42,914	$43,231	$43,551	$43,872	$44,197	$44,524	$44,853
Follow Up Visits - First 3mos	$1,979													
Follow Up Visits Thereafter		$1,993	$2,008	$2,023	$2,038	$2,053	$2,068	$2,083	$2,099	$2,114	$2,130	$2,145	$2,161	$2,177
ANNUAL PRESENT VALUE	$294,797	$1,993	$43,370	$43,690	$44,013	$73,282	$73,824	$74,370	$74,920	$75,474	$76,031	$76,594	$77,160	$77,730
CUMULATIVE TOTAL	$294,797	$296,790	$340,160	$383,850	$427,864	$501,146	$574,970	$649,340	$724,260	$799,733	$875,765	$952,358	$1,029,518	$1,107,248

TABLE 16A

ITEM	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037
Trial Stimulator													
Permanent Placement Stimulator													
Stimulator Replacement	$30,927	$31,156	$31,386	$31,618	$31,852	$32,087	$32,325	$32,564	$32,804	$33,047	$33,291	$33,537	$33,785
Leads Revision	$45,184	$45,518	$45,855	$46,194	$46,535	$46,879	$47,226	$47,575	$47,927	$48,281	$48,638	$48,998	$49,360
Follow Up Visits - First 3mos													
Follow Up Visits Thereafter	$2,193	$2,210	$2,226	$2,242	$2,259	$2,276	$2,293	$2,309	$2,327	$2,344	$2,361	$2,379	$2,396
ANNUAL PRESENT VALUE	$78,305	$78,884	$79,467	$80,054	$80,646	$81,242	$81,843	$82,448	$83,058	$83,672	$84,290	$84,913	$85,541
CUMULATIVE TOTAL	$1,185,553	$1,264,437	$1,343,904	$1,423,958	$1,504,604	$1,585,847	$1,667,690	$1,750,138	$1,833,196	$1,916,867	$2,001,157	$2,086,071	$2,171,612

TABLE 16A

ITEM	2038	2039	2040	2041	2042	ITEM TOTALS
Trial Stimulator						$83,097
Permanent Placement Stimulator						$209,721
Stimulator Replacement	$34,035	$34,287	$34,540	$34,795	$35,053	$861,417
Leads Revision	$49,725	$50,092	$50,463	$50,838	$51,212	$1,383,529
Follow Up Visits - First 3mos						$1,979
Follow Up Visits Thereafter	$2,414	$2,432	$2,450	$2,468	$2,486	$69,156
ANNUAL PRESENT VALUE	$86,173	$86,811	$87,452	$88,099	$88,750	
CUMULATIVE TOTAL	$2,257,785	$2,344,596	$2,432,048	$2,520,147	$2,608,897	

EXHIBIT "5"

SUEC
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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' TWENTY-EIGHTH SUPPLEMENT TO THE LIST OF WITNESSES AND DOCUMENTS PRODUCED PURSUANT TO NRCP 16.1

Plaintiffs, WILLIAM SIMAO and CHERYL SIMAO, by and through their attorneys, ROBERT T. EGLET, ESQ., and ROBERT M. ADAMS, ESQ., of the law firm of MAINOR EGLET, and MATTHEW E. AARON, ESQ. of the law firm AARON & PATERNOSTER, pursuant to NRCP 16.1, supplement their List of Documents and Witnesses pursuant to NRCP 16.1 as follows:

EXHIBITS:

1. Addendum Report of Stan Smith, Ph.D. dated March 29, 2011.

Plaintiffs reserve the right to supplement this pleading to produce any further documents or to add any witnesses that may not be presently known.

DATED this 29TH day of March, 2011.

MAINOR EGLET

By: _____ #7432
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
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400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing **PLAINTIFF'S TWENTY-EIGHTH SUPPLEMENT TO THE LIST OF WITNESSES AND PRODUCTION OF DOCUMENTS PURSUANT TO NRCP 16.1** in the matter of **SIMAO v. RISH, et al** is hereby acknowledged by the following counsel of record:

/Stephen H. Rogers, Esq./ Date: March 29, 2011

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

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Smith Economics Group, Ltd.
A Division of Corporate Financial Group
Economics / Finance / Litigation Support

Stan V. Smith, Ph.D.
President

March 29, 2011

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

Re: Simao - ADDENDUM

Dear Mr. Adams:

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

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

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

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

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

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

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

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

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

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

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

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II. REDUCTION IN VALUE OF LIFE

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

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

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

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

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

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

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

(2) The central tendency of the range of the economic studies cited above which I estimate to be

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

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

III. LOSS OF SOCIETY OR RELATIONSHIP

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

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

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IV. COST OF FUTURE LIFE CARE

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

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

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

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

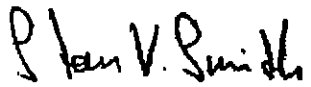
All opinions expressed in this report are clearly labeled as such. They are rendered in accordance with generally accepted standards within the field of economics and are expressed to a reasonable degree of economic certainty. Estimates, assumptions, illustrations and the use of benchmarks, which are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

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

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

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

Sincerely,



Stan V. Smith, Ph.D.
President

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APPENDIX: VALUE OF LIFE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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SUMMARY OF LOSSES FOR WILLIAM SIMAO

TABLE	DESCRIPTION	ESTIMATE
	HOUSEHOLD/FAMILY REPLACEMENT SERVICES	
6A	LOSS OF HOUSEHOLD/FAMILY HOUSEKEEPING AND HOME MANAGEMENT SERVICES	$ 167,196
	LOSS OF ENJOYMENT OF LIFE	
	REDUCTION IN VALUE OF LIFE	
9A	Lower impairment rating	$ 603,454
12A	Upper impairment rating	$1,206,884
	LOSS OF SOCIETY AND RELATIONSHIP	
	LOSS OF RELATIONSHIP	
15A	Cheryl Simao	$ 681,286
	PRESENT VALUE OF FUTURE LIFE CARE	
	COST OF FUTURE LIFE CARE	
16A	See Page 4 of Life Care Plan	$2,608,897

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

003515

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Table 4A

LOSS OF PAST HOUSEHOLD SERVICES
2005 - 2011

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

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Table 5A

PRESENT VALUE OF FUTURE HOUSEHOLD SERVICES
2011 - 2042

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

WILLIAM SIMAO $133,970

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Table 6A

PRESENT VALUE OF NET HOUSEHOLD SERVICES LOSS
2005 - 2042

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

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Table 7A

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

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

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Table 8A

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

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

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Table 9A

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

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

Table 10A

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

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

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Table 11A

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

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

Table 12A

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

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

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Table 13A

LOSS OF PAST RELATIONSHIP TO CHERYL
2005 - 2011

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

CHERYL SIMAO $109,453

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Table 14A

PRESENT VALUE OF FUTURE RELATIONSHIP TO CHERYL
2011 - 2048

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

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Table 15A

PRESENT VALUE OF NET RELATIONSHIP LOSS TO CHERYL
2005 - 2048

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

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TABLE 16A

LIFE CARE PLAN CALCULATION		MEDICAL SERVICES								
NAME:	William Simao	ADOT:	47.9						(MS = MED SERVICES)	2.20%
DOI:	04/15/05	RLEDOT:	30.9						(MC = MED COMMODITIES)	0.75%
DOT:	04/01/11	LEDOT:	78.8						(NMS = NON-MED SVCS)	1.05%
# OF DAYS FROM DOT TO EOY =		274							(NON-MC = NON-MED COMM)	0.00%
FIRST YEAR FRACTION		0.75							(D = DISCOUNT RATE)	1.45%
END OF LE:		02/23/42								

ITEM	COST PER UNIT	# OF UNITS USED	per	# OF YEARS	# OF UNITS PER YEAR	ANNUAL COST	INITIAL YEAR OF COST	LAST YEAR OF COST
Trial Stimulator	$84,000	1		1	1.00	$84,000	2011	2011
Permanent Placement Stimulator	$212,000	1		1	1.00	$212,000	2011	2011
Stimulator Replacement	$141,000	1		5	0.20	$28,200	2016	2042
Leads Revision	$103,000	2		5	0.40	$41,200	2013	2042
Follow Up Visits - First 3mos	$1,000	2		1	2.00	$2,000	2011	2011
Follow Up Visits Thereafter	$1,000	2		1	2.00	$2,000	2012	2042

TABLE 16A

	TRIAL YEAR													
ITEM	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Trial Stimulator	$83,097													
Permanent Placement Stimulator	$209,721													
Stimulator Replacement						$28,943	$29,157	$29,373	$29,590	$29,809	$30,029	$30,251	$30,475	$30,700
Leads Revision			$41,362	$41,668	$41,976	$42,286	$42,599	$42,914	$43,231	$43,551	$43,872	$44,197	$44,524	$44,853
Follow Up Visits - First 3mos	$1,979													
Follow Up Visits Thereafter		$1,993	$2,008	$2,023	$2,038	$2,053	$2,068	$2,083	$2,099	$2,114	$2,130	$2,145	$2,161	$2,177
ANNUAL PRESENT VALUE	$294,797	$1,993	$43,370	$43,690	$44,013	$73,282	$73,824	$74,370	$74,920	$75,474	$76,031	$76,594	$77,160	$77,730
CUMULATIVE TOTAL	$294,797	$296,790	$340,160	$383,850	$427,864	$501,146	$574,970	$649,340	$724,260	$799,733	$875,765	$952,358	$1,029,518	$1,107,248

Smith Economics Group, Ltd.

Life Care Plan Costs

MED SVCS

TABLE 16S

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TABLE 16A

ITEM	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037
Trial Stimulator													
Permanent Placement Stimulator													
Stimulator Replacement	$30,927	$31,156	$31,386	$31,618	$31,852	$32,087	$32,325	$32,564	$32,804	$33,047	$33,291	$33,537	$33,785
Leads Revision	$45,184	$45,518	$45,855	$46,194	$46,535	$46,879	$47,226	$47,575	$47,927	$48,281	$48,638	$48,998	$49,360
Follow Up Visits - First 3mos													
Follow Up Visits Thereafter	$2,193	$2,210	$2,226	$2,242	$2,259	$2,276	$2,293	$2,309	$2,327	$2,344	$2,361	$2,379	$2,396
ANNUAL PRESENT VALUE	$78,305	$78,884	$79,467	$80,054	$80,646	$81,242	$81,843	$82,448	$83,058	$83,672	$84,290	$84,913	$85,541
CUMULATIVE TOTAL	$1,185,553	$1,264,437	$1,343,904	$1,423,958	$1,504,604	$1,585,847	$1,667,690	$1,750,138	$1,833,196	$1,916,867	$2,001,157	$2,086,071	$2,171,612

Smith Economics Group, Ltd.

Life Care Plan Costs

MED SVCS

TABLE 16S

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TABLE 16A

ITEM	2038	2039	2040	2041	2042	ITEM TOTALS
Trial Stimulator						$83,097
Permanent Placement Stimulator						$209,721
Stimulator Replacement	$34,035	$34,287	$34,540	$34,795	$35,053	$861,417
Leads Revision	$49,725	$50,092	$50,463	$50,836	$51,212	$1,383,529
Follow Up Visits - First 3mos						$1,979
Follow Up Visits Thereafter	$2,414	$2,432	$2,450	$2,468	$2,486	$69,155
ANNUAL PRESENT VALUE	$86,173	$86,811	$87,452	$88,099	$88,750	
CUMULATIVE TOTAL	$2,257,785	$2,344,596	$2,432,048	$2,520,147	$2,608,897	

Smith Economics Group, Ltd.

Life Care Plan Costs

TABLE 16S

MED SVCS

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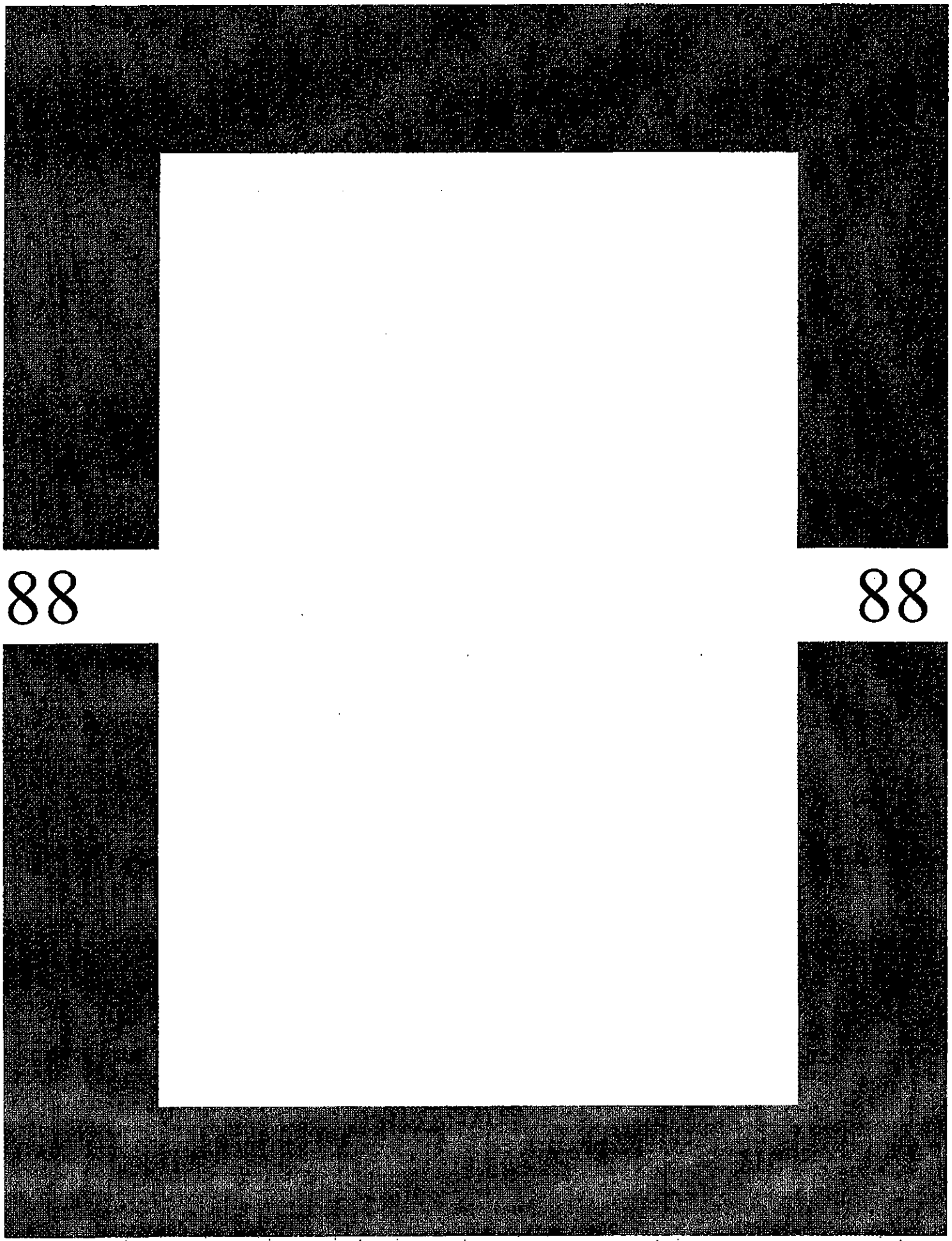

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SAO
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Attorneys for Plaintiffs

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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

STIPULATION AND ORDER TO MODIFY BRIEFING SCHEDULE

THE PARTIES STIPULATE to extend the due date for their brief regarding

///

attorneys' fees from April 20, 2011 to April 22, 2011.

DATED this 19 day of April, 2011

MAINOR EGLET

10558

ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

DATED this ____ day of April, 2011.

LEWIS AND ROCA LLP

See next page

DANIEL F. POLSENBERG, ESQ.
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Nevada Bar No. 8492
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CHARLES A. MICHALEK, ESQ.
Nevada Bar No. 5721
ROGERS, MASTRANGELO,
CARVALHO & MITCHELL
300 S. Fourth St., Ste. 710
Las Vegas, NV 89191
Attorneys for Defendant

IT IS SO ORDERED:

BY Jessie Walsh
DISTRICT JUDGE

DATED: 20 Apr 2011

attorneys' fees from April 20, 2011 to April 22, 2011.

DATED this 19 day of April, 2011

MAINOR EGLET

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ROBERT M. ADAMS, ESQ.
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DATED this 19th day of April, 2011.

LEWIS AND ROCA LLP

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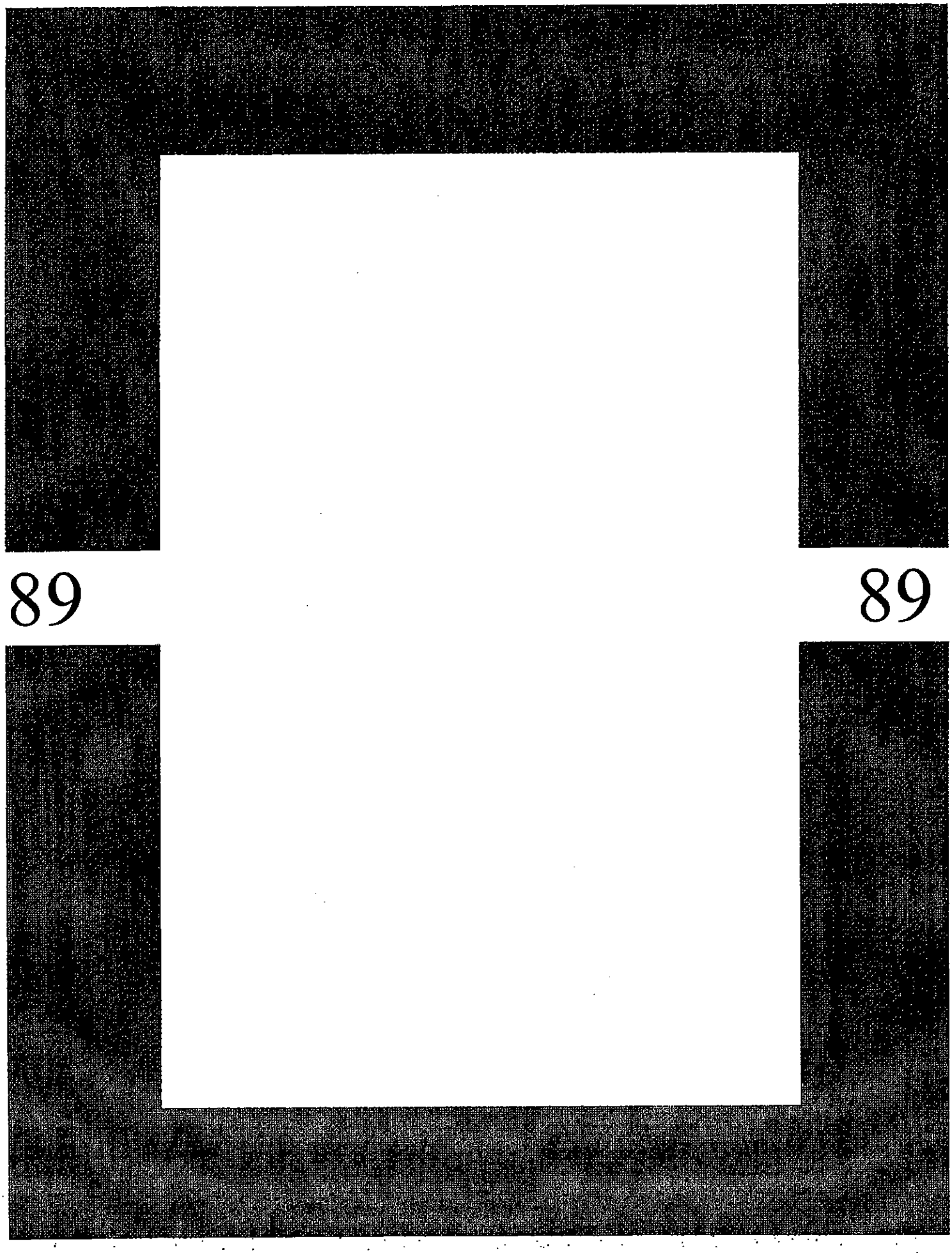
Las Vegas, NV 89191
Attorneys for Defendant

IT IS SO ORDERED:

BY_____
DISTRICT JUDGE

DATED: _____



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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,

Plaintiffs,

v.

JENNY RISH; JAMES RISH; LINDA RISH; DOES 1 through V; and ROE CORPORATIONS 1 through V, inclusive,

Defendants.

Case No. A539455

Dept. No. X

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY FEES

During the prove up hearing, on April 1, 2011, plaintiffs requested an award of attorney fees, based only on the argument that there is a "long line of precedent establishing that attorney fees and cost can be awarded for a default judgment[.]" (*See* excerpt of plaintiff's PowerPoint presentation, attached as Exhibit "A.") Plaintiff cited 12 cases that purportedly supported that argument. (*Id.*) But, the proposition is false; a default judgment, of itself, does *not* justify an award of fees. All of the cases

cited by plaintiffs, moreover, deal with an award of fees based upon "statute, rule, or contract"—*not* on the mere fact that a default judgment was entered.

At this point, no basis exists for an award of attorney fees. While it is true that plaintiff served an offer of judgment in this case—so, too, did the defendant—the court has not yet entered any award in excess of any offer. Nor has plaintiff made even a *prima facie* showing pursuant to the factors in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), that an award of fees would be appropriate. Thus, on the current district court record, any award of fees based on Rule 68 would be premature and erroneous.

(Note: If plaintiffs disclosed any offer of judgment in their moving papers, before this court enters judgment, such premature disclosure is improper, barring a recovery. *See* NRS 48.105 (1)(b); *Morrison v. Beach City, LLC*, 116 Nev. 34, 991 P.2d 982 (2000).)

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I.

FEES MUST BE AUTHORIZED BY A STATUTE, RULE OR AGREEMENT

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Under Nevada law, a district court cannot award attorney's fees unless authorized by statute, rule, or agreement between the parties. *See* NRS § 18.010; *see also Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d 1022, 1028 (2006); *State, Dep't of Human Resources v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993); *Woods v. Label Inv. Corp.*, 107 Nev. 419, 812 P.2d 1293 (1991). Within this stated criteria, the decision to award attorney's fees is left within the sound discretion of the district court. *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993). However, a district court may abuse its discretion when it disregards guiding legal principles. *Franklin v. Bartsas Realty Inc.*, 95 Nev. 559, 562-73, 598 P.2d 1147, 1149 (1979). District courts do not have the inherent power to impose attorney's fees without statutory authorization. *See Sun Realty v. Dist. Ct.*, 91 Nev. 774, 542 P.2d 1072 (1975).

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In this case, Plaintiffs are not entitled to attorney's fees because none of the above avenues for obtaining fees apply. Plaintiffs' assertion that a long line of precedent establishes that attorney's fees and costs can be awarded for default judgments ignores the fact that the awards in the cases they cited are all based on either "statute, rule, or contract"—***not*** on the mere fact that a default judgment was entered. As discussed below, all of the cases cited by Plaintiffs in their presentation to this Court (*see* Exhibit "A") are distinguishable from the current matter. Plaintiffs are not entitled to an attorney's fee award merely based on entry of a default judgment. On the contrary, the Court can award fees only if specifically authorized by statute, rule or contract—none of which apply here.

II.

THERE IS NO BASIS IN THIS CASE FOR AN AWARD OF FEES

A. Plaintiffs are Not Entitled to Fees Pursuant to an Agreement Between the Parties

Pursuant to NRS § 18.010(1) and (4), attorney's fees are recoverable only where an express or implied agreement between the parties provides for such recovery. *See also Singer v. Chase Manhattan Bank*, 111 Nev. 289, 890 P.2d 1305 (1995). This personal injury action does not involve any agreement between the parties entitling Plaintiffs to attorney's fees.

Ignoring this obvious distinction, Plaintiffs cited in their presentation to the Court *Tri-Pacific Commer. Brokerage, Inc. v. Boreta*, 113 Nev. 203, 931 P.2d 726 (1997). In *Boreta*, the district court awarded attorney's fees pursuant to a contractual provision in the promissory note sued upon. Ultimately, the court of appeals reversed the judgment, including the fee award, after finding the guaranty unenforceable pursuant to the statute of frauds. *Id.* at 206, 931 P.2d at 729. Contrary to Plaintiffs' assertion, *Boreta* does not stand for the proposition that a default judgment in and of itself can be a basis for an award of attorney's fees.

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Similarly, the award of fees in *Foster v. Dingwall*, 126 Nev. ___, 227 P.3d 1042 (2010), was justified not by the default judgment, but by the underlying contract.

B. Plaintiffs Are Not Entitled to Fees Pursuant to a Statute or Rule

1. NRS 18.010(2)(a) Does Not Apply

NRS § 18.010(2)(a) permits a prevailing party who obtained a monetary judgment of less than $20,000 to seek attorney's fees. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 93-94, 127 P.3d 1057, 1065 (1996) (holding that attorney's fees cannot be awarded pursuant to NRS § 18.010(2)(a) where no monetary judgment was obtained). The monetary limit applies to the total judgment, not to separate claims. *See Peterson v. Freeman*, 86 Nev. 850, 855-56, 477 P.2d 876 (1970).

Plaintiffs do not fall within NRS § 18.010(2)(a), as they are seeking a default judgment well in excess of $20,000. As such, this provision is inapplicable and the cases cited by Plaintiffs awarding attorney's fees in the default judgment context pursuant to this statute are equally inapposite. *See Yochum v. Davis*, 98 Nev. 484, 633 P.2d 1215 (1982) (while district court awarded attorney's fees to plaintiff upon entry of default judgment, the award was authorized by NRS § 18.010(2)(a) because the plaintiff obtained less than $20,000); *Harris v. Shell Dev. Corp.*, 95 Nev. 348, 594 P.2d 731 (1979) (attorney's fees were awarded but they were authorized under NRS § 18.010(2)(a) because plaintiff's recovery was under $20,000); *Bruno v. Schroch*, 94 Nev. 712, 582 P.2d 796 (1978) (default judgment entered by the district court was reversed on appeal and was for a figure of less than $20,000); *Bromberg v. Anthis*, 75 Nev. 120, 335 P.2d 777 (1959) (awarding attorney's fees to plaintiff where judgment was for less than $20,000); *Lentz v. Boles*, 84 Nev. 197, 438 P.2d 254 (1968) (district court originally granted a default judgment and awarded attorney's fees where judgment was for less than $20,000 and thus valid pursuant to NRS § 18.010(2)(a)); *Durango Fire Protection v. Troncoso*, 120 Nev. 658, 98 P.3d 691 (2004) (judgment was for less than $20,000).

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Again, contrary to Plaintiffs' assertion, these cases do not stand for the proposition that a default judgment in and of itself can be a basis for an award of attorney's fees.

2. *NRS § 18.010(2)(b) Would Not Justify an Award of Fees*

Under N.R.S. § 18.010(2)(b), a district court can award attorney's fees if a claim or defense was "brought without reasonable grounds to harass the prevailing party." *See Rodriguez v. Primadonna Co.*, 125 Nev. __, 216 P.3d 793, 800 (2009); *United Ins. Co. of Am. v. Chapman Indus.*, 120 Nev. 745, 748, 100 P.3d 664 (2004). Although a district court has discretion to award attorney fees under NRS § 18.010(2)(b), there must be evidence in the record supporting the district court's finding that the claim or defense was unreasonable or brought to harass. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995).

Even assuming the Court had a justifiable reason for its default order—which defendant contends it did not—the plain language of NRS § 18.010(2)(b) and Nevada case law interpreting it do not permit an award of attorney's fees based on an allegation or finding that a party acted maliciously or engaged in unacceptable tactics in the case. *See Frantz v. Johnson*, 116 Nev. 455, 472, 999 P.2d 351, 361-62 (2000) (award of fees under NRS § 18.010(2)(b) is not permitted "for acting maliciously or engaging in unacceptable discovery tactics"); *see also Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 851 P.2d 459 (1993); *Semenza*, 111 Nev. at 1096, 901 P.2d at 688. In other words, the fact that the Court entered default against Defendants based on its findings regarding tactics employed at trial does not authorize an award of fees under NRS § 18.010(2)(b).

Rather, NRS § 18.010(2)(b) allows an award of attorney's fees to the prevailing party only when a party has alleged a groundless claim or defense that is not supported by any credible evidence. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993) (emphasis added). Here, there are no bases to support a finding that the defense was frivolous or groundless. If there were, plaintiff would

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have succeeded on a motion for summary judgment. No award of fees can be made under NRS § 18.010(2)(b).

3. *Plaintiffs Cannot Recover Fees Pursuant to a Personal-Injury, Fee-Shifting Statute or any Other Fee-Shifting Statute*

There are no fee-shifting statutes in Nevada authorizing awards of attorney's fees in personal injury actions. Plaintiffs' citation to *Eversole v. Sunrise Villas Homeowners*, 112 Nev. 1255, 925 P.2d 505 (1996), *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992), *and Young v. Johnn Ribeiro Bldg.*, 106 Nev. 88, 787 P.2d 777 (1990), are all inapposite.

In *Eversole* the district court awarded attorney's fees pursuant to NRS § 116.4117, the Common-Interest Ownership Uniform Act. *Eversole*, 112 Nev. at 1258. Under that statute, the court was authorized to award the prevailing party attorney's fees in actions involving community associations. That statute is clearly not applicable to this personal injury action.

The court in *Kahn*, after entering default judgment, awarded the plaintiff his attorney's fees incurred in defending against a separate criminal complaint as a component of damages pursuant to his malicious prosecution claim. The court in *Kahn* did not award the plaintiff the attorney's fees he incurred in litigating the malicious prosecution action itself. As such, *Kahn* has no applicability to this case.

Lastly, Plaintiffs' reliance on *Young* for the proposition that attorney's fees are recoverable in default judgment cases is equally misplaced. In *Young* the only attorney's fees awarded were those incurred by the defendant in filing its discovery sanctions motion pursuant to NRCP 37(b)(2). Although, the court sanctioned the plaintiff for willfully fabricating evidence by dismissing the complaint with prejudice and adopting the final accounting as a form of default judgment, the court did not award the defendant all of its attorney's fees. Instead, as punishment for the discovery abuses the court awarded defendant its attorney's fees for filing the motion. As such,

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Young does not stand for the proposition that attorney's fees for an entire case are recoverable when a default judgment is obtained.

C. Plaintiffs Are Not Entitled to Fees Under Rule 68 or NRS 17.115

The Court lacks grounds to award fees under Rule 68 or NRS 17.115. While it is true that plaintiff served an offer of judgment in this case, the current record cannot support an award of fees. First, it would be premature, as the Court has not yet entered any award in excess of plaintiff's offer of judgment. Secondly, and more importantly, plaintiffs have not demonstrated even a *prima facie* justification for fees pursuant to the *Beattie v. Thomas* factors.

Furthermore, if fees are awarded, they are strictly limited to those fees actually incurred from the time of service of the offer of judgment forward. NRCP 68(f)(2); NRS § 17.115(4)(d)(3).

1. *An Award Based on NRCP 68 and NRS § 17.115 Would Be Premature*

The Court has yet to enter a judgment on the default. For purposes of the statute and rule governing offers of judgment, permitting fee-shifting penalties to be assessed against an offeree who "rejects an offer and fails to obtain a more favorable judgment," the word "judgment" connotes a final judgment. *In re Estate and Living Trust of Miller*, 125 Nev. 42, 216 P.3d 239, 125 Nev. 42 (2009). In this matter, there has yet to be a "final judgment" entered by the court. Thus, an award of fees under NRCP 68 and NRS § 17.115 would be premature.

2. *Plaintiffs Have Not Made the Requisite Showing Under* Beattie v. Thomas

Plaintiffs would not be entitled to an award of fees even if this Court's judgment exceeds plaintiffs' offer of judgment. NRCP 68 and NRS 17.115 provide that when a party wins a more favorable judgment than offered, the offeror may recover fees incurred from the date of the offer. However, an award of fees is not automatic. It may follow only from a sound and thorough exercise of the Court's discretion. *Chavez v. Sievers*, 118 Nev. 288, 296, 43 P.3d 1022, 1027 (2002). And,

"the failure to exercise discretion when required is [itself] an abuse of discretion." Rex A. Jemison, *A Practical Guide to Judicial Discretion*, NEVADA CIVIL PRACTICE MANUAL § 29.05 (5th ed. 2010), *citing Massey v. Sunrise Hosp.*, 102 Nev. 367, 724 P.2d 208 (1986).

Before this Court could award fees based on an offer of judgment, full and transparent briefing would be required to enable this Court to fulfill its duty to "carefully weigh" at least the following factors:

(1) Whether the plaintiff's claim was brought in good faith:

(2) Whether the offer of judgment was reasonable and in good faith in both its timing and amount;

(3) Whether the decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and

(4) Whether the fees sought by the offeror are reasonable and justified in amount.

Yamaha Motor Co., U.S.A. v. Arnoult, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998) (*citing Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)); *see also Wynn v. Smith*, 117 Nev. 6, 13-14, 16 P.3d 424, 428-29 (2001). Plaintiff has made no showing to demonstrate that an award of fees is appropriate under Rule 68.

(If plaintiff endeavors to address these issues for the first time in the brief that will be filed simultaneously with this paper, defendant will have a right to respond. While plaintiffs may continue to insist that defendant has no right to file opposition papers based on this court's default order, this notion is not supported by law. Importantly, parties have an ongoing duty to alert the district court to errors they foresee as being possible grounds for reversal. *C.f., Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299-300, 757 P.2d 361, 362-63 (1988).)

3. *A Contingency Fee is Not Appropriate in the Offer-of-Judgment Context*

Even if the Court were to find at some later time than an award of fees is appropriate under NRCP 68 and NRS 117.115, the award cannot be in the amount of their contingency fee.

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Fees are awarded differently under Rule 68 than pursuant to a fee-shifting statute or contract provision. It is true that this Court has discretion in the manner of calculating fees pursuant to a fee-shifting statute. *See, e.g., Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005) (fees awarded under Chapter 40). However, under fee-shifting statutes, plaintiff's fees from the entire action are imposed. Rule 68 and NRS 17.115, on the other hand, authorize fees only for part of the litigation, after the offer of judgment is rejected. *See* NRCP 68(f)(2) (fees are limited to those fees actually incurred from the time of service of the offer of judgment forward); NRS § 17.115(4)(d)(3) (same); *see also Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 884, 822 P.2d 1100, 1107 (1992); *Panicaro v. Robertson*, 113 Nev. 667, 941 P.2d 485 (1997) (stating that an award of attorney's fees under NRS 17.115 is restricted to fees accrued after the offer of judgment). Thus, awarding a contingency fee in the offer-of-judgment context is inappropriate because it disregards the limited nature of the fees that are awardable. In the offer-of-judgment context, courts use the lodestar approach (multiplying the actual hours spent by a reasonable market rate) because it provides the court with the control necessary to enforce that temporal line.

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CONCLUSION

Plaintiffs' contention that there is a long line of precedent establishing that attorney fees and costs can be awarded for a default judgment is misleading. Plaintiffs are not entitled to an award of attorney's fees merely because they obtained a default judgment. They are entitled to attorney's fees only if a "statute, rule, or contract" authorizes the award. In this matter, no such grounds exist authorizing an attorney's fee award. While an award of fees may eventually be authorized under NRCP 68 and NRS § 117.115, such an award would be premature at this time because no final judgment has been entered. In addition, any fee award under Rule 68 and NRS § 117.115 must be limited to those fees actually incurred from the time of service of the

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offer of judgment forward (here, February 9, 2009 forward). An award of plaintiffs' counsel's contingent fee is impermissible.

DATED this 15th day of April 2011.

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Attorneys for Defendant

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I HEREBY CERTIFY that on the 22nd day of April, 2011, I served the foregoing DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY FEES by depositing a copy for mailing, first-class mail, postage prepaid, at Las Vegas, Nevada, to the following:

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MATTHEW E. AARON
AARON & PATERNOSTER
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s/ Mary Kay Carlton
An Employee of Lewis and Roca LLP

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EXHIBIT A

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EXHIBIT A

ATTORNEY FEES

- Whether to award attorney fees is left to the sound discretion of the court.
  - -Laforge v. State of Nev., 997 P.2d 130 (2000)
  - -Uniroyal Goodrich Tire Co. v. Mercer, 111 Nev. 318 (1995)
- Here, Plaintiff's contingency fee agreement with their counsel is 40% of all amounts recovered.
- Nevada recognizes the validity of contingency fee agreements.

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ATTORNEY FEES

- District courts, in the Eighth Judicial District have awarded attorney fees based upon contingency fee amount.
- The method upon which attorney fees are determined is left to the discretion of the court.
- In determining the amount of attorney fees, the court is not limited to one specific approach. -Shuette v. Beazer Homes Holding Corp., 121 Nev. 837 (Nev 2005)
- Long line of precedent establishing an award of attorney fees on a default judgment.

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In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

JENNY RISH,

Appellant,

vs.

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

Respondents.

APPEAL

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

APPELLANT'S APPENDIX
VOLUME 15
PAGES 3407-3627

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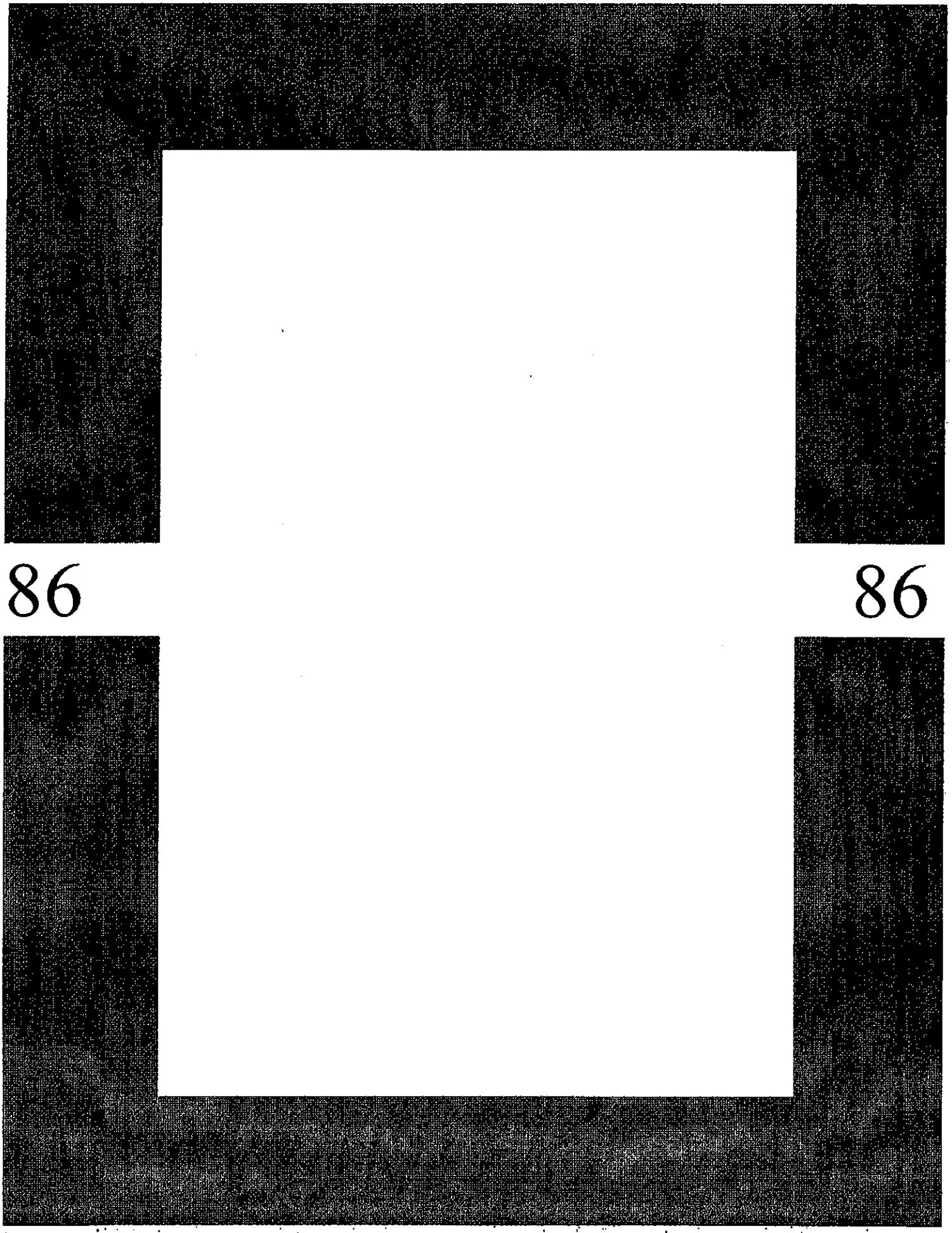
Attorneys for Appellant

TABLE OF CONTENTS TO APPENDIX



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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' FOURTH SUPPLEMENT TO THEIR CONFIDENTIAL TRIAL BRIEF REGARDING CROSS EXAMINATION OF DR. WANG**

This Trial Brief is served pursuant to Eighth Judicial District Court Rule 7.27 which specifically states:

Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memorandum of points and authorities prior to the commencement of trial by delivering one unfiled copy to the court, without serving opposing counsel or filing the same, provided that the original trial memorandum of points and authorities must be filed and a copy must be served upon opposing counsel at or before the close of trial.

I.

INTRODUCTION

The defense has name Jeffrey Wang, M.D. as a medical expert in this case. Apparently, Dr. Wang has some scheduling difficulties and as such requested to testify at trial on Tuesday, March 29, 2011. The Plaintiffs are still in their case in chief. However, to accommodate the witness, the Plaintiffs agreed to allow Dr. Wang to testify on the date requested.

Plaintiffs intend to cross examine Dr. Wang on several issues, including the issue of adjacent segmental breakdown. [1] Moreover. Plaintiffs indent on eliciting testimony from Dr. Wang on cross examination, regarding the costs associated with a future surgery to repair the adjacent segments. Plaintiffs anticipate that Dr. Wang will be able to complete his direct and cross examination on March 29, 2011.

II.

ARGUMENT

1. **Plaintiffs Intend on Fully Cross Examining Dr. Wang, Including Cross Examination Regarding Adjacent Segmental Breakdown.**

The defense has name Jeffrey Wang, M.D. as a medical expert in this case. Dr. Wang is a Board Certified Spine Surgeon. In this case, Dr. Wang has performed an examination of

[1] As this Court may be aware, adjacent segmental breakdown is a condition that occurs over time to people who have had fusion surgeries to their spine. Specifically, adjacent segmental breakdown refers to wear and tear on the spinal segment either below or above the fusion site. When the spine is fused at one or two levels, pressure is placed on the adjacent levels above and below the fusion, which causes those adjacent levels to wear out over time. Hence, the term "breakdown."

Plaintiff, reviewed all of Plaintiff's medical records, read all of the depositions and has authored three (3) expert reports.

Dr. Wang has been retained as a defense expert several times regarding personal injury cases that occurred in Nevada. Moreover, Dr. Wang has testified in numerous depositions as a retained expert, in Nevada personal injury cases. In several depositions, Dr. Wang is asked and renders opinions regarding adjacent segment breakdown. As a Board Certified Spine Surgeon, Dr. Wang is readily familiar with the percentage of breakdown that the adjacent (fusion) segments breakdown over time. Moreover, he is very familiar with the type of spine surgery required to repair the adjacent segments, as well as the cost thereof. Plaintiffs will elicit this testimony from Dr. Wang on cross examination on March 29, 2011, when testifying out of order, during Plaintiffs case and chief due to an accommodation made by Plaintiffs.

2. **Plaintiff's Future Medical Needs and Costs Pertaining to "Adjacent Segmental Breakdown" Can Be Established Through Defense Expert, Dr. Wang.**

It is anticipated that the defense will object to Dr. Wang being cross examined with regard to adjacent segmental breakdown, and the future surgical costs to repair this condition. Specifically, the defense may argue that their expert cannot be used to establish an element of William Simao's damages. However, this would be an incorrect statement of the law.

Plaintiffs are not precluded from introducing evidence at trial through cross-examination of an opposing party's witnesses. Ninth Circuit case law explicitly holds that a plaintiff need not establish the requisite foundation for elements of his claims through his own experts; "**the requisite foundation can be established by the defendant's expert testimony.**" *Barcai v. Betwee*, 98 Haw. 470, 485 (Haw. 2002).

The *Barcai* case addressed the issue of expert testimony with regard to informed consent, holding that expert testimony is required to establish the risks, the probabilities of success, the frequencies of the occurrence of the risks, and any alternatives available for a particular

procedure. *Id.* Importantly, the *Barcai* Court specifically stated that although evidence of this nature must come through expert witness testimony, it is not required that it come through plaintiff's expert, rather it can also come through defendant's expert witness as well. *Id.*

Barcai relied upon the case of *Carr v. Strode*, 79 Haw. 475, 487 (Haw. 1995), in which the Supreme Court of Hawaii overturned a district court's granting of a motion JNOV which was granted based upon the plaintiff's failure to meet his evidentiary burden through his own medical expert. The Supreme Court of Hawaii held that plaintiff did in fact meet his burden **through defendant's medical expert**. The Court held as follows:

> Defendants argue that, because plaintiffs failed to establish their claim based on lack of informed consent through expert medical testimony, the trial court properly granted their motion for a JNOV. Plaintiffs retort by asserting that they met their evidentiary burden as to the standard of disclosure through Dr. Strode's testimony. We agree with plaintiffs, but for different reasons.
>
> **As previously discussed, a plaintiff is not required to prove the standard of disclosure required for informed consent with medical expert evidence, but is required to prove by expert medical evidence the materiality of the risk of harm to which the plaintiff was subjected. It is clear that a defendant-physician's testimony may satisfy this burden. *See Nishi*, 52 Haw. at 196-97, 473 P.2d at 121 (defendant-doctor's testimony sufficient to meet expert medical evidence burden required to prove an informed consent claim).**
>
> ...
>
> **Based on Dr. Strode's testimony, we hold that plaintiffs met their burden of establishing the materiality of the risk of the vasectomy failing through the defendant-physician's expert medical testimony.**

Id. [Emphasis Added].

Although the cases referred to above address the issue of "informed consent" the same reasoning applies to the issue presently before this Court, *i.e.* that defendant's experts can establish the requisite foundation for plaintiff's claims. This is consistent with Nevada law, as

evidenced by Nevada Pattern Jury Instruction 2.01, which reads:[2]

> "In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it."

In the case at hand, Plaintiff, through Defendant's medical expert Dr. Wang, will be able to establish unequivocally that William Simao will require future cervical spine surgery because of adjacent segmental breakdown and the reasonable costs of the surgery. Whether this evidence comes through William's own medical experts or the Defendant's is of no consequence to this litigation.[3] As such, any objection by Defendant on this issue is unfounded and should be disregarded.

RESPECTFULLY SUBMITTED, this 28TH day of March, 2011.

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[2] Exhibit 1, Nevada Pattern Jury Instruction 2.01

[3] *See Barcai and Carr; See also,* Nevada Pattern Jury Instruction 2.01.

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INSTRUCTION NO. _____

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

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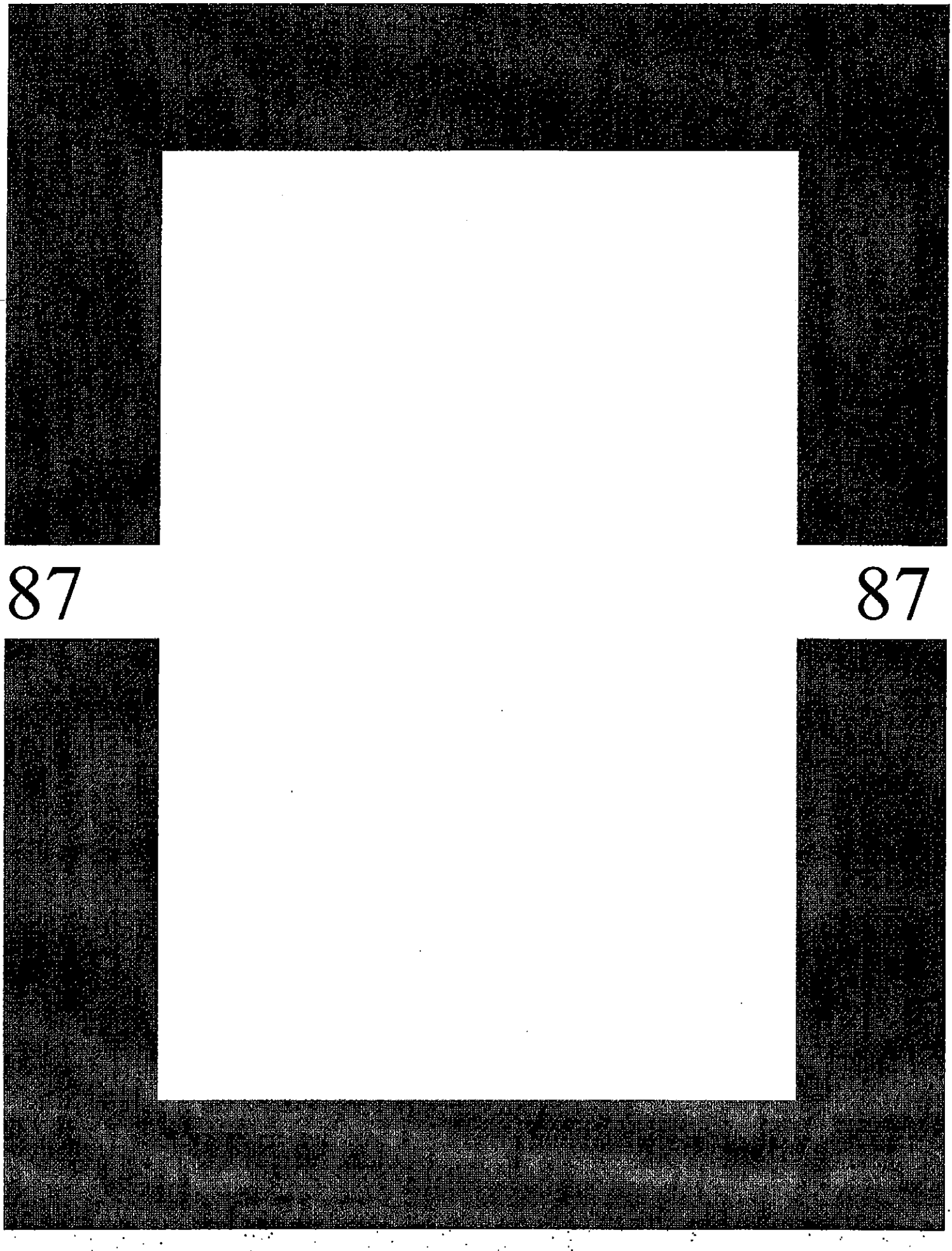
Nevada Pattern Civil Jury Instructions, Civil 2.01



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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' FIFTH SUPPLEMENT TO THEIR CONFIDENTIAL TRIAL BRIEF TO PERMIT STAN SMITH, Ph.D., TO TESTIFY REGARDING, EVIDENCE MADE KNOWN TO HIM DURING TRIAL

PLAINTIFFS' FIFTH SUPPLEMENT TO THEIR CONFIDENTIAL TRIAL BRIEF TO PERMIT STAN SMITH, Ph.D., TO TESTIFY REGARDING, EVIDENCE MADE KNOWN TO HIM DURING TRIAL

This Trial Brief is served pursuant to Eighth Judicial District Court Rule 7.27 which specifically states:

> Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memorandum of points and authorities prior to the commencement of trial by delivering one unfiled copy to the court, without serving opposing counsel or filing the same, provided that the original trial memorandum of points and authorities must be filed and a copy must be served upon opposing counsel at or before the close of trial.

I.

ARGUMENT

Pursuant to Nevada Statute, an expert can offer opinions based upon evidence presented at trial, that the expert either perceived or was made aware of. Specifically NRS 50.285, governing expert opinions, states as follows:

> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
>
> 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Economist, Stan Smith, Ph.D., has been retained as an expert. Dr. Smith is expected to testify at trial regarding the economic impact the subject accident has had on Plaintiffs' lives, including William Simao's loss of household services, the reduction in value of life (loss of enjoyment of life or hedonic damages), the cost of future medical care, and Cheryl Simao's loss of society, relationship and comfort. (*See* Expert Designation of Stan Smith, Ph.D., attached

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hereto as **Exhibit "1"**). Pursuant to NRS 50.285, as an expert, Dr. Smith can form additional opinions, including refined opinions, based upon evidence made known to him during trial.

Based upon the evidence presented during trial, certain aspects of William's claims for damages have been modified and/or withdrawn. The trial of this matter commenced on March 14, 2011. Since that time, there have been several medical witnesses who have testified. Some of these witnesses have testified regarding William Simao's future care needs. Specifically, Patrick McNulty, M.D., (William's treating Spine Surgeon) testified that William will more likely than not require: (1) a trial spinal cord stimulator; (2) a permanent placement of a spinal cord stimulator, (3) spinal cord stimulator replacements; (4) leads revisions; (5) two follow-up physician visits within three months of his spinal cord stimulator placement surgery; and (6) bi-annual physician visits. (*See* Trial Transcript of Patrick McNulty, M.D., attached hereto as **Exhibit "4,"** 100:15 thru 110:25). Moreover, during trial the Plaintiffs have formally withdrawn their Life Care Planning Expert, Kathleen Hartman, R.N., including her reports and opinions. (*See* Plaintiff's De-designation of Kathleen Hartman, R.N. as an Expert Witness, attached hereto as **Exhibit "2"**). Additionally, William's loss of earning capacity was formally withdrawn at the EDCR 2.67 Pre-Trial Conference, immediately before trial. (*See* Transcript of EDCR 2.67 Conference, attached hereto as **Exhibit "3,"** 27:9-17).

Dr. Smith does not intend to, and will not, offer opinions at trial relating to Ms. Hartman's Life Care Plan or William's loss of earning capacity. As such, the defense should be precluded from questioning Dr. Smith regarding either of these two (2) opinions as they are no longer relevant to any material mater of this litigation. However, Dr. Smith does intend on offering opinions at trial relating to Plaintiff's future medical care costs, including opinions that he has formulated based upon the evidence made known to him during trial. Specifically, a copy

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of the trial transcript containing Dr. McNulty's trial testimony was provided to Dr. Smith. Based upon the evidence presented at trial which was made known to Dr. Smith, he has formed additional opinions regarding the cost of William's future medical care. Moreover, although an expert is not required, Dr. Smith has memorialized his refined opinions in a supplemental report, dated March 29, 2011. (*See* March 29, 2011 Report attached hereto as **Exhibit "5"**)[1]. Dr. Smith intends to offer these opinions during his trial testimony, which is expected to take place on Wednesday, March 30, 2011. Pursuant to NRS 50.285, there is nothing which would preclude Dr. Smith from offering his refined opinions, since the foundation for these opinions is based upon the evidence presented during trial and made known to him. Accordingly, any objection made by the defense regarding Dr. Smith's opinions (based upon the evidence elicited at trial) must be overruled.

RESPECTFULLY SUBMITTED this 29th day of March, 2011.

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400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101

[1] Although NRS 50.285 does not require that an expert update his report after forming opinions based upon evidence elicited at trial, in the interest of fairness, Dr. Smith has written his opinions in a supplemental report, which has already been served upon Defendant. (*See* Receipt of Copy for Supplemental Report , attached hereto as **Exhibit "6"**).

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EXHIBIT "1"

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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. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive. Defendants.	CASE NO.: A539455 DEPT. NO.: X

PLAINTIFFS' DESIGNATION OF EXPERT WITNESSES AND REPORTS

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

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

. . . .

. . . .

ORIGINAL

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

. . . .

. . . .

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

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

Ms. Hartmann is an expert in the area of life care planning, cost projections, medical record analysis, case management, and nursing. Ms. Hartmann's qualifications are set forth in the curriculum vitae attached hereto[4]. Ms. Hartmann's fee schedule and list of cases testified during either trial or deposition are attached hereto[5]. Ms. Hartmann is expected to provide expert testimony and opinions, including but not limited to the cost of life care needs of the Plaintiff William Simao. A copy of Ms. Hartmann's report and opinions is attached hereto[6].

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

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

[3] See Ex. "4"- Report of Stan Smith.

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

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

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

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

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

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

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

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

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[7] See Ex. "9"- Curriculum Vitae of Ira Spector.

[8] See Ex. "10"- Fee Schedule of Ira Spector.
See Ex. "11"- List of Cases of Ira Spector.

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

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

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

DATED this 7th day of May, 2009.

AARON & PATERNOSTER, LTD.

GLENN A. PATERNOSTER, ESQ.
Nevada Bar No. 5452
Attorney for Plaintiffs

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) and the amendment to the EDCR 7.26, I hereby certify that service of the foregoing **PLAINTIFFS' DESIGNATION OF EXPERT WITNESSES AND REPORT** was made this date by depositing a true and correct copy of same for mailing, in a sealed envelope, postage fully prepaid, first class mail at Las Vegas, Nevada, addressed to the following:

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 S. Fourth Street, Suite 710
Las Vegas, NV 89101
Facsimile: (702) 384-1460
Attorney for Defendant,
JENNY RISH

at his last known mailing address.

DATED this 5 day of May, 2009.

An employee of AARON & PATERNOSTER, LTD.

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EXHIBIT "2"

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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 Defendant.	CASE NO.: A539455 DEPT. NO.: X

PLAINTIFFS' DE-DESIGNATION OF KATHLEEN HARTMAN, R.N. AS AN EXPERT WITNESS

Plaintiffs, WILLIAM JAY SIMAO and CHERYL SIMAO, by and through their attorneys, DAVID T. WALL, ESQ., and ROBERT M. ADAMS, ESQ., of the law firm of MAINOR EGLET, hereby de-designate the following expert witness:

I. Kathleen Hartmann, RN
DeVinney & Dinneen
445 Apple St., #108
Reno, NV 89502
(775) 825-5558

Ms. Hartman will no longer provide expert testimony in this matter.

DATED this 23rd day of March, 2011.

MAINOR EGLET

By: _____
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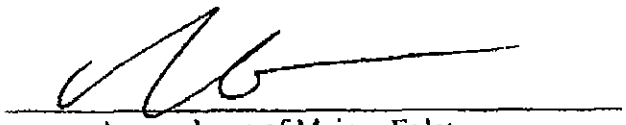
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, NV 89101
Attorneys for Plaintiffs

CERTIFICATE OF MAILING AND FACSIMILE

I hereby certify that I am an employee of Mainor Eglet and that I served the foregoing **PLAINTIFFS' DE-DESIGNATION OF KATHLEEN HARTMANN, R.N. AS AN EXPERT WITNESS** via facsimile and by placing a copy thereof, first class mail postage prepaid on the 23rd day of March, 2010 to the following:

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendant
(702) 384-1460



An employee of Mainor Eglet

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH Defendant.	CASE NO.: A539455 DEPT. NO.: X

MAINOR EGLET

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EXHIBIT "3"

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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2.67 CONFERENCE

LAS VEGAS, NEVADA

THURSDAY, MARCH 10, 2011

Reported By Kele R. Smith, NV CCR No. 672, CA CSR No. 13405

LST Job No. 1-135828

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2.67 CONFERENCE,
taken at 400 South Fourth Street, Suite 600, Las Vegas, Nevada, on Thursday, March 10, 2011, at 10:55 a.m., before Kele R. Smith, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:
For the Plaintiffs:
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BY: DAVID T. WALL, ESQ.
BY: BRICE CRAFTON, ESQ.
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For the Defendants:
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INDEX

EXHIBITS

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

MR. ADAMS: You said which supplement?

MR. ROGERS: It was -- I don't recall if you had a computation attached to the latest one, but it was like 23 or higher that amounted to 194. Somewhere in that neighborhood.

This may be Ingrassia.

(Interruption in proceedings.)

(Discussion off the record.)

MR. ADAMS: Back on for the 2.67. We just started discussing Plaintiff's Exhibit No. 1, which is a medical special summary, and we just had a discussion with counsel where I agreed to check the amounts that I have listed in Exhibit 1 and compare them with our last computation of damages. So I did that. If I need to revise it, I'll get back -- I'll let you know sometime today so you have that.

(Interruption in proceedings.)

(Discussion off the record.)

MR. ROGERS: I don't know if we need to go through -- all I'm interested in the meds is it's the same stuff that's been produced.

MR. ADAMS: I'm going to do them in groups.

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Like 2 through 17 is the billing. We separate out our billing, typically, from the records themselves. And, again, the billing's been redacted for the treatment not related to this. Like for his symptoms at Southwest or other conditions that he was treated for not related to this accident.

MR. ROGERS: You know, that's another curious wrinkle, though, in the amount in your summary is that I expected it to be less than 194 after removing all the colonoscopy things. There was probably 15 grand in that.

MR. ADAMS: I'll look. I know there was an upper GI and there was a colonoscopy as well. I'll look and make sure that I have the medical bills redacted. So you -- once you have somebody look at it, they can point something out. I'm going to have my people look at it as soon as we're done here and just confirm that that bill is for something on that day related to this accident.

MR. ROGERS: Because, in the end, I don't think the defense experts are disputing the charges.

MR. ADAMS: Right.

MR. ROGERS: It's just the reasonableness -- pardon me -- the necessity of treatment.

MR. ADAMS: The necessity. Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ROGERS: It's a short vowel.

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

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

MR. ADAMS: Winkler you have local. Right?

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

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

MR. WALL: We may not need the defendant.

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

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

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

MR. ROGERS: Lee?

MR. ADAMS: Yeah.

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

MR. WALL: Yeah.

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

MR. WALL: Understood.

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

MR. ADAMS: Oh, really?

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

MR. ROGERS: Sure.

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

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

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

MR. WALL: Right.

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

MR. WALL: Right.

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

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

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

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

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

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

All right, Brice. What did we figure out?

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

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

MR. CRAFTON: It wasn't filed.

MR. WALL: It wasn't?

MR. ADAMS: Okay.

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

MR. ADAMS: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ADAMS: Probably. 8 and 4.

(Exhibit 2 was marked.)

MR. ADAMS: Your list, Page 4.

MR. ROGERS: All right.

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

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

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

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

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

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

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

MR. ROGERS: Okay.

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

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

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

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

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

MR. WALL: Okay.

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

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

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

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MR. ROGERS: Okay.

MR. ADAMS: G.

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

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

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

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

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

MR. ADAMS: Okay.

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

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

MR. ROGERS: Right.

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

MR. ROGERS: Yep.

MR. ADAMS: Okay.

MR. ROGERS: Oh, the reports.

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

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

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

MR. ROGERS: Okay.

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

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

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MR. ADAMS: The life expectancy table?

MR. ROGERS: That's what I meant.

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

MR. ROGERS: Yeah.

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

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

MR. ROGERS: Admit them.

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

Q, we objected because it was excluded.

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

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

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

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

MR. ADAMS: How is our stip coming?

MR. WALL: Right there.

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

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

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

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

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MR. ADAMS: We can go off.
MR. WALL: Let's go off.
(Discussion off the record.)
MR. WALL: It's clearer because it takes the same type of affirmative defenses and makes them into the subject motor vehicle accident. Look at the language on their one --
MR. ROGERS: Yeah. As long as those affirmative defense waivers are related and limited to the accident, that's okay.
MR. WALL: See if she can take those and turn it into that.
MR. CRAFTON: Yeah.
MR. WALL: On the other issue, I guess my understanding of her order on minor impact, it's the same reason that the photos do not come in or the damage estimates do not come in, because just bringing in the photos and then saying this impact was not severe enough to cause these injuries is no longer and issue, and so that's why the photos are no longer relevant and the damage estimates are no longer relevant, so even the testimony that "Gee, we just barely bumped him" is the same thing as the damage estimates and the photos.
MR. ROGERS: See, I took her ruling to be

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that she excluded property damage and the photos on the basis that it would call for speculation in that, for example, a juror might not understand what forces are involved that would result in that property damage.
My argument, of course without that evidence the jury can do nothing but speculate, but that didn't mean that the parties were prohibited from describing the accident. That, to me, would be a crazy extension of that idea because now the jury is more or less being called on to assume injury because there is going to be no testimony about cause.
MR. WALL: Well, there's a -- it would be a stipulation that the defendant caused the accident, essentially rear-ended Mr. Simao. There is not a question that he was injured to the point of going to Urgent Care and treating for some period of time. There's -- at one end of the spectrum that's four weeks, and at the other end of the spectrum, that's six years. That's what we're trying, whether it's four weeks or six years, and whether it -- it doesn't matter whether the person in the defendant's car thinks the impact was only enough to make it four weeks. That would be reasonable. That's not -- that's not an opinion that has any relevance.

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So my understanding of her ruling would essentially be that -- especially with a stipulation for responsibility for the accident, the testimony would be that he was rear-ended on April 15th, 2005, and then everything else is whether based on medicine this is causally related to the accident. And so I would definitely object to either the defendant or --I suppose they're both technically still defendants -- to either Linda or Jenny Rish testifying about it being a minor impact because I believe that that's being precluded by her order.
MR. ROGERS: Well --
MR. WALL: Maybe that's an issue we should raise before opening, because what relevance is it if you can't argue this impact was too minor to cause this injury. If you're not allowed to argue that based on her order, then what would be the relevance of Linda coming in saying, "Geez, this was just a minor accident. We barely even bumped him."
MR. ROGERS: Remember she said that in her opinion the photos are relevant but that you needed a bio mech to admit them. Those were her concluding comments. What she meant, as I understood it, was that without a bio mech, a jury couldn't understand what those photos and that property damage evidence

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meant.
That doesn't mean that a jury can't understand an accident as described by the people involved. They need some understanding of what happened here because that is the root of the plaintiff's entire claim, and I didn't take at all from that that she meant the jury is not going to learn one thing about this accident.
MR. WALL: The substance of the motion was to exclude evidence of minor impact, including an argument that -- the argument and the testimony that a minor impact -- that this was a minor impact that couldn't cause these injuries, and additionally, to exclude the photos and the damage estimates. So if you can't argue that it was a minor impact and therefore couldn't cause these injuries, then I don't know what the relevance is of Linda Rish, for example, testifying that this was minor. In fairness, that needs to be clarified before --
MR. ROGERS: Yeah. So we will. We'll talk to her.
MR. ADAMS: She's drafting the stipulation?
MR. CRAFTON: Yeah.
MR. WALL: Were we all the way through the list?

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

MR. ROGERS: Okay.

MR. ADAMS: Do you want to do that?

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

(Discussion off the record.)

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

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

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

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

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

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

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

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

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
SS:
COUNTY OF CLARK)

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

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

_____

KELE R. SMITH, CCR NO. 672

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EXHIBIT "4"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

CHERYL A. SIMAO and WILLIAM J. SIMAO,

Plaintiffs,

v

JAMES RISH, LINDA RISH and JENNY RISH,

Defendants.

CASE NO. A-539455

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, MARCH 23, 2011

REPORTER'S TRANSCRIPT
TRIAL TO THE JURY
DAY 3 - VOLUME 1

APPEARANCES

For the Plaintiffs: DAVID T. WALL, ESQ.
ROBERT M. ADAMS, ESQ.
ROBERT T. EGLET, ESQ.
Mainor Eglet

For the Defendants James and Linda Rish: BRYAN W. LEWIS, ESQ.
Lewis and Associates, LLC

For the Defendant Jenny Rish: STEVEN M. ROGERS, ESQ.
CHARLES A. MICHALEK, ESQ.
Hutchison & Steffen, LLC

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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BY MR. EGLET:

Q Do you want to look at him on the big screen, to talk about him, Doctor or --

A Sure. Are you going to be able to link it onto the monitor?

Q We're going to put it on this monitor, it should be there. Here they are.

A Okay. So let's start with number three. Okay. That looks okay. So let's go down to four, five. Okay. Go back to that level, five.

Q Five.

A Could you skip to the next --

Q Here's five.

A Okay. So this actually C-3,4 as best as I can tell. So there's still a little bit of narrowing of that nerve exit hole. Okay. So, six, is with our technique.

[Pause]

Q Did you want to look at another one?

A Six.

UNIDENTIFIED SPEAKER: Six, oh, I'm sorry, I didn't hear that. Six.

THE WITNESS: Because I haven't really seen this, we just need to scroll down --

Q Okay. Fine.

[Pause]

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A Yeah. I would have to say. This is a little difficult, because they're sequenced in I can tell they're out of sequence.

Q Okay.

A So --

Q That's fine.

A But let me look at on more thing. Just one more sequence.

[Pause]

A Okay. So briefly looking at his -- can you pull that up on here?

UNIDENTIFIED SPEAKER: Sure. It locked up on me. It's not going to happen.

THE WITNESS: Number?

UNIDENTIFIED SPEAKER: It locked up on me. I'm going to actually start apologizing.

THE WITNESS: Okay. Well, let me just summarize it --

BY MR. EGLET:

Q Yes.

A -- I was able to see some.

So the things that would take a little disagreement with the report, is I did not see any retrolisthesis at C5,6 I did not see any significant -- and then, again, it only says mild disc bulge at C5,6 or narrowing at C6,7.

And I would say the for foraminal narrowing at C3,4

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may be a little improved. And that can be explained by simply the fact once you fuse a segment bones spurs and stuff actually can go away. So --

Q All right. Now, Doctor, after having done well in his immediate post-operative course following your cervical fusion surgery, why has Mr. Simao developed chronic left axial left pain, left trapezial pain and intermittent left upper extremity radicular symptoms?

A Well, I would say the potential causes that would be reasonable so far as the residual left-side at neck, periscap or trapezial pain can simply be the fact that he went so long before definitive treatment.

And then you start getting issues of chronic pain, and then you start getting intrusion, pain. And what that means in a simple sense, is the nervous structure from the brain all the way out to the little receptors in your body, when you have chronic pain issues going on the internal architecture of the neurological system can be altered.

So what happens is, as the pain becomes more chronic, and I use, you know, I would say that you're at more risk for these neuropathic chronic persistent pain syndromes. Once you start getting beyond a year that the internal architecture of these pathways gets changed.

Now what happens is as time goes on, even though you potentially take care of the structural cause of the pain.

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because the change in these internal pathways of the nervous system the patient still perceives pain.

And patients are at risk for this. Technically any time you're at risk for this. But in general once you have chronic pain syndromes that go beyond a year gradually that risk gets higher and higher.

So what happens is, is that there's a potential where even though you take care of the structural issues the pain is persisting

. So technically with Mr. Simao, his accident was what, April of '05, surgery wasn't until March of '08, well, we're talking about almost four years.

So that's one reasonable explanation

Q So --

A The other explanation is he can still have a component of occipital pain, or occipital neuralgia. And that's any time -- again, I've mentioned it, but this occipital nerve you've got basically two that come out on each side, you've got a greater and a lesser, but these nerves are coming out of the spine and they're going through various layers of muscle.

And when someone has chronic pain and spasm these various muscle layers are spasms and kind of shearing this nerve as it's puntirating [sic] through.

And over time if you have a chronic pain problem

where the spasm component is aggravating this nerve you can get what we call occipital neuralgia Now that potentially is a real entity that could be contributing to his ongoing pain as well.

Q Is the development of neuropathic pain syndrome post-operatively considered a surgical failure?

MR. ROGERS: Objection. Your HOnor. On this one we do need to make a record.

THE COURT: All right.

[Bench Conference Not Transcribed]

BY MR. EGLET:

Q All right, Doctor. The question is, was pending, is the development of neuropathic pain syndrome post operatively considered a surgical failure?

A Well, I would definitely say it's considered less on a desirable outcome. Surgical failure in a general sense I think would imply that something technically with the surgery went amiss. The fusion didn't take, the hardware broke, something like that.

Q Do you believe that any surgeon that is -- strike that.

Do you believe that surgery that is unsuccessful, means that it was not indicated and/or unnecessary?

A No.

Q Why?

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A Well, I mean, if you take a simple example that's fairly black and white, when you look at what surgeries orthopedic surgeons do, one of the best operations we do are hip replacements. That's a great job of a patient having an operation, feeling better, having more function, less pain. But even that operation is successful about 90 to 95 percent of the time.

So I mean, by definition, so what does that mean? That means five to ten percent of the time because it wasn't successful it was unnecessary or not indicated; absolutely not.

I mean, in fact it's so extreme that I think even in Nevada it's actually against the law for a doctor to make a guarantee as far as outcome for a surgical procedure.

So I mean, anything we do, I mean nothing is a hundred percent. I wish it was, it would be awesome, but it's not.

Q Do some patients who have a good indication for cervical spine, a reconstruction in fact, not experience any relief of their symptoms, or have worsening symptoms following surgical reconstructions?

A Well, it can occur, and there's all kinds of reasons. Worsening I'd say typically would be because of more likely structural issues with the surgery itself. No relief. And again, it's a spectrum, but I'm sure it's possible.

Q Why do some patients either not improve, continue to have pain or get more symptomatic following surgical reconstruction of the chronic spine?

A Well, the answer is basically a spectrum again You can have the one extreme where technically everything is fine, but things are not improved and you probably have neuropathic pain.

Technically you could have, if the surgery was done correctly, but maybe something else has started to become a problem. Or you've got another more definitive down spectrum where the surgery technically has issues; the fusion didn't take, hardware broke, screw went in the wrong place, something.

Q What percentage of patients that undergo this multi-level surgery that you perform do not improve?

A Well, I would say the vast majority do improve. But at the same time I would say the vast majority of patients don't -- you know, I think what was the timeframe when I actually recommended surgery to when he eventually got it; wasn't it like '07?

Q Yeah

A You know, so I would say the vast majority of my patients, because they've gone through a reasonable treatment and we've tried reasonable things, and it's been a reasonable period of time, the vast majority will not delay surgery

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another two years.

So for that reason in my hands I think a lot of my patients do very good, good, well. Sure, do you I have patients who don't improve, sure.

Q What criteria do you use to make surgical recommendations for cervical spine reconstruction in your patients that gives them the best chance of having good outcomes from surgery?

A The question one more time, please?

Q What criteria do you use to make surgical recommendations for cervical spine reconstruction in your patients that gives them the best chance of having good outcomes in surgery?

A Well, I think we've already touched on a lot of it. I think you want to make sure that you've given patients a chance to get better who are going to get better. But once they reach that branch part in the road where chances of improving are low, and that's usually 6 to 12 months once you're into that, then I think that's the time to intervene and take care of the problem.

Studies shows, a good example would be spinal stenosis which is an age-related degenerative thing as people are just getting older where there's a gradual narrowing of the spinal canal. And people when they try to stand up and walk they get pain going -- tingling down their legs. Studies

show that if you wait more than a year to do surgery the outcomes of the surgery go down.

And when you think about it intuitively, I mean, if a nerve is getting squashed, you know, over time there's going to be chronic irreversible changes. I mean, it's just commonsense.

Q Now was --

A So - I'm sorry.

Q I'm sorry.

A So that's one thing. You want to make sure you're intervening at appropriate effective branch points in the timeline, just because you want to, at the beginning you want to give them a chance to get better, because odds are good they're going to get better.

But once they get to that three to six months, and as long as they've done reasonable, conservative things, your odds are stacking up against you

Q Was Mr. Simao at increased risk for not responding well to surgical reconstruction of the cervical spine?

A I would say yes simply because of the four-year delay.

Q If Mr Simao were at increased risk for not having a good surgical outcome, why do you offer him the surgical reconstruction?

A Well, I think it's fair to say it was very dogmatic

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to make sure the workup was as fresh as it could be. So every time he came back after a delay of a year, of a year and a half, we always said, okay, well, things could have changed. Let's make sure we get a new MRI. Let's make sure we repeat injections. Let's just don't assume that things haven't changed.

So then the scope of what's reasonably possible, I think that commitment to being dogmatic and making sure the workup is recent and fresh minimizes that chance. Does it eliminate it? No.

Q All right. You've explained to us that you believe that he has the development of neuropathic pain syndrome, as well as potentially you have occipital neuralgia, which you explained to us.

What is the treatment for neuropathic change syndrome?

A Again, there's a whole spectrum. Some people make it better just taking Lyrica or Neurontin. But for those that are persistent and non-improving, the treatment's typically a spinal cord simulator or some type of neuro modulation.

Q What is a spinal cord stimulator?

MR. ROGERS: Oh, objection, Your Honor.

MR. EGLET: May we approach, Your Honor.

THE COURT: Yeah. Sure, come up.

[Bench Conference Not Transcribed]

BY MR. EGLET:

Q Okay. Doctor The question that was pending is what is a spinal cord stimulator?

A Well, the general answer is you have these electrodes which do neuromodulation. The simple concept is you have a device that's low profile and it has multiple electrodes and it lays on top of neurologic structure. It can lay on top of a nerve, it can lay on top of a spinal cord.

And what it does, it has multiple programming capabilities that's typically attached to a very complex internal device called a pulse generator. What it is, is a mini-size computer with a battery or a power source and it can do all these configurations to modulate the electrical impulses as they're traveling through these neurologic structures; either the nerves or the spinal cord.

So the whole idea is that these altered neurologic pathways basically need to be calmed down. It's like listening to the radio but there's too much static, it's just annoying. So what it does is it changes that perception from pain to typically a gentle buzz or vibration.

So what it's doing is technically in a layman's term kind of down-regulating or simmering down these over-excited inappropriate impulses that are traveling through these pathways in the nervous system.

Q Okay. And would come out of the box, Doctor, and

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using the spine, if you could explain to the jury how a spinal cord stimulator. A Texas 5 [phonetic] cord stimulator, we're talking ter about Mr. Simao, would be surgically placed?

A So the spinal cord stimulators are placed in the spinal canal. They sit on top of the spinal cord. So if you -- can you pull up a -- that's okay.

Q Do you want the animation?

A No. No, it's okay. I was just going to show them a spinal cord.

So when you look at a spinal cord the pathways that are going back up towards the brain, providing sensation and pain, primarily on the back side.

So what we do, is you make a small opening to get into the spinal canal and you insert this device. Okay. And that device sits on top of the spinal cord. Technically it sits on top of the spinal sac, and then there's usually a thin layer of fluid and then the spinal cord.

And then it's connected via a cable to this pulse generator which classically is put on the patient's right butt cheek. Those are separate incisions. Sometimes you need to make an additional incisions just to connect the cables. And then it's placed wherever it's deemed to be appropriate, to get good coverage.

Typically you'll get a trial done first, or extembula [phonetic] needle sticks. Pain management will

place what they call percutaneous leads, which are smaller leads. They're basically in the shape of small cylinder tube, and they can be placed in various configurations.

The idea is that's done awake and the patient's able to give feedback saying: Oh, yeah, that's the spot, that's not it. And then the pain management doc will move that around until he gets what we call the sweet spot. Meaning it's getting good stimulation in the area we want it.

And then the patient -- they will make temporary connections to an external version of the pulse generator, and then that's typically you want at least a five-day trial where they're adjusting it, and getting a chance to really use it, so they can be in a good position to say: Yeah, that was really helpful, or, you know, it didn't really make a difference.

Q And this is a pain management device?

A Yes. By definition it's to manage, but -- yeah.

Then if this trial is successful then they'll come to me and I'll place the permanent one in.

Q Okay. All right. Thank you, Doctor.

And if you could take a look at this animation we have, and tell us, is this, I know in simple forms, how the stimulator is placed and how it works? Is this the battery stimulator, if it's placed surgically in the hip to the butt?

A Yes.

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Q Okay.

A There's the connection cables. Most commonly it's placed in the lower thoracic or mid-back, but selectively it can be used up in the neck. There's a good picture of this electrode, and it's basically spread out; it looks like a paddle sitting in the spinal canal.

And typically this can be a device that has a remote programmer so the patient can have multiple settings.

Q That's what this is, the program?

A Yes. And newer the devices the patients can have up to 16 different settings, and they can adjust the intensity, turn it off, turn it on. I had several patients where it's very helpful, the lives for those who need it.

Q Okay. Now is a neurostimulator also an effective treatment for occipital neuralgia?

A It can be. Typically the treatment will be try some injections, first. Pain management may try some blocks to -- do long-term blocking of the nerve. They may try ablation, but they can also, it's very common to use these percutaneous leads as well.

Q And is it your opinion, as one of Mr. Simao's treating physicians that he needs placement of a neurostimulator to most effectively treat his neurogenic pain?

MR. ROGERS: Objection, Your Honor, foundation, and the disclosure issues that we discussed.

MR. ECLET: Same argument, Your Honor.

THE COURT: Noted for the record. Do you want a continuing objection, Mr. Rogers?

MR. ROGERS: Absolutely.

THE COURT: Very well, I'll note it for the record.

THE WITNESS: Answer?

THE COURT: Overruled. Yes.

THE WITNESS: Repeat the question, please.

BY MR. ECLET:

Q Is it your opinion as one of Mr. Simao's treating physicians that he needs placement of a neuro or spinal cord stimulator to most effectively treat his neurogenic pain?

A Well, the clinical answer would be he at least would need placement of a trial.

Q Okay.

A And the trial is important, because the trial tells you whether or not to do the permanent.

Q Okay. What I want you to do for us now, Doctor, is if you key in, I'd like you to outline for us the cost associated with the surgical placement of this spinal cord stimulator.

A Do you want to tilt that a little bit so I can -- it's not important, I guess.

Q Yeah. I'm just -- this is for the jury --

A Okay, good.

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Q -- to see, and I'm going to just write on it and have you -- so you mentioned a trial stimulator would be the first thing.

So what would be the costs for the trial stimulator, including the surgeon's costs, anesthesia fees, surgical center, supplies, all of that?

A And the facility --

Q The facilities

A -- basically everything?

Q Yeah.

A So, I'm sorry, for the trial?

Q For the trial of the stimulator?

A Approximately $84,000.

Q Eighty-four thousand?

A Yes.

Q Okay. And then the permanent placement of the stimulator by the spine surgeon, what are the total costs: the surgeon's fees, the anesthesiologist's fees, the hospital or surgery center's fees, the cost of the stimulator and equipment and all of that?

MR. ROGERS: Objection, Your Honor. The doctor's testified only to the trial not the permanent --

MR. EGLET: Your Honor, he has testified to both this trial and the stimulator, we're entitled to outline the cost.

THE COURT: Overrule the objection.

THE WITNESS: If the trial is successful and a permanent implant is indicated those costs altogether would be approximately $12,000.

BY MR. EGLET:

Q $212,000?

A Yes.

Q All right. Now, the -- is there normally a revision of the pulse generator battery that is done?

A On general the pulse generator, depending on how the patient uses it, may be replaced anywhere from three to seven years. I think a reasonable average is five years

Q So the stimulator would have to be surgically replaced?

A We were just talking about the pulse generator.

Q The pulse generator.

A Which is basically the, you know, which is the power source and the computer.

Q And you said --

A Average, five years

Q Every five years on average. And what's the cost of that?

A Approximately $41,000.

Q Okay. Now is there usually in people Mr. Simao's age, a revision that has to be done for the leads, at least once?

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A Well, the leads typically aren't as durable in the cervical spine, because there's simply a lot more motion. So there is a higher incidence of needing to replace the leads or revise a connection cable.

Typically if there's a problem it's usually right where it's going in. So on average that revision is approximately every two to three years for cervical. And --

Q Every two --

A Every two to three years. So say every two years.

Q And what's the cost of that?

A Approximately $3,000.

Q And then is there a requirement, any requirements if there's any follow-up? I mean, is this thing programmed with a computer or something?

A Typically what happens is, the patient, the first initial period over the first three months may need more frequent follow-ups to just fine-tune the programming.

So basically that involves seeing the doc and then having the clinical specialist from the respective company that makes the implant and altering the programming.

Q Okay.

A So average costs for that, including everything, it's typically about a thousand dollars.

Q And then you said that's how often?

A I would say in the first three months, it's twice.

Q Okay.

A And then after that it varies. I would say I typically would see a patient back maybe every six months

Q Okay The follow-up is for programming in the first three months, you say how many times?

A Twice.

Q Twice, at --

A Approximately a thousand dollars.

Q One thousand dollars per visit?

A Yes.

Q So $2,000. And then you said -- then the reprogramming is every six months?

A On average, yes.

Q So that would be $2,000 annually?

A Yes.

Q Now, these neurostimulators, or spinal cord stimulators, are these something that normally are placed in, those are placed in the patients, these are lifetime things?

A Typically they keep them a long time. Yes

Q All right. Now, is the need for the placement of the spinal cord stimulator in Mr. Simao directly and causally related to the motor vehicle crash of April 15, 2005?

MR. ROGERS: Same objection, Your Honor.

THE COURT: Same, duly noted for the record. Overruled.

THE WITNESS Assuming, based on everything we've talked

about on the issue of chronic pain, a four-year interval, yes

BY MR. EGLET:

Q Based on -- Doctor, based on your experience in your treatment of this patient over the last number of years, and your understanding of his chronic pain, is it more likely than not that he's going to need the permanent placement of the spinal cord stimulator?

A Again, I would -- the permanent is contingent upon the trial. I'd say it's definitely more likely than not, he at least needs the trial.

Q I understand. But my question is this, Doctor: based on your experience and your understanding of his chronic pain, and your treating patients like him in the past, and this type of neuropathic pain, and understanding his problems, and based on your experience, is it more likely than not that he will end up having a permanent placement of a stimulator?

MR. ROGERS: Objection; asked and answered. The Doctor already --

THE COURT: Noted for the record.

MR. ROGERS: -- responded to this.

THE COURT: Overruled.

THE WITNESS: I would say over my experience most of the patients I send for trials do have successful trials; so the answer is yes.

BY MR. EGLET:

Q Thank you. Now, after your extensive evaluation, your treatment, your surgical interventions with Mr. Simao, have you reached any conclusions with respect to what injuries he sustained directly and causally by the April 15th, 2005 motor vehicle crash?

A I would say --

MR. ROGERS: Objection; foundation.

THE COURT: Overruled.

THE WITNESS: I would say that in a simplistic sense he injured the C3,4 and C4,5 levels, with the least significant component being discogenic

BY MR. EGLET:

Q As well as intractable post-operative neuropathic pain syndrome?

A As well as what appears to be neuropathic pain.

Q And occipital neuralgia?

A And/or occipital neuralgia.

MR. ROGERS: Objection; leading, Your Honor

THE COURT: Sustained.

BY MR. EGLET:

Q Are your conclusions regarding causation more likely right than wrong, Doctor?

A Yes, they're more likely right.

Q And beyond that are you certain?

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A Yes.

Q And could you please -- strike that.

Hypothetically, if someone told this jury -- well, I think I've already asked you. You answered that. You've already asked and answered that.

Was the medical care and treatment rendered by you and all of the physicians at Nevada Orthopedic and Spine Center, all of the treatment from University Medical Center and PBS Anesthesia, been necessary and reasonable and causally related to the injuries Mr. Simao sustained from his April 15th, 2005 motor vehicle crash?

MR. ROGERS: Objection; compound and the doctor hasn't been identified as an expert to comment on other providers.

MR. EGLET: Your Honor, speaking objection. You ruled on this --

THE COURT: I agree. I agree.

MR. EGLET: -- he's a treating physician.

THE COURT: Overrule the objection.

THE WITNESS: Yes.

BY MR. EGLET:

Q Now was the billing associated with all of the above treatment that you have described for us and provided to Mr. Simao, customary and reasonable for patients in Clark County Nevada?

A Yes.

Q Are your conclusions regarding the care rendered to Mr. Simao and their associated costs, more likely true than not true?

A Yes

Q Okay. And beyond that are you certain?

A Yes.

Q And have all the conclusions you have shared with us here today been to a reasonable degree of medical probability?

A Yes.

Q And by that you mean that your conclusions are based on medical reasoning?

A Yes.

MR. EGLET: Thank you, Your Honor. I pass the witness

THE COURT: Mr. Rogers.

MR. ROGERS: If the jury would like -- it's up to you, Your Honor.

THE COURT: Could counsel approach, please.

[Bench Conference Not Transcribed]

MR. EGLET: Oh, Your Honor, could I do one more thing. I'm sorry, before I pass the witness? He hasn't started yet.

THE COURT: Sure

MR. EGLET: Your Honor, I would ask that this be marked as Plaintiff's next in order. And I would move this into --

UNIDENTIFIED SPEAKER: 65.

MR. EGLET: 65, move and have it admitted into evidence

THE COURT: Okay. It should be marked as proposed 65, any objection?

MR. ROGERS: Sure. All the objections are stated.

THE COURT: Your objection is noted for the record, 65 will be admitted.

MR. EGLET: Thank you, Your Honor.

[Plaintiff's Exhibit 65 Received]

THE WITNESS: There actually is one mistake on the bill there. It's two pages, not one. Two levels, that's all.

MR. EGLET: So it's not the right amount?

THE WITNESS: Yeah. They just gave one, it's like two.

MR. EGLET: Your Honor, if we could go back on the record, the doctor's noted there's a mistake on the bill?

THE COURT: Sure. Back on record.

BY MR. EGLET:

Q Is this referenced -- do you have this referenced anywhere else? What exhibit number is the bills? Is this your bills?

A Exactly, it's basically the surgical bill. There was two pages and they only billed one.

MR. EGLET: The surgical bill, Robert?

MR. ADAMS: From University Medical Center is 9.

MR. EGLET: No, for Nevada Orthopedic and Spine Center?

MR. ADAMS: 6.

THE WITNESS: On the letterhead.

BY MR. EGLET:

Q 6.

A Yes. So 22853, that's just for our page, so it's two. So that should be 1900 times two.

Q Okay. Can you point that out? Okay. Right here?

A Yeah. Right here.

Q All right. So for the record, Doctor, you're identifying Exhibit 6, page 1, date of service, March 25th, 2005. It says "cage interior" and it's only billed for one cage --

A Correct.

Q -- at 1900 and should be two cages?

A Correct.

Q So that should be 3800; is that right?

A Yes.

Q Okay. Thank you.

MR. EGLET: Thank you, Your Honor.

THE COURT: Okay. Can I see counsel at the bench, please.

[Bench Conference Not Transcribed]

THE COURT: All right. It seems, ladies and gentlemen of the jury, that we cannot conclude the examination of this witness, so we're going to have to ask Dr. McNulty to return another day. Tomorrow is apparently not the day he can return because of the scheduling of the witnesses.

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Mr. Rogers will be calling a witness out of order tomorrow afternoon, so that's what all the discussion was about, scheduling matters. And what that means is, we don't know yet when Dr. McNulty can return, so you'll have to remember what he said and wait until he's concluded his testimony.

There are a couple of questions that some of you asked. I'm going to read to him. He may be a proper witness to answer these questions. I don't know. The first one is photos of discs before surgery, question.

THE WITNESS: Photos?

THE COURT: Photos of discs before surgery.

THE WITNESS: What's the surgery?

THE COURT: I would -- I would imagine it means, are there photos of discs before surgery?

THE WITNESS: You mean like, taking a picture with a camera?

THE COURT: I don't know. You know as much as I do.

THE WITNESS: Okay. I would say that photos of the discs before surgeries on the MRIs, if you look at the x-rays and pictures when Dr. Nesler did the discograms, those are other pictures that show how the dye is going into the discs, plain x-rays. Those would be the closest thing to photos --

THE COURT: Okay.

THE WITNESS: -- because obviously, I mean, not to be too

simplistic, but I can't really take a picture of the disc unless you expose it surgically, and so --

THE COURT: Okay. I think that answers the question. The second one reads, how can two discs have the same fissure in about the same location, that one is painful and the other has no pain?

THE WITNESS: Well, I think there were three discs -- well, you had two discs that were painful. I assume we're talking about the discogram? Because we're able -- are we not allowed to ask a question to clarify?

THE COURT: No.

THE WITNESS: Okay. Assuming it's the discogram, where it talks about the fissures, basically when you talk about a fissure, you're injecting dye into the disc, and you're seeing the dye leak out of the disc and you're assuming it's a fissure. So I made the comment that the cervical discs are different than the lumbar discs. Lumbar discs are more common.

A discography is also done of the lumbar spine, the lower spine. Anatomically, that structure is more of a classic disc that's encased with a tough, essentially watertight, seal all around, whereas the cervical discs are a little different. At the sides of the cervical discs, they have these things called uncovertebral joints.

And I can actually show you. And these joints

you see from the front, there's a little prominences of bone that go up, whereas a lumbar disc, everything's fairly flat So the anatomy and the structure of a cervical disc is a little different, where it's not completely encased in a watertight, tough outer covering

So even in the normal disc, if you put dye in it, you can have some leakage of dye out of the sides. So what's specific about that is that when they did the discogram, they tested three discs, C3-4, C4-5 and C5-6, the painful discs that were reproducing -- this was the mouth pain.

We're at C3-4 and C4-5. C5-6 did not cause pain, even though there was leakage of dye. So you can explain the leakage of dye just by understanding that subtle but important difference to anatomy.

THE COURT: Any follow-up questions by counsel, either side?

THE WITNESS: I'm sorry Let me --

THE COURT: Sorry.

THE WITNESS. But I think the question --

THE COURT: Sorry, Doctor. I thought you were finished.

THE WITNESS: Read your question once more so I make sure I answer it correctly.

THE COURT: How can two discs have the same fissure in about the same location, that one is painful and the other has no pain?

THE WITNESS: Well, I'm at a little bit of a disadvantage because I haven't been technically been shown those pictures. But just because they have them, quote, unquote, in the same location doesn't mean it discredits or makes it confusing. It just happens to be that way.

THE COURT: Any follow up questions by counsel?

MR. EGLET: No, Your Honor.

THE COURT: I'm going to be asked that these questions be marked as Court's Exhibits next in order.

THE CLERK: Yes

THE COURT: There were a couple of other questions submitted by the jurors, but this witness is probably not the one to answer these questions, so I'm going to ask the Clerk to mark these and just hang onto them for now in the event that we get a witness who can answer them. Then we'll address the questions to that witness, whoever that might be. So I need those two back.

With the thanks of the Court, ladies and gentlemen of the jury, you may be excused. I remind you of your obligation not to discuss this case with anyone, not to form or express any opinion, not to do any research on any subject connected with this case. Please return tomorrow promptly at 1:00.

THE WITNESS: Friday at 1:00 start as well?

THE COURT: No. Friday's a noon start.

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(Jury Out)

THE COURT: Okay. You may be excused if you wish or you can stick around. It's all the same to me, Sir.

UNIDENTIFIED SPEAKER. I'll talk to you after.

THE WITNESS: Okay. Well, I think, for what it's worth, I can make Friday at noon I think I can do that

MR. EGLET: We have to -- we have to -- and I'll talk -- I'll call you tonight. We have to coordinate with Dr. Grover.

THE WITNESS: Okay.

MR. EGLET: And it may very well be at noon, so -- but I'll let you know.

THE WITNESS: So you will try to affirm that this evening?

MR. EGLET: I'm going to try to firm that up.

THE WITNESS: Okay. All right. I'll get all my stuff.

THE COURT: Thank you. Okay. Outside the presence of the jury, Mr. Michalek?

MR. MICHALEK: Yes, Your Honor. I understand that the doctor was allowed to give a future care opinion. We are entitled under 26G to a computation of damages. We filed a motion in limine specifically on this issue.

And Your Honor, during the hearings on the motion in the limine, specifically said that you hadn't heard anything new, hadn't heard any discussion of any future care. This was a surprise today, that without any prior disclosure, certainly

from a former member of the bench who would know that such documents would need to be disclosed under 26, we haven't got a copy of it

It hasn't been produced to us and certainly not a listing of those damages And the doctor should not be entitled to give a future care discussion when you violate rule 26 in -- regarding the computation of those damages There are a listing of another ton of issues that the doctor should not be allowed to testify about.

I was beginning to discuss those earlier. We moved onto have his testimony, but the veracity of the witnesses -- Your Honor, there was a motion in limine that we filed that said experts, even medical experts, are not allowed to discuss or vouch for the credibility of their witnesses.

THE COURT: Mr. --

MR. MICHALEK: You granted our motion.

THE COURT: Mr. Michalek, I need to stop you there because now, you're repeating argument you made in a previous hearing, in a previous objection. You've already lodged your objection with respect to that. The Court's already ruled on it. I don't intend to allow you to revisit issues that you've already addressed. You've already made your record and the Court's already ruled on it.

MR. MICHALEK: Your Honor, my understanding was, when I tried to make that issue earlier, I was prevented from doing

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so when you moved onto the other issue I will note, for the Court, however, that every time there is an objection, three members of the Plaintiff's firm are up there, giving their ideas as to, you know, what should be or should not be allowed into evidence, only two of which are trial counsel.

I think the Defendant should be allowed the same leeway. I'm making my objections now. Otherwise, we're going to have a cavalcade of people coming up to the bench, making their arguments all the time. And I don't think that is what the Court wants, either. There was an issue regarding relationship between the doctors and the Plaintiff's counsel. And I believe there was an issue that was raised during the motion in limine.

And the Court actually said that there's two separate issues. You prevented us from making an argument about the medical build-up. But you said that the bias of the witnesses was certainly fair game. And I can point to that, actually, in the transcript, Your Honor.

THE COURT: Mr. Michalek, now, you're rearguing issues that the Court's already heard. Whether you made the argument or whether someone from your firm made the argument, the Court has carefully considered all of the motions, all of the briefs, all of the arguments and all the objections lodge. And the Court's made a ruling and I don't intend to revisit issues we've already discussed and addressed.

MR. MICHALEK: The reason why I'm going over this, Your Honor, today, is because yesterday, there was a misstatement to the record. I'm pointing out in the transcript what Your Honor actually ruled. There were arguments made by the Plaintiff's counsel, while these motions were denied, that, that is not -- just because there is a minute order that says hey, your motions are denied, that does not accurately reflect what the Court ruled. And if I could --

THE COURT: Wait a minute.

MR. MICHALEK: If I am allowed --

THE COURT: Wait a minute. Wait a minute. Wait a minute. Let me address one thing, because you have misstated what the Court ruled. You said that the Court denied your motion regarding medical build-up. And what happened is, when I specifically asked counsel what evidence do you have that there -- that this case was -- that there was any sort of medical build-up, or that this case was attorney driven, counsel could not respond to that question.

MR. MICHALEK: I'm not --

THE COURT: You couldn't --

MR. MICHALEK: I'm not --

THE COURT: -- tell me -- you couldn't tell me one way or the other. And I realize it wasn't you making the argument, but from the Court's perspective, it really doesn't matter whether it's you, or Mr. Rogers or another defense attorney.

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It doesn't matter whether it's Mr. Wall, or Mr. Adams or Ms. Eglet. The point is, you've already made your record

MR. MICHALEK: Sure. Your Honor, I think that -- I think I misstated or you must have misunderstood what I was trying to say. I'm not asking for argument about medical build-up. What I'm discussing is, during the discussion of the motion in limine on medical build-up, there was a discussion of bias of the witnesses.

And on page 34 of our transcript, we were discussing, Mr. Rogers and the Court, about medical build-up. And we were talking about there, the bias or the prejudice of the witnesses, that they may have some relationships, that had some prior relationships with counsel.

And the Court said that we would allowed to go -- would be allowed to go into that. You said, okay. The motion, as it was granted, i.e., talking about medical build-up, was granted. With respect to the other issues that you've raised, which I think are important issues for trial purposes, relating to bias of expert witnesses, 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.

And yesterday, there was an argument about, well, the Court's ruling was, we couldn't get into bias or relationships. That's not true. The issue that you granted

the motion in limine on, and I agree with the Court's ruling, was on medical build-up. It had nothing to do with bias or relationships. You said that those things were fair game. And we were prevented from doing that.

THE COURT: And I think they are fair game.

MR. MICHALEK: And -- well, Mr. Rogers --

UNIDENTIFIED SPEAKER: Well, we don't know he's -- she's said --

MR. WALL: That's absolutely incorrect. That is absolutely incorrect. What it -- was said in a hearing about relationships between lawyers and witnesses -- you said, if you want to make a specific point on that, file another motion in limine on that point specifically and the Court would consider it and rule on it after we had a chance to opposite it. Nothing has been filed.

THE COURT: That's my recollection.

MR. MICHALEK: So you're saying, because there wasn't a specific question brought up during pre-trial, we're not allowed to raise it during trial? Motions in limine, Your Honor, are certainly for the Court's benefit and I understand that. But if there's a specific question that comes to our attention, we should be able to raise that issue during trial, not just because we haven't brought that issue in a motion in limine.

Motions in limine certainly speed things along, but

there's going to be issues that come up during trial that just can't be raised in a motion in limine, questions we discover through discussions with other counsel or through other witnesses.

Just because we didn't raise it before doesn't mean we shouldn't be able to raise it now. I think Mr. Rogers was attempting to ask that yesterday and he was simply precluded from asking any questions regarding bias or relationship.

THE COURT: Well, that's not true, Mr. Michalek. You're not really accurately representing the record. Mr. Wall's statement of what occurred is accurate. And the fact of the matter is, if the parties aren't going to comply with the rulings the Court makes in these pre-trial motions in limine, then what's the point of any of them being drafted and argued before the Court?

So I really don't appreciate the fact that you are rearguing issues the Court's already heard. The Court's taken a lot of time. I never cut any of you off. I let you argue to your heart's content on each one of these motions in limine and then we made a record. And now, you're revisiting the very issues the Court's already taken the time to hear and rule on, so I wish you would move onto some new material, if you have any.

MR. MICHALEK: Your Honor, look, I've been raised for 35 years in this jurisdiction and I've been taught by appellate

counsel how to make a record. And I will say, I'm just trying to do my job, which is preserve the appeal. Just because a motion in limine has been filed does not mean the objection should not be raised during trial. It does not mean that the Court can't have an opportunity to change their mind.

And what I'm trying to do is twofold. One, preserve the objection. Even though it was filed in a motion in limine, the Supreme Court tells me to raise the issue again during trial, to make the objection. And second, maybe my argument is going to change your mind, in which case I don't have that issue on appeal, I win that issue. And so that's what I'm trying to do. I'm not trying to waste the Court's time. If I bring something up, it's because I'm doing my job.

MR. WALL: Well, I don't think it's part of his job, whether trained by appellate counsel or not, to misstate what's in the record.

And I bet I can go back through this transcript, just in the last 48 hours, probably, and find eight to ten complete misstatements from Mr. Michalek about what's in the record, absolute misstatements, including the one that he's just -- the several that he has just made today, not even taking into account the ones he made on jury selection after not having been present during jury selection.

There are -- to my knowledge, there was not a single question yesterday of Dr. Rosler about any personal

relationships, that Mr. Rogers tried to make, that there was -- that we objected to that wasn't allowed to go into. I don't think there was a single question on that, and that wasn't the subject of what was brought up in the motion in limine. So --

THE COURT: Well --

MR. WALL: I probably shouldn't have even stood up, but I got to just -- I got it -- if the point of this, from their perspective, is to make a record to preserve it, you know what? That's fine. But don't misstate what happened in this courtroom.

THE COURT: Well, I agree, and here's the thing. When Mr. Michalek says that Mr. Rogers was prevented from exploring issues of bias with respect to witnesses that the Plaintiff called, that is simply not true. That is not true.

MR. MICHALEK: I'll move on, Your Honor. If that's your recollection of it, I will certainly accept the Court's recollection of it. There was discussion today by Dr. McNulty that he was more concerned with the patient, the Plaintiff, being more concerned about his head symptoms, and that, that overshadowed his neck symptoms. Now, we raised this issue and this came up at the pre-trial motions in limine. And it's on page seven.

Well, I'll start earlier, Your Honor. I'll start back at page four. And this is discussion about Mr. Rogers

and he's raising the issue to the Court. And he's talking about it in the context of the motorcycle incident and aggravation of migraines. And he says, 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, 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 been made.

Essentially, what Dr. McNulty said was, well, the patient was more concerned about the head symptoms. This overshadowed the neck symptoms, so there's this masking going on. And on page seven of the transcript, Your Honor said the motion is granted, although if Plaintiff's expert witness identified, and Mr. Rogers has indicated, then I think that's probably fair game for purposes of cross-examination.

MR. WALL: That's not correct. We were talking --

MR. MICHALEK: It's right --

MR. WALL: We were talking about the motorcycle accident. That was the motion regarding the motorcycle accident. Nobody has said that the motorcycle accident caused a migraine or even exacerbated a migraine. This is what I'm talking about.

about misstating the record. That motion -- and I didn't even look at the transcript, but I know what he's talking about. And the motion was on the motorcycle accident. Dr. McNulty never even mentioned it.

THE COURT: Well --

MR. MICHALEK: Well, Your Honor, the issue is --

THE COURT: And again, you know, it was Mr. Rogers who was here arguing it. Maybe that's -- part of the problem is that Mr. Michalek was not here arguing. Maybe that's why you don't recall what happened.

MR. MICHALEK: Your Honor, I'm reading directly from the transcript. The issue that Mr. Rogers is raising is this masking claim, this issue that, well, the Plaintiff did not make any complaints of neck pain because it was overshadowed or more concerned about his head.

And that specifically was what Mr. Rogers was raising on page four and specifically what the Court said yeah, I think that that's probably fair game. And now, I'm being told that that's inaccurate. Well, I'm reading directly from the transcript.

THE COURT: You're reading it, but I don't think you understand it.

MR. MICHALEK: Well, Your Honor, I can have Mr. Rogers come up here and tell you what his understanding was of the issue, and what we wanted to preserve and the claims we want

to make. I will tell you that this doctor has testified as an expert. He's vouched for the credibility of the Plaintiff. He's made these arguments about masking, about how -- about how the concern for the head pain is overshadowing the neck symptoms.

And I think, as with the motion in limine, if you were saying, well, you know, I'll consider it if someone's made that claim, well, he's made that claim now. So I would ask you take a look at that issue and say well, I think we're allowed on cross-examination to explore that.

MR. WALL: This is so confused. Here's what happens. He has a history of migraines. We accept it. We told them that. And then he has this injury. We discussed at the motion in limine that the fact -- you know what? He had migraines before. That's coming in and we agreed. And that's fine. And if they were exacerbated or any head pain is exacerbated by this accident, they can explain that.

And if they want to bring in the fact, you know what, he did have migraines before, absolutely, there's -- they're entitled. And that was the extent of the motion. So I don't know -- I don't know where you get from the motorcycle accident to masking because they're at polar opposites and none of them were even -- were even relevant to the discussion that we were actually having in the motion in limine.

MR. MICHALEK: Your Honor, I'll read from --

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MR. ROGERS: Your Honor, just a second.

MR. MICHALEK: I'll read from page three.

MR. ROGERS: Charles, just a second.

MR. MICHALEK: I'll read it.

MR. ROGERS: If I might, I remember in the opening, that the Plaintiff took great offense at the fact that I included the motorcycle accident in the record or on the display. And the truth was, I didn't have the transcript at that time, but that was -- my understanding was that if -- that the Court had a qualified position on the motorcycle accident.

And that really was the reason that I put it on there. There was no intent to sneak anything in. What Mr. Michalek is saying right now was that maybe the confusion that Dave's pointing at, that --

MR. WALL: I'm not confused.

THE COURT: I'm not confused.

MR. ROGERS: I'll --

MR. WALL: None of the court's confused.

MR. ROGERS: Your Honor --

MR. WALL: I believe Mr. Michalek's confused. And there was --

MR. ROGERS: Your Honor, I was --

MR. WALL: There is no medical person who can, or has or would ever say that the motorcycle accident has anything to do with any claim we're making in the case.

And so when the order says your motion to prevent unrelated accidents, injuries, conditions is granted in its entirety, one of those things was, specifically, the motorcycle accident because there's no one to testify that it has any relationship to any injury claimed. It is unrelated and that was, in my mind, perfectly clear at the time of the hearing. It is perfectly clear in the order.

THE COURT: That's precisely my recollection.

MR. MICHALEK: Your Honor, I don't know what in -- what's in counsel's mind. On page three, it says -- this is Mr. Rogers, factually, what's going on in the case is, there's a 2005 car accident and the Plaintiff claims that the accident aggravated his pre-existing migraines, which in turn, masked a new injury of cervical problems, for which he later had surgery.

That's exactly what Dr. McNulty was saying, that there were more concerns over -- about his head. It overshadowed his neck symptoms. It's -- this is exactly the issue that was raised on page three. I'm not reading this transcript wrong. It's right there. Now, if that -- if the Court's going to deny it, that's fine. I'm not making this stuff up. It's right here in the transcript. I don't know what counsel's recollection is.

I'm reading, directly, the words. And he's talking specifically about an accident that aggravated his pre-

existing migraines, which in turn, masked a new injury. So I resent the implication here that I'm coming up here without knowledge of something. I'm looking directly from the transcript.

Every time I've appeared in front of this Court, Your Honor, I've had a case citation to back up what I've said. I'm looking at the transcript and reciting it. So I resent these implications and the interruptions, you know, during my argument. You want to deny my motion, that's fine, but I'm reading directly from the transcript.

I'm just trying to make a record here and make it clear from the words used, not from someone's recollection, not from someone's understanding, the transcript. And this is the exact issue Mr. Rogers was raising.

THE COURT: Defense counsel was never able to link the motorcycle accident to any of the injuries that Plaintiff sustained. You were never able to do so before and I haven't heard you say anything today, that you can now do so.

MR. MICHALEK: I'm not trying to link the motorcycle accident. I'm trying to link the issue of, well, is there a -- is there a concern that this head pain is overshadowing neck symptoms? Well, if there is, then why is this being caused? How is this occurring?

MR. MICHALEK: Well, guess what? The head pain's caused from this accident. There is some pre-existing migraines, but

the head pain is caused from this accident and that which they treated in April or May of 2005 may have masked some of the neck pain at that time, but it's not -- it's not from a motorcycle accident. It's from the accident in question.

MR. MICHALEK: Well --

THE COURT: Let's move onto the next issue. We've talked about this one enough.

MR. MICHALEK: I have raised that. Fine, Your Honor. The last issue is jury questions. I know that you're marking some that have been given and some that have been not given. I don't know if that occurred yesterday. I know you made a note of exhibits, or I guess, questions that are going to be read at some future point in time. Are those going to be marked for some purpose or --

THE COURT: All of the juror's questions -- whether they're read into the record and answered by a witness or whether they're not read into the record, they're all marked and included in the file.

MR. MICHALEK: Okay. So even if those -- will those just be held until a witness comes to the stand, apparently, that can answer those?

THE COURT: Well, as I told the jury, if it's a proper one to be given, to be asked and inquired into, then I'll ask, and inquire into it and if we have a witness who hasn't already been excused by the Court. We received -- one of the

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questions we got today had to do with migraine auras and that related to a witness that was excused yesterday afternoon, but we didn't get the question in until today.

As soon as we began, I think, is when we got the question. So I don't know whether we're even going to have a witness who will be able to answer that question. If we do, I'll ask the question of a witness. Counsel'll have to help me keep track of that one. The other one -- I don't even know if it's an appropriate question to ask, but in any event, they're all being marked and included in the record.

MR. MICHALEK: So I just, for clarification, Your Honor --

THE COURT: Which I told Mr. Rogers at a sidebar.

MR. ADAMS: Your Honor, I would just like to address one issue real quickly. And that's basically reiterating my argument that I made at the bench with regard to the spinal cord stimulator as a treatment option for Mr. Simao. As I pointed out at the bench, the Defense took several depositions in this case, many of which were treating physicians. In fact, they deposed Dr. McNulty earlier twice. Okay?

They deposed Dr. Seibel on August 20th, 2010. At that time, they asked him several questions about his treatment that he had provided and was providing. At the time of his deposition, he was still treating, and even through this day, by the way, is still treating Mr. Simao. One of the

questions that counsel asked him is, do you have a future treatment plan for the Plaintiff? And he responds at page 53, line 20 through 22. I don't right now in front of me.

He's asked further questions of why he doesn't have a future treatment plan right now. He keeps using that phrase, right now. And he says, well, from a diagnostic standpoint and based on the last time I saw him, I would pursue, again, a selective nerve reblock at C4 level. In other words, he needs to do a diagnostic block. In fact, right above that, he says for diagnostic purposes, he needs to do a diagnostic block before he can know what his next treatment plan and future treatment plan is of Mr. Simao.

Later on through the deposition, he's asked more refined questions with regard to his future treatment plan. And basically, he's asked a question from an associate at my office, who says okay, assuming that he has a positive outcome from that pain management procedure, what would your treatment options for or your treatment recommendations be for him?

And he answers, at page 68 of his deposition, lines one through 17 through 25, again from my perspective -- I'm not the spine surgeon -- but my job is to provide some diagnostics, but also some therapeutic interventions, which range from modalities we mentioned before.

Would it be medication management or repeat story injection or considered re-referral back to a surgeon to see

if he felt that he was another surgical or other surgical interventions that could help alleviate, just based on those diagnostic results?

Then he's asked, again, by my -- by my associate. It says, okay, let's assume that it was negative. What would be your next step? And he says, well, if the results were negative, I'd probably continue to do myofascial treatments for him, medication management. He may not have any further intervention or surgical modalities.

Then he's asked, with regard to these modalities, what does he mean by these modalities and he's asked a specific question. At this point in time, is it foreseeable to you that he would be recommended for, say, an implant of an electronic stimulator or other type of pain relief modality such as a morphine pump for -- the response from the doctor was, I could see where some might consider that an option.

I don't consider it an option for an intrathecal device right now, again, going back to right now because, he goes on to say, he hasn't done that diagnostic test. Well, guess what, Your Honor? In fact, he does do the diagnostic test in November of 2010. That diagnostic test, as you heard today from Dr. McNulty -- my client received 75 to 80 percent relief. Okay?

Based on Dr. Seibel's deposition and his testimony, the fact that he had a positive outcome from that diagnostic

test means that -- now, that spinal cord stimulator is not now just a viable option, but now, it's a recommendation. Why? Because now, we have the diagnostic medical basis in which to recommend it now.

The doctors do, not us. The doctors have a medical basis now, based on the diagnostic results, to recommend a spinal cord stimulator as future medical treatment for Mr. Simao. So this whole thing, that they are surprised by this, is simply not true. They learned about it first as a viable option back in August. The procedure's done. The diagnostic test is done in November.

They could have re-noticed his deposition. As we heard here today, they noticed some doctors on two occasions. They never made the nexus, Your Honor, from what they learned about in the depo and then seen on the records. If they would have, I'm sure they would have deposed one of the doctors about that.

But that being a side, there were several questions about a spinal cord stimulator, morphine pumps and other pain management devices discussed in his deposition. Not one time did Defense counsel ask what the costs of those are. Now, I understand we got to give them their damages, but we don't have to do their job, Your Honor.

I mean, he's -- Mr. Rogers is a seasoned attorney. He could have asked that simple question and that would have

been outlined for him. But he didn't. He didn't do that with any of the treating physicians in this case.

MR. ROGERS: This one. I'll respond to

THE COURT: Well --

MR. ROGERS: Counsel aren't meant to divine a nexus. Counsel are meant to disclose under the rules. They clearly knew this before they came today. They clearly met with Dr. McNulty. They clearly took the time to bring in diagrams and to come up a projection for future damages, never once disclosing that this was an element of damages the Plaintiff would request.

We filed the motion because we said, look, fair is fair. We are telling you everything that we're bringing. Tell us what you're bringing. The rules require you to. They didn't. And that was the basis for the objection before you. I understand you've ruled on it, but to pretend that Dr. Seibel's testimony from four months ago constitutes notice when he said, I don't know what's coming, is an absurd proposition.

THE COURT: Your response, Mr. Adams?

MR. ADAMS: Yeah. You're right. Dr. Seibel's testimony, the procedure that's been done in November, the follow-up that was -- November 11th, the follow-up that was on November 23rd, the referral back to the spine surgeon -- this time, Dr. McNulty's partner, Dr. Lee [phonetic] on two occasions and the

very last record, which was last month, says no surgical options but pain management options.

As the doctor testified here today, this is a pain management device. I mean, how many -- there's a litany there now. There's, like, five pieces of either medical records or depositions that they are aware of this.

MR. EGLET: And let me just add something, Your Honor. Dr. McNulty is a treating physician. Under the rules in Nevada, treating physicians are not required to do reports and treating physicians are permitted, under Nevada law, to talk about the prognosis, future treatment and ongoing treatment. That's exactly what Dr. McNulty did.

And Your Honor, it is -- it is so hypocritical to me that it is beyond comprehension for Mr. Rogers to get up and try to claim ambush and unfair -- when his experts in this case -- I, quite frankly, in 24 years of practice, have never seen any anything quite like this. I've never seen a moving target quite like Dr. Fish [phonetic].

You're going to hear from him tomorrow. You're going to see what a moving target defense whore this guy is, who will lie on the stand and under oath about anything. And you're going to see that, I promise you, tomorrow. But let me give you an example of Dr. Fish. Dr. Fish does a report in this case.

MR. ROGERS: Is this relevant to the issue?

MR EGLET Yes It is.
MR ROGERS Is this relevant?
MR. EGLET: Sit down, counsel.
THE COURT: Well --
MR. ADAMS: All right.
MR. EGLET: You've had your say. I'm going to --
MR. ROGERS: Stop.
MR. EGLET: -- have my say.
MR. ROGERS: Stop. Back off.
THE COURT: I think -- I think -- yeah. I think it's fair. I think it's fair.
MR MICHALEK: Your Honor, that's fine and I apologize. I should haven't interrupted.
MR. ROGERS: It's not --
MR MICHALEK: I've been interrupted from several --
MR ADAMS: No, no. Let him finish. I want to hear this.
MR. MICHALEK: Well, I just need to say this on the record. I've had -- been interrupted several times by Plaintiff's counsel, you know, when I'm trying to make my argument I don't need counsel to say something. If the Court wants to tell me to sit down, certainly, I will. I am shocked at the lack of respect that is being shown from Plaintiff's counsel in this courtroom.
I have never seen it where counsel is going to

changes his opinions again. And I'm not talking modify or supplementing his opinions Changes his opinions again.
Changes his opinions again in supplemental reports And then, when Mr. Wall, on the day he deposes him, he completely changes all his opinions from all of his reports with no notice to us whatsoever. Now, this is a Defense expert who is required under our rules to do written reports, unlike the treating physicians in this case.
So it is so incredibly hypocritical to make that remark when -- and act like, oh, this is unfair. you know, their treating physicians are coming up with these statements that there -- that are -- they were on notice of, as pointed out by Mr. Adams. And it's completely and totally different from what their experts have done in this case. And I can guarantee you to this Court that Dr. Fish is going to come in here tomorrow with completely new opinions that have never been disclosed, Your Honor.
THE COURT: Well, I think the record's pretty clear. Mr. Adams made a pretty good record regarding the issue of notice. I think, clearly, there's no surprise here.
Anything else you need to address?
MR. ADAMS: One last thing, Your Honor. I mean, if Mr. Michalek wants to come to the bench, I welcome him there, but the crazy thing for him to bring this up today is just -- I just can't believe it because yesterday, one of my partners

threaten someone physically with violence, directing things to take things outside, to yell at other counsel to sit down, shut up. Those are things that professional attorneys do not do and I am shocked at the lack of respect that's being shown.
And I would ask the Court, on both sides, to direct both counsel, that from now on, proceedings in this courtroom should be directed, and arguments directed, to you. Counsel should not be making arguments to each other, or yelling at each other --
THE COURT: That's true.
MR MICHALEK: -- or screaming at each other --
THE COURT: That's true.
MR. MICHALEK: -- or threatening them in any manner.
THE COURT: That's true. Consider yourselves all admonished. Mr. Eglet, please proceed.
MR. EGLET I find it incredible that Mr. Michalek would come up with -- had the audacity to make that remark after some of the things he's said over the last two days and particularly, the extremely cheap shot that he took at Judge Walsh a few moments ago.
So you know, he ought to listen to what he has said in this courtroom and have a little introspection when he starts throwing stones at other people. But it is incredible to me that they have an expert, Dr. Fish, who has -- from his first report, changes his opinions in a supplemental report,

says you know, it looks like you're overpowering the Defense when you three are up there.
And so you know what? Today, I made a conscious effort to keep my butt in the chair, except for one time when Mr. Eglet asked me to come up. And that was the argument that I made, because I was well-versed with this issue. Okay? Other than that, I've made a conscious decision to abide by my partner, Tracy Eglet's, recommendation to stay there or just two of us go up there.
But you know what? If Mr. Michalek wants to come up, that's fine I don't know what he's referencing that there's only two trial counsel. If he was here the first day, I believe all three of us made an appearance on the record and he didn't look at that transcript. On the record before the jury panel, there -- the three of us were here.
THE COURT: Ms. Eglet was here, too, on the first day.
MR. ADAMS: That's true.
MR. MICHALEK: Your Honor, I don't think the point should be a cavalcade of --
MR ROGERS: No, no. I'm tired. Let's just leave. I'm done with this.
MR. MICHALEK: -- people coming up to the bench. I think that, that doesn't help the process to have five people huddled around there, arguing. My point was simply that if you're going to allow the Defense counsel -- or Plaintiff's

counsel two or three people to come up there and make arguments, then I was simply asking for the same leeway.

I don't think it's appropriate to have every counsel, every time, run up to the bench and make arguments. It labors the process in front of the jury. You know, it -- the more people that are up there, the more likely it is the jury's going to overhear something. You know, typically, the objections are heard when the jury's excused.

That's simply what I was doing, making my record now. You know, I don't want to run up there, and with everybody else and have six or seven people, you know. We just call people and have everybody stand there. And that's not going to look good in front of the jury and it's not going to help the process.

THE COURT: Well, it's up to you if you want to approach the bench or not. When I ask counsel to approach the bench, it usually isn't you, you and you, it's counsel, approach the bench. So whoever wants to come up here and have a conversation, feel free.

MR. EGLET: Thank you, Your Honor.

THE COURT: See you tomorrow.

[Proceedings Concluded at 5:01 p.m.]

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

CYNTHIA HOSKINS, Transcriber

TANJ S MAYES, Transcriber

ERIN GOOLD, Transcriber

BONNIE FURLONG, Transcriber

LINDA J. HEPPLER, Transcriber

ERICA L. VAN OSTRAND, Transcriber

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Smith Economics Group, Ltd.
A Division of Corporate Financial Group
Economics / Finance / Litigation Support

Stan V. Smith, Ph.D.
President

March 29, 2011

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

Re: Simao - ADDENDUM

Dear Mr. Adams:

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

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

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

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

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

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

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

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

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

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

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

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II. REDUCTION IN VALUE OF LIFE

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

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

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

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

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

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

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

(2) The central tendency of the range of the economic studies cited above which I estimate to be

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

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

III. LOSS OF SOCIETY OR RELATIONSHIP

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

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

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IV. COST OF FUTURE LIFE CARE

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

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

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

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

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

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

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

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

Sincerely,

Stan V. Smith, Ph.D.
President

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APPENDIX: VALUE OF LIFE

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

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

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

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