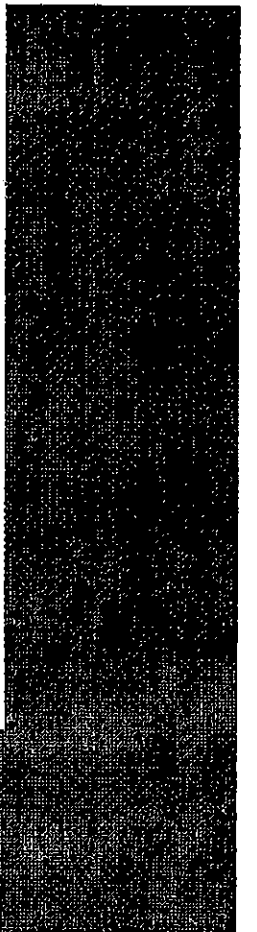
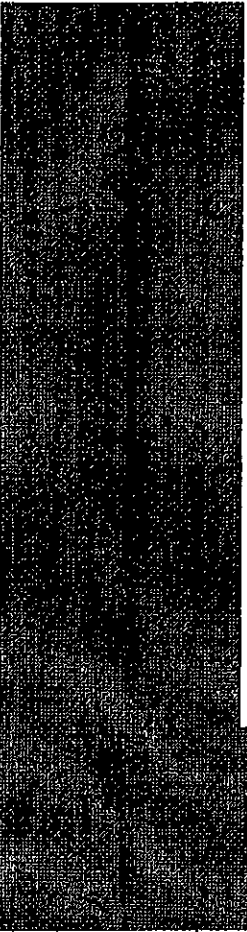
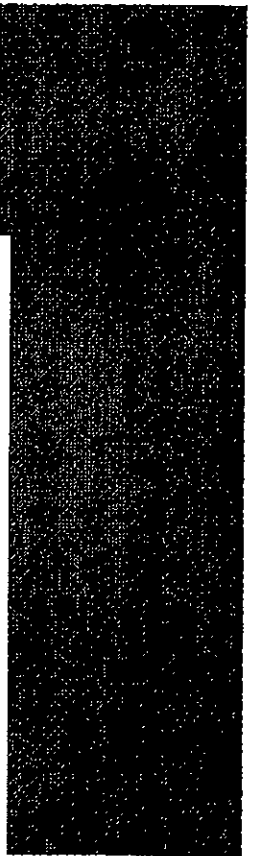
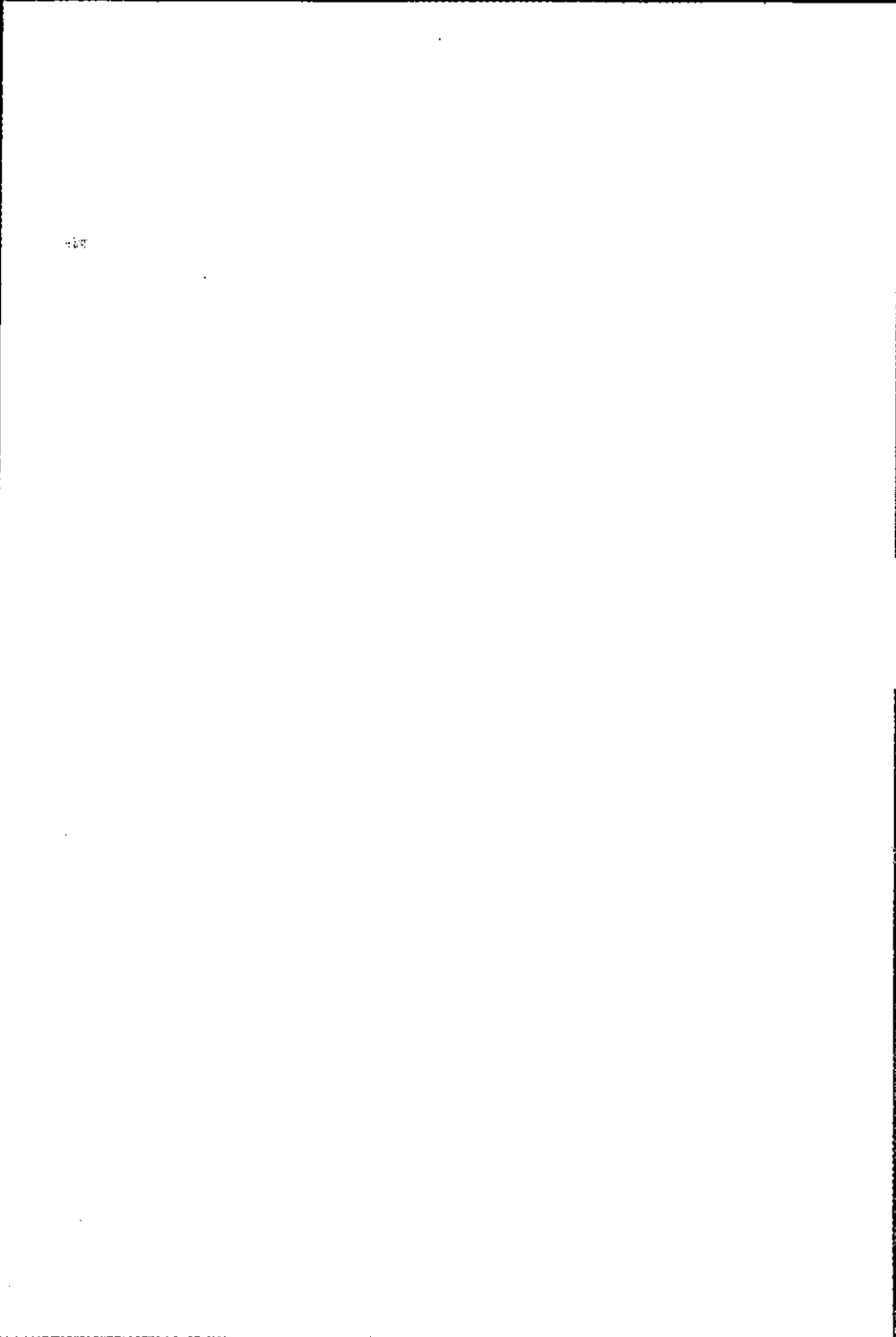
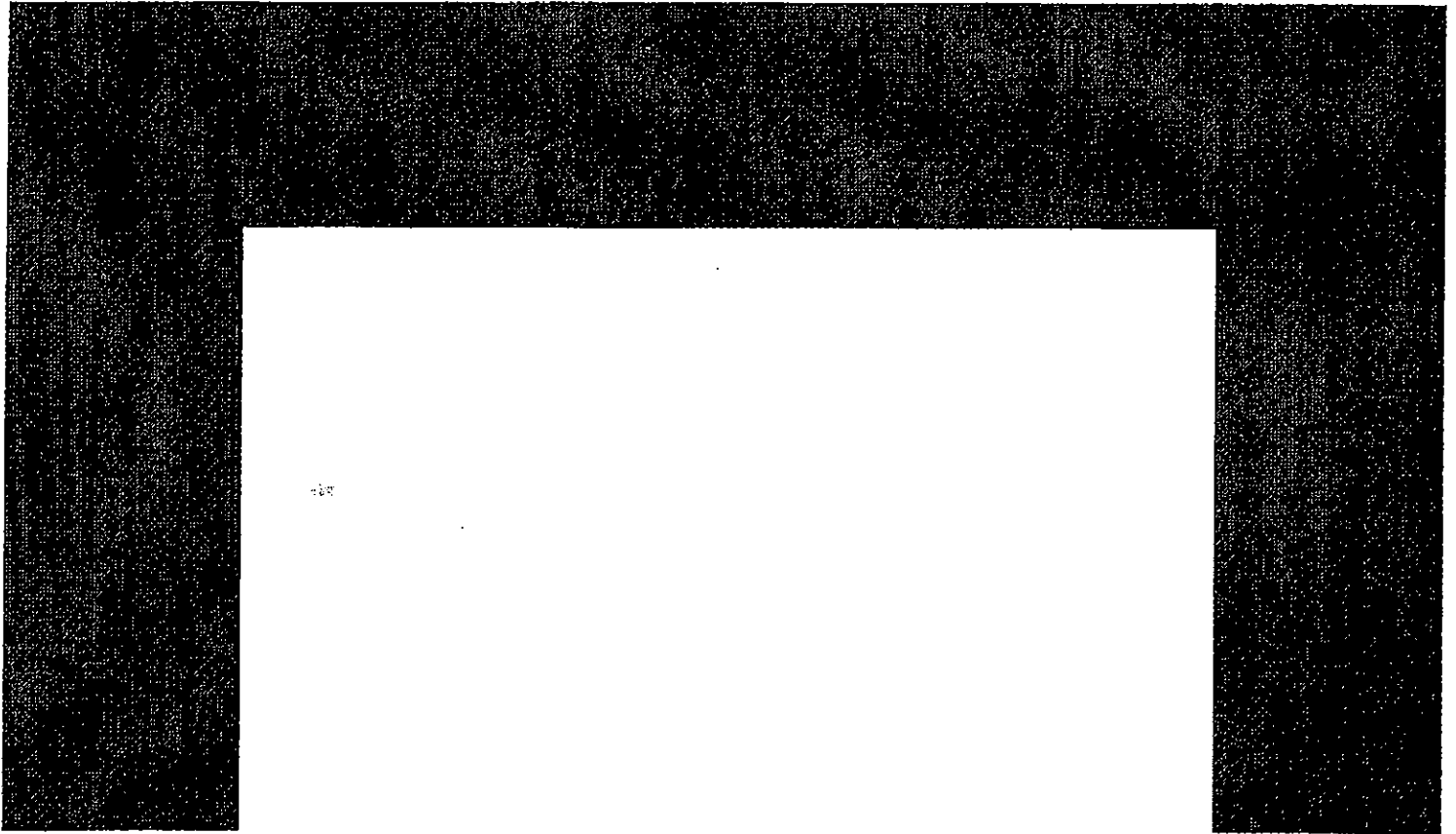


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DATED this 4th day of March, 2011.

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



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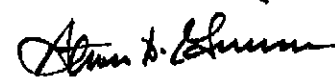
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DISTRICT COURT



CLARK COUNTY, NEVADA

CLERK OF THE COURT

CHERYL SIMAO,
WILLIAM SIMAO,

Plaintiffs,

CASE NO. A-539455

v.

DEPT. X

LINDA RISH,
JAMES RISH,
JENNY RISH,

Defendants.

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, MARCH 8, 2011

REPORTER'S TRANSCRIPT
MOTION HEARING

APPEARANCES:

For the Plaintiffs: BRADLEY J. MYERS, ESQ.
Mainor Eglet, LLPFor the Defendants: STEVEN M. ROGERS, ESQ.
Hutchison & Steffen, LLC

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TUESDAY, MARCH 8, 2011 AT 9:09 A.M.

THE COURT: Good morning. Please be seated.

Good morning, all four of you. That's unusual. All right. Let's start with page 5, please.

THE CLERK: Number A-539455, William Simao versus Jenny Rish.

THE COURT: Good morning.

MR. MYERS: Good morning, Your Honor. Brad Myers for the Plaintiffs.

MR. ROGERS: Steve Rogers for the Defendant.

THE COURT: Morning. These -- some of these issues were discussed, I thought, not so long ago.

MR. MYERS: I believe some of the general topics were, but these issues -- if I can give you some background, Mr. Wall and Mr. Rogers I believe had spoken about these pursuant to the local Rule 2.47. And I believe they had reached an agreement that these could be stipulated to, and then sometime later -- and you can correct me if I'm wrong, because I wasn't involved, I believe that Mr. Rogers indicated to Mr. Wall that they then could not stipulate to some of these -- or to any of these. And that's why we brought the motion.

But some of these topics, for example, the prior unrelated accidents, injuries and lawsuits. There's two items that we're arguing about today that were not included in the prior motion, because we thought those were going to be

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1 stipulated to.

2 Okay. So if I may, on the first issue, the
3 unrelated injuries, accidents, and claims. Well look, there's
4 two things we're talking about. One is that the Plaintiff was
5 diagnosed with a non-cancerous tumor. And then there was a
6 lawsuit on their home -- regarding their home.

7 I mean these aren't relevant. I mean the argument
8 from the Defense is that these are -- it's relevant to
9 emotional distress that accompanies the injury and I mean any
10 time that someone is injured there is of course some level of
11 garden variety emotional distress that accompanies an injury.
12 But I mean, if that's the argument where does it end?

13 I mean if someone has any sort of financial worry,
14 if they have a family member who's sick or they have stress at
15 work that's causing stress in their life or distress. I mean
16 does everything come in just to show that they have other
17 stressors in their life and -- so I mean, these things just
18 aren't irrelevant. They're not relevant to the injuries or
19 the damages in this case. And that's really our position on
20 number one.

21 I don't know if you want to take them each at a time
22 or you want me to run through all of them? Or --

23 THE COURT: I think so. Let's take them each at a time.

24 MR. MYERS: Okay.

25 THE COURT: Can you give me some idea what the class

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1 action lawsuit is regarding the home?

2 MR. MYERS: Right. I mean I think it's --

3 THE COURT: The house.

4 MR. MYERS: Right. And I -- Your Honor, and forgive me,
5 I don't have the exact details. But I believe it may have
6 been a constructional defect.

7 MR. ROGERS: It was.

8 MR. MYERS: It was? Related to the home where there was
9 several claimants in the subdivision who may have had, you
10 know, bad plumbing, or something. And all made a claim
11 related to that.

12 THE COURT: And what about the timing, Mr. Myers, on both
13 the class action lawsuit and on the non-cancerous tumor?

14 MR. MYERS: I believe the tumor was several years before
15 -- oh, actually, I take that back. I think it was subsequent
16 to the accident. I believe it was, so -- it was during the
17 time that Defendant was dealing with the injuries, but you
18 know, it's not cancerous. It doesn't really relate to the
19 actual injury that's being claimed in the case. And I'm sure,
20 of course the prospect of cancer I'm sure was not pleasant to
21 my client, but it's just -- it's -- it's not relevant to the
22 emotional distress and the garden variety distress that
23 accompanies having a neck injury and a neck surgery.

24 THE COURT: Okay. Thank you.

25 Mr. Rogers?

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1 MR. ROGERS: Thank you. As to Mr. Myers's first point,
2 the -- actually there never was an agreement. There was -- we
3 were exchanging stipulations -- Mr. Wall and I to avoid
4 additional motions. These were in a pile of motions that we
5 couldn't agree to. We never did.

6 So this wasn't like a surprise, 11th hour thing.
7 Now on the first motion the Plaintiff has testified that there
8 were months that passed that he feared that he had life
9 threatening cancer. And that this did cause him emotional
10 distress. He also testified that he ultimately left the house
11 that he lived in because the defects in the house were never
12 repaired. And that the money recovered in the lawsuit wasn't
13 sufficient.

14 I understand the Court's possible reluctance to
15 allow in an unrelated lawsuit. It's not the Defendant's
16 intention to establish that the Plaintiff is litigious.
17 That's not the point. The point is that the Plaintiff is
18 bringing in this economist, Mr. Smith, the hedonic damages
19 expert who is going to quantify general damages in this case.
20 He calls them hedonic. And the criteria for that number that
21 he reaches includes stressors in life, emotion distress.
22 These things become relevant particularly on the cross of that
23 expert.

24 So I don't know how it can be kept out if Mr. Smith
25 is going to take the stand.

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1 THE COURT: How recent in time is the lawsuit over the
2 home and requirement that the Plaintiff move out of the home?

3 MR. ROGERS: All subsequent to the accident.

4 THE COURT: All subsequent?

5 MR. ROGERS: Yes.

6 THE COURT: But Mr. Myers said the lawsuit involving the
7 house was prior to --

8 MR. ROGERS: No. No. It had -- in fact the Plaintiff
9 moved from the house after the incident. Now the action might
10 have been filed before, but the litigation continued. And the
11 Plaintiff vacated the house afterwards.

12 THE COURT: Well I think the non-cancerous tumor is
13 relevant for purposes of emotional distress. And I think the
14 ruling is limited to that sole issue, which is really all
15 you've argued anyway, Mr. Rogers.

16 MR. ROGERS: True.

17 THE COURT: So I think that's appropriate. I'm not so
18 certain that the class action lawsuit is something that I
19 think we really ought to get into in front of this jury. I
20 think it takes us too far off field.

21 MR. ROGERS: What I propose is that we don't even mention
22 the word lawsuit. We're just discussing problems that he had
23 with his home that were so severe that he ultimately had to
24 leave.

25 That is naturally a very stressful situation.

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1 Without using the word lawsuit that becomes relevant to the
2 Plaintiff's emotional distress and to the Plaintiff's expert's
3 determinations about the value of it.

4 THE COURT: Did he testify in his deposition that he was
5 distressed because of that issue?

6 MR. ROGERS: Yes. And upset that the recovery wasn't
7 sufficient. We wouldn't even mention the word recovery to the
8 jury. But the recovery wasn't sufficient to cover all of the
9 problems in the home.

10 THE COURT: Well that's another issue then. Just the
11 distress of being displaced from your home.

12 MR. ROGERS: Yes.

13 THE COURT: Mr. Myers?

14 MR. MYERS: Thank you, Your Honor. I think it's even
15 worse if we don't -- if given the climate of foreclosures, I
16 mean the jury -- you know, who knows what they'll think. If
17 this is a foreclosure or a bankruptcy, or whatever reason
18 that, you know, my client may have lost their home. It's just
19 not relevant to any -- and the emotional distress in this case
20 is from the physical injuries. There's emotional distress
21 accompanying the inability to live the same life as before.

22 And Dr. Smith, when he talks about hedonic damages
23 is the loss of enjoyment of life and recreational endeavors
24 and things that people could do when they're healthy.

25 I mean just stress in life -- I mean, anything and

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1 everything can cause stress in life. And have it come in, in
2 a lawsuit like this, I mean I don't know where the line is
3 drawn. I mean it could technically bring in anything. I
4 mean, you know, my dog peed on my rug this morning. That was
5 pretty stressful. I mean is that I had to clean it up and I
6 was running late. I mean does that kind of stuff come in?
7 It's just -- I just don't see where the line is drawn.

8 I think if anything this stuff is more unfairly
9 prejudiced -- or even if it is relevant, the probative value
10 is outweighed by the unfair prejudice about this tumor. The
11 jury -- juries tend to fill things in and they may say, "Well
12 gee was his tumor close the neck? Or did it have -- was --
13 did the surgery have an impact on this tumor?" I just think
14 that we get -- it just turn -- it could turn into a sideshow,
15 and there's a risk that the jury could do things that just may
16 not have any bearing on the facts.

17 And that's the fear that both these items, there's a
18 risk of unfair prejudice to my client. These are really
19 irrelevant issues, but even if they have some relevance the
20 risk of unfair prejudice significantly outweighs any probative
21 value here.

22 THE COURT: This part of the motion is granted in part
23 and denied in part. Granted as it relates to the class action
24 lawsuit and the fact that he had to move out of the house.
25 But denied as to the non-cancerous tumor. And specifically

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1 related to the emotional stress. That's the part of the
2 argument that's persuasive, Mr. Rogers, so I'm going to be
3 clear in the ruling that I think it's a very narrow focused
4 issue. That's fair game for purposes of exploring the
5 emotional distress issue.

6 MR. MYERS: Okay. Thank you, Your Honor.

7 Okay. The second motion is regarding hypothetical
8 questions. And this simply -- we're not asking to preclude
9 any hypothetical questions. It's simply that -- to have a
10 ruling that all hypothetical questions must have foundation in
11 the evidence and more specifically that there be no
12 hypothetical's that try to mention or discuss non-existent
13 medical conditions as that's unfairly prejudicial because any
14 reference to non-existent medical condition is -- that's just
15 not true. And that can unfairly prejudice my client. So
16 we're not asking to preclude all hypos -- hypothetical
17 questions, just that there be a proper foundation for each
18 question.

19 THE COURT: Mr. Rogers?

20 MR. ROGERS: Well, characterized that way I have no
21 opposition to it. We're not going to invent scenarios to
22 mislead the jury. So yes. There will be foundation.

23 THE COURT: Well the way I read Plaintiff's motion was
24 that he was asking the Court to preclude improper hypothetical
25 questions regarding non-existent medical conditions, symptoms,

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1 or injuries. So, to that extent the motion is granted the way
2 that I read it. It sounds like Mr. Rogers is viewing the
3 argument the same way that I read the pleading.

4 MR. ROGERS: Yes. I think we are on the same page.

5 MR. MYERS: Okay. Thank you, Your Honor.

6 The next issue relates to the absence of medical
7 records. I think in their opposition they -- the Defense
8 agrees with the premise, but they believe it's premature and
9 they want to wait until trial.

10 I mean this motion isn't premature. And we -- if --
11 it's a real narrow issue. All we're looking for is a ruling
12 to preclude -- and this comes up in cases and I was discussing
13 it with Mr. Rogers before we were called this morning, is that
14 the Defense experts like to say sometimes -- not all of them,
15 but if we ask them a question like "Would you agree that there
16 were no -- there's no evidence of any neck pain before this
17 accident?" for example. And they say, "Well I could give you
18 an answer if I had reviewed the Plaintiff's entire medical
19 history. Maybe, you know, he or she complained to a doctor of
20 some neck pain years ago, but because I haven't seen those
21 records I can't state that." That's the argument that we're
22 09:21:45 we're seeking to preclude, because under the Slautter
23 [phonetic] case, the Defense isn't entitled to unfettered
24 access to the Plaintiff's entire medical history.

25 So any comments from any experts or counsel relating

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1 to the absence of records, or what some medical records may
2 show that they don't have. Or if the Plaintiff complained of
3 some -- or had neck pain, but didn't go to a doctor --
4 something along those lines is what we're looking to exclude
5 with this motion, Your Honor.

6 THE COURT: Okay.

7 Mr. Rogers?

8 MR. ROGERS: That's a little broader than the motion as
9 written. We didn't oppose the motion as written, because as
10 we understood their intention it was to exclude testimony --
11 well like we quoted in the opposition. Where evidentially an
12 expert in a case that the Plaintiff's counsel tried, testified
13 that the absence of medical records bothered him. And that it
14 would be better if he could have reviewed them. Suggesting
15 that there was something there.

16 Now counsel brings up a scenario that really is a problem
17 in these trials. And it's been brought in by the Slautter
18 decision and Plaintiff counsel will invariable now produce
19 authorizations that are provider specific. The discovery is
20 limited.

21 And then to come in before the jury and pretend as
22 though the Defendant did have unfettered discovery rights, and
23 that's not true seems an unfair misrepresentation to the jury.

24 Getting back, though, to the motion as written, as I
25 wrote in the opposition, we don't really oppose it. None of

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1 the Defense medical experts have ever written in their
2 reports, and never testified in their deposition that they
3 suspect there are records out there that have not been
4 produced. And on that basis the motion as written should be
5 granted.

6 THE COURT: I agree. The motion as it was drafted should
7 be granted. And it is granted. Okay. That's the order.

8 MR. MYERS: Your Honor, the next issue related to the
9 Federal Grand Jury investigation and there was no opposition.

10 THE COURT: Was there any opposition, Mr. Rogers?

11 MR. ROGERS: No. And it was my understanding from a
12 previous hearing that investigation evidence has been
13 excluded.

14 THE COURT: Well you were here at all of the other
15 hearings.

16 MR. ROGERS: I'm sorry. I didn't hear.

17 THE COURT: You were here at all the other hearings, Mr.
18 Rogers. They were your --

19 MR. ROGERS: Yes.

20 THE COURT: -- arguments. We discussed this issue
21 thoroughly.

22 MR. ROGERS: Yeah.

23 THE COURT: So, I was a little surprised to read your
24 comment and your opposition regarding this issue. This Court
25 has already held that no investigation can be inquired to at

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1 trial.

2 MR. ROGERS: Okay.

3 THE COURT: I found that an odd sort of statement.

4 MR. ROGERS: Okay. How so?

5 THE COURT: Well because we discussed this issue
6 thoroughly and I asked if you had any evidence regarding that
7 whole nebulous grand jury investigation that ties, you know,
8 any of Plaintiff's counsel or any of Plaintiff's witnesses to
9 that issue. And you said you didn't. Ultimately you said you
10 didn't. Right? That's my recollection.

11 MR. ROGERS: Okay. Yeah, my recollection was that our
12 discussion of the investigation didn't involve Plaintiff's
13 counsel, but rather Defense expert, Dr. Wang [phonetic].
14 There was a senator named Grassley [phonetic] who conducted an
15 investigation of him and we filed a motion to exclude that
16 investigation which was withdrawn, evidentially. The -- not
17 the motion, but the investigation itself.

18 And what we said in our moving papers was that this
19 senate investigation of that doctor is much like the
20 investigation of some medical providers and lawyers in town.
21 Where it really isn't relevant to anything. It's -- no one's
22 reached a determination of fault or of capability. And we
23 wouldn't bring that in. And Plaintiff's shouldn't bring in
24 this senate investigation. That motion was granted. So yeah,
25 while we may have discussed it. It was only sort of

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1 tangential to the motion that was brought before you.

2 That's the way I understood it.

3 THE COURT: Well they brought this motion previously.
4 Plus you brought the motion regarding Dr. Wang and we
5 discussed that at length and ultimately there was never any
6 finding in that senate investigation that implicated Dr. Wang.
7 So the Court was inclined to agree with you and grant your
8 motion.

9 So all right. I think I understand. Any more
10 comment on that issue?

11 MR. MYERS: No, Your Honor.

12 THE COURT: That motion is granted. It was previously
13 granted.

14 MR. MYERS: And I believe the final issue relates to
15 attorney advertising. And again, I don't believe there's much
16 opposition, just a statement that, you know, if during voir
17 dire one of the potential jurors makes a comment about any
18 counsel that they may have heard of a lawyer through
19 advertising -- I mean under those circumstances I think we're
20 -- we could actually inquire into that. The motion was more
21 geared to excluding any sort of sarcastic reference to the
22 fact that attorneys may advertise or a reference to the
23 ambulance chasers or things like that. That's really what the
24 motion was geared to. Not to preclude any voir dire, should
25 issues come up if a potential jury member heard of any lawyer

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1 through advertising.

2 THE COURT: Let me ask you this; is this the subject of
3 any of those questions on that extensive jury questionnaire
4 that counsel submitted? Is this subject covered on that
5 questionnaire?

6 MR. MYERS: It's -- it just -- it asks have you heard of
7 and then it lists all of the attorneys and then it asks, if
8 so, how? And so I'm sure if a juror's heard of an attorney
9 through advertising, they could indicate that.

10 THE COURT: Mr. Rogers?

11 MR. ROGERS: Right. It seemed to me -- you hit the nail
12 on the head. It seemed to me that that was an issue that
13 might naturally arise out of that questionnaire. It's not a
14 topic that I normally hit in voir dire. I don't know that it
15 would come up in this case. And I -- it's not a topic that I
16 ever get to preaching about in front of a jury. So I'm not
17 going to be going into this during the case.

18 THE COURT: Well I'm glad to hear that. So how do you
19 imagine this might come up during voir dire?

20 MR. ROGERS: Exactly from the source you pointed out.
21 And that is that jury questionnaire talks about -- juror
22 opinions about lawyers, whether they -- I can't remember
23 specifically, but things like: "Do you trust them?" And, "Do
24 you think that they ask for too much?" Stuff like that. And
25 it seemed that this question might come out. But naturally, I

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1 mean, you know the Plaintiff's law firm. They're not an
2 advertising law firm. This question may not come up at all.
3 I'm just saying that to exclude it -- if the jury brings it
4 up, would be sort of a strange interaction with them.

5 I'm not going to be arguing the point though.
6 There's really -- this may be a motion better addressed to
7 other lawyers who -- defense lawyers who do that. I don't.

8 THE COURT: So you don't anticipate bringing up the issue
9 of attorney advertising? You're just saying that if one of
10 the prospective jurors brings it up, then you ought to have
11 the opportunity to address it?

12 MR. ROGERS: Something much more like that. Yes.

13 THE COURT: Okay.

14 Mr. Myers?

15 MR. MYERS: That's not a problem. The motion is just
16 geared to avoiding any sarcastic references or any sort of
17 innuendo or suggestion about the fact that an attorney may
18 advertise or something nefarious about that in bringing the
19 case forward. That's really all the motion's geared to.

20 THE COURT: If that's the case, and I appreciate the
21 clarification, then I think the motion is properly brought and
22 should be granted. The fact that an attorney advertises
23 really isn't relevant one way or the other. However, if one
24 of the prospective jurors volunteers the subject then I think
25 it's fair game for counsel to be able to inquire in further.

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1 So with that, any chance this case is going to settle?

2 MR. ROGERS: It -- the chances appear to be diminishing.
3 We're still trying. But I wouldn't bet on it.

4 THE COURT: Okay. So are there going to be any more of
5 these motions before we see you for trial on the 14th?

6 MR. ROGERS: Not.

7 MR. MYERS: I don't believe so. This should be it.

8 THE COURT: Mr. Myers, would you draft a proposed order
9 for the Court's signature. Please run the proposed order past
10 Mr. Rogers.

11 MR. MYERS: I'd be happy to do so, Your Honor.

12 THE COURT: Thank you.

13 MR. ROGERS: Thank you, Your Honor.

14 MR. MYERS: Thank you.

15 [Proceedings Concluded at 9:31 a.m.]

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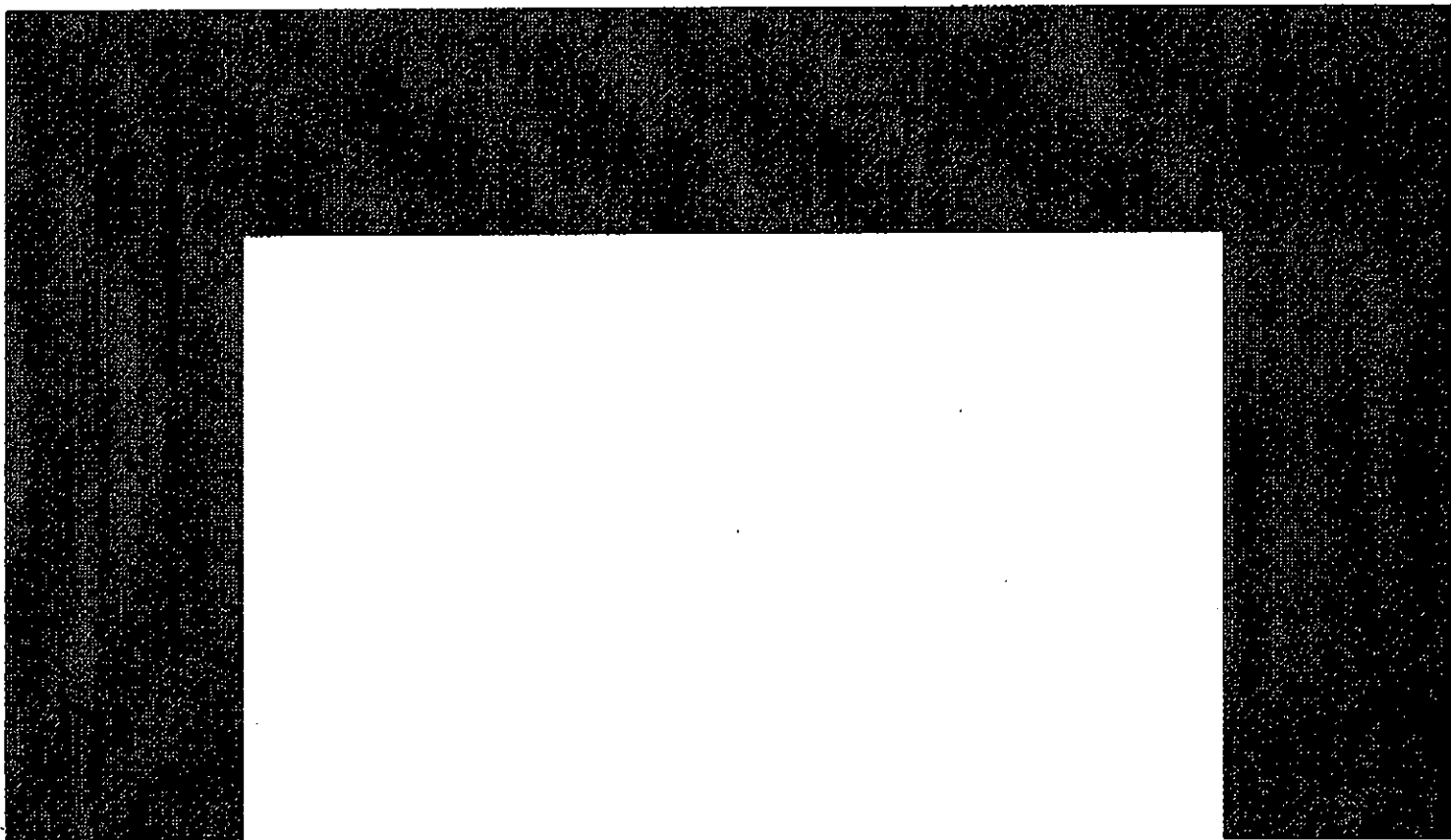
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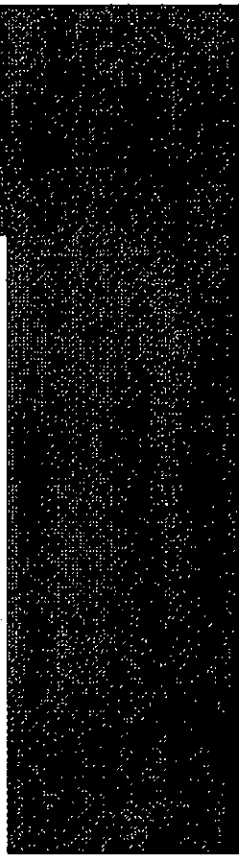
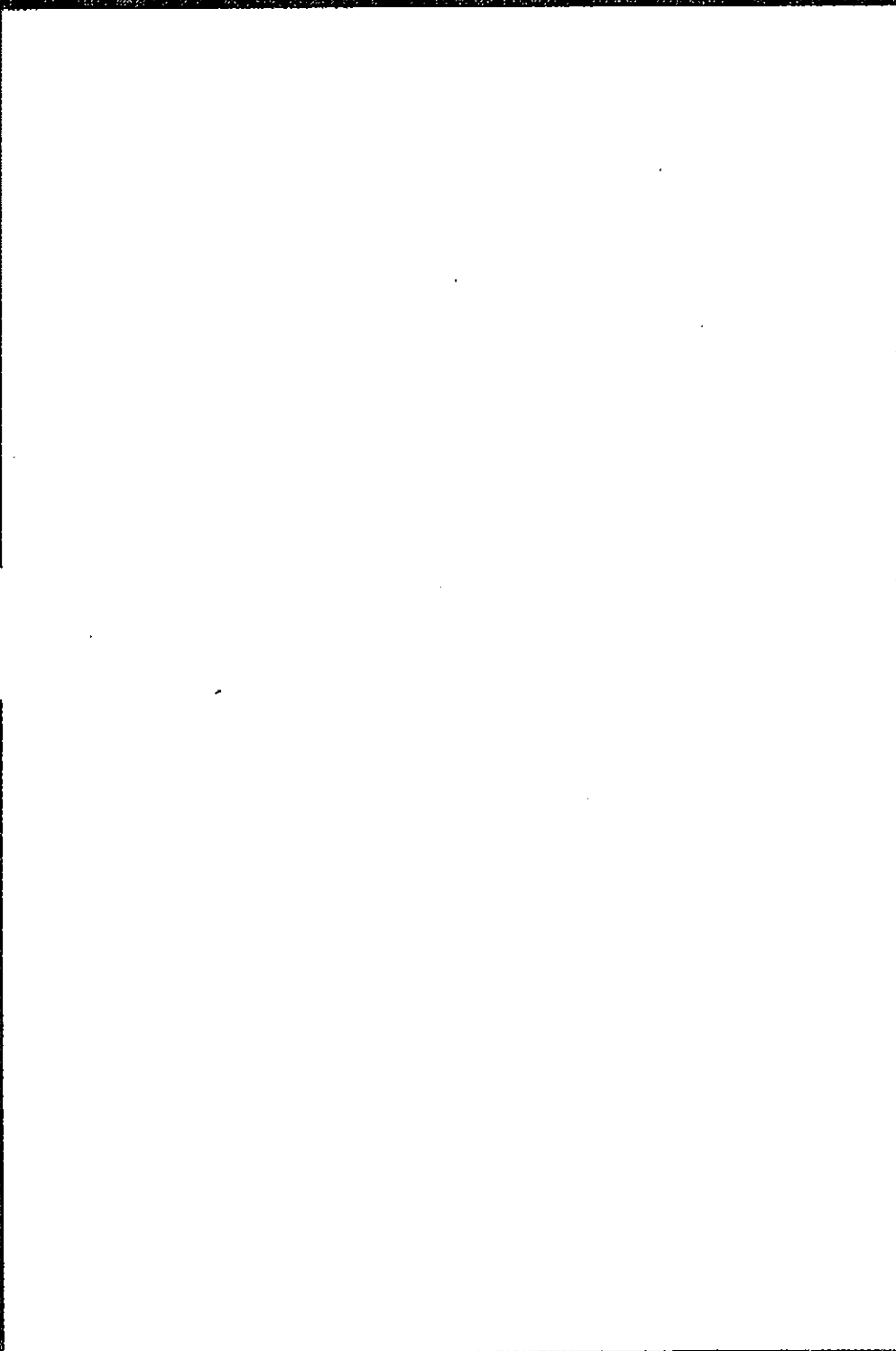

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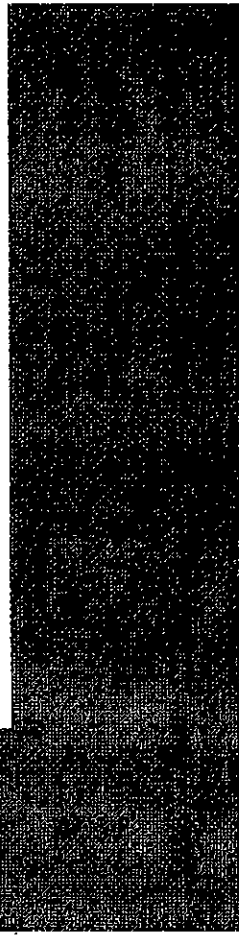
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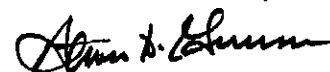
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21 *Attorneys for Plaintiffs*

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 WILLIAM JAY SIMAO, individually and
25 CHERYL ANN SIMAO, individually, and as
26 husband and wife,

27 Plaintiffs,

28 v.

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

32 Defendants.

CASE NO.: A539455

DEPT. NO.: X

NOTICE OF ENTRY OF ORDER

MAINOR EGLET

000588

1 PLEASE TAKE NOTICE that a Stipulation and Order Pursuant to EDCR 2.47 was
2 entered on March 7, 2011, a copy of which is attached hereto.

3 DATED this 10 day of March, 2011.

4 MAINOR EGLET, LLP

5 BY: 
6 DAVID T. WALL, ESQ.
7

8
9 **CERTIFICATE OF SERVICE**

10 Pursuant to N.R.C.P 5(b), I hereby certify that I am an employee of MAINOR EGLET
11 and that on the 10 day of March, 2011, I deposited for mailing, postage prepaid thereon, at
12 Las Vegas, Nevada the foregoing **NOTICE OF ENTRY OF ORDER** in the above matter
13 addressed as follows:
14

15
16 Stephen H. Rogers, Esq.
17 **ROGERS, MASTRANGELO,**
18 **CARVALHO & MITCHELL**
19 300 South Fourth Street, Suite 710
20 Las Vegas, Nevada 89101

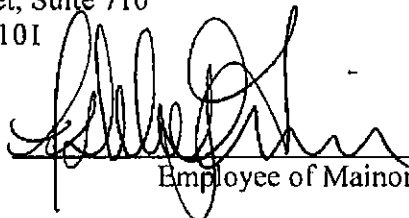
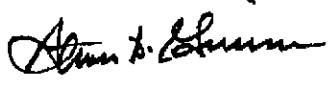
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22 Employee of Mainor Eglet
23
24
25
26
27
28

EXHIBIT "1"

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CLERK OF THE COURT

1 **SAO**
2 **ROBERT T. EGLET, ESQ.**
3 Nevada Bar No. 3402
4 **DAVID T. WALL, ESQ.**
5 Nevada Bar No. 2805
6 **ROBERT M. ADAMS, ESQ.**
7 Nevada Bar No. 6551
8 **MAINOR EGLET**
9 400 South Fourth Street, Suite 600
10 Las Vegas, Nevada 89101
11 Ph: (702) 450-5400
12 Fx: (702) 450-5451
13 reglet@mainorlawyers.com
14 dwall@mainorlawyers.com
15 badams@mainorlawyers.com
16 *Attorney for Plaintiffs*

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

21 **Plaintiffs,**

22 **v.**

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

26 **Defendants.**

CASE NO.: A539455
DEPT. NO.: X

STIPULATION PURSUANT TO
EDCR 2.47

27 **IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto,**
28

MAINOR EGLET

000591

1 through their respective counsel of record and pursuant to EDCR 2.47, that the parties will not
2 introduce any evidence of or make any comment regarding the following:

- 3 1) Reference to or evidence of Plaintiff pulling a muscle in his lower back 23 to 24 years
4 ago while moving a keg of beer at California Beverage Company;
- 5 2) Reference to or evidence of a motor vehicle accident that occurred 25 years ago
6 wherein Plaintiff was pulling a boat with his pick up truck and another vehicle hit the
7 boat and knocked it off the trailer;
- 8 3) Argument regarding improper use of prescription medications;
- 9 4) Plaintiffs' and/or Defendants' specially retained non-testifying consultants, if any;
- 10 5) Improper attorney arguments, such as those prohibited by the Nevada Supreme Court.
11 *See Lioce v. Cohen*, 122 Nev., Advance Opinion 115 (2006);
- 12 6) Reference to this accident being unavoidable;
- 13 7) Any evidence relating to the fact that a recovery by Plaintiff would or would not be
14 subject to taxation, or that Plaintiff's income would or would not be subject to
15 taxation;
- 16 8) Any reference to offers of settlement or compromise;
- 17 9) The fact that either party filed any pre-trial motions, any ruling made by the court
18 regarding the motions, or the content thereof;
- 19 10) Reference to or evidence of treatment not reflected in the parties' document
20 production; and
- 21 11) Reference to or evidence that James and Linda Rish were parties to the action.
- 22 12) Brandon's medical billing is usual and customary in Las Vegas, Nevada;
- 23 13) Non-testifying witnesses shall be excluded from the courtroom; and
- 24 14) The deposition testimony of Britt Hill, P.A.C may be read to the jury, as Mr. Hill is
25 unavailable to appear at trial (reserving the right to redact or designate portions of the
26 deposition to be read).

27 Pursuant to this Stipulation, none of the above-listed Motions have been briefed and/or
28 filed with the Court. In light of the parties' agreement pursuant to EDCR 2.47, all motions in
limine on file with the Court are those upon which the parties were unable to come to an


1 agreement.


2 Dated this 1st day of ~~February~~ ^{March}, 2011.

Dated this 28th day of February, 2011.

3 MAINOR EGLET

ROGERS, MASTRANGELO, CARVALHO
& MITCHELL, LTD.

4 
5
6 DAVID T. WALL, ESQ.
7 Nevada Bar No. 2805
8 400 South Fourth Street, Suite 600
9 Las Vegas, Nevada 89101
10 Attorney for Plaintiffs


STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 S. Fourth Street, #710
Las Vegas, NV 89101
Attorneys for Defendants

11 **ORDER**


12 IT IS SO ORDERED.

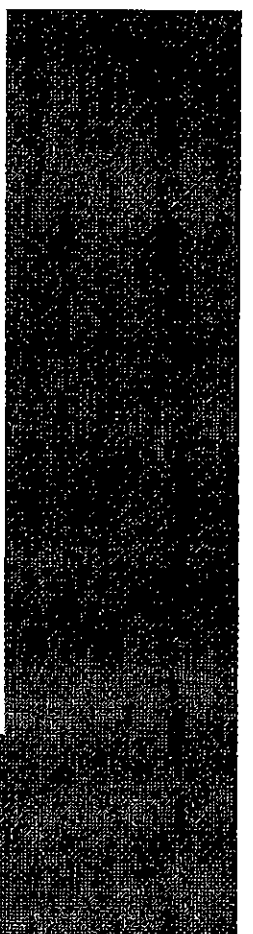
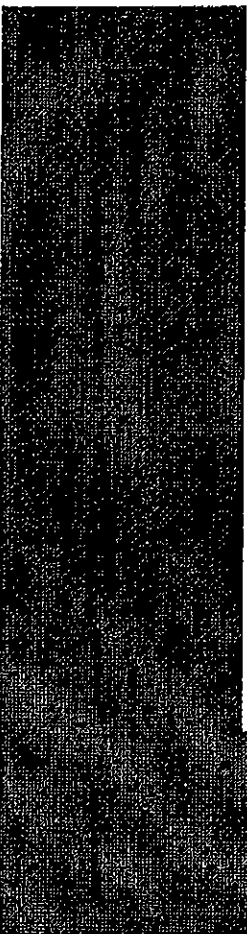
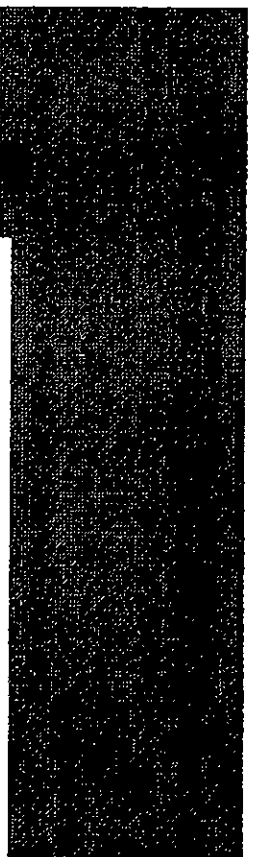
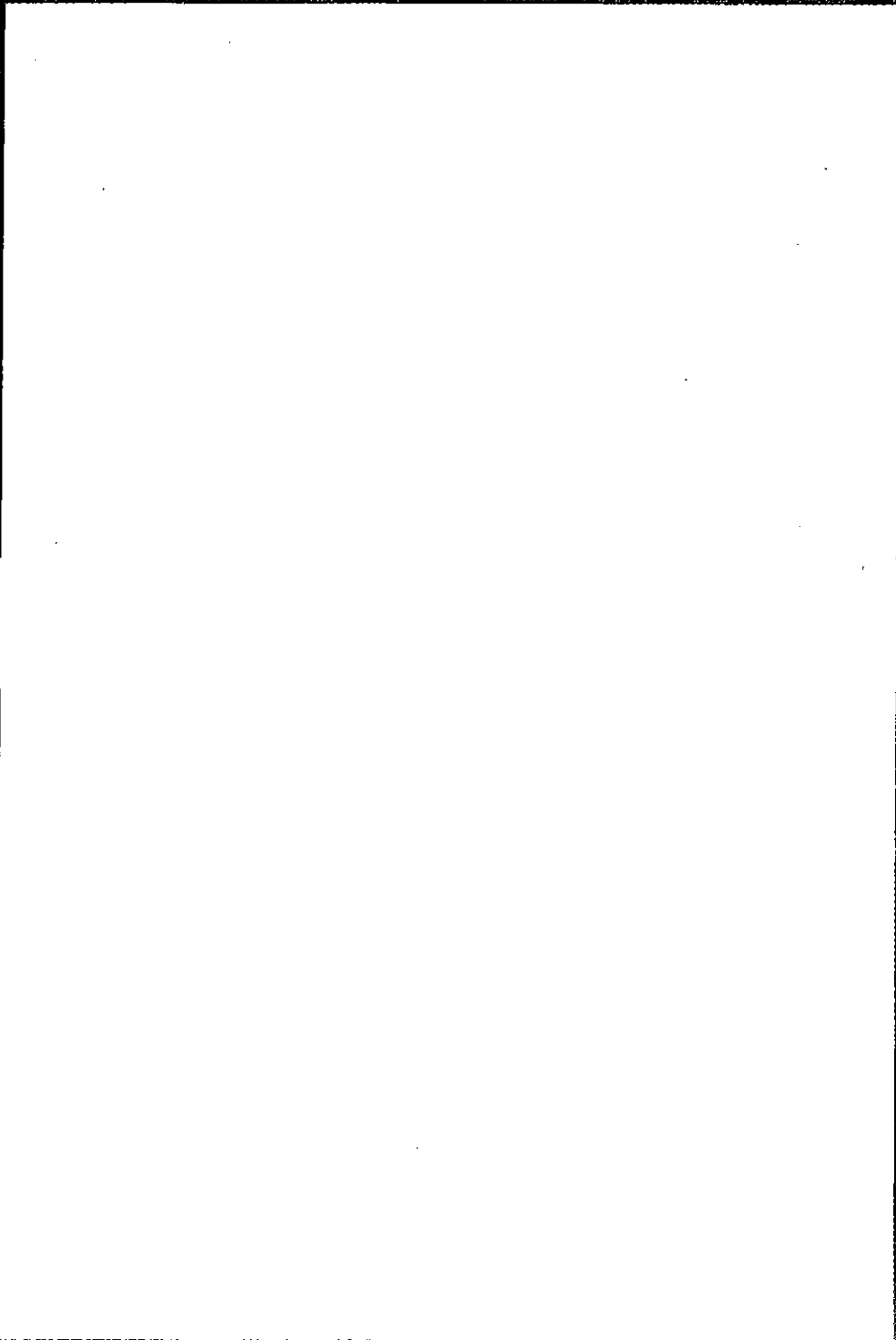
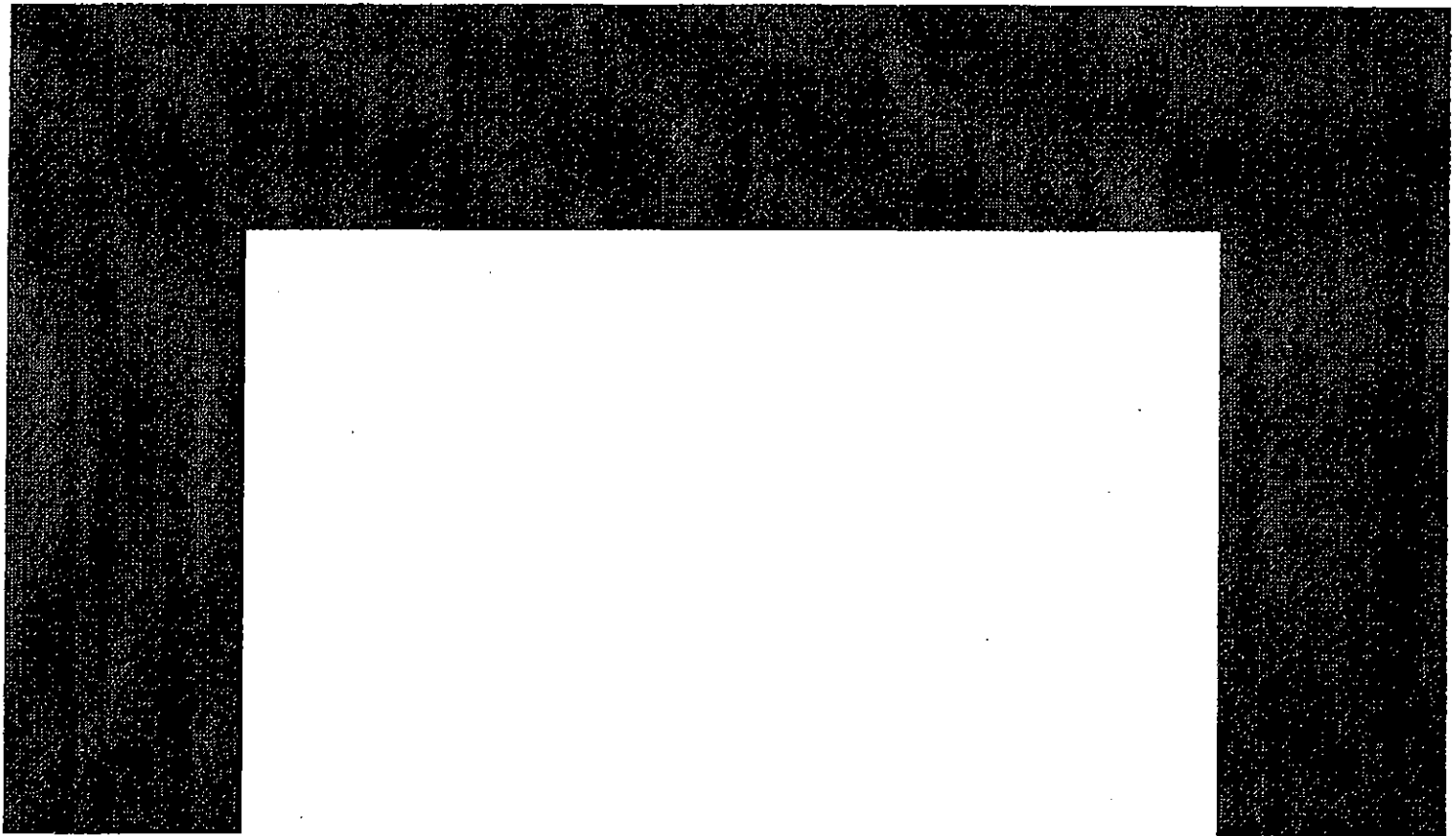
13 DATED this 1st day of ~~February~~ ^{Mar}, 2011.

14 
15 DISTRICT COURT JUDGE

16 Submitted by:

17 MAINOR EGLET

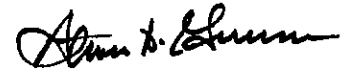
18 
19 DAVID T. WALL, ESQ.
20 Nevada Bar No. 2805
21 MAINOR EGLET
22 400 South Fourth Street, Suite 600
23 Las Vegas, Nevada 89101
24 (702) 450-5400
25 Attorneys for Plaintiffs
26
27
28



45

45

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CLERK OF THE COURT

1 **ORDR**

2 **ROBERT T. EGLET, ESQ.**

3 Nevada Bar No. 3402

4 **DAVID T. WALL, ESQ.**

5 Nevada Bar No. 2805

6 **ROBERT M. ADAMS, ESQ.**

7 Nevada Bar No. 6551

8 **MAINOR EGLET**

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11 Ph: (702) 450-5400

12 Fx: (702) 450-5451

13 dwall@mainorlawyers.com

14 **MATTHEW E. AARON, ESQ.**

15 Nevada Bar No. 4900

16 **AARON & PATERNOSTER, LTD.**

17 2300 West Sahara Avenue, Ste.650

18 Las Vegas, Nevada 89102

19 Ph.: (702) 384-4111

20 Fx.: (702) 384-8222

21 *Attorneys for Plaintiffs*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

25 Plaintiffs,

26 v.

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

Defendants.

CASE NO.: A539455

DEPT. NO.: X

**ORDER REGARDING
PLAINTIFFS' OMNIBUS MOTION
IN LIMINE**

This Honorable Court, having read the pleadings and papers on file herein regarding

MAINOR EGLET

000595

1 Plaintiffs' Omnibus Motion in Limine, the parties appearing before the Court on February 15,
2 2011 for hearing, DAVID T WALL, ESQ. and Mainor Eglet appearing for Plaintiffs, STEVE
3 ROGERS, ESQ. and Rogers, Mastrangelo, Carvalho and Mitchell appearing for Defendants, and
4 good cause appearing therefore, the Court rules upon the Plaintiffs' Motion as follows:

5 **IT IS HEREBY ORDERED** that Plaintiffs' request to exclude prior and subsequent
6 unrelated accidents, injuries and medical conditions and prior and subsequent claims or lawsuits
7 is GRANTED in all respects;
8

9 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude reference to William
10 being a malingerer, magnifying symptoms or manifesting secondary gain motives is GRANTED,
11 such that medical witnesses may testify to medical inconsistencies, but references to Plaintiff
12 being a malingerer, magnifying symptoms or manifesting secondary gain motives are excluded.
13

14 **IT IS FURTHER ORDERED** that treating physicians do not need to prepare expert
15 reports separate from and in addition to their medical records and dictated reports.

16 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude reference to defense
17 medical examiners as "independent" is GRANTED.
18

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

21 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude references to collateral
22 sources of payment or medical bills and all other expenses, including health insurance, liens
23 and/or Medicare is GRANTED.
24

25 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude evidence of when
26 Plaintiffs retained counsels is GRANTED.

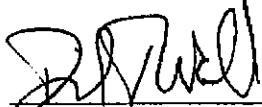
27 **IT IS FURTHER ORDERED** that Plaintiffs' request to preclude Defendants from
28

1 arguing that Plaintiffs are asking the jury for an amount greater than they anticipate receiving is
 2 GRANTED.

3 DATED this 9th day of ^{Mar}~~February~~, 2011.

4
 5 
 6 DISTRICT COURT JUDGE

7
 8 MAINOR EGLET

9 

10 DAVID T. WALL, ESQ.

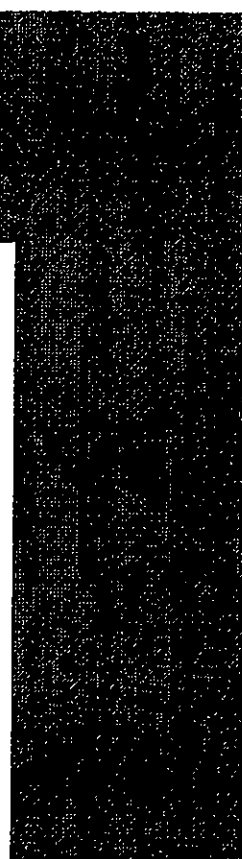
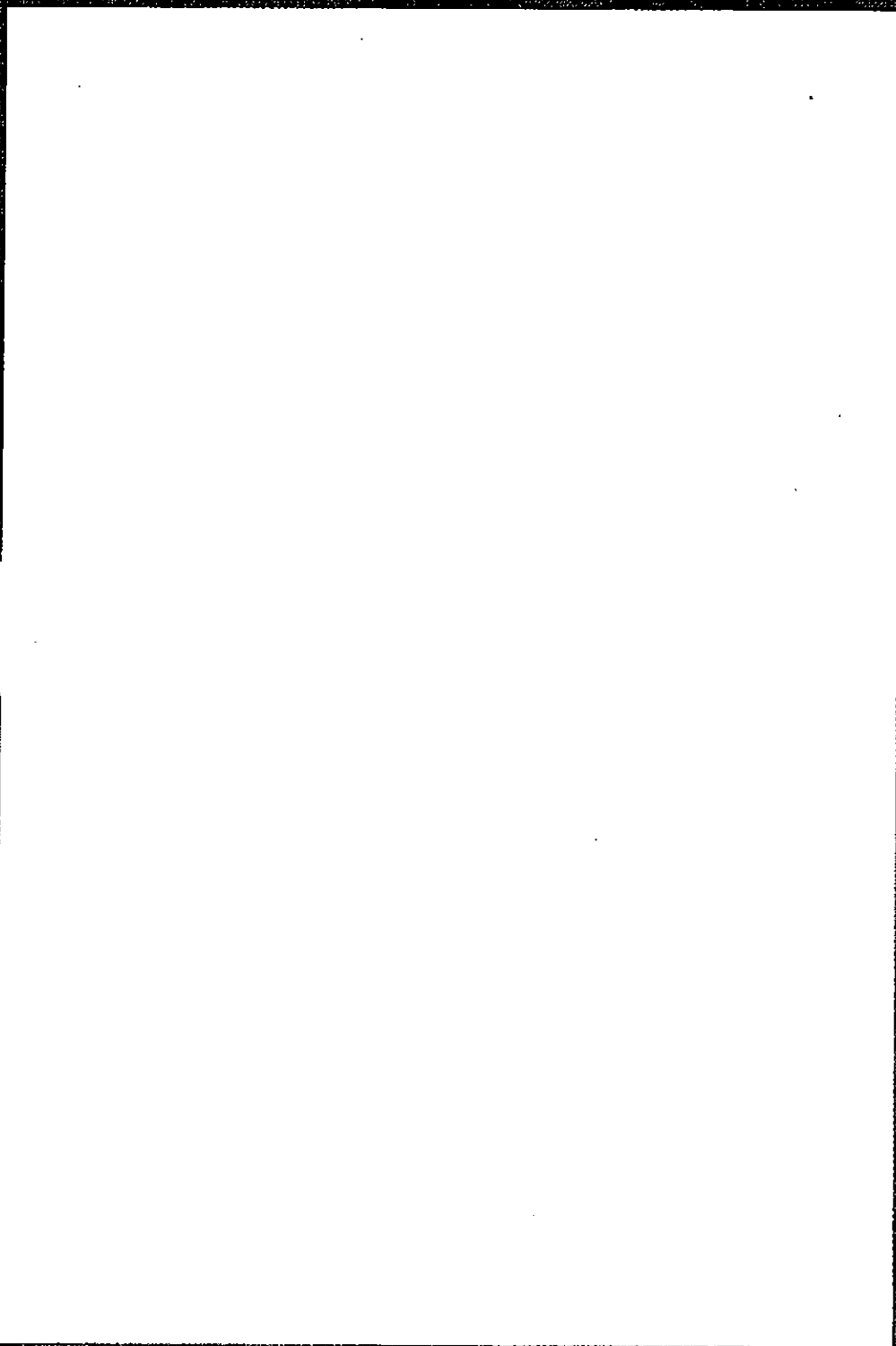
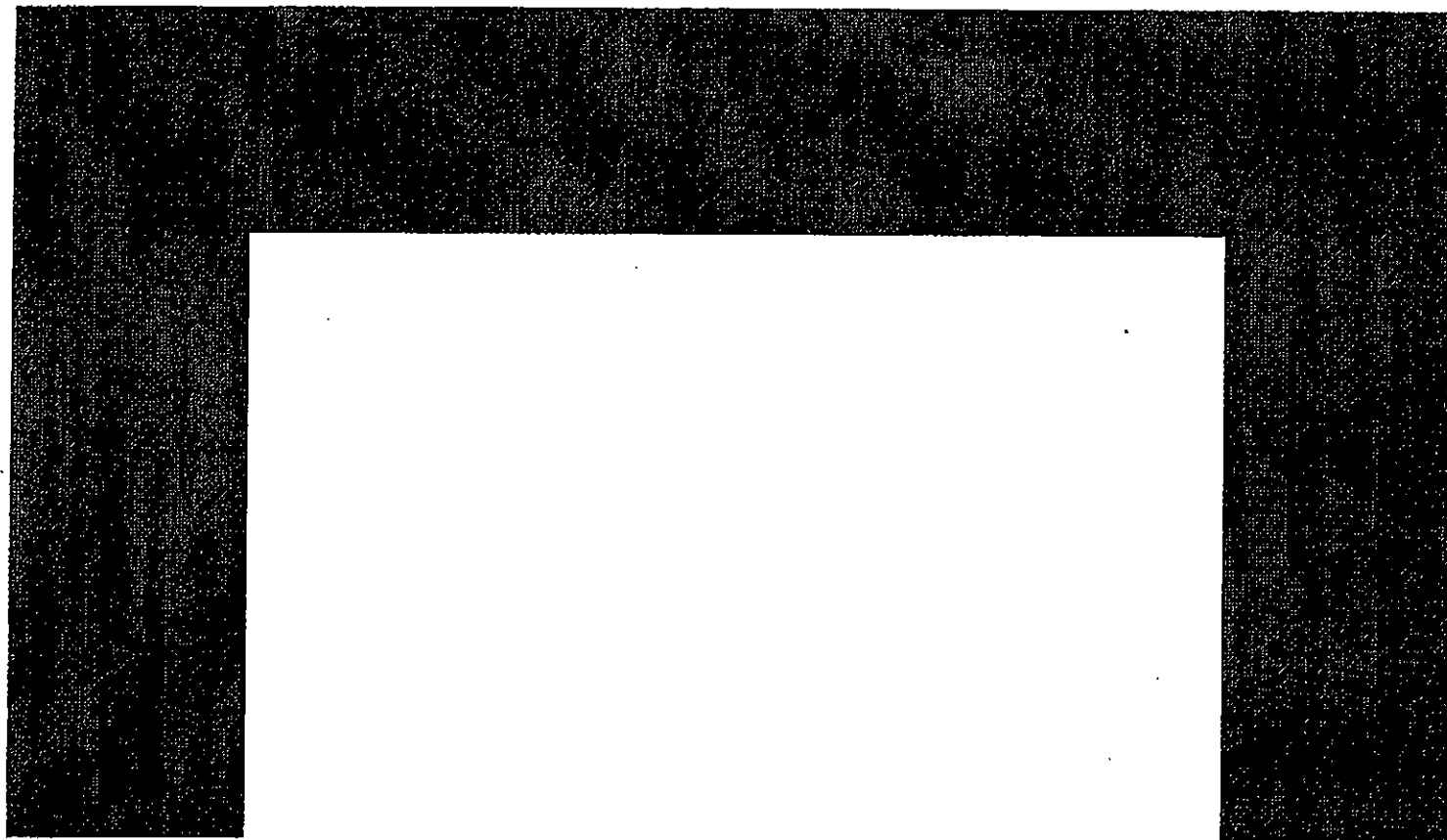
11 Nevada Bar No. 2805

12 MAINOR EGLET

13 400 South Fourth Street, Suite 600

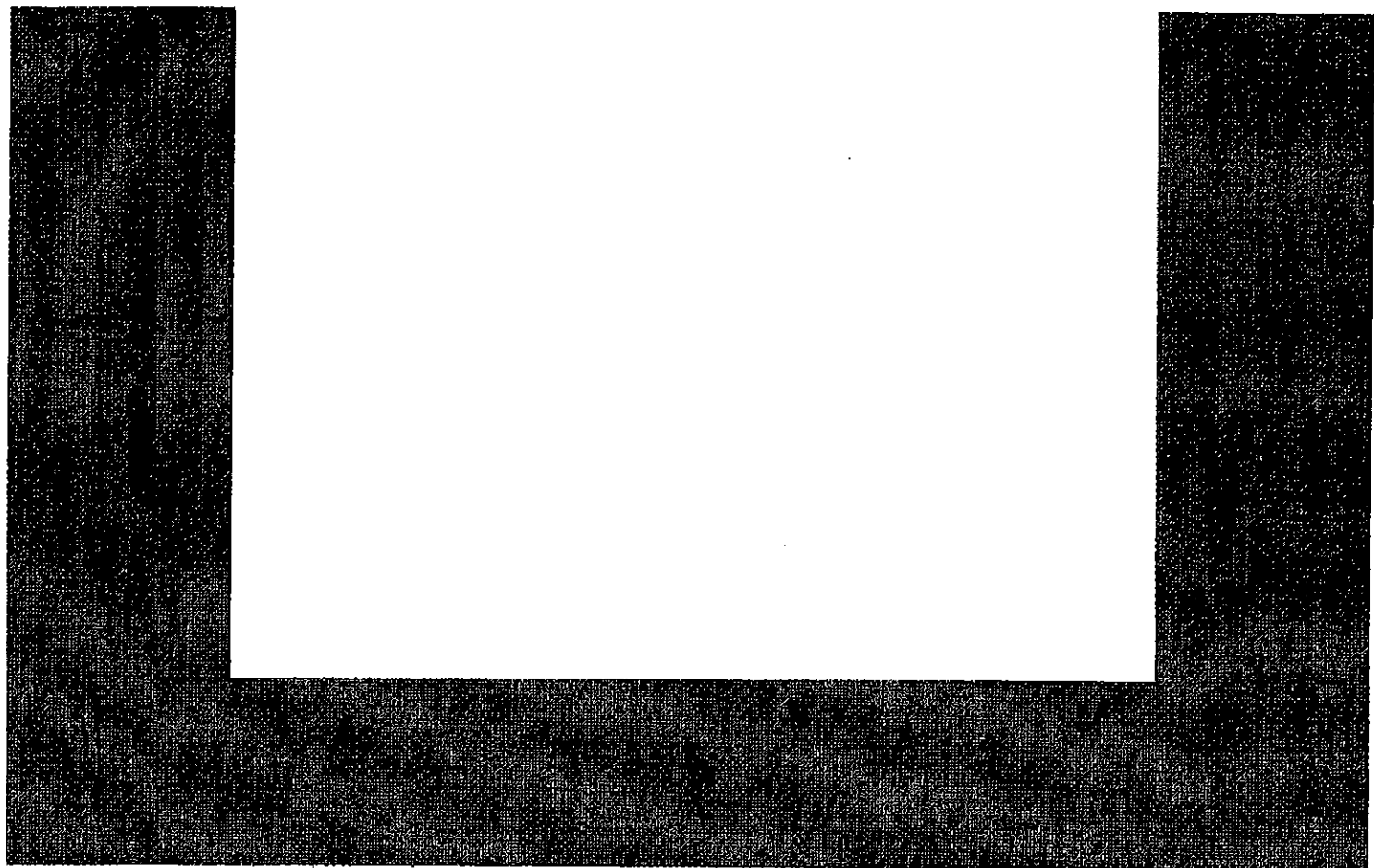
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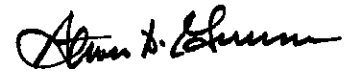


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CLERK OF THE COURT

1 **ORDR**

2 **ROBERT T. EGLET, ESQ.**

3 Nevada Bar No. 3402

4 **DAVID T. WALL, ESQ.**

5 Nevada Bar No. 2805

6 **ROBERT M. ADAMS, ESQ.**

7 Nevada Bar No. 6551

8 **MAINOR EGLET**

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18 Las Vegas, Nevada 89102

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20 Fx.: (702) 384-8222

21 *Attorneys for Plaintiffs*

22 **DISTRICT COURT**
23 **CLARK COUNTY, NEVADA**

24 WILLIAM JAY SIMAO, individually and
25 CHERYL ANN SIMAO, individually, and as
26 husband and wife,

27 Plaintiffs,

28 v.

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

Defendants.

CASE NO.: A539455

DEPT. NO.: X

ORDER REGARDING PLAINTIFFS'
MOTION IN LIMINE TO (1)
PRECLUDE DEFENDANT FROM
RAISING A "MINOR" OR "LOW
IMPACT" DEFENSE; (2) LIMIT THE
TRIAL TESTIMONY OF
DEFENDANT'S EXPERT, DAVID
FISH, M.D. AND; (3) EXCLUDE
EVIDENCE OF PROPERTY
DAMAGE AND PLAINTIFFS'
MOTION TO EXCLUDE SUB ROSA
VIDEO

This Honorable Court, having read the pleadings and papers on file herein regarding the

MAINOR EGLET

000599

000599

1 Plaintiffs' Motion in Limine to (1) Preclude Defendant from Raising a "Minor" or "Low Impact"
2 Defense; (2) Limit the Trial Testimony of Defendant's Expert, David Fish, M.D., and; (3)
3 Exclude Evidence of Property Damage and Plaintiffs' Motion to Exclude Sub Rosa Video, the
4 parties appearing before the Court on March 1, 2011 for hearing, and good cause appearing
5 therefore, the Court rules upon the Plaintiffs' Motions as follows:
6

7 **IT IS HEREBY ORDERED** that Plaintiffs' request to preclude Defendant from Raising
8 a "Minor" or "Low Impact" Defense is **GRANTED**.

9 **IT IS FURTHER ORDERED** that Plaintiffs' request to limit the trial testimony of
10 Defendant's expert, David Fish, M.D. to those areas of expertise that he is qualified to testify in
11 regards to is **GRANTED**. Neither Dr. Fish nor any other defense expert shall not opine
12 regarding biomechanics or the nature of the impact of the subject crash at trial.
13

14 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude the property damage
15 photos and repair invoice(s) is **GRANTED**.

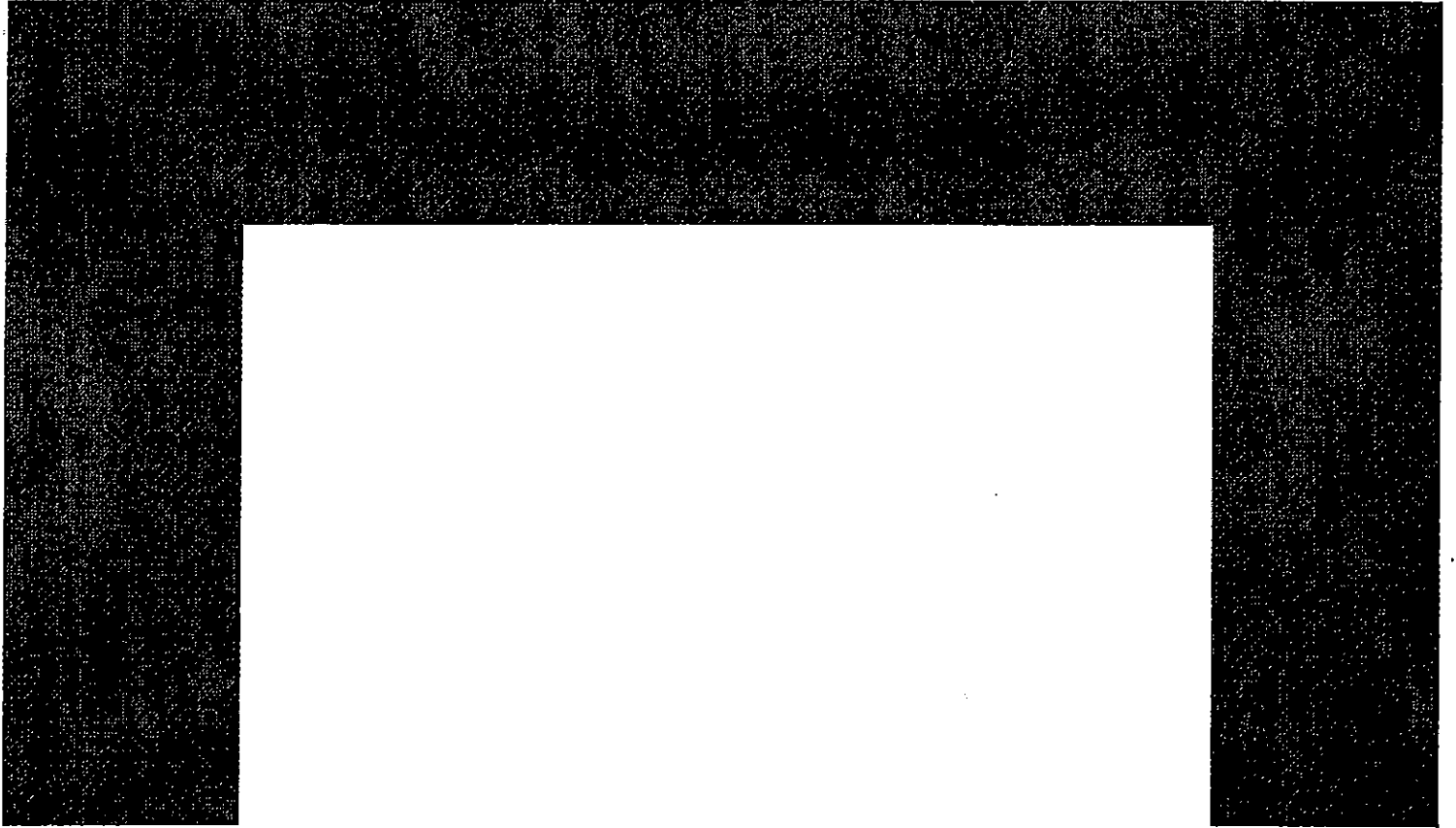
16 **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude sub rosa video ~~she~~ is
17 deferred until after Plaintiff's direct testimony, so that Defendant can establish how it impeaches
18 the Plaintiff. Defendant is precluded from showing the sub rosa video or referring to it until that
19 time.
20

21 DATED this 8th day of March, 2011.

22
23 
24 **DISTRICT COURT JUDGE**

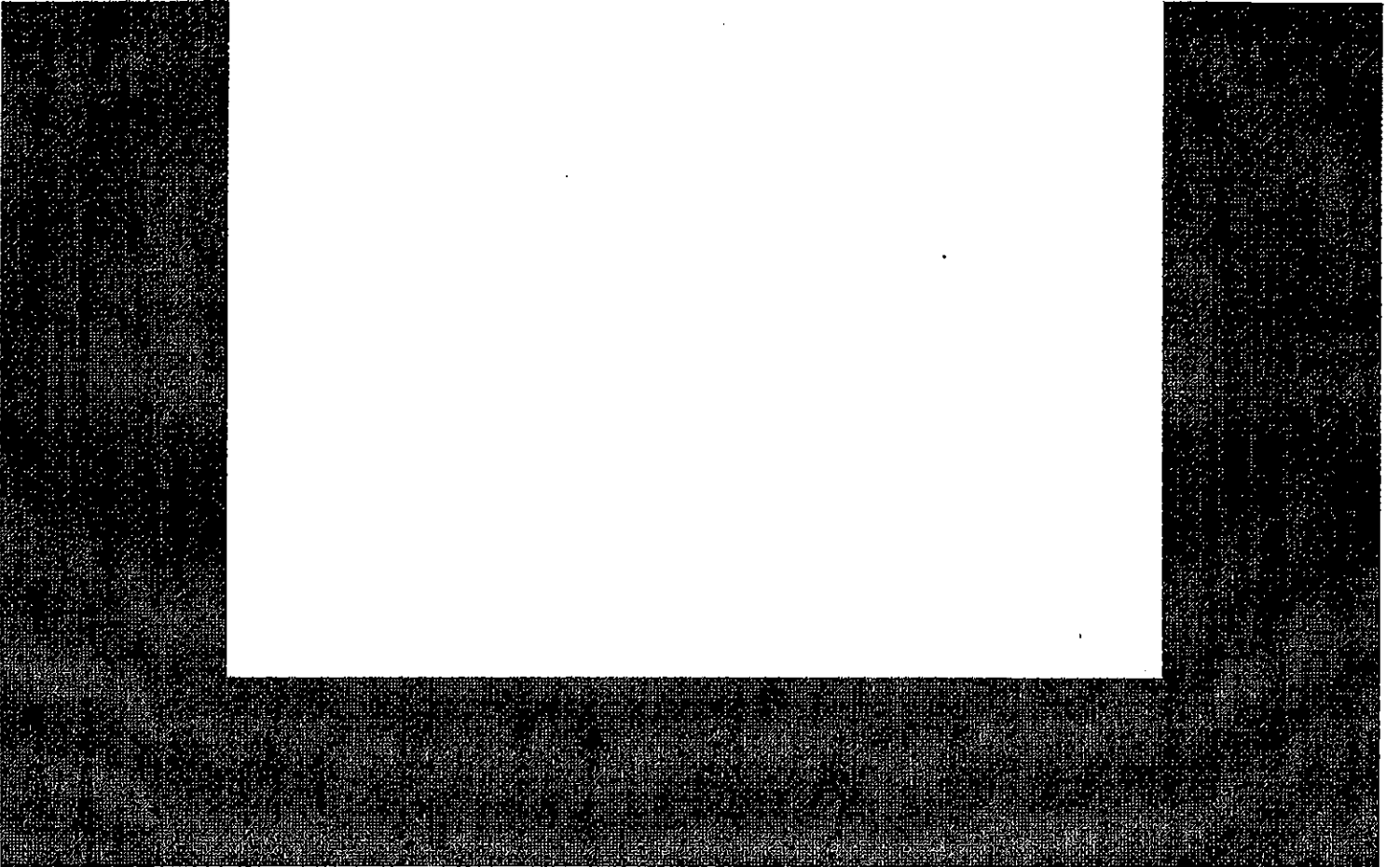
25 **MAINOR EGLET**

26 
27 **DAVID T. WALL, ESQ.**
28



47

47



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CLERK OF THE COURT

ASSC
DANIEL F. POLSENBERG (SBN 2376)
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 474-2616

STEPHEN H. ROGERS (SBN 5755)
ROGERS MASTRANGELO CARVALHO & MITCHELL
300 South Fourth Street, Suite 170
Las Vegas, Nevada 89101
(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,

Case No. A539455

Dept. No. XX

Plaintiffs,

vs.

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

Defendants.

NOTICE OF ASSOCIATION OF COUNSEL

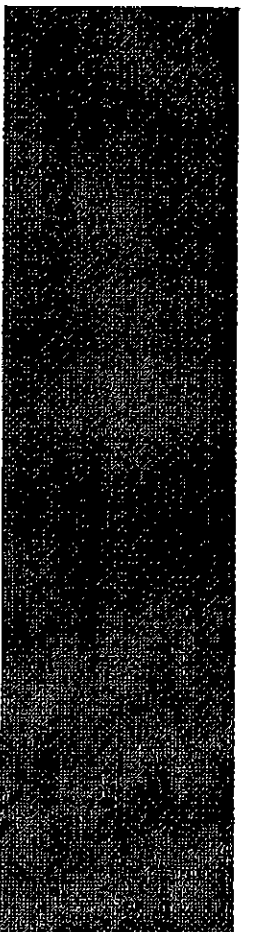
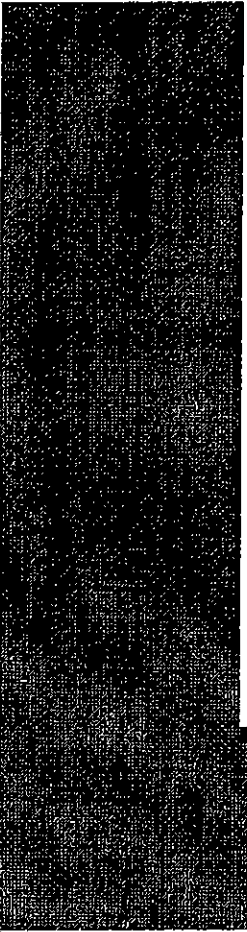
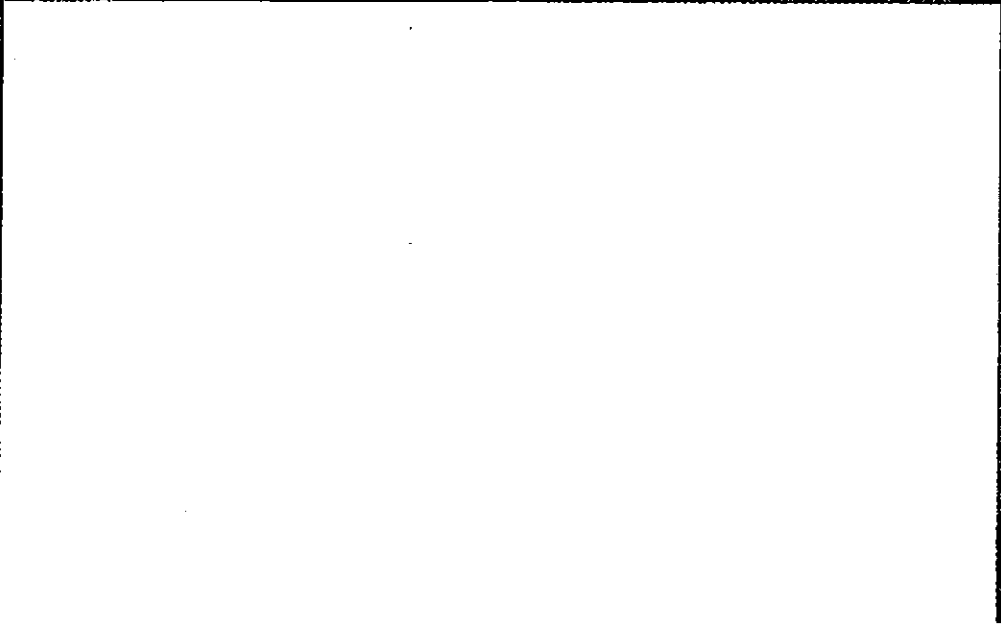
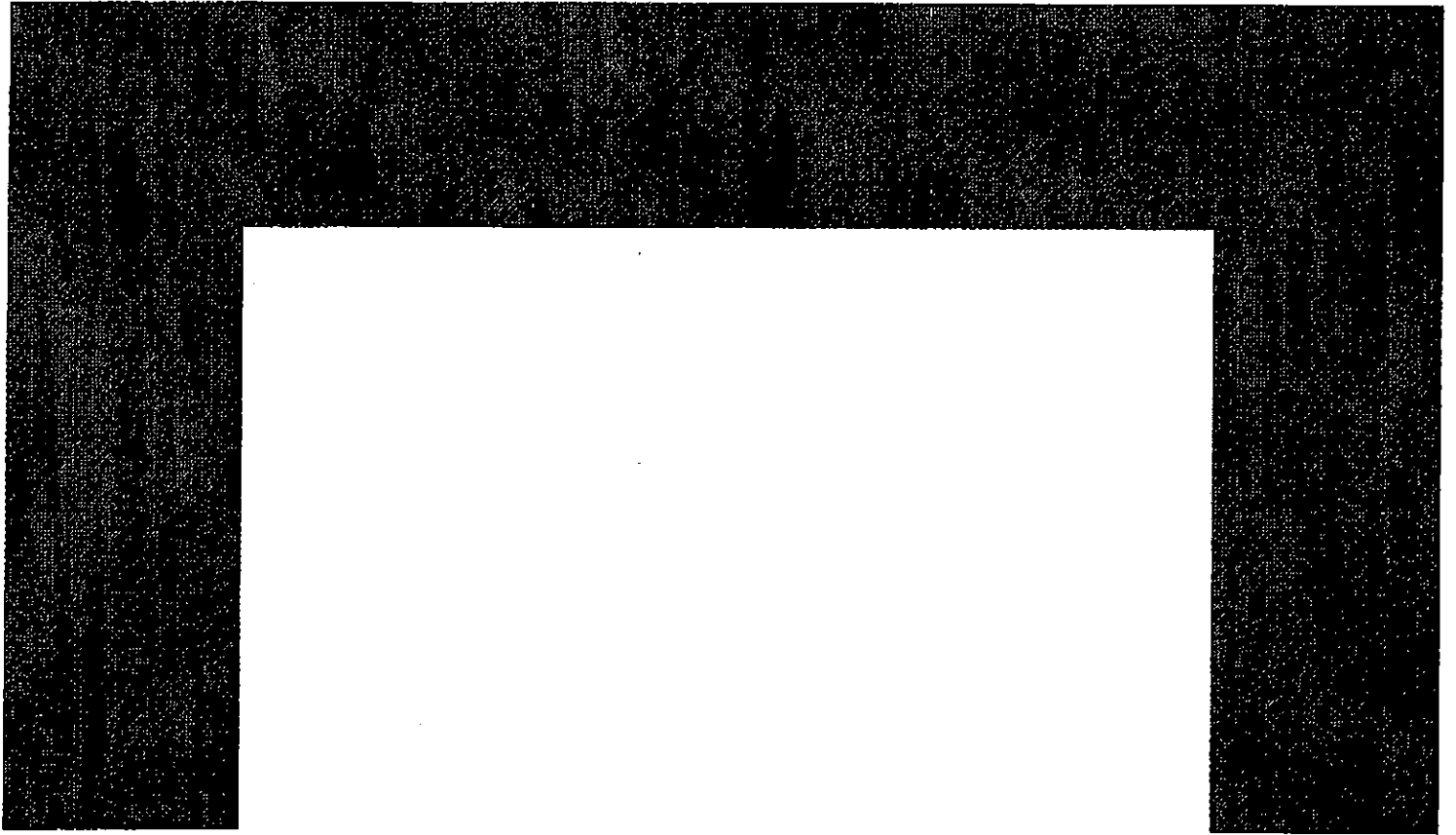
Please take notice that Daniel F. Polsenberg, of the law firm of LEWIS AND
ROCA LLP hereby associates with STEPHEN H. ROGERS of the law firm of ROGERS
MASTRANGELO, CARVALHO AND MITCHELL, as an attorney for defendant Jenny Rish in
the above captioned case.

DATED this 14th day of March 2011.

LEWIS AND ROCA LLP

By: s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG (SBN 2376)
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 474-2616

Attorneys for Defendant Jenny Rish



48

48

ORIGINAL

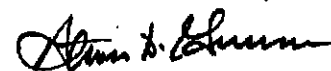
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TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA



CLERK OF THE COURT

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

MONDAY, MARCH 14, 2011

REPORTER'S TRANSCRIPT
TRIAL TO THE JURY
JURY PANEL VOIR DIRE

APPEARANCES:

For the Plaintiffs: DAVID T. WALL, ESQ.
ROBERT M. ADAMS, ESQ.
ROBERT T. EGLET, ESQ.
Mainor EgletFor the Defendants: BRYAN W. LEWIS, ESQ.
James and Linda Rish: Lewis and Associates, LLCFor the Defendant: STEVEN M. ROGERS, ESQ.
Jenny Rish: CHARLES A. MICHALEK, ESQ.
Hutchison & Steffen, LLCAlso Appearing: DANIEL F. POLSENBERG, ESQ.
Lewis and Roca, LLP

RECORDED BY: VICTORIA BOYD, COURT RECORDER

RECEIVED

APR 5 2011

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Denver (303) 634-2295

1 MONDAY, MARCH 14, 2011 AT 1:22 P.M.

2 THE COURT: We have a few preliminary matters to discuss
3 before we bring our panel in?

4 MR. ROGERS: Yes.

5 THE COURT: All right. Would you like to begin?

6 MR. EGLET: Your Honor, Mr. Rogers and we have agreed on
7 four alternates for the jury and, therefore, six preemptory
8 strikes per side. So we'd request that 24 be placed in the
9 box. I've already spoken to Deputy Diamond about this and
10 he's securing another chair. We've also stipulated that the
11 last four jurors of the jurors in seats 9 and 12 once the jury
12 is selected will be the four alternates, Your Honor.

13 THE COURT: So from among those last seated on the floor,
14 you'll choose the alternates?

15 MR. EGLET: We're just going to put, we're going to put
16 24 in the box and each side's going to have six preemptory
17 challenges to use as they please. Once we're all done with
18 jury selection, whoever is are the last four seated, you know,
19 out of the 12 in seats 9 through 12 of the jury, those will be
20 the alternates.

21 THE COURT: Uh-huh. Mr. Rogers, do you agree?

22 MR. ROGERS: I do.

23 THE COURT: Very well.

24 MR. EGLET: And then I guess we have some issues with,
25 Deputy Diamond just pointed out some jurors that have some

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1 issues, hardship issues that I think the Court wanted to
2 discuss with us, and we've gone through those.

3 THE COURT: Very well. I don't have that piece of paper
4 in front of me, but he brought to my attention that there were
5 three or four people who have scheduled vacations.

6 MR. EGLET: Yeah. What it is, I've got my notes right
7 here. It's actually juror who was going to be Juror No. 1
8 right now. She's the first up. Kathleen Garza. She has a
9 trip leaving next Friday. Obviously, now with the trial
10 schedule being changed to one, because of the additional
11 Judges, 1:00 to 5:00 every day, we're not going to be finished
12 by then. And so we would have no objection to excusing her.

13 THE COURT: Mr. Rogers, do you agree?

14 MR. ROGERS: Yes I do.

15 MR. EGLET: And her badge number is 220837, Your Honor.

16 THE COURT: So Kathy Garza may be excused.

17 THE CLERK: Okay.

18 MR. EGLET: The next juror is Sara Lenn, Badge No. 220 --

19 MR. ROGERS: I think you skipped.

20 MR. EGLET: Oh, I'm sorry.

21 MR. WALL: I see Catherine.

22 THE MARSHAL: Kathy or Catherine Hurley?

23 MR. EGLET: Oh, so Kathy Hurley. Excuse me. Kathy
24 Hurley, Badge No. 220838, and she is also scheduled to leave
25 on a trip next Friday, and we have no objection to her being

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Denver (303) 634-2295

1 excused.

2 THE COURT: Mr. Rogers?

3 MR. ROGERS: The defense doesn't object either, Your
4 Honor.

5 THE COURT: Very well. Catherine Hurley, No. 838, is
6 excused.

7 MR. EGLET: The next one is Sara Lenn, Badge No. 220848.
8 She has a trip, or she's scheduled to leave this Friday, Your
9 Honor, and so we would have no objection to her.

10 Well, Deputy Diamond, let me ask you a question. She
11 said she was leaving this Friday. Was she --

12 THE MARSHAL: Yes, this Friday.

13 MR. EGLET: Was she going to be, did she say how long
14 she'd be gone? Was it a weekend or was it longer than that?

15 THE MARSHAL: I think it's a vacation trip. The three of
16 them represented that they were. She's going to California,
17 this gal.

18 MR. EGLET: Okay.

19 THE MARSHAL: Lina and Sara's going to California. I'm
20 not sure when the other two are leaving --

21 MR. EGLET: Did she say, and she didn't say --

22 THE MARSHAL: -- for parts unknown.

23 MR. EGLET: -- how long she was going to be gone?

24 THE MARSHAL: No.

25 MR. EGLET: I'd request we find out how long she's going

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Denver (303) 634-2295

1 to be gone. If it's just a weekend, it may not be a problem.

2 THE MARSHAL: I will get it.

3 MR. EGLET: I just, you know. The next one, Your Honor,
4 was Ms. Phillip Caudillo.

5 MR. ROGERS: Hold up. You skipped Sanchez.

6 MR. EGLET: I thought Sanchez was a FTA.

7 MR. WALL: I have him as already been excused.

8 MR. ROGERS: No. He's -- oh, he's already been excused.

9 THE COURT: Sanchez was excused by the Court because he
10 has a court appearance --

11 MR. ROGERS: Very good.

12 THE COURT: -- day, I believe. It happens.

13 MR. ROGERS: All right.

14 MR. EGLET: And my understanding is that Gary Rubrico,
15 220965 has been excused, or is a failure to --

16 THE COURT: He's a failure to appear.

17 MR. EGLET: -- failure to appear. The next juror,
18 Phillip Caudillo, Badge No. 220966, apparently is on OxyContin
19 and other pain medications. It makes him very difficult to
20 concentrate and stay awake, and we would have no objection to
21 him being excused.

22 THE COURT: Mr. Rogers, what do you think?

23 MR. ROGERS: Yes. No objection.

24 THE COURT: Phillip Caudillo, No. 966, is excused.

25 MR. EGLET: Next juror is Jan Rodeski [phonetic], Badge

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1 No. 220970. Jane Rodeski, excuse me. She's also on
2 medications that affect her ability to concentrate and stay
3 awake, and we have no objection to her being excused.

4 MR. WALL: Who's that?

5 THE COURT: Mr. Rogers?

6 MR. ROGERS: Objection.

7 THE COURT: [Indiscernible] Dave Grodensky.

8 THE MARSHAL: Okay. That's a male. Okay.

9 THE COURT: Excused.

10 MR. EGLET: The next one is Ronald Nichols, 221021. We
11 understand he's FTA?

12 THE COURT: Yes.

13 THE MARSHAL: Roland Nicolas, yeah.

14 MR. EGLET: Next is Shauna Renee Adkins, 221031. We
15 understand she's FTA?

16 THE COURT: Yes.

17 MR. EGLET: The next juror is Carla Eucina [phonetic].
18 I'm not going to pretend to --

19 THE MARSHAL: Hinojosa.

20 MR. EGLET: Okay. 221033. Very pregnant and is having
21 trouble sitting and standing for more than 15, 20 minutes at a
22 time. We have no objection to letter her be excused.

23 THE COURT: Mr. Rogers?

24 MR. ROGERS: No objection.

25 THE COURT: She's excused. Carla Hinojosa.

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1 MR. EGLET: The next juror is Yolanda Fernandez, 221047.
2 She has perpetual migraines, and I can't remember everything
3 Deputy Diamond told me about her but it sounds like it's a
4 lot of trouble for her.

5 THE MARSHAL: She was complaining the whole time she was
6 there, but I didn't ascertain whether she takes medications
7 for them or not.

8 MR. EGLET: Yeah. The problem is, is that the issue in
9 this case. She's probably going to be let go for cause anyway
10 because we, our client, it's a migraine issue. So we would
11 stipulate to let her go.

12 THE COURT: Mr. Rogers.

13 MR. ROGERS: Would, too.

14 THE COURT: Her migraines would truly be exacerbated if
15 she served jury duty this week. She's excused.

16 MR. EGLET: Next is Joseph Duane Henderson, 221288. He's
17 FTA, Your Honor. Isn't he?

18 MR. WALL: Hardmon?

19 THE MARSHAL: Hardmon. Joseph Hardmon.

20 THE COURT: I don't see Joseph Hardmon.

21 MR. WALL: What's the name? 288?

22 THE MARSHAL: 1288 is his badge number.

23 MR. EGLET: Oh, they got the wrong name here.

24 THE MARSHAL: He's FTA.

25 THE COURT: He is FTA.

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1 MR. EGLET: Hard -- how is it?

2 MR. WALL: Hardmon, H-A-R-D-M-O-N. It's on the jury
3 list.

4 MR. EGLET: Okay. Well, it's wrong here. All right.
5 Next is Rodolfo Soler-Garcia, 221303. It's our understanding
6 he's FTA.

7 THE COURT: Yes.

8 MR. EGLET: The next is William Glassford. It's our
9 understanding he has hypertension, or is hypo deficit and has
10 hyper deficit attention. Deputy Diamond says he's kind of
11 jumping all over the place. Difficult to stand still.

12 THE MARSHAL: He was doing it outside.

13 MR. EGLET: Okay.

14 THE MARSHAL: As I went out to talk to Lina.

15 MR. EGLET: We have no objection to excusing this juror.

16 MR. ROGERS: No objection.

17 THE COURT: Very well. William Glassford is excused.

18 MR. EGLET: Understanding that Shirley Linzy, 221362 is
19 FTA.

20 THE COURT: Yes.

21 MR. EGLET: Mackey, 221365, had agreed to be excused
22 earlier by the parties.

23 THE COURT: Which one?

24 THE MARSHAL: Who?

25 MR. WALL: Oh, that's actually not on the list.

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1 THE MARSHAL: That's on the list.

2 MR. EGLET: He's not even on the list. Okay. The ones
3 that have been agreed. All right. Next is Irene Galimi,
4 221382. She is FTA.

5 THE COURT: Yes.

6 MR. EGLET: And the next is Gayle Welch. It's our
7 understanding that she's leaving --

8 THE MARSHAL: Patricia Welch.

9 MR. EGLET: I'm sorry?

10 THE MARSHAL: Patricia Welch.

11 MR. EGLET: Patricia Welch, excuse me.

12 THE MARSHAL: Yes.

13 MR. EGLET: She's leaving in three weeks and on Monday
14 she's been subpoenaed to testify, and so we have no objection
15 to letter her go as well.

16 THE COURT: Mr. Rogers?

17 MR. ROGERS: Actually, we'd like to talk with her about
18 this. If she's not leaving in three weeks, she's obviously
19 fine. And if we're not starting every day until 1:00, we
20 don't know if there's going to be a conflict.

21 THE COURT: Very well. We'll examine Ms. Welch.

22 MR. EGLET: Could we, could the Court examine her on that
23 issue first when you ask questions? The reason I say that,
24 Your Honor, is she's almost at the bottom of the list anyway.
25 So the likelihood that she'd end up on the jury is somewhat

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1 slight.

2 THE COURT: Well, should we call her in before we call
3 the entire panel in?

4 MR. EGLET: Yes. That's --

5 THE COURT: I don't want everybody in the panel having a
6 subpoena if they have to --

7 MR. EGLET: I agree, Your Honor.

8 THE MARSHAL: Okay. I'll bring her in. So --

9 THE COURT: What about the other one that you wanted to
10 examine, Mr. Eglet? Where is that other person?

11 THE MARSHAL: That was Sara Lenn.

12 MR. ROGERS: Yeah.

13 MR. EGLET: Yeah. 848.

14 THE MARSHAL: Yeah. She has to, she will be out of town
15 Friday, Saturday and Sunday. She will not be here Friday.
16 Her flight leaves Thursday night, and depending on what
17 happens while she's over there, she'll either come home Sunday
18 or she'll extend. That's what she just represented to me
19 outside. So --

20 THE COURT: Well, if she's not here Friday then -- we're
21 planning to be here Friday afternoon, right?

22 MR. ROGERS: Yes.

23 MR. EGLET: As far as I know, Your Honor.

24 MR. WALL: Yes.

25 THE MARSHAL: She'll already be gone.

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1 THE COURT: Well, no point in keeping her is there?

2 MR. ROGERS: That's fine, Your Honor.

3 THE COURT: We'll excuse Sara Lenn, No. 848.

4 THE MARSHAL: Okay. So am I, just recap [indiscernible]
5 excuse them?

6 THE COURT: Yes.

7 THE MARSHAL: The correct jurors? Kathy Garza, Badge No.
8 837; Catherine Hurley, Badge 838; Sara Lenn, Badge 848;
9 Phillip Caudillo, Badge 966; Dave Grodensky, Badge 970; Carla
10 Hinojosa, Badge 1033; Yolanda Fernandez, Badge 1047; William
11 Glassford, Badge 1335; Patricia Welch -- no. Mr. Rogers
12 needed to voir dire her?

13 THE COURT: Yes.

14 THE MARSHAL: Outside the presence so I'll bring her
15 right in. May I excuse those others?

16 THE COURT: Yes.

17 THE MARSHAL: Okay.

18 THE COURT: With the thanks of the Court. If you could
19 send Patricia Welch in, we can address her issues now. Thank
20 you.

21 MR. ROGERS: Your Honor, there are a couple of
22 housekeeping matters we wanted to take care of that might take
23 a little while, and I wanted to know if you want to handle
24 those today or put that off to possibly tomorrow morning?

25 THE COURT: Are they issues that have to do with the

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1 selection of the jury?

2 MR. ROGERS: No.

3 THE COURT: Then probably, we can put them off rather
4 than keep our jury panel waiting.

5 MR. ROGERS: Okay.

6 THE COURT: We can either take it up at the end of the
7 afternoon after we excuse them or first thing tomorrow before
8 we bring our panel in.

9 MR. EGLET: Okay. Now, I brought Mr. Polsenberg
10 [phonetic] to discuss an issue that was brought up at the 267
11 conference last Thursday. So I want to coordinate it with his
12 schedule if, in another words, you'd like to meet tomorrow
13 morning or tomorrow afternoon shortly before the jury comes,
14 that's fine.

15 THE COURT: If you could stand by just a moment, Mr.
16 Polsenberg, I don't think this will be a lengthy inquiry.

17 Please be seated, ma'am.

18 PROSPECTIVE JUROR NO. 1: Thank you.

19 THE COURT: Are you Patricia Welch?

20 PROSPECTIVE JUROR NO. 1: Yes I am.

21 THE COURT: We appreciate you coming in here. We're not
22 trying to single you out, ma'am, but we had some questions.
23 One of them had to do with the issue of you had indicated you
24 had a subpoena to have to report to court on Monday.

25 PROSPECTIVE JUROR NO. 1: It's for an arbitration. An

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1 employment, employee management arbitration with the school
2 district. I'm the school district administrator.

3 THE COURT: Okay. What time of the day is that?

4 PROSPECTIVE JUROR NO. 1: That's at 11:00. And I was
5 just telling the marshal I just got, after we proceeded out in
6 the corridor, an email from my supervisor that says that I'm
7 suppose to Carson City on Friday to talk to the State
8 Department of Education regarding testing issues.

9 THE COURT: What kind of testing issues?

10 PROSPECTIVE JUROR NO. 1: I was the testing coordinator
11 for second language students for the school district, and they
12 are working on a contract for the next couple of years for the
13 State. And they wanted me to come up to address the publisher
14 of the test and to work with the State Department of Ed, a
15 Title 3 Consultant, because she's new and she doesn't know
16 about the previous contract and what was involved.

17 THE COURT: Okay. Let me ask you this. I don't have
18 your jury questionnaire in front of me, so would you be so
19 kind as to describe for me what your job requirements are?

20 PROSPECTIVE JUROR NO. 1: Right now, I'm an EL
21 Coordinator for the school district. I work with second
22 language, with schools with their second language learners,
23 and I am teaching them how to best educate those students.
24 Prior to that, the reason they would want me for this
25 particular trip is for my expertise as the Testing and

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1 Translation Services Coordinator which I did until the end of
2 the last school year.

3 THE COURT: Okay. And is that something that could be
4 rearranged, or is there someone else that could make that trip
5 in your place?

6 PROSPECTIVE JUROR NO. 1: My supervisor is making the
7 trip and, you know, she knows that this is going on. The only
8 reason they want me is because from the people in the State,
9 Clark County of course having the largest second language
10 population in the State, this is the school district that's
11 most impacted by the contract. And since it's a contract that
12 generally costs the school district well over \$1 million each
13 year, they wanted to make sure that I was there to talk to the
14 company to make sure that the kinds of things, the issues that
15 we've had with them in the past are addressed.

16 THE COURT: And is your supervisor up north?

17 PROSPECTIVE JUROR NO. 1: No. She's here in town.

18 THE COURT: She's here also. What about the arbitration
19 on Monday?

20 PROSPECTIVE JUROR NO. 1: It has to do with some
21 allegations of testing irregularity that were directed at four
22 of the I29 testers for the school district. They want me to
23 come in as a witness. I don't know anything more than that
24 about it. I was called last Friday by the employee management
25 relations person, Doc Harris --

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1 THE COURT: Uh-huh.

2 PROSPECTIVE JUROR NO. 1: -- to come in next Monday, and
3 he asked that I come in for a pre-meeting tomorrow at 1:15. I
4 did explain to him that I have this obligation pending, and
5 that I would get back with him depending upon what the outcome
6 of this is.

7 THE COURT: Okay. So that Monday commitment, is that
8 something that someone else could fill in for you in your
9 stead?

10 PROSPECTIVE JUROR NO. 1: No, ma'am.

11 THE COURT: It isn't?

12 PROSPECTIVE JUROR NO. 1: No. Apparently and honestly, I
13 don't know why they called me as a witness for this particular
14 case because when the alleged misdeeds happened or were
15 brought to my attention, I redirected them to the supervisor
16 for those particular people. And at that point, that was
17 pretty much all my entire involvement and any disciplinary
18 things that happened after that, it was simply I believe in my
19 capacity as test coordinator for the school district for the
20 EL students that [indiscernible].

21 THE COURT: Okay. Let me ask you this. The other
22 question we had had to do with your vacation schedule.

23 PROSPECTIVE JUROR NO. 1: Yeah.

24 THE COURT: Tell me about that. When is that vacation
25 schedule to begin?

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1 PROSPECTIVE JUROR NO. 1: In three weeks. It's my 40th
2 class reunion. It's in Lima, Peru.

3 THE COURT: Oh.

4 PROSPECTIVE JUROR NO. 1: That's where I graduated from
5 high school.

6 THE COURT: That's where you went to high school?

7 PROSPECTIVE JUROR NO. 1: Well, my father worked for the
8 State Department.

9 THE COURT: Oh.

10 PROSPECTIVE JUROR NO. 1: And so that's where I happened
11 to be when I graduated from high school.

12 THE COURT: Wow. That sounds like a fun trip.

13 PROSPECTIVE JUROR NO. 1: So it's the first time in 40
14 years -- I am so -- I have been looking forward to this for
15 almost a year. And your clerk in the room downstairs, she
16 asked me to bring verification of the air travel plans and
17 stuff, so I do have that with me if you need to see it.

18 THE COURT: Okay. What day are you slated to leave for
19 that trip?

20 PROSPECTIVE JUROR NO. 1: I'm suppose to leave here to go
21 to San Diego on the 7th and we're flying out on the 8th.

22 THE COURT: 7th of April. Surely, we won't still be in
23 this trial.

24 PROSPECTIVE JUROR NO. 1: I would hope not, but I figured
25 I should mention it because.

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1 THE COURT: I appreciate that. All right. Let me ask
2 counsel if you have any follow-up questions.

3 Mr. Rogers, did you have any?

4 MR. ROGERS: Really what we're trying to figure out is if
5 there's going to be any hardship on you as a result of serving
6 in this trial which is probably going to last two and a half
7 weeks. It sounds like the problem isn't going to be Peru.
8 We'll be done before then. But rather this trip to Carson.
9 If you would tell me, is this something that either you or the
10 school district is going to suffer from if you're unable to go
11 up north for this meeting?

12 PROSPECTIVE JUROR NO. 1: I don't want to overstate it,
13 but the person who is the current acting consultant for Title
14 3 for the State has been doing this for about eight months.
15 She has not been involved in any of the contract process with
16 this company, CTB, in the past. She doesn't know everything,
17 all of the issues that we've had with them in the past. And
18 one of the things that we found when they did the extension of
19 the contract the last time is they ended up overcharging the
20 State for the materials that were being received for testing
21 throughout the State, not just Clark County. That's part of
22 the reason that they wanted me to be there was to make sure
23 that we weren't being charged again for materials that we've
24 already received, which is what happened in the previous
25 contract, and to also address any problems that we had as far

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1 as shipping and receiving materials and getting the orders
2 right and things like that. Am I saying that nobody else
3 could do it? No I'm not. But I'm just the person who's the
4 resident expert. For lack of a better way to describe it.

5 MR. ROGERS: That sounds like a self-effacing way of
6 saying, yeah, I'm kind of needed out there.

7 PROSPECTIVE JUROR NO. 1: Well, you know, you never want
8 to say that you're indispensable because you aren't. There's
9 always somebody who can walk in and take your place. But from
10 the standpoint of being the person who has the most background
11 knowledge on what has happened in the past and what probably
12 needs to happen in the future then, yes, I'm probably that
13 person.

14 MR. ROGERS: Okay. I don't have any follow-up, Your
15 Honor.

16 MR. EGLET: No objection.

17 THE COURT: Well, ma'am, with the thanks of the Court,
18 you may be excused.

19 PROSPECTIVE JUROR NO. 1: Thank you. I hope you call me
20 again sometime because I've always wanted to serve on a jury,
21 and I have. But, I mean, it's just [indiscernible].

22 THE COURT: We appreciate your service. Have a safe
23 trip.

24 PROSPECTIVE JUROR NO. 1: Thank you.

25 THE COURT: Safe trips.

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1 PROSPECTIVE JUROR NO. 1: Yeah. Thank you.

2 THE COURT: All right. Okay. Brian has brought to my
3 attention another juror who has a possible problem. What is
4 the name of that juror, Marshal Diamond?

5 THE MARSHAL: Page 1, Emmett Findlay. He just consulted
6 his calendar on his cell phone and realized he's got a trip on
7 March 31st through April 6th.

8 MR. EGLET: I think that the way we've calendared out, it
9 looks like to us that we will probably, from our scheduling,
10 yeah. I think there's a reasonable chance we're still going
11 to be arguing this case on March 31st. That's what? That's a
12 Thursday I believe. And that's what we kind of calendared
13 out. So I hate to have him risk [indiscernible]. We'll just
14 have to let him go. Seems like a waste of time.

15 THE COURT: You know, it's interesting because I was told
16 this case would be two weeks even considering they were half
17 days.

18 UNKNOWN SPEAKER: Who said that?

19 MR. EGLET: I didn't think we'd go to the 31st either,
20 Your Honor.

21 THE COURT: How long do you think we'll go, Mr. Rogers?

22 MR. ROGERS: I was expecting that we'd be done in right
23 around two to two and a half weeks.

24 MR. EGLET: Well, I can assure you it's not going to be
25 two, Your Honor. And I apologize if the, for the

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1 miscommunication, but it is definitely going to go into that
2 third week. And I just don't see the point of having somebody
3 sit through an entire trial and then on the last day have to
4 go on his trip and be excused so.

5 THE COURT: What about that, Mr. Rogers?

6 MR. EGLET: We've let other people go who have trips so.

7 MR. ROGERS: It makes sense. I think it would make more
8 sense if the trip date were closer. I think we're hedging on
9 this one, and where we're going to seat four alternates, we're
10 going to have plenty of people to cover in case this case does
11 go over long.

12 MR. EGLET: Well, if --

13 THE COURT: Well, if it's going to go three weeks now,
14 that's going to put us to April the 1st.

15 MR. EGLET: Yes, Your Honor.

16 THE COURT: Through April the 1st.

17 MR. EGLET: Right. And I'm not saying it's going to
18 go --

19 THE COURT: That's appropriate isn't it.

20 MR. EGLET: -- all the way through April 1st, Your Honor,
21 but I think it will go into the 31st based on what we mapped
22 out with the number of witnesses we have and counsel has, and
23 this Court knows the scheduling problems. Most of the
24 witnesses are physicians. Many of them are out of state
25 physicians. So I think that it just seems to me -- and I

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1 understand the four alternates, but the whole idea of the
2 alternates is when surprises come up in trial, not when we
3 know about it in advance. When we know about it in advance,
4 we take care of it beforehand and resolve the issue. We've
5 got enough here.

6 And the other thing, too, is we're not -- let's say
7 Mr. Rogers is right. Let's say we finish the trial on
8 Wednesday the 30th. Well, what about deliberations? What if
9 this jury takes two, three days to deliberate. I mean, that's
10 not unheard of. So you're not -- what about deliberations?
11 Let's say we do finish in two and a half weeks which is
12 Wednesday the 30th. If he has to leave on the 31st, then he
13 can't be there for deliberations. So I think it's a problem
14 and doesn't make any sense.

15 THE COURT: Mr. Rogers, any final thoughts?

16 MR. ROGERS: I thought you did a find job of finding out
17 if it was a problem with the last juror, and we could be
18 probably do that again with Mr. Findlay. I'm not clear, for
19 example, if he's going to drive to San Diego or if he's going
20 to fly to Bolivia.

21 THE MARSHAL: He says he's got a trip that's paid for.
22 If you want to voir dire him, I can bring him right in and you
23 can voir dire him and --

24 MR. ROGERS: Well, that clarifies some of it. If it's --

25 THE COURT: Well, might as well bring him in I guess.

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1 Emmett Findlay.

2 THE MARSHAL: Please take a seat right here, Mr. Findlay.

3 This is Emmett Findlay, Badge No. 857.

4 THE COURT: Good afternoon, Mr. Findlay.

5 PROSPECTIVE JUROR NO. 2: Doc Emmett.

6 THE COURT: Dr. Findlay, good afternoon.

7 PROSPECTIVE JUROR NO. 2: Thank you.

8 THE COURT: The marshal has advised me that you have a
9 vacation slated for March 31st through April the 6th?

10 PROSPECTIVE JUROR NO. 2: I do have a trip scheduled.

11 THE COURT: Trip.

12 PROSPECTIVE JUROR NO. 2: A trip to Albuquerque.

13 THE COURT: So can you tell us a little bit about that,
14 sir, about that schedule?

15 PROSPECTIVE JUROR NO. 2: This is a -- it's actually a
16 trip with two purposes. I'm leaving to go to Albuquerque.
17 One is that my entire life I've been involved in Aikido and
18 other Japanese martial arts, and there is a guest instructor
19 teaching in Albuquerque, and he is nearing the end of his
20 career and likely to retire soon. So this will probably be
21 the last chance for any of us to ever work with him.

22 The other is, actually, as luck would have it, my
23 wife and I have purebred corgis and we breed them. The
24 breeder that -- or we don't breed them, but we show them. The
25 breeder that we get them from is also in Albuquerque and our

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1 other puppy will be ready that same weekend. So we'll be
2 driving down on a Thursday and then probably she'll go and see
3 the puppies. And I'll actually be in the seminar for about
4 four to fives, four and a half days, and then we'll come back
5 and he will leave the following week.

6 THE COURT: So your plan is to drive on the 31st which is
7 --

8 PROSPECTIVE JUROR NO. 2: Sometime on the 31st.

9 THE COURT: -- Thursday?

10 PROSPECTIVE JUROR NO. 2: Yes. Likely early.

11 THE COURT: And returning when?

12 PROSPECTIVE JUROR NO. 2: Probably the 5th or the 6th.

13 THE COURT: Okay. And when are the days of your
14 conference, sir?

15 PROSPECTIVE JUROR NO. 2: That would be the 1st through I
16 think the 3rd if I remember correctly. I apologize. If I
17 don't have my Outlook calendar in front of me --

18 THE COURT: I understand. The weekend. In other words,
19 Friday, Saturday and Sunday, the 1st, 2nd and 3rd?

20 PROSPECTIVE JUROR NO. 2: It'll be all day Friday,
21 Saturday, Sunday, and then Monday open. I need day to
22 recover.

23 THE COURT: Okay. Any follow-up questions from counsel,
24 Mr. Eglet?

25 MR. EGLET: Dr. Findlay, do you know how long of a drive

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1 it is to Albuquerque?

2 PROSPECTIVE JUROR NO. 2: I believe it's about nine
3 hours, eight hours, nine hours.

4 MR. EGLET: So to get there at a reasonable hour, you'd
5 have to leave early in the day, is that a fair statement?

6 PROSPECTIVE JUROR NO. 2: Yes, sir.

7 MR. EGLET: Would it be reasonable for you to leave at
8 the very, very end of the day and be able to expect to be
9 there without having to drive all night?

10 PROSPECTIVE JUROR NO. 2: I'm sorry. Could you repeat
11 the question?

12 MR. EGLET: If you had to leave like at 6:00, 7:00 on the
13 31st, you'd have to drive all night to get there for the
14 conference the next morning, is that a fair statement?

15 PROSPECTIVE JUROR NO. 2: Yes, yes. And it's a very
16 physical, very demanding seminar so.

17 MR. EGLET: Have you prepaid for the conference?

18 PROSPECTIVE JUROR NO. 2: I have.

19 MR. EGLET: You've registered for it? It's cost you
20 money and everything?

21 PROSPECTIVE JUROR NO. 2: Yes.

22 MR. EGLET: Okay. We have no objection, Your Honor, to
23 excuse him.

24 THE COURT: Mr. Rogers, do you --

25 MR. ROGERS: No.

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1 THE COURT: -- have any questions?

2 MR. ROGERS: No I don't. Thank you, sir.

3 THE COURT: All right. You may be excused.

4 PROSPECTIVE JUROR NO. 2: Thank you.

5 THE COURT: Safe trip.

6 Any others, Marshal Diamond?

7 THE MARSHAL: I'm afraid to go out and ask.

8 THE COURT: Going once, going twice.

9 THE MARSHAL: I mean, this is getting -- I think that's
10 all I have.

11 THE COURT: All right. Then for scheduling purposes,
12 let's address this issue with Mr. Polsenberg's presence being
13 required. Let's see, let me ask you this. And I know this is
14 a tough question to answer. It's a tough one for me to ask.
15 How much time do you anticipate we need to set aside so that
16 we don't keep our jury pool waiting to discuss this issue?
17 And is this something that we have to discuss before jury
18 selection or can it be discussed after jury selection?

19 MR. POLSENBERG: I think it can be discussed after jury
20 selection. And the reason I think Mr. Rogers was bringing it
21 up is to figure out how we could present it that would least
22 be an interference with you and the Plaintiffs in picking the
23 jury.

24 THE COURT: All right.

25 MR. POLSENBERG: So if we could do it -- I'm available

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1 any time tomorrow, except I have an 8:00 hearing and a 9:00
2 hearing in other departments. And I know I have a mediation
3 coming up this week. Let me check what day that is. I could
4 even work around -- that's on Wednesday. If you wanted to do
5 it early on Wednesday, I could just arrive late for the
6 mediation. And if you think that you'd like to do it late on
7 Wednesday, I can take a break from the mediation and come in.
8 So I can be available for you at any time basically.

9 THE COURT: Well, that's something new to consider. But
10 let me ask you this. How much time does the Court need to set
11 aside to hear argument?

12 MR. ROGERS: I'd say roughly an hour. We have about
13 three to four issues to cover. In a perfect world, it would
14 be tomorrow because these issues are going to effect the
15 opening, and I will need time to prepare in response to your
16 orders.

17 THE COURT: When you say one hour, do you mean one hour
18 for your side or one hour total?

19 MR. ROGERS: Well, I'm thinking all tolled. Yes.

20 THE COURT: All total?

21 MR. ROGERS: I think so.

22 THE COURT: All right. I think that counsel might be
23 forgetting is this Court still has motion calendars to hear
24 every morning even though we're not in trial. So it's not
25 that your availability from say 9:00 to 11:00 is really going

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1 to make it feasible to schedule something then. I think what
2 we need to do is get this jury empanelled however long that's
3 going to take. I would hope it would be efficient considering
4 we did have the benefit of a jury questionnaire, and then
5 schedule time before we begin opening statements. Schedule
6 some time to hear this argument. But I don't know exactly
7 when that's going to be, Mr. Polsenberg. That's what I mean.
8 Any idea how long it might take to empanel this jury?

9 MR. EGLET: I anticipate we'll have opening statements
10 Thursday, Your Honor.

11 THE COURT: Thursday? So Thursday late morning might be
12 a possibility. What's Thursday look like?

13 MR. POLSENBERG: Thursday would be great, Your Honor.

14 THE COURT: Like 10:30 or so? What does that look like?

15 MR. POLSENBERG: Perfect.

16 THE COURT: What about you, Mr. Eglet?

17 MR. EGLET: That's fine, Your Honor.

18 MR. WALL: That's fine, Judge.

19 THE COURT: All right. 10:30 Thursday then.

20 MR. POLSENBERG: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 MR. ROGERS: Thank you.

23 THE COURT: You're welcome.

24 THE COURT: I have a question I wanted to ask counsel
25 inasmuch as we did have a jury questionnaire in this case.

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1 Counsel has had an opportunity to review those answers.
2 There's no point in the Court doing any kind of general
3 canvas. Do you still want the individual jurors to stand up
4 and tell a little bit about themselves, or do you have enough
5 information you've gleaned from the questionnaire?

6 MR. EGLET: I think we have enough information, Your
7 Honor. We can just get right into it.

8 THE COURT: We'll go right into supplemental questions?

9 MR. EGLET: Not unless the Court feels so inclined.
10 We're not requesting any.

11 THE COURT: Not requesting any what?

12 MR. EGLET: Any questions by the Court.

13 THE COURT: Okay. What about you, Mr. Rogers?

14 MR. ROGERS: No. I think the questionnaire was pretty
15 thorough.

16 THE COURT: Think so. All right. Are we waiting for our
17 panel then?

18 MR. EGLET: Yes, Your Honor.

19 MR. WALL: Yes, Your Honor.

20 MR. ROGERS: Yes.

21 THE COURT: Please be seated, ladies and gentlemen.

22 THE MARSHAL: Everyone's in court, Your Honor.

23 THE COURT: Thank you, Marshal Diamond.

24 Good afternoon, ladies and gentlemen.

25 [Prospective Jurors Reply]

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1 THE COURT: Okay. Verbal response. That's a good thing.
2 My name is Jessie Walsh. I will be the judge presiding over
3 this trial. In a few moments, you're going to meet counsel
4 and the parties. I'm going to ask the clerk to call up this
5 case.

6 THE CLERK: Case No. 07-A539455, William Simao, Cheryl
7 Simao versus Jenny Rish, James Rish, et al.

8 THE COURT: This is the time set for trial. Are the
9 parties ready to proceed?

10 MR. WALL: We are, Your Honor.

11 MR. ROGERS: Yes, Your Honor.

12 THE COURT: Very well. Ladies and gentlemen, the court
13 clerk is going to call the roll of those of you summoned as
14 prospective jurors in a moment. I'm going to ask you that
15 when you're name is called, please answer out loud for the
16 record so we can make a good record.

17 I also want to introduce you, by the way, to the
18 court clerk. His name is Alan Castle. He's responsible for a
19 number of things including keeping the minutes of the court
20 and making sure the evidence goes intact to you in the jury
21 deliberation room.

22 To his right is Victoria Boyd, our court reporter.
23 Actually, our court recorder. She came to us as a court
24 reporter. She now serves as our court recorder, and she's
25 responsible for the audio/visual recording system and making

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1 sure we make a good record. So we appreciate her as well very
2 much.

3 Mr. Clerk, whenever you're ready.

4 [Clerk Takes Roll]

5 THE COURT: Okay. Thank you. Do you have any
6 instructions, Marshal Diamond, for our jury panel?

7 THE MARSHAL: Yes I do. There's a lot of them.

8 THE COURT: Please.

9 THE MARSHAL: First of all, this applies to everyone
10 coming from the pool in the gallery and everyone sitting here.
11 In responding to any questions during the jury selection
12 either from the Court or from the attorneys, you need to
13 respond with your last name and the last three digits of your
14 badge. Ms. Bell would be Bell 011. When you exit if you're
15 excused from the panel and the box or on the floor, we will
16 use this exit here. Anyone called to fill in an empty seat
17 will enter the jury box. If it's in the box, behind counsel
18 table. If it's a seat on the floor, between counsel table.
19 Is everybody clear on that?

20 [Prospective Jurors Reply Affirmatively]

21 THE MARSHAL: Okay. Away we go.

22 THE COURT: By the way, ladies and gentlemen, one thing I
23 should bring to your attention and that is this, that Marshal
24 Diamond is the only one in this room that may have any direct
25 contact with you. Not I, not my staff, not counsel, not the

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1 parties may have any direct contact with you. So if we see
2 you in the hallway and we don't chat with you or we don't
3 speak to you, please don't think us discourteous. We're not
4 allowed to have any direct contact with you.

5 Ladies and gentlemen, I propose that we select the
6 jury as follows: the court clerk has called the names of 24
7 prospective jurors from the jury list, and you were seated in
8 the jury box in the order in which your names were called.
9 The seats are numbered 1 through 24 as follows: with seat No.
10 1 being to my far left and the very back row numbered left to
11 right. These first 24 will be qualified for cause. Any
12 number excused for cause will be replaced by another member of
13 the panel. Once 24 prospective jurors have been qualified for
14 cause, counsel will exercise their preemptory challenges to
15 reduce to eight the number of jurors who will actually try the
16 case. If any preemptory challenges are waived, the first
17 eight jurors will compose the jury. The alternates will be
18 chosen from among those seated.

19 Will counsel agree that the jurors may be so
20 selected?

21 MR. EGLET: Yes, Your Honor.

22 MR. WALL: Yes, Your Honor.

23 MR. ROGERS: Yes, Your Honor.

24 THE COURT: Very well. Ladies and gentlemen of the jury,
25 I know that you've received and answered an extensive jury

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32.

1 questionnaire, but I imagine there will be some supplemental
2 questions asked by counsel. I know request the attorney for
3 the Plaintiff to state the nature of this action in three or
4 four sentences, to introduce the members of his firm, his
5 client and his proposed witnesses. Mr. Wall?

6 MR. WALL: Thank you very much, Your Honor.

7 Ladies and gentlemen, good afternoon. My name is
8 David Wall. Along with my law partners, Mr. Robert Eglet, Mr.
9 Mr. Robert Adams and Tracy Eglet, we represent the Plaintiffs
10 in this case, William and Cheryl Simao. Why don't you stand
11 up, Bill and Cheryl. All right. You can have a seat. Thank
12 you so much. You'll also see Brennan Locksly [phonetic] here
13 very often. He basically makes everything work that we don't
14 understand how to make work. So he will be there in charge of
15 our IT.

16 This is a negligence case. It's based upon a motor
17 vehicle accident that took place on April 15th of 2005 in the
18 area of the 215 Beltway near Cheyenne. It's about the serious
19 injuries caused by the Defendants in this case when she rear-
20 ended the van driven by Mr. Simao. I'm going to give you a
21 list of potential witnesses who may testify in this case.
22 You'll be asked later and have to some extent in the
23 questionnaire been asked whether you know any of these
24 individuals. But the potential witnesses that you may hear
25 from or about include the following: obviously, Bill and

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1 Cheryl Simao; two orthopedic spine surgeons, Dr. Patrick
2 McNulty and Dr. Jas Winder-Grover; three pain management
3 specialists, Dr. Adam Arita, Dr. Ross Sible and Dr. Jorg
4 Rosler; a physicians assistant by the name of Britt Hill;
5 Kathleen Hartman who's a specialist in preparing a life care
6 plan to help you understand what the future medical costs and
7 treatment will be for Mr. Simao; as well as Stan Smith, an
8 economist.

9 Thank you so much, and thank you, Your Honor.

10 THE COURT: Thank you, Mr. Wall. Mr. Rogers?

11 MR. ROGERS: Thank you, Your Honor.

12 Good afternoon, everyone. My name is Steve Rogers
13 and I represent Jenny Rish. Her husband is here along with
14 her. She traveled up from Arizona for this trial. The case,
15 as Mr. Wall pointed out, is about a car accident. The defense
16 disputes that injury was caused. That's what this trial will
17 primarily be about. I think Mr. Wall gave an accounting of
18 all the witnesses we'll be hearing from. And that I believe
19 covers it. The witnesses answered in the questionnaire
20 everything they know about the attorneys involved. So thank
21 you, and we look forward to the trial.

22 THE COURT: All right. Let me ask you this. How long do
23 you anticipate this trial may last? Mr. Wall?

24 MR. WALL: Judge, my anticipated time would probably be
25 about two and a half weeks, two and a half to three weeks.

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1 THE COURT: Mr. Rogers?

2 MR. ROGERS: Hoping for a little less. Two weeks at the
3 outside, two to two and a half maybe.

4 THE COURT: Okay. Thank you. In a moment, the court
5 clerk is going to swear all prospective jurors. Mr. Eglet?

6 MR. EGLET: Your Honor, I just wanted to -- maybe the
7 Court would want to point out that now because of the
8 additional judges and not enough courtrooms, that the trial
9 will be only from 1:00 to 5:00 every day as opposed to not in
10 the mornings.

11 THE COURT: That is true, ladies and gentlemen. I don't
12 know if you're aware of that but because we have more judges
13 than we have courtroom space for, we've had to double up. And
14 so the trial days are only slated to go from 1:00 to 5:00
15 Monday through Friday. That's a part, accounts for the length
16 of this trial.

17 I'm going to ask the court clerk in a moment to
18 swear all prospective jurors. Those of you seated in the box
19 and just in front of the box as those of you further outside
20 the rail to answer truthfully all questions propounded to you
21 concerning your qualifications to serve as jurors in this
22 particular case. Ladies and gentlemen, please stand, face the
23 clerk and raise your right hand.

24 [Clerk Swears In Prospective Jurors]

25 THE COURT: Please be seated. Ladies and gentlemen, the

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1 purpose of what follows now is to ascertain if you are
2 qualified under the law to serve as a juror in this particular
3 case. That is, are you so unrelated to the parties, their
4 attorneys and the facts of this case that you would be able to
5 act as a fairly partial juror in this case. You are obligated
6 by the oath that you just took to answer all such questions
7 fully and truthfully. If any of your answers appears to
8 reveal a legal basis for you to be excused as a juror, one of
9 the attorneys may challenge you. That is to say he or she may
10 request that you be excused. If the Court agrees with the
11 reason stated for the challenge, you may be excused from
12 further service in this case and the name of another
13 prospective juror will be drawn. These challenges are called
14 challenges for cause.

15 Once all jurors have been qualified for cause, the
16 attorneys may then exercise another type of challenge known as
17 a preemptory challenge. Each side in this case is allowed six
18 preemptory challenges. If either side for any reason or for
19 no reason whatsoever makes this type of challenge against you,
20 the Court has no alternative but to excuse you. It simply
21 means that the attorney who challenges you believes rightly or
22 wrongly that you may not be as receptive to his or her case as
23 another attorney, as another juror might be.

24 During this questioning, I want you to bear in mind
25 that neither I nor the attorneys want to embarrass you or to

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1 match wits with you. We are only seeking relevant information
2 upon which to decide your qualifications to serve as jurors in
3 this particular case.

4 I think this is a good opportunity now to allow
5 counsel to follow-up with supplemental questions. Mr. Eglet?

6 MR. EGLET: Thank you, Your Honor.

7 Good afternoon, ladies and gentlemen. Again, my
8 name is Robert Eglet and along with Mr. Wall and Mr. Adams and
9 Mrs. Eglet, we'll be trying this case. The name of our firm
10 here in Las Vegas is Mainor Eglet and we're located just
11 across the street here from the courthouse.

12 The Judge has given you kind of a preliminary sketch
13 of what's going to take place during jury selection. And
14 although for 95% of the time I'm going to be facing the ladies
15 and gentlemen in the box, I'm going to be talking generally to
16 all of you as well in this case. So that some of you, and
17 invariably some of you will back there are going to end up in
18 the box over the next few days. You'll have understood what's
19 going on and won't have to catch up much.

20 Let me start out with this. If you could just raise
21 your hand, the people in the box, how many of you have been
22 through -- I'm not asking you if you've actually been on a
23 jury before, but have been through this process of jury
24 selection. Just raise your hand for me. Quite a number of
25 you and that's good. And I suspect the rest of you have never

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1 done this. So let me just kind of give you some idea maybe of
2 what's going on, and the Judge touched on this. Voir dire
3 which is what we're about to engage in is actually French and
4 it means to see, to say. And it's translation from the Latin
5 which means basically to say what you see or what you think,
6 and that's what we're here about. We're here to find out what
7 each of you think about the various subjects we're going to
8 discuss with you. It doesn't matter, there is no right or
9 wrong answer to any of the questions that I pose or Mr. Rogers
10 poses to you when he gets up here. There's only your answer
11 and there's only your honest, truthful answer. Now the jury
12 questionnaire that you guys filled as you probably remember,
13 it was very long questionnaire, so we know quite a bit about
14 all of you demographically, your background, your marital
15 status, education, employment, all of those type of things,
16 and we're all going to do our best not to repeat any of those
17 questions that were in the jury questionnaire. We may follow-
18 up on some answers you gave, but what we're going to engage in
19 over the next few days is to try to get a little bit deeper
20 and find out who you are and how you think and what you think
21 about a particular subject.

22 The Court mentioned to you that there's this thing
23 called challenge for cause. It's sounds like a, wow,
24 [indiscernible], I've been challenged for cause. What does
25 that mean? A challenge for cause is basically, simply a

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1 thought and it may be the Court's thought, it may be the
2 counsel's, maybe we agree on it collectively. You'll see us
3 going up for sidebars and we talk about these tests. And some
4 people are just not the right fit for some types of cases. It
5 doesn't make you a bad person if you're excused for cause for
6 a case like this or any other case for that matter. It just
7 means you're not the right fit for this type of case because
8 what everybody here is interested in, myself, Mr. Wall, Mr.
9 Rogers, the Court is getting as fair and impartial jury for
10 this type of case as possible. We all have biases. We all
11 have history. None of us come here with a blank mind and so
12 we have different thoughts on different subjects. And our
13 goal here is to try to probe those thoughts from you guys on
14 how you feel, get that information and help us to determine
15 and help you to determine quite frankly whether you're the
16 right fit for this type of case.

17 Let me give you an example that's unrelated to this.
18 In Nevada in the criminal realm - and this is not a criminal
19 case, this is a civil case - but in the criminal realm in
20 capital murder cases, the death penalty [indiscernible]
21 potential sentence if the State seeks to invoke the death
22 penalty. Well, there are many people, many, many people,
23 whether it's religious, political or personal reasons who do
24 not believe in the death penalty. And so in those type of
25 cases, those jurors have to be what they call death qualified.

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1 They're qualified to sit on a jury where they would at least
2 be willing to consider, consider imposing the death penalty if
3 they were on that jury. Some people are not the right fit for
4 those type of cases. Everybody knows that.

5 There are people who are not the right type of fit
6 for these type of case. This is personal injury case and a
7 lot of people various views on these type of cases, and
8 sometimes it just doesn't make them the right fit for these
9 type of cases. It doesn't make them bad. Everybody's
10 entitled to their opinion. It just means they're not the
11 right type of fit. Now I can assure you of one thing when
12 we're asking these questions and you're giving us your
13 answers. There is nothing that you can say to us that's going
14 to offend us, that's going to shock us. Everybody here is
15 seasoned experienced trial lawyers and we've heard it all,
16 believe me. There's nothing you can't say. And there's
17 nothing you can say that's wrong. Nobody here's going to
18 judge you or think negatively of you for any answer you give.
19 But what's important is that we get truthful and honest
20 answers from you because that's the only way this process
21 works is if you open us to us and give us truthful and right
22 answers. Otherwise, if we don't get the truthful and right
23 answers then things that can happen down the road where, you
24 know, somebody finds out later that a juror wasn't honest
25 about something then you end up with a mistrial and we have to

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1 do the case all over again and nobody wants that.

2 Does everybody understand? Anybody that doesn't
3 understand with what I've just said? Anybody disagree with
4 what I just said for any reason, raise your hand. Okay.

5 Let me tell you a little bit about how this is going
6 to work with the attorneys' involvement in the voir dire
7 process. Because we go first - and we'll go first on
8 everything, or the Plaintiffs - because we go first, we go
9 first in jury selection, in voir dire, we go first in opening
10 statements and we put our case on first and closing arguments
11 we go first. Every part of the case we go first. And so Mr.
12 Rogers will be getting up here after me. So what that means
13 is since we go first, we tend to basically ask almost
14 everything you can think of, probe every subject that you can
15 think of. So the bad news is you're going to be staring at me
16 for a long time up here, okay. The good news is that when I'm
17 done that while Mr. Rogers I'm sure is going to have some
18 additional questions for you, he will not be anywhere near as
19 long as I will be. This is the longest part of the trial.
20 It's always the longest part of every trial because it's the
21 most important part for everybody to make sure we get a fair
22 and impartial juror.

23 So I'm going to start out here and the process is
24 going to work, I'm actually going to go very quickly through
25 all of you to just get us warmed up, for everybody to say

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1 something. I'm going to ask you three quick questions, each
2 one of you. Very simple. I'm going to go through and ask you
3 those questions. Then I'm going to come back and ask some
4 more deeper individual probing questions of each of you. And
5 then we're going to start having a group discussion. Now
6 chances are, it's 2:30, we probably won't get to those group
7 discussions today. We'll probably get through those three
8 quick questions each, and then the more in-depth questions for
9 everybody, and then before we start getting into the group
10 questions and discussions -- when we have these group
11 questions and discussions, it's important that when somebody
12 else is saying something, not what I'm saying, when somebody
13 else is saying something on the jury panel and you disagree or
14 you agree with that, it's important that you raise your hand
15 because we want to hear what your comments are on what that
16 person has to say. And so what we're going to do is after we
17 get through the individual questions, we're going to engage in
18 a group conversation about various subjects that are relevant
19 to what we're doing here. So let me start with these three
20 quick questions, and I'm just going to go right down the row.
21 I'm going to start with you.

22 Oh, let me tell you what's up here so there's no
23 mystery as to what all this stuff is up here. First of all, I
24 don't have a photographic memory, and Mrs. Eglet told me or,
25 well, explained to me a long time ago, I have trouble saying

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1 the right names of people. You'll notice that throughout
2 trial. I'll call people the wrong name all the time. It's a
3 bad habit and so she convinced me years ago that I need to
4 have this screen up here that gives me the names of all the
5 jurors and the seats they're sitting so I can call you by the
6 right name. That's all that is right there, this screen right
7 here. This right here, this little computer screen, this is
8 basically a little email thing. My partners here can send me
9 notes if they think there's something I need to follow-up, a
10 question I need to follow-up with each one of you. I have an
11 outline here of the areas I want to talk to you about. And
12 this book right here, each two pages in each one of these
13 books is basically a summary of your jury questionnaire, each
14 of your jury questionnaires. This is a summary of that tells
15 us what your answers were, and I've highlighted certain things
16 in here I want to follow-up with each one of you. So there's
17 nothing secretive about what's going on.

18 Okay. Ms. Dearing, how are you today?

19 PROSPECTIVE JUROR NO. 3: Fine.

20 MR. EGLET: Good. First question, what is your date of
21 birth?

22 PROSPECTIVE JUROR NO. 3: 12/12/57.

23 MR. EGLET: December 12th, 1957. Okay. And have you
24 been known by any other names?

25 PROSPECTIVE JUROR NO. 3: Yes.

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1 MR. EGLET: What other names have you every been --
2 PROSPECTIVE JUROR NO. 3: Dottie.
3 MR. EGLET: I'm sorry?
4 PROSPECTIVE JUROR NO. 3: My nickname, Dottie.
5 MR. EGLET: Dottie is your nickname. Last name. Any
6 other last names you've been known by?
7 PROSPECTIVE JUROR NO. 3: Maiden.
8 MR. EGLET: Maiden name, yes. What's that?
9 PROSPECTIVE JUROR NO. 3: McCurdy.
10 MR. EGLET: Is it M-C --
11 PROSPECTIVE JUROR NO. 3: C-U-R-D-Y.
12 MR. EGLET: Okay. M-C-C-U-R-D-Y. All right. Thank you.
13 And while you're going to think this is strange, but there's a
14 method to our madness, how often do you wash your car?
15 PROSPECTIVE JUROR NO. 3: Not a whole lot because it
16 rains and then it doesn't, and it's dusty and windy. And the
17 next time you think you want to wash your car it rains.
18 MR. EGLET: Okay. Very good.
19 PROSPECTIVE JUROR NO. 3: Not often.
20 MR. EGLET: That's how I am. All right. Thank you very
21 much.
22 PROSPECTIVE JUROR NO. 3: Uh-huh.
23 MR. EGLET: Ms. Schmidt.
24 PROSPECTIVE JUROR NO. 4: Yes.
25 MR. EGLET: Ms. Schmidt, what is your date of birth?

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1 PROSPECTIVE JUROR NO. 4: February 11th, '53.
2 MR. EGLET: Okay. And have you been known by any other
3 names?
4 PROSPECTIVE JUROR NO. 4: Yes. My maiden name was
5 O'Keefe.
6 MR. EGLET: Could you spell that for us?
7 PROSPECTIVE JUROR NO. 4: O-K-E-E-F-E.
8 MR. EGLET: Okay. Thank you.
9 PROSPECTIVE JUROR NO. 4: It's actually O-'-K-E-E-F-E.
10 MR. EGLET: Thank you. And how often do you wash your
11 car?
12 PROSPECTIVE JUROR NO. 4: Once a month.
13 MR. EGLET: Okay. Ms. Kistler.
14 PROSPECTIVE JUROR NO. 5: Hi.
15 MR. EGLET: How are you?
16 PROSPECTIVE JUROR NO. 5: I am fine.
17 MR. EGLET: What's your date of birth?
18 PROSPECTIVE JUROR NO. 5: 7/11/57.
19 MR. EGLET: July 11th, 1957.
20 PROSPECTIVE JUROR NO. 5: Uh-huh.
21 MR. EGLET: Some people born in the '50s here so far.
22 All right. Baby boomers. All right. What is -- have you
23 been known by any other names?
24 PROSPECTIVE JUROR NO. 5: Yes. My maiden name was
25 Devine, D-E-V-I-N-E.

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1 MR. EGLET: D-E-V-I-N-E, okay. And how often do you wash
2 your car?

3 PROSPECTIVE JUROR NO. 5: I wash my car weekly.

4 MR. EGLET: Weekly?

5 PROSPECTIVE JUROR NO. 5: Yes.

6 MR. EGLET: All right. Very good. Mr., is it Buntins
7 [phonetic]?

8 PROSPECTIVE JUROR NO. 6: The E's silent. Buenting.

9 MR. EGLET: Buenting, Buenting, okay. Mr. Buenting,
10 what's your date of birth, sir?

11 PROSPECTIVE JUROR NO. 6: 8/8/56.

12 MR. EGLET: Okay. August 8th, 1956. And have you been
13 known by any other names?

14 PROSPECTIVE JUROR NO. 6: No.

15 MR. EGLET: Okay. And how often do you wash your car,
16 sir?

17 PROSPECTIVE JUROR NO. 6: Oh, every couple of months.

18 MR. EGLET: Couple of months. Okay. Ms. Pomfret, how
19 are you doing?

20 PROSPECTIVE JUROR NO. 7: [Indiscernible]

21 MR. EGLET: Your date of birth?

22 PROSPECTIVE JUROR NO. 7: March 31, '49.

23 MR. EGLET: I'm sorry, what?

24 PROSPECTIVE JUROR NO. 7: 31, '49.

25 MR. EGLET: March 31st.

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1 PROSPECTIVE JUROR NO. 7: 1949.
2 MR. EGLET: 1949, okay. And have you been known by any
3 other names?
4 PROSPECTIVE JUROR NO. 7: Yes.
5 MR. EGLET: What?
6 PROSPECTIVE JUROR NO. 7: Pricila De Jesus Thomas.
7 MR. EGLET: Say that again?
8 PROSPECTIVE JUROR NO. 7: Pricila De Jesus Thomas.
9 MR. EGLET: Pricila De Jesus Thomas.
10 PROSPECTIVE JUROR NO. 7: Yes.
11 MR. EGLET: Okay. Any other names?
12 PROSPECTIVE JUROR NO. 7: [Indiscernible].
13 MR. EGLET: That's okay. And what -- how often do you
14 wash your car?
15 PROSPECTIVE JUROR NO. 7: Months.
16 MR. EGLET: Every several months?
17 PROSPECTIVE JUROR NO. 7: Yeah.
18 MR. EGLET: Whenever it strikes you, right?
19 PROSPECTIVE JUROR NO. 7: [Indiscernible]
20 MR. EGLET: Okay. All right. Mr. Kim, what is your date
21 of birth?
22 PROSPECTIVE JUROR NO. 8: October 22nd, '91.
23 MR. EGLET: 1991?
24 PROSPECTIVE JUROR NO. 8: Yeah.
25 MR. EGLET: Okay. All right. And have you been known by

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1 any other names?

2 PROSPECTIVE JUROR NO. 8: Just short, like Jon.

3 MR. EGLET: Jon, your first name?

4 PROSPECTIVE JUROR NO. 8: Yeah.

5 MR. EGLET: Just shortening it? Okay. And how often do
6 you wash your car?

7 PROSPECTIVE JUROR NO. 8: Once every few months.

8 MR. EGLET: Once every few months. Okay. Thank you.

9 Ms. Nolte?

10 PROSPECTIVE JUROR NO. 9: Right here.

11 MR. EGLET: Ms. Nolte, what's your date of birth?

12 PROSPECTIVE JUROR NO. 9: 10/28/54.

13 MR. EGLET: October 28, 1954. Okay. Have you been known
14 by any other names?

15 PROSPECTIVE JUROR NO. 9: My maiden name's Dockter.

16 MR. EGLET: Okay. Spelled like doctor?

17 PROSPECTIVE JUROR NO. 9: It's D-O-C-K-T-E-R.

18 MR. EGLET: D-O-C-K-T-E-R. How often do you wash your
19 car?

20 PROSPECTIVE JUROR NO. 9: Actually, I don't wash my car.
21 My husband does.

22 MR. EGLET: How often does your husband wash your car?

23 PROSPECTIVE JUROR NO. 9: He washes it probably once a
24 week, twice a month.

25 MR. EGLET: Okay. Very good. Thank you. Mr. Dusty

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1 [phonetic]?
2 PROSPECTIVE JUROR NO. 10: It's Seth Doty.
3 MR. EGLET: Madoty [phonetic]?
4 MR. ROGERS: It's not Dusty, Brennan. It's Doty.
5 MR. EGLET: How do you spell that?
6 PROSPECTIVE JUROR NO. 10: D-O-T-Y.
7 MR. EGLET: D-O-T-Y. Sorry about that.
8 PROSPECTIVE JUROR NO. 10: That's all right.
9 MR. EGLET: Mr. Doty, what is your date of birth?
10 PROSPECTIVE JUROR NO. 10: July 17, '81.
11 MR. EGLET: 1981. And have you been known by any other
12 names?
13 PROSPECTIVE JUROR NO. 10: No.
14 MR. EGLET: And how often do you wash your car?
15 PROSPECTIVE JUROR NO. 10: About three times a month.
16 MR. EGLET: Three times a month. Okay. Thank you. Mr.
17 Martinez?
18 PROSPECTIVE JUROR NO. 10: Yes.
19 MR. EGLET: Mr. Martinez, what is your date of birth?
20 PROSPECTIVE JUROR NO. 11: 7/25/1982.
21 MR. EGLET: July 25th, 1982.
22 PROSPECTIVE JUROR NO. 11: That's correct.
23 MR. EGLET: Have you been known by any other names?
24 PROSPECTIVE JUROR NO. 11: No, sir.
25 MR. EGLET: Okay. And how often do you wash your car?

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1 PROSPECTIVE JUROR NO. 11: Once or twice a week.
2 MR. EGLET: Once or twice a week?
3 PROSPECTIVE JUROR NO. 11: A month, I mean.
4 MR. EGLET: Okay. All right. Mr. Harrison, good
5 afternoon.
6 PROSPECTIVE JUROR NO. 12: Doing good, sir.
7 MR. EGLET: Mr. Harrison, what's your date of birth?
8 PROSPECTIVE JUROR NO. 12: January 29th, 1987.
9 MR. EGLET: Okay. And have you been known by any other
10 names?
11 PROSPECTIVE JUROR NO. 12: No.
12 MR. EGLET: All right. How often you wash your car?
13 PROSPECTIVE JUROR NO. 12: About once a month.
14 MR. EGLET: Once a month. Okay. Ms. Rosinski?
15 PROSPECTIVE JUROR NO. 13: Yes, sir.
16 MR. EGLET: Ms. Rosinski, what's your date of birth?
17 PROSPECTIVE JUROR NO. 13: December 8th, 1946.
18 MR. EGLET: December 8th, 1946. Okay. And have you been
19 known by any other names?
20 PROSPECTIVE JUROR NO. 13: Yes. Two others. Maiden name
21 McAlister.
22 MR. EGLET: And can you spell that please?
23 PROSPECTIVE JUROR NO. 13: M-C-capital A-L-I-S-T-E-R.
24 MR. EGLET: Okay.
25 PROSPECTIVE JUROR NO. 13: And Geist, G-E-I-S-T.

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1 Divorced.

2 MR. EGLET: G-E-I-S-T. All right. Thank you. How often
3 you wash your car?

4 PROSPECTIVE JUROR NO. 13: About once a month.

5 MR. EGLET: Once a month. All right. Mr. Leonard?

6 PROSPECTIVE JUROR NO. 14: Yes.

7 MR. EGLET: What's your date of birth, sir?

8 PROSPECTIVE JUROR NO. 14: January 23rd, 1967.

9 MR. EGLET: Okay. And have you been known by any other
10 names?

11 PROSPECTIVE JUROR NO. 14: No.

12 MR. EGLET: And how often do you wash your car, sir?

13 PROSPECTIVE JUROR NO. 14: Once a month.

14 MR. EGLET: Once a month?

15 PROSPECTIVE JUROR NO. 14: Yes.

16 MR. EGLET: Thank you. Ms. Smith, what is your date of
17 birth?

18 PROSPECTIVE JUROR NO. 15: October 19th, 1965.

19 MR. EGLET: Okay. And have you been known by any other
20 names?

21 PROSPECTIVE JUROR NO. 15: My maiden name is Ard, A-R-D,
22 and --

23 MR. EGLET: Did you say A-A or just one A?

24 PROSPECTIVE JUROR NO. 15: Just one A.

25 MR. EGLET: A-R-D?

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1 PROSPECTIVE JUROR NO. 15: Uh-huh.
2 MR. EGLET: All right.
3 PROSPECTIVE JUROR NO. 15: And my family calls me Danny.
4 MR. EGLET: Danny? Okay. And how often do you wash your
5 car?
6 PROSPECTIVE JUROR NO. 15: Do you mean like hand wash it
7 or do the drive-thru?
8 MR. EGLET: No, no, no. No.
9 PROSPECTIVE JUROR NO. 15: Have my car washed, but just
10 either one?
11 MR. EGLET: How often is it washed, do you have it
12 washed? Whether you wash it yourself or you make your kid or
13 your husband washes it, or whether you take it to Freddie's or
14 wherever.
15 PROSPECTIVE JUROR NO. 15: Probably like once every
16 couple of months about.
17 MR. EGLET: Okay. Once every couple. All right. Okay.
18 And let me see, it's Ms. Prince?
19 PROSPECTIVE JUROR NO. 16: Yes.
20 MR. EGLET: Ms. Prince, what is your date of birth?
21 PROSPECTIVE JUROR NO. 16: September 25th, 1960.
22 MR. EGLET: Okay. Have you been known by any other
23 names?
24 PROSPECTIVE JUROR NO. 16: Yes. My maiden name is
25 Freeman.

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1 MR. EGLET: Freeman?
2 PROSPECTIVE JUROR NO. 16: Uh-huh.
3 MR. EGLET: All right. And how often do you wash your
4 car?
5 PROSPECTIVE JUROR NO. 16: About once a month.
6 MR. EGLET: Okay. You're not related to Dennis Prince,
7 are you?
8 PROSPECTIVE JUROR NO. 16: No.
9 MR. EGLET: Okay. Thank you. Mr. Sellers.
10 PROSPECTIVE JUROR NO. 17: Yes.
11 MR. EGLET: Mr. Sellers, what's your date of birth?
12 PROSPECTIVE JUROR NO. 17: [Indiscernible] 25, 1959.
13 MR. EGLET: May 25th --
14 PROSPECTIVE JUROR NO. 17: 1959.
15 MR. EGLET: 1959. Okay. Have you been known by any
16 other names?
17 PROSPECTIVE JUROR NO. 17: No I haven't.
18 MR. EGLET: All right. And how often do you wash your
19 car?
20 PROSPECTIVE JUROR NO. 17: Once a week.
21 MR. EGLET: Once a week.
22 PROSPECTIVE JUROR NO. 17: Right.
23 MR. EGLET: All right. Okay. Thank you. Mr. Barrett.
24 PROSPECTIVE JUROR NO. 18: Yes.
25 MR. EGLET: Your date of birth please?

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1 PROSPECTIVE JUROR NO. 18: April 9th, 1958.
2 MR. EGLET: Okay. Been known by any other names?
3 PROSPECTIVE JUROR NO. 18: No. I generally go by Andy,
4 though.
5 MR. EGLET: You go by Andy? All right. And how often do
6 you wash your car?
7 PROSPECTIVE JUROR NO. 18: Probably about every six
8 weeks.
9 MR. EGLET: Every six weeks. Okay. Ms. Bell, your date
10 of birth?
11 PROSPECTIVE JUROR NO. 19: 3/30/62.
12 MR. EGLET: Okay. And have you been known by any other
13 names?
14 PROSPECTIVE JUROR NO. 19: Yes.
15 MR. EGLET: Tell us.
16 PROSPECTIVE JUROR NO. 19: Hunt.
17 MR. EGLET: Hunt, H-U-N-T?
18 PROSPECTIVE JUROR NO. 19: Yes.
19 MR. EGLET: Okay.
20 PROSPECTIVE JUROR NO. 19: Minnich, M-I-N-N-I-C-H.
21 MR. EGLET: Okay.
22 PROSPECTIVE JUROR NO. 19: Maiden, Coss, C-O-S-S.
23 MR. EGLET: And the maiden name is Coss. All right.
24 Thank you. And you nodded your head. Was that a yes?
25 PROSPECTIVE JUROR NO. 19: Yes.

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1 MR. EGLET: Okay. The reason I say that is everything in
2 here is being recorded. You see these - where are they - see
3 these cameras here? They're all over the place. There's also
4 microphones behind you everywhere and they pick up sound. And
5 so we don't -- a lot of the courtrooms, most of the courtrooms
6 have them now. They're not stenographers anymore.

7 PROSPECTIVE JUROR 19: Yes.

8 MR. EGLET: They actually video tape and record them. So
9 we have to make sure it's said out loud. Okay?

10 PROSPECTIVE JUROR NO. 19: Yes.

11 MR. EGLET: And what did -- how often do you wash your
12 car?

13 PROSPECTIVE JUROR NO. 19: Once a month.

14 MR. EGLET: Once a month. Thank you. Mr. Johnson.

15 PROSPECTIVE JUROR NO. 20: Hello.

16 MR. EGLET: What's your date of birth, sir?

17 PROSPECTIVE JUROR NO. 20: June 2nd, 1984.

18 MR. EGLET: Okay. And have you been known by any other
19 names?

20 PROSPECTIVE JUROR NO. 20: I have not.

21 MR. EGLET: Okay. And how often do you wash your car?

22 PROSPECTIVE JUROR NO. 20: I travel by carpool and bus so
23 nada.

24 MR. EGLET: Okay. Do you own a car?

25 PROSPECTIVE JUROR NO. 20: No.

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1 MR. EGLET: Okay. That's good. Mr. Webster, what's your
2 date of birth, sir?

3 PROSPECTIVE JUROR NO. 21: June 23rd, 1986.

4 MR. EGLET: June 23rd, 1986. And have you been known by
5 any other names?

6 PROSPECTIVE JUROR NO. 21: No, sir.

7 MR. EGLET: Okay. How often do you wash your car?

8 PROSPECTIVE JUROR NO. 21: Probably once every two
9 months.

10 MR. EGLET: Every two months?

11 PROSPECTIVE JUROR NO. 21: Yes.

12 MR. EGLET: Thank you. Ms. Manful?

13 PROSPECTIVE JUROR NO. 22: Uh-huh.

14 MR. EGLET: Good afternoon. What's your date of birth,
15 ma'am.

16 PROSPECTIVE JUROR NO. 22: 12/25/51.

17 MR. EGLET: Okay. And have you been known by any other
18 names?

19 PROSPECTIVE JUROR NO. 22: No.

20 MR. EGLET: Okay. Never married?

21 PROSPECTIVE JUROR NO. 22: No.

22 MR. EGLET: Okay. And how often do you wash your car?

23 PROSPECTIVE JUROR NO. 22: I don't own a car.

24 MR. EGLET: Okay.

25 PROSPECTIVE JUROR NO. 22: I ride the bus so.

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1 MR. EGLET: Okay. All right. Very good. All right. Ms.
2 Meza?
3 PROSPECTIVE JUROR NO. 23: Yes.
4 MR. EGLET: Ms. Meza, what is your date of birth?
5 PROSPECTIVE JUROR NO. 23: 2/12/71.
6 MR. EGLET: Okay. And have you been known by any other
7 names?
8 PROSPECTIVE JUROR NO. 23: Cathy for Catherine.
9 MR. EGLET: Cathy?
10 PROSPECTIVE JUROR NO. 23: Uh-huh.
11 MR. EGLET: Cathy instead of Catherine. Okay. And how
12 often do you wash your car?
13 PROSPECTIVE JUROR NO. 23: Once a month.
14 MR. EGLET: Once a month.
15 PROSPECTIVE JUROR NO. 23: Uh-huh.
16 MR. EGLET: All right. Thank you. Mr. Bambino
17 [phonetic]?
18 PROSPECTIVE JUROR NO. 24: Bombino.
19 MR. EGLET: Bonbino [phonetic].
20 PROSPECTIVE JUROR NO. 24: Bombino.
21 MR. EGLET: Bomb, M?
22 PROSPECTIVE JUROR NO. 24: Bomb, yeah, and then bino.
23 MR. EGLET: Can you change that for me in the
24 [indiscernible].
25 PROSPECTIVE JUROR NO. 24: B-O-M-B-I-N-O.

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1 MR. EGLET: B-O-M not N, okay.

2 PROSPECTIVE JUROR NO. 24: Yeah.

3 MR. EGLET: And what's your date of birth, sir?

4 PROSPECTIVE JUROR NO. 24: April 23rd, 1952.

5 MR. EGLET: Okay. And have you been known by any other
6 names?

7 PROSPECTIVE JUROR NO. 24: No.

8 MR. EGLET: Okay. And how often do you wash your car?

9 PROSPECTIVE JUROR NO. 24: About once every five or six
10 months.

11 MR. EGLET: Okay. Are you a U-Dub grad?

12 PROSPECTIVE JUROR NO. 24: Oh yes.

13 MR. EGLET: Oh yeah?

14 PROSPECTIVE JUROR NO. 24: Yes.

15 MR. EGLET: Huskies, huh?

16 PROSPECTIVE JUROR NO. 24: Yes

17 MR. EGLET: Go Huskies.

18 PROSPECTIVE JUROR NO. 24: Oh yes.

19 MR. EGLET: Okay. I went to Washington State.

20 PROSPECTIVE JUROR NO. 24: I understand.

21 MR. EGLET: But half my family went to UT University.

22 But you know the rivalry?

23 PROSPECTIVE JUROR NO. 24: Oh yes.

24 MR. EGLET: So half either went to U-Dub, the other half
25 went to Washington State. So it's a good rivalry in the apple

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1 country. Okay. And let me see. Did I ask you how often you
2 wash your car?

3 PROSPECTIVE JUROR NO. 24: Yeah. About once every five
4 or six months.

5 MR. EGLET: Five or six months, okay.

6 PROSPECTIVE JUROR NO. 24: Yeah.

7 MR. EGLET: And you go the record now, right?

8 PROSPECTIVE JUROR NO. 24: I think so.

9 MR. EGLET: Okay. Thanks. Okay. Mr. Casden. Your date
10 of birth, sir.

11 PROSPECTIVE JUROR NO. 25: March 8th, 1984.

12 MR. EGLET: Okay. And have you been known by any other
13 names?

14 PROSPECTIVE JUROR NO. 25: No.

15 MR. EGLET: All right. And how often do you wash your
16 car?

17 PROSPECTIVE JUROR NO. 25: About every two or three
18 months.

19 MR. EGLET: Okay. Great. Thank you. And is it Ms.
20 Zelfel [phonetic] or Welfel [phonetic]?

21 PROSPECTIVE JUROR NO. 26: It's Zweifel.

22 MR. EGLET: Zweival [phonetic], Zweifel.

23 PROSPECTIVE JUROR NO. 26: Zweifel.

24 MR. EGLET: Zweifel. Okay. I might mess that up. I
25 apologize in advance. Ms. Zweifel, can you tell us your date

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1 of birth?

2 PROSPECTIVE JUROR NO. 26: 8/27/1960.

3 MR. EGLET: Okay. And have you been known by any other
4 names?

5 PROSPECTIVE JUROR NO. 26: Yes, four.

6 MR. EGLET: Okay. And why don't you tell us please.

7 PROSPECTIVE JUROR NO. 26: Kragenbring.

8 MR. EGLET: Can you spell that?

9 PROSPECTIVE JUROR NO. 26: K-R-A-G-E-N-B-R-I-N-G.

10 MR. EGLET: Okay.

11 PROSPECTIVE JUROR NO. 26: Scheiv, S-C-H-E-I-V.

12 MR. EGLET: Okay.

13 PROSPECTIVE JUROR NO. 26: George, G-E-O-R-G-E. Cochran,
14 C-O-C-H-R-A-N.

15 MR. EGLET: Okay. And which was your maiden?

16 PROSPECTIVE JUROR NO. 26: Kragenbring.

17 MR. EGLET: Okay. And how often do you wash your car?

18 PROSPECTIVE JUROR NO. 26: Only when it really needs it.

19 MR. EGLET: Which for some people that's like never,
20 right?

21 PROSPECTIVE JUROR NO. 26: No. I'd say every three to
22 four months.

23 MR. EGLET: Okay. All right. Thanks very much. All
24 right. I appreciate that. Now I'm going to start asking a
25 little more in-depth questions after everybody's kind of

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1 warmed up. Some easy questions. Let me ask you, Ms. Dearing
2 -- I know that you are a dialysis tech. Can you tell us what
3 makes you good at your job?

4 PROSPECTIVE JUROR NO. 3: Consistency. Caring.
5 Attentive.

6 MR. EGLET: Anything else?

7 PROSPECTIVE JUROR NO. 3: And I have to be there.

8 MR. EGLET: Okay. Don't we all. All right. Okay. And
9 I don't remember, do you have children?

10 PROSPECTIVE JUROR NO. 3: Yes.

11 MR. EGLET: What makes you a good parent?

12 PROSPECTIVE JUROR NO. 3: Love.

13 MR. EGLET: And can you tell us when you were in high
14 school, what did you want to be?

15 PROSPECTIVE JUROR NO. 3: I think - it's been awhile - I
16 wanted to be a P.E. teacher.

17 MR. EGLET: I wanted to be a high school football coach
18 so I feel you. Okay. And so what caused you to go into the
19 medical field as opposed to with education?

20 PROSPECTIVE JUROR NO. 3: I'd have to start from the
21 beginning. I got married and had children early, dropped out
22 of school. And later got my GED, and then had opportunities.
23 And I was a nurse aid for awhile and then got an opportunity
24 to have an interview with that company and went from there.
25 Went to school and got certified.

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1 MR. EGLET: So life happened and medical field
2 opportunities doors opened and you went that direction. How
3 do you feel about that as opposed to what you wanted to do
4 when you were younger? Was it a happy --

5 PROSPECTIVE JUROR NO. 3: Yeah.

6 MR. EGLET: -- decision?

7 PROSPECTIVE JUROR NO. 3: Yes.

8 MR. EGLET: Okay. And can you tell us what are your five
9 year goals? As you sit here now, what are your five goals in
10 your life?

11 PROSPECTIVE JUROR NO. 3: Be with my children and
12 grandchildren more. Hopefully, save money and to watch my
13 health.

14 MR. EGLET: Very good. Can you tell us, do you belong to
15 any clubs or organizations?

16 PROSPECTIVE JUROR NO. 3: No.

17 MR. EGLET: Have you ever belonged to any clubs or
18 organizations?

19 PROSPECTIVE JUROR NO. 3: I don't think so, no.

20 MR. EGLET: Okay. And what are the two most important
21 values to you other than honest and whatever faith you may
22 practice? Can't use those two because everybody wants to say
23 honesty and a lot of people want to say their faith or their
24 religion. But what are the two most important values to you
25 other than those two?

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1 PROSPECTIVE JUROR NO. 3: I guess I probably don't think
2 about it a lot because I'm so busy with my life and my
3 children and grandchildren, my job. It's always changing, and
4 they're always improving or, you know, we have to fuss with
5 everything. Just trying to keep up with everything.

6 MR. EGLET: And I know, you know, it's not something that
7 any of us probably think about that often, but we're going to
8 make you think about everybody here. A lot of things that
9 maybe you don't think about that often in this jury selection
10 process. So if you could pick like two words that would
11 describe the two values that are most important to you other
12 than honesty and whatever faith you practice, what would that
13 be?

14 PROSPECTIVE JUROR NO. 3: [Indiscernible].

15 MR. EGLET: Anything else?

16 PROSPECTIVE JUROR NO. 3: [Indiscernible] life.
17 [Indiscernible] things I need to do.

18 MR. EGLET: What do you mean by making sure you're right
19 with the things you need to do? Elaborate on that for me.

20 PROSPECTIVE JUROR NO. 3: You know, just making sure my,
21 with my bills, my children are getting along with each other.
22 Making sure I'm doing right at work. [Indiscernible].

23 MR. EGLET: Okay. I think that's pretty good. Okay.
24 Now, having said that you're a parent and a grandparent, okay.
25 What, other than honesty and whatever faith you may practice

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1 or believe in, what are the two most important values that you
2 try to instill in your children when they were growing up?

3 PROSPECTIVE JUROR NO. 3: To be good. To love parents.

4 MR. EGLET: Love your family?

5 PROSPECTIVE JUROR NO. 3: And to be good to others.

6 MR. EGLET: So the golden rule, be good to others and
7 love your family?

8 PROSPECTIVE JUROR NO. 3: Uh-huh.

9 MR. EGLET: Okay.

10 PROSPECTIVE JUROR NO. 3: And then you'll be.

11 MR. EGLET: All right. Very good. Can you tell us what,
12 if any, situations that you think that you're regarded as a
13 leader?

14 PROSPECTIVE JUROR NO. 3: Excuse me? Say that again?

15 MR. EGLET: Tell us any situations in your personal life,
16 in your family life, in your job or any other aspect, any
17 aspect of your life where you think that you are regarded as a
18 leader?

19 PROSPECTIVE JUROR NO. 3: I guess I can say now that with
20 my children, they like to come to me for advice.

21 MR. EGLET: It's funny how they think you are an idiot
22 for a certain period of their life, and then all the sudden
23 they come back and we'll be really enlightened and smart, huh?

24 PROSPECTIVE JUROR NO. 3: Uh-huh. They don't want to
25 listen to you but --

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1 MR. EGLET: Yeah.

2 PROSPECTIVE JUROR NO. 3: -- as they get older and have
3 their own children, yes.

4 MR. EGLET: Yeah. I know. Okay. Very good. Thank you.
5 If someone were to offer to send money to the charity of your
6 choice, you could choose what charity for they offer that they
7 send the money to, what charity would that be and why?

8 PROSPECTIVE JUROR NO. 3: Probably a children's charity.

9 MR. EGLET: What kind of children's charity?

10 PROSPECTIVE JUROR NO. 3: Maybe like cancer.

11 MR. EGLET: Okay.

12 PROSPECTIVE JUROR NO. 3: And I think that they have here
13 down --

14 MR. EGLET: Sure.

15 PROSPECTIVE JUROR NO. 3: -- at UMC. And because their
16 so defenseless, they don't know a lot and can't do a lot for
17 themselves. So it would help to help for the cures for them.

18 MR. EGLET: All right. What is the worst tragedy you've
19 ever experienced in your life?

20 PROSPECTIVE JUROR NO. 3: I know I've had several.
21 Probably the closest to me was I had a fiancé and he was a
22 drinker and he drank for many years. I was with him for nine
23 years, and I'm sure he didn't tell me at first, but he was
24 real, he got real, real sick and went to the hospital a couple
25 of times. And I didn't really realize what was going on, and

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1 eventually he died of cirrhosis of the liver. And I was
2 devastated.

3 MR. EGLET: I'm sorry. How long ago was that?

4 PROSPECTIVE JUROR NO. 3: He died in 1998.

5 MR. ROGERS: Your Honor, I do appreciate Ms. Dearing's
6 openness and candor, but these questions are far from bias or
7 prejudice.

8 THE COURT: Would counsel approach please?

9 [Bench Conference Begins]

10 THE COURT: So what's your ruling?

11 MR. EGLET: The Nevada Supreme Court -- first of all, if
12 counsel's going to make an objection during voir dire, I
13 request that he do it at the bench, not in front of the panel.
14 It's inappropriate. Second of all, The Nevada Supreme Court
15 in Whitlock v. Salmon [phonetic] said that there are two
16 purposes for a jury selection or voir dire: one, to
17 facilitate the identification and removal of jurors who cannot
18 serve as fair and partial jurors; two, for trial counsel to
19 gather information for an intelligent exercise preemptory
20 challenge. That's what I'm doing. He may not like my
21 questions. He may not understand my questions. But I know
22 what I'm doing. These are for us to exercise intelligence,
23 for us to intelligently exercise our preemptory challenge.
24 These are not based only on demographics or things that are
25 improper like gender and race, etcetera, and they're

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1 absolutely appropriate.

2 THE COURT: Mr. Rogers?

3 MR. ROGERS: They're not. You can recite an abstract
4 principal of law, but compare that to the questions you've
5 just heard. They have absolutely nothing to do with whether
6 this jury is the right fit, as Mr. Eglet characterized.
7 Getting into things like your worst traumatic experience, your
8 goals as a high school student. I mean, this is way off
9 field. Just ask the jury if they can be fair in questions
10 that might not be so direct but subtly get you there. We
11 don't need to get into personality traits of ambitions and
12 sadness in their past.

13 MR. EGLET: That is an elementary look at jury selection.
14 Very elementary. I think first year lawyers actually quite
15 know more than that about it. So it's just, it's wrong, and
16 I'm entitled to ask these questions. I've never been
17 restricted by any court ever from asking these type of
18 questions.

19 THE COURT: Well, I'm hearing, though, some objections
20 that we [indiscernible] hear about earlier then. Specifically
21 interesting in response to these specific objections to this
22 one like what's the worse tragedy that every occurred to you.

23 MR. EGLET: Well, I'm entitled to know what sort of
24 tragedies these jurors have gone through and what their
25 emotional [indiscernible] has been because it tells us how

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1 they're going to react to certain things. It tells us whether
2 they're an emotional personal or non-emotional person, and
3 that's important for our jury selection.

4 MR. ROGERS: Well, ask them, but they have a privacy
5 right. And jurors give us something to be here, but not that
6 much.

7 MR. EGLET: I know they do. They can --

8 MR. ROGERS: You can ask them if they --

9 MR. EGLET: Where does it say anywhere in any case that
10 jurors have a privacy right?

11 MR. ROGERS: In cases I cited to the Judge in our
12 opposition to the questionnaire. That was one of the basis
13 for the Court saying these questionnaires are too invasive.

14 MR. EGLET: Your Honor, this is not invasive. This is
15 absolutely appropriate voir dire, and this is going to cause
16 this trial to go on for four weeks if I get objections --

17 MR. ROGERS: But these --

18 MR. EGLET: -- to questions like this. These are -- I
19 have actually seen questions, dozens - well, not dozens - but
20 close to probably ten times [indiscernible], and these are
21 appropriate questions getting a background so that we can
22 intelligently exercise our preemptory challenges.

23 THE COURT: Well, I'm going to allow it. But if you have
24 specific objections, you have the right to ask to approach the
25 bench and we'll address it. I don't know if the responses Mr.

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1 Eglet's going to get to some of these questions, and I have I
2 guess some concerns. But I don't think there's any concern
3 with these responses so far.

4 MR. ROGERS: Okay.

5 THE COURT: You can make an objection for the record,
6 though.

7 [Bench Conference Ends]

8 MR. EGLET: Okay. Ms. Dearing, there are -- some people
9 when they hear about another person becoming seriously hurt or
10 killed and they, some people will often think to themself
11 [sic] that that might've happened because bad things, because
12 the bad things that person may have done earlier in their
13 life. What I want to ask you, I'm going to give you a
14 multiple choice answer to that question, and it's this. Do
15 you: you never think that's true, do you often think that's
16 true, do you think that's true once in a while, or do you
17 always think that's true?

18 PROSPECTIVE JUROR NO. 3: Once in a while.

19 MR. EGLET: Once in a while. Okay. Now some folks
20 believe that when someone is killed or someone -- some people
21 have the belief that when someone is killed or hurt, it's
22 usually due to fate or destiny or God's will or just bad luck.
23 Okay. So it's wrong to sue anyone because what happened was
24 bound to happen anyway. I'm going to give you some multiple
25 choices for that. Do you completely agree with that

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1 statement, do you mostly agree with that statement, do you
2 somewhat agree with that statement, or do you mostly disagree
3 with that statement, or do you entirely disagree with that
4 statement?

5 PROSPECTIVE JUROR NO. 3: I disagree.

6 MR. EGLET: Mostly or entirely.

7 PROSPECTIVE JUROR NO. 3: Mostly.

8 MR. EGLET: Mostly. Okay. Thank you. And Ms. Dearing,
9 who is the public figure, living or dead, that you admire most
10 and why?

11 PROSPECTIVE JUROR NO. 3: Can I say I don't have one?

12 MR. EGLET: Okay. Do you know what I mean by a public
13 figure?

14 PROSPECTIVE JUROR NO. 3: I think so.

15 MR. EGLET: Okay. Who do you -- what kind of people do
16 you think are public figures?

17 PROSPECTIVE JUROR NO. 3: The President --

18 MR. EGLET: Okay.

19 PROSPECTIVE JUROR NO. 3: -- actors, actresses.

20 MR. EGLET: All right. Is there any public figure out
21 there that you admire for any reason at all? Living or dead.
22 They don't have to be someone that's alive.

23 PROSPECTIVE JUROR NO. 3: No.

24 MR. EGLET: No. I'm not going to let you off the hook,
25 but I'm going to come back --

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1 PROSPECTIVE JUROR NO. 3: I don't --

2 MR. EGLET: -- I'm going to come back to you and let you
3 think about that, okay? And I'm going to ask everybody these
4 questions so think about that, but let me come back to you on
5 that.

6 PROSPECTIVE JUROR NO. 3: Okay.

7 MR. EGLET: In your questionnaire that you answered in
8 this case, you indicated that your daughter works for Allstate
9 Insurance Company, is that correct?

10 PROSPECTIVE JUROR NO. 3: [Indiscernible].

11 MR. EGLET: What does she do for Allstate Insurance
12 Company?

13 PROSPECTIVE JUROR NO. 3: She just started so I don't
14 know a whole lot --

15 MR. EGLET: Okay.

16 PROSPECTIVE JUROR NO. 3: -- but I think she just tries
17 to get people to buy policies.

18 MR. EGLET: Okay. So she's in sales?

19 PROSPECTIVE JUROR NO. 3: Yeah, I think.

20 MR. EGLET: All right. Very good. Now you also
21 indicated in you questionnaire in the answer to if someone, if
22 you or someone in your family was hurt or injured, would you
23 consider, as a result of the fault of someone else, would you
24 consider filing a lawsuit? And it was a yes or no multiple
25 choice response and you wrote in maybe. Can you tell us what

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1 you meant when you answered that way?

2 PROSPECTIVE JUROR NO. 3: I guess because I've never been
3 in that situation, and I'm sure because if that happened I
4 would, you would sue or not sue, or if you're having trouble
5 getting someone to pay or, you know. It's not your fault.
6 It's somebody else's fault. It depends.

7 MR. EGLET: It depends. So if it's someone else's fault,
8 you would, is that correct?

9 PROSPECTIVE JUROR NO. 3: Probably.

10 MR. EGLET: Okay. All right. Thank you. Court's
11 indulgence for a moment, Your Honor?

12 THE COURT: Sure.

13 MR. EGLET: Thank you, Ms. Dearing. I appreciate it.
14 Ms. Schmidt.

15 PROSPECTIVE JUROR NO. 4: Yes.

16 MR. EGLET: Okay. I'm going to ask you the same
17 questions. You ready? Okay. Before I begin --

18 PROSPECTIVE JUROR NO. 4: Yes, I'm ready.

19 MR. EGLET: -- before I begin, what I noticed when you
20 walked in the courtroom, for whatever reason, you look very
21 familiar to me. Do we know each other?

22 PROSPECTIVE JUROR NO. 4: I doubt it. I've only lived in
23 Las Vegas two years.

24 MR. EGLET: Two years? Okay. My mistake, but I just
25 thought you looked like --

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1 PROSPECTIVE JUROR NO. 4: I know. I look like
2 everybody's Aunt Millies.

3 MR. EGLET: Well, I don't have any Aunt Millies so, but I
4 don't know. For some reason I thought you were either on a
5 prior jury panel or something.

6 PROSPECTIVE JUROR NO. 4: No. This is my first jury
7 panel --

8 MR. EGLET: It's your first one? Okay.

9 PROSPECTIVE JUROR NO. 4: -- in Las Vegas.

10 MR. EGLET: All right. Very good. So tell us, you're a
11 graphic artist, correct?

12 PROSPECTIVE JUROR NO. 4: I was. I'm retired now.

13 MR. EGLET: You're retired now. What made you good at
14 your job?

15 PROSPECTIVE JUROR NO. 4: Ability to communicate.
16 Because it wasn't just graphic artist. It was graphic artist
17 in conjunction with online education. So the graphic arts had
18 to be the means of communication. They weren't just pretty
19 pictures. So it would have to be ability to communicate and
20 imagination.

21 MR. EGLET: All right. Very good. And do you -- I don't
22 remember from you questionnaire, but do you have children?

23 PROSPECTIVE JUROR NO. 4: Yes, sir.

24 MR. EGLET: Okay. And what makes you a good parent?

25 PROSPECTIVE JUROR NO. 4: Ability to listen.

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1 Consistency.

2 MR. EGLET: Consistency. Very good. And what did you
3 want to be when you were in high school?

4 PROSPECTIVE JUROR NO. 4: Something in the theater.

5 MR. EGLET: Something in the theater.

6 PROSPECTIVE JUROR NO. 4: A legitimate theater as opposed
7 to movies or.

8 MR. EGLET: Okay. You mean Broadway or --

9 PROSPECTIVE JUROR NO. 4: Yeah, yeah.

10 MR. EGLET: Yeah?

11 PROSPECTIVE JUROR NO. 4: Uh-huh.

12 MR. EGLET: And did you pursue that at all?

13 PROSPECTIVE JUROR NO. 4: Oh yeah. Yeah. Up until 15
14 years ago, I one way or the other was connected with theater
15 and made at least a part-time living off of it.

16 MR. EGLET: Okay. So you --

17 PROSPECTIVE JUROR NO. 4: I got to do what wanted. Yeah.

18 MR. EGLET: You got to do what you wanted. All right.
19 Very good. All right. And what are your five year goals now?

20 PROSPECTIVE JUROR NO. 4: Enjoy my grandchildren and
21 develop oil painting skills.

22 MR. EGLET: Okay. You're learning to paint?

23 PROSPECTIVE JUROR NO. 4: Well, going back to it. I did
24 some minor.

25 MR. EGLET: Okay. Very good. Do you belong to any clubs

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1 or organizations?

2 PROSPECTIVE JUROR NO. 4: Not presently.

3 MR. EGLET: What clubs or organizations have you belonged
4 to in the past?

5 PROSPECTIVE JUROR NO. 4: Church choir, theater
6 organizations, a docent organization for a museum, a docent
7 organization for performing arts. They did backstage tours.
8 An organization that met to talk about how the arts could work
9 together in El Paso.

10 MR. EGLET: Okay. Very good. And what are the two most
11 important values that you hold other than honesty and whatever
12 faith you may practice?

13 PROSPECTIVE JUROR NO. 4: Charity in the old, medieval
14 since of the word.

15 MR. EGLET: Explain that please.

16 PROSPECTIVE JUROR NO. 4: The ability to look and love a
17 person without the other stuff getting in the way. It's not
18 giving awes. It's looking the other person eye to eye. It's
19 very, it's a different concept than normally used now. And
20 curiosity.

21 MR. EGLET: Curiosity. Okay. And can you tell us what
22 are the two most important values other than honesty and
23 whatever faith you may practice that you try to instill in
24 your children?

25 PROSPECTIVE JUROR NO. 4: Self-reliance.

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1 MR. EGLET: Self-reliance.

2 PROSPECTIVE JUROR NO. 4: Openness.

3 MR. EGLET: What do you mean by openness?

4 PROSPECTIVE JUROR NO. 4: Openness to new ideas. Like
5 curiosity.

6 MR. EGLET: Curiosity.

7 PROSPECTIVE JUROR NO. 4: Let's say curiosity again.

8 MR. EGLET: Okay. And in what situations do you think
9 you're regarded as a leader?

10 PROSPECTIVE JUROR NO. 4: Problem solving situations.
11 People have a tendency to come to me to solve problems.

12 MR. EGLET: You mean personal problems or work problems?

13 PROSPECTIVE JUROR NO. 4: Work problems. Almost
14 invariably I'd be the one they would come to.

15 MR. EGLET: Okay.

16 PROSPECTIVE JUROR NO. 4: I'm good at taking things apart
17 and putting them back together again. And of course, as a
18 parent and a mother. But in my organizations, I was
19 [indiscernible] and stuff.

20 MR. EGLET: And if someone were to offer to send money to
21 the charity of your choice, what charity would that be and
22 why?

23 PROSPECTIVE JUROR NO. 4: Probably a scholarship program
24 for nursing.

25 MR. EGLET: Why?

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1 PROSPECTIVE JUROR NO. 4: Because there is such a huge
2 need in the field of nursing. So many women that would be
3 good at nursing, or men that would be good at nursing can't
4 afford to get in there. I've seen a lot of first generation
5 people decide that's a good field to go into and it is, but
6 it's expensive.

7 MR. EGLET: Right. And what's the worse tragedy that
8 you've had to experience?

9 PROSPECTIVE JUROR NO. 4: My father died when I was 12.

10 MR. ROGERS: Excuse me, Your Honor. Can we approach?

11 THE COURT: Sure.

12 [Bench Conference Begins]

13 MR. ROGERS: We're back to where we --

14 THE COURT: Hold up please.

15 MR. ROGERS: Yeah. We're back to where we left off, and
16 it is the collective of these questions that causes concern.
17 And Mr. Eglet might say, well, point out each individual one,
18 but it's the collective ingratiating that causes me concern
19 now. Because what is going on is a sort of counseling or
20 counselor approach. They're discussing very personal things
21 with them. He's becoming sort of a teacher model now. That's
22 not what this is about. This is about finding out which
23 jurors will be impartial, and instead Mr. Eglet, and
24 effectively to his credit, is switching the purpose of voir
25 dire into a professorial and sort of counselor approach. This

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1 is not appropriate.

2 THE COURT: Uh-huh. It's an interesting take.

3 MR. EGLET: Well, it's personal. I'm not counseling
4 anybody. I'm not giving anybody any advice or saying, giving
5 empathy. Can I finish please?

6 MR. ROGERS: I'm not saying anything.

7 MR. EGLET: Well, you opened your mouth. I have eyes in
8 my ears so. I'm not -- I'm asking them a question and
9 listening to what the answer is. It's a perfectly, legitimate
10 question. It's the same objection that you just overruled --

11 THE COURT: It is.

12 MR. EGLET: -- five minutes ago.

13 THE COURT: It is sustained.

14 MR. ROGERS: Sustained?

15 THE COURT: I mean overruled.

16 MR. EGLET: Thank you.

17 MR. ROGERS: One moment then, Your Honor.

18 THE COURT: Uh-huh.

19 MR. ROGERS: If Mr. Eglet is going to go on this long
20 with each individual juror, then I'd request that the defense
21 be permitted to approach them when he's concluded. If he
22 intends, in other words, to spend two or three days with them
23 discussing this, the defense will be left at a great
24 disadvantage because the only speaker in the courtroom will be
25 the Plaintiff for that entire time.

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1 THE COURT: Well, you know, the Court's policy is to
2 allow Plaintiff to examine the panel once and fully one time
3 around the panel in order, and then the defense once around
4 the panel in order. So I'm not inclined to do a back and
5 forth.

6 MR. ROGERS: Thank you, Your Honor.

7 THE COURT: You'll have your opportunity to follow-up.

8 [Bench Conference Ends]

9 MR. EGLET: All right. Ms. Schmidt, the question I had
10 asked you was, and you said the worse tragedy you've ever
11 experienced was the death of your father when you were 12
12 years old --

13 PROSPECTIVE JUROR NO. 4: Yes, sir.

14 MR. EGLET: -- is that correct? Okay. Thank you. When
15 you hear that someone has been hurt or killed or becomes
16 seriously ill, how often do you think it might've happened
17 because of bad things the person may have done earlier in
18 their life, and I'm going to give you multiple choices: (a)
19 you never think that way; (b) once in awhile you think that
20 way; (c) often you think that way; or (d) always you think
21 that way?

22 PROSPECTIVE JUROR NO. 4: I'm not sure how you mean that
23 question. Do you mean are the ills self-inflicted by the
24 lifestyle, or do you mean divine intervention?

25 MR. EGLET: Well, it's not necessarily divine

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1 intervention. I guess it could be, but it's more that it's
2 based on, well, this person I guess got what they deserved
3 because they must've done something earlier in their life that
4 could cause this and they got what they deserve.

5 PROSPECTIVE JUROR NO. 4: Okay. You're not talking about
6 as a direct consequence of their actions?

7 MR. EGLET: Correct.

8 PROSPECTIVE JUROR NO. 4: All right. Seldom.

9 MR. EGLET: Seldom. Okay. Thank you. Some folks
10 believe that when someone is killed or hurt, it's usually due
11 to fate, destiny, God's will or just bad luck. So --

12 PROSPECTIVE JUROR NO. 4: Seldom.

13 MR. EGLET: I'm sorry?

14 PROSPECTIVE JUROR NO. 4: Seldom.

15 MR. EGLET: Seldom. Okay. The public figure you admire
16 most, living or dead, and why?

17 PROSPECTIVE JUROR NO. 4: Eleanor Roosevelt.

18 MR. EGLET: Okay. And tell us why Mrs. Roosevelt.

19 PROSPECTIVE JUROR NO. 4: She could have done nothing.
20 She did a lot. She came back from being upset, being crushed
21 by her husband's infidelities and instead made a life for
22 herself that benefited millions of people. And she was open-
23 minded. She was probably one of the most open-minded people
24 of her generation.

25 MR. EGLET: Particularly for that time period.

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1 PROSPECTIVE JUROR NO. 4: Yeah. Of her generation.

2 MR. EGLET: Okay. In your questionnaire, you told us
3 that your grandfather owned an insurance company, is that
4 correct?

5 PROSPECTIVE JUROR NO. 4: Yeah. An insurance agency.
6 Yeah.

7 MR. EGLET: An agency.

8 PROSPECTIVE JUROR NO. 4: Uh-huh.

9 MR. EGLET: So he was on the sales end of insurance?

10 PROSPECTIVE JUROR NO. 4: No, not really. He had people
11 under him that did it. No.

12 MR. EGLET: Okay. He owned the company but he, his
13 employees were on the sales end of it?

14 PROSPECTIVE JUROR NO. 4: And wrote the policies. Yeah.

15 MR. EGLET: And wrote the policies.

16 PROSPECTIVE JUROR NO. 4: Yeah.

17 MR. EGLET: Okay. Very good.

18 PROSPECTIVE JUROR NO. 4: His company -- I'm not sure I'm
19 making this clear. His company, the agency also were the
20 people who would be paying out. It wouldn't be like they
21 didn't have a -- they had one parent company that they sales
22 for, but they also did their own thing where they were --

23 MR. EGLET: Claims?

24 PROSPECTIVE JUROR NO. 4: -- directly responsible. Yes.

25 MR. EGLET: They handled claims?

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1 PROSPECTIVE JUROR NO. 4: They handled their own claims,
2 you know.

3 MR. EGLET: Okay.

4 PROSPECTIVE JUROR NO. 4: It was a small agency that did,
5 that insured businesses in Pantego, Texas.

6 MR. EGLET: Okay.

7 PROSPECTIVE JUROR NO. 4: But it wasn't, but there wasn't
8 a parent company when they started. They did their own
9 claims.

10 MR. EGLET: So he actually owned his own insurance
11 company.

12 PROSPECTIVE JUROR NO. 4: Yes.

13 MR. EGLET: It was a franchise of some other insurance
14 company.

15 PROSPECTIVE JUROR NO. 4: Yes. And then later it became
16 a franchise.

17 MR. EGLET: Okay. And who, what company was it
18 associated with when it became a franchise?

19 PROSPECTIVE JUROR NO. 4: I honestly cannot remember.

20 MR. EGLET: Okay.

21 PROSPECTIVE JUROR NO. 4: I honestly cannot remember.

22 MR. EGLET: Did you ever work in that company?

23 PROSPECTIVE JUROR NO. 4: No.

24 MR. EGLET: All right. Is your grandfather still alive?

25 PROSPECTIVE JUROR NO. 4: No.

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1 MR. EGLET: Okay. All right. You indicated on your jury
2 questionnaire under work information that you were in a nasty
3 car wreck --

4 PROSPECTIVE JUROR NO. 4: Yes.

5 MR. EGLET: -- in your youth, and you cheerfully - these
6 are your words - cheerfully --

7 PROSPECTIVE JUROR NO. 4: Yep.

8 MR. EGLET: -- settled for standing medical expenses --

9 PROSPECTIVE JUROR NO. 4: Uh-huh.

10 MR. EGLET: -- even though there was a good chance of
11 back problems.

12 PROSPECTIVE JUROR NO. 4: Yeah. And actually that's
13 happened twice.

14 MR. EGLET: I have those problems. I'm sorry?

15 PROSPECTIVE JUROR NO. 4: And actually that's happened
16 twice.

17 MR. EGLET: Okay. Can you tell us about those
18 situations?

19 PROSPECTIVE JUROR NO. 4: When I was 18, I was driving a
20 small foreign car and '57 Chevy hit my car. I was
21 hospitalized for a week. I was in physical therapy for eight
22 months. With as I said a good chance of continuing back
23 problems, which I do have, what we settled for was cost of the
24 hospital stay and the physical therapy that would be going on
25 the next year or so. And that's it.

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1 MR. EGLET: And how do you feel about that in hindsight
2 that you settled?

3 PROSPECTIVE JUROR NO. 4: I think it was the right thing
4 to do. Yeah, I hurt but, you know, you get hurt a lot. If it
5 wasn't that, it could've been anything else. I felt like
6 they, because it was obviously his fault, that he was
7 responsible for paying my medical costs, but I don't feel like
8 he owed me anymore than that?

9 MR. EGLET: And why not?

10 PROSPECTIVE JUROR NO. 4: It was malicious or
11 intentional. I think I might have felt differently if he had
12 been drinking heavily or on drugs, or he had done something
13 intentionally to cause the accident.

14 MR. EGLET: Uh-huh.

15 PROSPECTIVE JUROR NO. 4: But he just didn't see my car.
16 It was maybe -- I wouldn't even say negligence either. It was
17 just misjudgment so there was no malice involved. So I didn't
18 feel like he should be or there should be punishment for it.

19 MR. EGLET: What do you mean by malice?

20 PROSPECTIVE JUROR NO. 4: Doing things that you know
21 could or would hurt somebody else.

22 MR. EGLET: Okay.

23 PROSPECTIVE JUROR NO. 4: And like I said, I think that a
24 drunk driver possibly might have some punishment coming. But
25 someone that just made a misjudgment I don't think should be

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1 punished.

2 MR. EGLET: And is that what you view it as is being
3 punished as opposed to --

4 PROSPECTIVE JUROR NO. 4: Yeah. Not always, but a lot of
5 times, yeah. I think somebody's out to get even. I think
6 there's a big revenge factor that takes place in a lot of
7 lawsuits.

8 MR. EGLET: Okay. Do your views on what happened to you
9 extend to other people? Do you think other people should be
10 the same or think the same way you do about that?

11 PROSPECTIVE JUROR NO. 4: No. I think it would depend on
12 the case. I really do. I cannot say how my -- that's one of
13 those things where I was saying I was open-minded. I think it
14 depends on a case-by-case [indiscernible], but I do strongly
15 believe that [indiscernible] --

16 THE COURT: I believe somebody has a cell phone.

17 MR. EGLET: [Indiscernible] have a cell phone on?

18 THE COURT: Excuse me. Excuse me for a moment.
19 Somebody's got a cell phone that's disrupting [indiscernible]
20 close to the microphone. [Indiscernible]. No?

21 THE MARSHAL: [Indiscernible].

22 THE COURT: Maybe not. Please proceed.

23 PROSPECTIVE JUROR NO. 4: I think going back going after
24 somebody for enormous damages just to get even with a revenge
25 is wrong. It's totally wrong.

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1 MR. EGLET: And what do you mean by getting revenge?

2 What, I mean, I guess I'm trying to --

3 PROSPECTIVE JUROR NO. 4: They want the other person to
4 suffer --

5 MR. EGLET: Okay.

6 PROSPECTIVE JUROR NO. 4: -- because you made them
7 suffer.

8 MR. EGLET: Okay. All right. And how do you feel about
9 people being compensated for, you know, their injuries beyond
10 just medical expenses?

11 PROSPECTIVE JUROR NO. 4: If it's going to effect their
12 livelihood and they've, you know, you know, if the injuries
13 are such that it's going to change the way they make their
14 livelihood or [indiscernible], they have something else
15 coming. Pain and suffering I think is highly overrated a lot.

16 MR. EGLET: Uh-huh.

17 PROSPECTIVE JUROR NO. 4: And having been through pain
18 and suffering, you know, good heavens, every mother could
19 possibly be sued for pain and suffering. But I think that
20 that's overdone, greatly overdone, pain and suffering damages.

21 MR. EGLET: Okay. We see your honesty. You said that
22 there was two situations?

23 PROSPECTIVE JUROR NO. 4: Yes. I've been hit --

24 MR. EGLET: And what's the other situation?

25 PROSPECTIVE JUROR NO. 4: I was rear-ended in a car wreck

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1 where the person that rear-ended a car four cars behind mine.
2 Yeah. It was a domino effect and hit with enough force that
3 it hit the person two cars in front of me. I sustained some
4 injuries from that as well as developing post traumatic stress
5 syndrome from my previous car wreck. And once again, all we
6 asked for was repairs to the car, medical, and that's all and
7 we got it. We didn't even go to court.

8 MR. EGLET: Okay. And so I take it that, generally, your
9 point of view is - you correct me if I'm wrong - but I'm
10 getting from you that your point of view is that, well, people
11 shouldn't bring lawsuits for anything other than, in injury
12 cases, for anything other than their medical expenses.

13 PROSPECTIVE JUROR NO. 4: I wouldn't.

14 MR. EGLET: You wouldn't.

15 PROSPECTIVE JUROR NO. 4: Yeah. I don't --

16 MR. EGLET: I understand that, but how do you feel about
17 other people doing it?

18 PROSPECTIVE JUROR NO. 4: Like I said, I think pain and
19 suffering damages are so highly overdone nowadays that it's
20 ridiculous. I really do.

21 MR. EGLET: Fair enough. You also said earlier, you
22 mentioned the subject about malice versus negligence or
23 intentionally doing it --

24 PROSPECTIVE JUROR NO. 4: Yeah.

25 MR. EGLET: -- versus negligence, and you think that that

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1 makes a difference?

2 PROSPECTIVE JUROR NO. 4: Yes. Oh yeah.

3 MR. EGLET: How do you think that makes a difference?

4 PROSPECTIVE JUROR NO. 4: Somebody that has deliberately
5 done something that they know is wrong should be punished.
6 Whether that's doing drugs before you get in a car, drinking
7 before you get in a car. That's wrong and you have done
8 something wrong and then you should be punished. Somebody
9 that's just made a misjudgment I don't think should be
10 punished.

11 MR. EGLET: And when you say punished, because punishment
12 means different things to different people. Are you talking
13 about they shouldn't have to compensate the person for their
14 injuries?

15 PROSPECTIVE JUROR NO. 4: Not to a ridiculous extent, no.
16 Sometimes --

17 MR. EGLET: And when you say not to a ridiculous extent,
18 are you saying --

19 PROSPECTIVE JUROR NO. 4: Anything --

20 MR. EGLET: -- just the medical expenses?

21 PROSPECTIVE JUROR NO. 4: Yeah. I think medical
22 expenses, possibly expenses to cover work missed or possibly
23 your ability to work in the future might be covered?

24 MR. EGLET: But nothing else?

25 PROSPECTIVE JUROR NO. 4: No. I don't think anything,

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1 generally - I won't say always - but generally, yeah. I don't
2 think that that's necessary.

3 MR. EGLET: I appreciate you being honest with us.
4 That's what we need to hear. We need everybody to tell us
5 this stuff, how they think, how they feel because it helps us.
6 Okay. Ms. Kistler.

7 PROSPECTIVE JUROR NO. 5: Hi.

8 MR. EGLET: How are you?

9 PROSPECTIVE JUROR NO. 5: I'm fine.

10 MR. EGLET: [Indiscernible]. I may come back to Ms.
11 Schmidt. I missed one question. Did you say in your
12 questionnaire that you know Dr. [indiscernible]?

13 PROSPECTIVE JUROR: [Indiscernible].

14 MR. EGLET: Not the way we do [indiscernible].

15 PROSPECTIVE JUROR: [Indiscernible].

16 MR. EGLET: I'm going to check my cell phone, Your Honor,
17 to see if it's still on. I keep it [Indiscernible]. You know
18 what? Let's take a five minute break to see if we can't
19 search this problem out. Ladies and gentlemen, let me remind
20 you of your obligation not to discuss this case with anyone.

21 THE MARSHAL: All right. Five minute break. Let's go.

22 [Recess]

23 THE MARSHAL: Please remain in order. You may be seated.

24 THE COURT: Okay. We've got a couple of replacements we
25 need to make, Mr. Clerk. I'm not sure which was first.

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1 THE CLERK: I believe Miss Ponfret, I guess, number 5.
2 THE COURT: New replacement for seat number 5?
3 THE CLERK: Jose Villafane Rivera, badge number 1005.
4 MR. EGLET: Seat number 5.
5 THE COURT: Good afternoon, sir. Could you please state
6 your name and spell your last name for the record?
7 PROSPECTIVE JUROR NO. 005: My first name is Jose. My
8 middle name is Roberto. And my last name is
9 V-I-L-L-A-F-A-N-E.
10 THE COURT: And how do you pronounce that?
11 PROSPECTIVE JUROR NO. 005: Villafane.
12 THE COURT: Villafane. Thank you, sir. And we need a
13 replacement for seat number 23?
14 THE MARSHAL: Yes, ma'am.
15 THE CLERK: Angela Ellis, badge number 1017.
16 THE MARSHAL: This way, please. Right next to
17 Mr. Bombino there.
18 THE COURT: Good afternoon. How do you spell Ellis,
19 ma'am?
20 PROSPECTIVE JUROR NO. 017: E-L-L-I-S.
21 THE COURT: Thank you. All right. Are we ready to
22 resume?
23 MR. EGLET: I am, Your Honor. Thank you. Good
24 afternoon, Mr. Villafane.
25 PROSPECTIVE JUROR NO. 005: Good afternoon.

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1 THE COURT: Can you tell us your date of birth, sir?

2 PROSPECTIVE JUROR NO. 005: It's January 7, 1989.

3 MR. EGLET: Okay. Have you been known by any other
4 names?

5 PROSPECTIVE JUROR NO. 005: No.

6 MR. EGLET: All right. How often do you wash your truck?

7 PROSPECTIVE JUROR NO. 005: Once a week.

8 MR. EGLET: Once a week. Okay. And Ms. Ellis, tell us
9 what's your date of birth.

10 PROSPECTIVE JUROR NO. 017: 10/2 of '68.

11 MR. EGLET: Okay. And have you been known by any other
12 names?

13 PROSPECTIVE JUROR NO. 017: No.

14 MR. EGLET: All right. And how often do you wash your
15 car?

16 PROSPECTIVE JUROR NO. 017: Probably once every two or
17 three months.

18 MR. EGLET: Two or three months?

19 PROSPECTIVE JUROR NO. 017: Mm-hmm.

20 MR. EGLET: Okay. All right. Thank you. Okay. Ms.
21 Kistler, how are you?

22 PROSPECTIVE JUROR NO. 864: Fine.

23 MR. EGLET: I know you're a cage cashier at the
24 Bellagio, correct?

25 PROSPECTIVE JUROR NO. 864: That's correct.

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1 MR. EGLET: Can you tell us what makes you good at your
2 job?

3 PROSPECTIVE JUROR NO. 864: I'm detail-orientated.
4 That's what makes me the --

5 MR. EGLET: Okay. And you should have to be that way
6 with money, right?

7 PROSPECTIVE JUROR NO. 864: And we deal with money. Yep.

8 MR. EGLET: All right. And you have kids?

9 PROSPECTIVE JUROR NO. 864: I have a stepson who's in the
10 United States Air Force.

11 MR. EGLET: Okay. And were you involved in raising your
12 stepson?

13 PROSPECTIVE JUROR NO. 864: Yes, I was.

14 MR. EGLET: Okay. And what made you a good parent?

15 PROSPECTIVE JUROR NO. 864: Consistency, love.

16 MR. EGLET: All right. Very good.

17 PROSPECTIVE JUROR NO. 864: And -- yeah, that's about it.

18 MR. EGLET: And what did you want to be when you were in
19 high school?

20 PROSPECTIVE JUROR NO. 864: I really had no idea.

21 MR. EGLET: Me neither.

22 PROSPECTIVE JUROR NO. 864: I had no aspirations. I --
23 when I was younger, it changed by the week depending on
24 whatever the word was. But I wanted to always be a singer,
25 but when I lost my voice box for a while, that went out the

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1 window.

2 MR. EGLET: Sure. Okay. What are your five year goals
3 right now?

4 PROSPECTIVE JUROR NO. 864: To be here.

5 MR. EGLET: To be here. Okay.

6 PROSPECTIVE JUROR NO. 864: To be healthy, wealthy and
7 wise.

8 MR. EGLET: Okay. Very good. And can you tell us any
9 clubs or organizations that you belong to?

10 PROSPECTIVE JUROR NO. 864: I don't belong to any at this
11 time. When I was younger, it was the Girl Scouts. And in my
12 early 20s, I was a Boy Scout volunteer. And that's about it.

13 MR. EGLET: And what are the two most important values
14 that you hold other than honesty? And what are --

15 PROSPECTIVE JUROR NO. 864: Self-reliance.

16 MR. EGLET: Self-reliance. Okay.

17 PROSPECTIVE JUROR NO. 864: And accountability, self-
18 accountability.

19 MR. EGLET: Self-accountability.

20 PROSPECTIVE JUROR NO. 864: Yes.

21 MR. EGLET: What is -- what do you mean by self-
22 accountability?

23 PROSPECTIVE JUROR NO. 864: If you break a window, you
24 say I broke the window. You don't go, well I think this --
25 no. I broke the window. How did you break the window? Now

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1 you have an explanation. But I don't want to hear 20 million
2 years of why it wasn't your fault and how it might have gotten
3 broken, but you -- you did it, you did it. You know?

4 MR. EGLET: All right.

5 PROSPECTIVE JUROR NO. 864: Yeah.

6 MR. EGLET: All right. So you -- it sounds like personal
7 responsibility would be another good term for that.

8 PROSPECTIVE JUROR NO. 864: Mm-hmm.

9 MR. EGLET: All right. Very good. Can you tell us the
10 two most important values --

11 PROSPECTIVE JUROR NO. 864: Same ones.

12 MR. EGLET: -- that you taught your children?

13 PROSPECTIVE JUROR NO. 864: Same ones. Along with
14 keeping -- get your -- keeping yourself self-educated.

15 MR. EGLET: Self-educated.

16 PROSPECTIVE JUROR NO. 864: Mm-hmm.

17 MR. EGLET: Okay. And what do you mean by self-educated?

18 PROSPECTIVE JUROR NO. 864: Read everything. Question
19 everything. Don't just go with the flow.

20 MR. EGLET: Okay. Very good. Can you tell us what
21 situations you're regarded as a leader?

22 PROSPECTIVE JUROR NO. 864: I've always stepped to my own
23 drummer, so they -- no one's ever really considered me a
24 leader. I'm more of a rebel.

25 MR. EGLET: Okay. If someone were to offer to send money

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1 to the charity of your choice, what charity would that be?

2 PROSPECTIVE JUROR NO. 864: I think it would be the Red
3 Cross because it helps the most people in the most dire
4 straits.

5 MR. EGLET: Okay. And what's the worst tragedy that
6 you've ever experienced?

7 PROSPECTIVE JUROR NO. 864: I won't discuss that. But
8 the second was my mother passing.

9 MR. EGLET: Your mother passing. And how old were you?

10 PROSPECTIVE JUROR NO. 864: I was up there. I was in my
11 30s.

12 MR. EGLET: Okay.

13 PROSPECTIVE JUROR NO. 864: But my mom and I had become
14 very close.

15 MR. EGLET: All right. When you hear that someone has
16 been killed or hurt or becomes seriously ill, how often do you
17 think it might have happened because of bad things that person
18 may have done --

19 PROSPECTIVE JUROR NO. 864: Never.

20 MR. EGLET: -- earlier in their life?

21 PROSPECTIVE JUROR NO. 864: Never.

22 MR. EGLET: Okay. Very good. Some folks believe that
23 when someone is killed or hurt, it's usually due to fate,
24 destiny, God's will or just bad luck so it's wrong to sue
25 anyone because what happened was bound to happen. Do you

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1 agree with that?

2 PROSPECTIVE JUROR NO. 864: That's why we have the word,
3 accidents. And no, I don't agree.

4 MR. EGLET: Who's the public figure, living or dead, you
5 admire most and why?

6 PROSPECTIVE JUROR NO. 864: Actually, it's a group. And
7 that would be the founding fathers. For 27 men to sit in a
8 room and come up with our constitution when the first time
9 didn't work, and come up with a republic, I have to admire
10 them, their tenacity to put a republic up when most republics
11 never worked. And I think we've done a great job with it.

12 MR. EGLET: All right. Thank you very much. Mr. -- I
13 know you told me something was silent. Buetins [phonetic]?

14 PROSPECTIVE JUROR NO. 880: The "E" is silent. Buenting.

15 MR. EGLET: Buntins (sic). I'm sorry, sir.

16 PROSPECTIVE JUROR NO. 880: Buenting.

17 MR. EGLET: Buenting.

18 PROSPECTIVE JUROR NO. 880: I-N-G. Yeah. There is no
19 "S."

20 MR. EGLET: Okay. No "S," Brendan. Buenting. Okay.
21 All right. Mr. Buenting, I know that you are -- and I'm not
22 sure what this is, but you're a buyer, a planner at Konami
23 Gaming. Can you tell us what you do? What does that mean?

24 PROSPECTIVE JUROR NO. 880: I negotiate contracts and I
25 am in the procurement department which basically buys the

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1 materials to put the [indiscernible] and cheese together.

2 MR. EGLET: Okay. And can you tell us what makes you
3 good at your job?

4 PROSPECTIVE JUROR NO. 880: I've been a buyer/planner for
5 23 years, so my experience makes me good. Being able to
6 analyze, being able to make decisions. And most of the time,
7 decisions are [indiscernible].

8 MR. EGLET: Okay. Do you have children?

9 PROSPECTIVE JUROR NO. 880: I have one.

10 MR. EGLET: What makes you a good parent?

11 PROSPECTIVE JUROR NO. 880: Some people say I wasn't a
12 good parent. I say well, they're too much. But the lack of
13 tough love. Other than that, she's turning out pretty good
14 now. She's got two kids of her own. She worked her way
15 through it. I was able to help.

16 MR. EGLET: Okay. And what did you want to be when you
17 were in high school?

18 PROSPECTIVE JUROR NO. 880: I played sports all the way
19 through college, so I -- that was the dream I had.

20 MR. EGLET: What sport did you play?

21 PROSPECTIVE JUROR NO. 880: Baseball [indiscernible].

22 MR. EGLET: Baseball.

23 PROSPECTIVE JUROR NO. 880: Mm-hmm.

24 MR. EGLET: All right. Very good. And what are your
25 five year goals?

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1 PROSPECTIVE JUROR NO. 880: Try and get my retirement
2 back [indiscernible].

3 MR. EGLET: And what happened with your retirement?

4 PROSPECTIVE JUROR NO. 880: Well, in the last few years
5 I've lost it, some choices I made, I lost it all.

6 MR. EGLET: Okay. Have you -- do you belong to any clubs
7 or organizations?

8 PROSPECTIVE JUROR NO. 880: I did belong to Natural
9 Disaster Relief Fund, going out and serving them a soup
10 kitchen. I also was a member of the Baptist Men's
11 Organization. Those are pretty much the two organizations.

12 MR. EGLET: Okay. And what are the two most important
13 values that you believe in other than honesty and whatever
14 faith you practice?

15 PROSPECTIVE JUROR NO. 880: Integrity, doing the right
16 thing even when nobody's watching, and passion.

17 MR. EGLET: Passion.

18 PROSPECTIVE JUROR NO. 880: If you're going to make a
19 decision to do something, have a passion about it.

20 MR. EGLET: Okay. And what are you -- what is the two
21 most important values you try to instill in your daughter?

22 PROSPECTIVE JUROR NO. 880: Do the right thing and
23 integrity, same thing.

24 MR. EGLET: Okay. In what situations do you think you're
25 regarded as a leader?

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1 PROSPECTIVE JUROR NO. 880: Over the years, it's been
2 being able to communicate, to understand what the goals are
3 and to communicate those goals, to make a decision and stand
4 by it and sometimes to admit that I'm wrong.

5 MR. EGLET: If someone offers to send money to the
6 charity of your choice, what charity would that be?

7 PROSPECTIVE JUROR NO. 880: I don't have a charity of my
8 choice. If somebody wants to be generous, I would just
9 encourage them to give generously.

10 MR. EGLET: What's the worst tragedy you've ever had to
11 experience?

12 PROSPECTIVE JUROR NO. 880: You know, I've been thinking
13 about that. And after watching TV the past few weeks, I
14 haven't had a tragedy, considering all the things that's going
15 on around the world.

16 MR. EGLET: No, and I understand that. I appreciate
17 that. And I think that when things like that happen, it kind
18 of brings us all down to reality. But let's just assume prior
19 to that, what would you think the worst thing that's ever
20 happened to you is?

21 PROSPECTIVE JUROR NO. 880: I've had a good life. I have
22 no complaints.

23 MR. EGLET: When you hear someone's been hurt or killed
24 or becomes seriously ill, how often do you think it might have
25 happened because of bad things that person may have done

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1 earlier in their life?

2 PROSPECTIVE JUROR NO. 880: I think there are --

3 MR. EGLET: Do you ever feel that way?

4 PROSPECTIVE JUROR NO. 880: I think there are times that
5 a person's choices do end up with the results. I have high
6 blood pressure because I quit exercising and because I ate a
7 lot. So I made those choices. That's why I have high blood
8 pressure.

9 MR. EGLET: Some folks believe that when someone is
10 killed or hurt, it's usually due to fate, destiny, God's will,
11 bad luck, so it's wrong for them to bring a lawsuit. How do
12 you feel about that?

13 PROSPECTIVE JUROR NO. 880: I don't -- I gotta know the
14 situation. I think there are times when lawsuits are right.

15 MR. EGLET: Okay. Who's the public figure you admire
16 most and -- living or dead and why?

17 PROSPECTIVE JUROR NO. 880: My number one public figure
18 is Jesus Christ.

19 MR. EGLET: Okay.

20 PROSPECTIVE JUROR NO. 880: He led a radical life, but he
21 gave a lot of instruction. And everything that I can find in
22 the Bible helps me to live my life. It's a high bar to reach,
23 but that's a good goal, I think, to go after.

24 MR. EGLET: All right.. Thank you very much. I have to
25 find you, Mr. Villafane. You're [indiscernible]. Can you

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1 tell us -- I know you're a ground package handler for FedEx,
2 is that correct?

3 PROSPECTIVE JUROR NO. 005: Yeah.

4 MR. EGLET: And how long have you been doing that?

5 PROSPECTIVE JUROR NO. 005: For about a year.

6 MR. EGLET: Okay. Okay. And what makes you good at your
7 job?

8 PROSPECTIVE JUROR NO. 005: Cause I'm very persistent and
9 [indiscernible]. And I try do it as quick as possible.

10 MR. EGLET: Okay.

11 PROSPECTIVE JUROR NO. 005: And you are two young to be a
12 parent, I would presume. You don't have children, do you?

13 PROSPECTIVE JUROR NO. 005: I don't.

14 MR. EGLET: Okay. And can you tell us what you -- and I
15 realize it's only a few years ago, but can you tell us what
16 you wanted to do when you were in high school?

17 PROSPECTIVE JUROR NO. 005: I wanted to be a welder for a
18 bike company. And as a welder I would weld BMX mainly.

19 MR. EGLET: Uh-huh.

20 PROSPECTIVE JUROR NO. 005: [Indiscernible].

21 MR. EGLET: And why didn't you pursue that line?

22 PROSPECTIVE JUROR NO. 005: Well, I got into some trouble
23 after high school. And I just kept doing the job that I'm
24 doing now.

25 MR. EGLET: Okay. And what are your five year goals?

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1 PROSPECTIVE JUROR NO. 005: To be living on my own.

2 MR. EGLET: Okay. Do you -- are you living on your own
3 now?

4 PROSPECTIVE JUROR NO. 005: No, I'm not.

5 MR. EGLET: Okay. Are you living with your parents?

6 PROSPECTIVE JUROR NO. 005: I live with my grandparents.

7 MR. EGLET: Okay. Your grandparents. Cause you -- I
8 thought it indicated in here in your questionnaire that you
9 owned your own home, which surprised me as young as you are.
10 So you live in your grandparents home?

11 PROSPECTIVE JUROR NO. 005: Yeah.

12 MR. EGLET: Okay. All right. And can you tell us what
13 clubs or organizations you belong to?

14 PROSPECTIVE JUROR NO. 005: I don't belong to any clubs.

15 MR. EGLET: Okay. Any organizations?

16 PROSPECTIVE JUROR NO. 005: No.

17 MR. EGLET: Have you ever belonged to any clubs or
18 organizations?

19 PROSPECTIVE JUROR NO. 005: No.

20 MR. EGLET: And what are the two most important values
21 that you hold other than honesty or whatever faith you may
22 practice?

23 PROSPECTIVE JUROR NO. 005: Trust and -- well, that's all
24 I can think of.

25 MR. EGLET: Okay. What situations, if any, are you

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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.

Electronically Filed
Aug 14 2012 04:06 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPEAL

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

**APPELLANT'S APPENDIX
VOLUME 3
PAGES 455-705**

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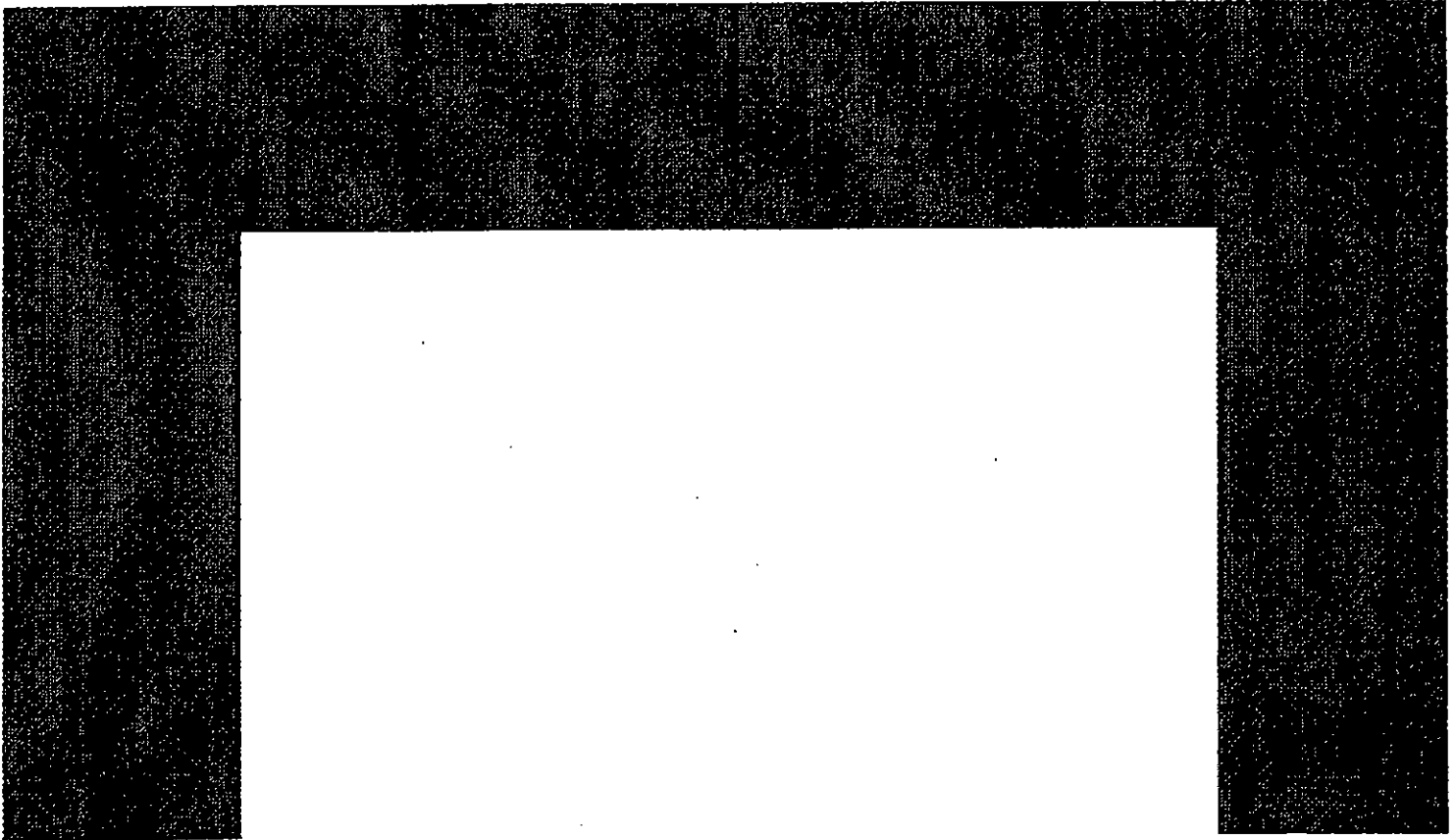
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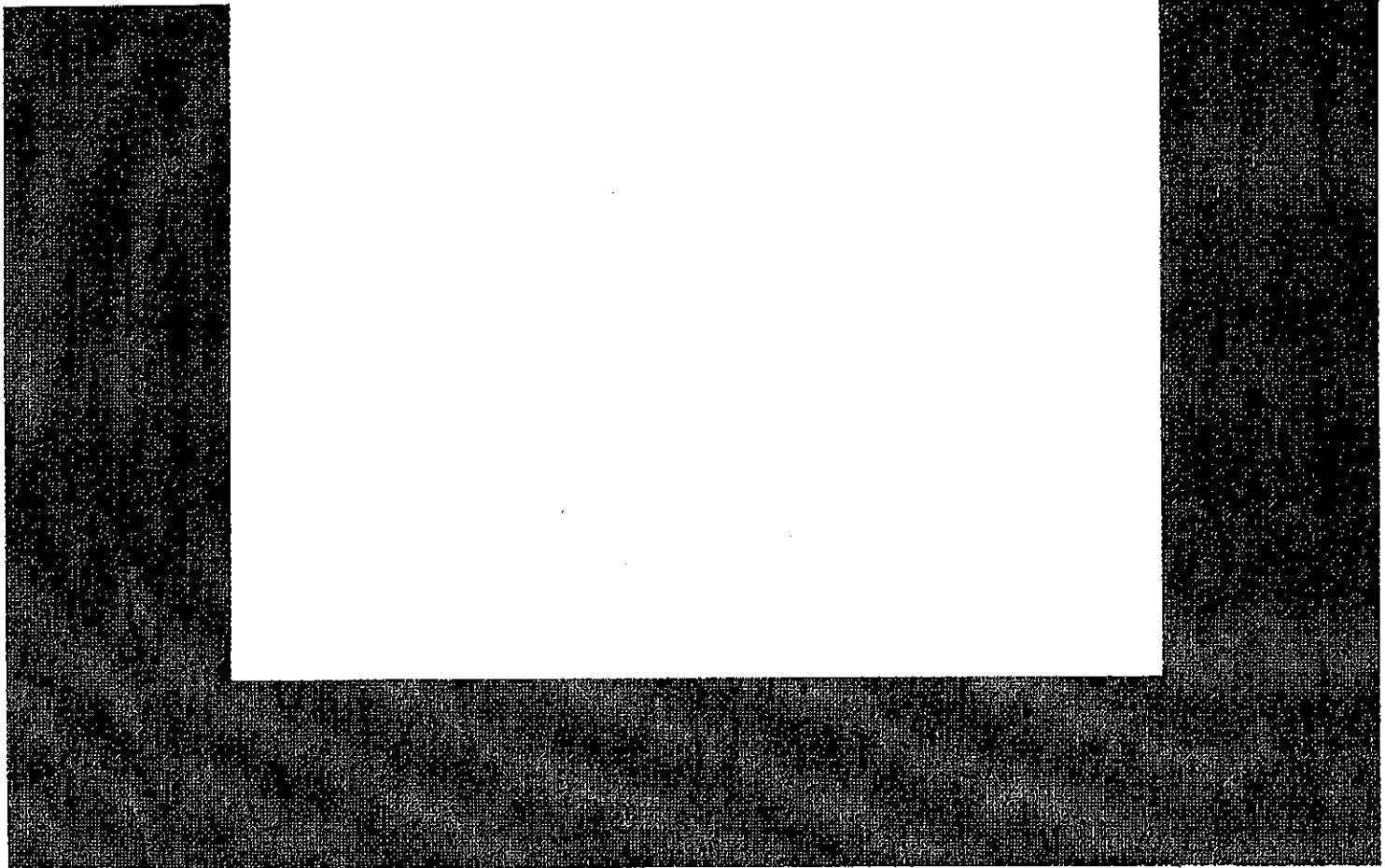
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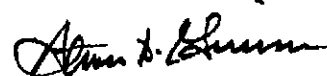
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03/24/2011 02:14:52 PMDISTRICT COURT
CLARK COUNTY, NEVADA

CLERK OF THE COURT

CHERYL SIMAO,
WILLIAM SIMAO,

Plaintiffs,

v.

CASE NO. A-539455

DEPT. X

LINDA RISH,
JAMES RISH,
JENNY RISH,

Defendants.

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 22, 2011

REPORTER'S TRANSCRIPT
MOTIONS IN LIMINE HEARING

APPEARANCES:

For the Plaintiffs: DAVID T. WALL, ESQ.
ROBERT T. EGLET, ESQ.
Mainor Eglet, LLPFor the Defendants: STEVEN M. ROGERS, ESQ.
Hutchison & Steffen, LLC

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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1 TUESDAY, FEBRUARY 22, 2011 AT 9:25 A.M.

2 THE COURT: These are some motions in limine for an
3 upcoming trial. We weren't able to get through all of them,
4 so we continued them until today. And I think we left off
5 with Defendant's motion in limine number seven regarding
6 Kathleen Hartman (phonetic). Did we conclude that one?

7 MR. WALL: We did not, Judge.

8 THE COURT: So that was the next in line, I believe, Mr.
9 Rogers.

10 MR. ROGERS: Okay. Grab my pen. Okay. Ms. Hartman is a
11 nurse and she is a derivative expert. She is not qualified to
12 offer expert medical opinion on the need for future medical
13 care. However, she -- pardon me. I ran up here.

14 THE COURT: Quite all right.

15 MR. ROGERS: However, she prepared a report in which she
16 projects the need for future treatment that is unsupported by
17 any medical doctors. She offers an opinion on the cost of a
18 neck surgery. No doctor supports this opinion. She, in fact,
19 disagrees with Dr. Seibel, one of the treating medical
20 providers, a pain management physician who did some
21 injections.

22 She says that the Plaintiff requires future
23 epidurals. Dr. Seibel, when we last deposed him said, I'm not
24 sure what's in his future. She then opines that the Plaintiff
25 needs future facet injections and a discogram -- again, not

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1 supported. Because she lacks these qualifications and because
2 there is no medical opinion to support the need for such
3 treatment, her report and her testimony should be excluded.

4 THE COURT: Mr. Wall?

5 MR. WALL: Thank you, Your Honor. It -- the -- there may
6 be some disagreement, as Mr. Rogers points out, with some of
7 her opinions on future treatment. That's all the subject of
8 cross-examination. This isn't a Hallmark issue on her
9 qualifications. She's not directing future treatment.

10 She receives the records, as we receive the records,
11 as Mr. Rogers receives the records, compiles the possible
12 future treatment from Plaintiff's doctors into a life care
13 plan. She's certainly qualified to do that. And she tells us
14 how much it's going to cost for that future treatment.

15 If they think any part of her plan isn't supported
16 by the evidence, cross-examine her on that and say look, where
17 did you come up with this number? Where did you come up with
18 this possible procedure? Well, I got it from here. They can
19 cross-examine her on it. He's still treating, obviously, so
20 she provides updates as the rule requires.

21 I'm not sure if they're trying to morph this into
22 some motion for partial summary judgment on future medical
23 treatments. The medical providers give the jury the
24 information on what Mr. Simao needs. That's the same
25 information that Ms. Hartman has. The jury, then, makes a

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1 determination on -- under instructions from the Court on what
2 future treatment we've proven up, as to whether we've carried
3 the burden to prove, and that it's -- that it's going to be
4 medically necessary, that there's a reasonable probability of
5 it under the instructions from the Court.

6 And if so, then the life care plan establishes how
7 much that future treatment will cost. If Mr. Rogers thinks
8 that her taking a note from the medical records about future
9 surgery doesn't equal proof of the surgery, well, fine.
10 Attack the proof. Attack the plan in cross-examination, but
11 it doesn't mean that the life care plan witness is excluded
12 under Hallmark, under any of the prongs of Hallmark, whether
13 it's qualifications, assisting the Trier of fact or limited to
14 her area of expertise.

15 As I said, he's still treating. Whatever's
16 established from the medical providers about the medical
17 treatment in the future -- she just correlates that to a cost.
18 If we don't meet our burden of proof on any element of that,
19 then you can excise that from the life care plan and that'll
20 happen with Ms. Hartman on the stand. But asking the Court to
21 prevent her from testifying based on some discrepancy between
22 what she put in her report and what's in the medical records
23 is inappropriate.

24 I'd ask the Court to deny this motion without
25 prejudice, at least until the time that she testifies or the

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1 medical providers' testimony about -- or testify about what
2 treatment will be necessary in the future.

3 THE COURT: Mr. Rogers?

4 MR. ROGERS: First, foundation is never a question of
5 fact. Hallmark, as Plaintiff cites, establishes that and so,
6 too, does the unpublished decision that the Plaintiff cited in
7 their opposition, Mattlock v. Greyhound (phonetic), where the
8 Court found that the life care planner, again a nurse, could
9 testify about future costs, but only because a pain management
10 physician, Dr. McKenna (phonetic), took the stand and
11 testified that the Plaintiff needed it.

12 And Dr. McKenna also supplied the cost. So this
13 doesn't go to the jury and right now, it seems that this
14 motion is sort of dovetailing into one of the other motions in
15 limine, which is to exclude any opinions that have not yet
16 been disclosed. There's been no opinion that the Plaintiff
17 requires future surgery.

18 On that basis alone, Ms. Hartman cannot testify
19 about the cost of future surgery. There's been no testimony
20 about a future treatment plan for injection therapy.
21 Accordingly, Ms. Hartman can't get on the stand and testify
22 about the cost of something that the Plaintiff can't establish
23 he needs. I don't know if you want to cross into that second
24 motion, but that seems to be where the Plaintiff is steering
25 right now.

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1 If the evidence is as it stands today, the point is
2 there is no future surgery recommendation. There is no future
3 injection therapy recommendation. There is no medical
4 evidence to support any of the future costs that Ms. Hartman
5 intends to testify about.

6 THE COURT: Well, I don't know what testimony the medical
7 providers are going to give, but assuming that a proper
8 foundation is laid with respect to that testimony, then the
9 nurse can testify within her scope and expertise. That's the
10 order, so the ruling is that the motion is denied without
11 prejudice. If you feel that you need to renew your motion
12 during trial, you certainly have the right to do so.

13 MR. ROGERS: Okay.

14 MR. WALL: Thank you, Your Honor.

15 THE COURT: Next motion that I had in order, Mr. Rogers,
16 was that regarding David Ingebretson (phonetic), the accident
17 reconstructionist.

18 MR. ROGERS: Okay. All right. Mr. Ingebretson offers
19 the following opinions -- number one, that the impact speed
20 was 20 miles per hour, number two, that there was a change in
21 velocity of 12 miles per hour in his van and three, that it is
22 likely that cervical injury was caused. Those three opinions
23 establish that Mr. Ingebretson offers himself up as an
24 accident reconstructionist, a biomechanical engineer and
25 someone qualified to offer medical opinion testimony.

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1 He lacks foundation to do any of the three. As you
2 see from his report, he's outlined what he reviewed, traffic
3 accident report, the complaint, vehicle photographs, quote,
4 unquote, some written discovery, a repair invoice for the
5 Plaintiff's vehicle and the Plaintiff's depositions. He did
6 not inspect the vehicles.

7 He did not see the Plaintiff's vehicle until after
8 it was repaired. He never saw the Defendant's vehicle. He
9 didn't do a scene inspection. He didn't measure co-efficient
10 of friction, without which Levine (phonetic) holds he can't
11 provide a credible estimate of speed. He did not attempt to
12 recreate the accident, without which Hallmark holds he can't
13 provide expert testimony.

14 And remember that in Hallmark, the proposed expert
15 was an engineer and a medical doctor. And even he wasn't
16 allowed to take the stand and offer medical opinion because,
17 like Mr. Ingebretson, he didn't have the foundation to offer
18 opinion on any of these areas -- accident recon, biomechanics
19 or medicine.

20 THE COURT: Mr. Wall?

21 MR. WALL: Judge, it -- saying it doesn't comply with
22 Hallmark at this point -- it absolutely does and it's exactly
23 the type of evidence and testimony that Hallmark requires.
24 Look, under Hallmark, and especially under Higgs, which went
25 back a little bit and explained Hallmark, there's three basic

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1 prerequisites, as I'm sure the Court knows, for the expert
2 witness testimony under 52.75. One, is the expert qualified?

3 I don't think, from the motion I saw, that they're
4 saying that he's not qualified. It's significant because in
5 Hallmark, actually, it was a doctor trying to testify to
6 biomechanics, so qualification was an issue. I'll skip to
7 number three, which is, is he limiting his testimony to the
8 scope of his expertise?

9 That doesn't seem to be the issue here. So the
10 issue here is the second prong, which is the assistance prong.
11 Will it assist the Trier of fact? Under Higgs, the question
12 is whether it's relevant -- they're not saying it's not
13 relevant -- whether it's a product of reliable methodology.
14 And that's where we get into this whole Hallmark analysis.
15 And that, as I understand it, is the crux of their motion. Is
16 it within a recognized field of expertise?

17 I don't know that they're taking an issue with that
18 particularly. Is it testable? Is it subject to peer review?
19 Is it generally accepted in the scientific community? And is
20 it based on particularized facts? That last one appears to be
21 where the motion is set out. Now, none of those factors, of
22 course, are dispositive. None of them actually absolutely
23 have to be present.

24 In fact, in Higgs, a number of those were missing,
25 yet the doctor's testimony in Higgs on the poison used was

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1 admitted. It's a matter of the considerations, the factors
2 that you would have to determine the reliability of the
3 opinion as to whether or not it would assist the Trier of fact
4 as the gatekeeper of that type of evidence. And there's
5 significant discretion that's afforded to the trial courts on
6 these issues.

7 This is not a Levine situation, where an expert
8 witness just relies on the photos or the estimates to
9 calculate Delta V (phonetic). Here, there isn't even an issue
10 as to how this accident took place. The traffic accident
11 report indicated that the speed of the Defendant's vehicle
12 when it rear-ended the stationary vehicle that the Plaintiff
13 was in was 20 miles an hour.

14 In her deposition, the Defendant basically indicated
15 that everything that she saw in that report was true in terms
16 of how this accident took place. So there isn't even a
17 contest about that. It's not Levine, where the nature of the
18 accident was contested and the calculation of Delta V and
19 speed was critical to the analysis.

20 It's not really even a Hallmark situation
21 particularly. There, the Defendant's expert witness, a
22 doctor, who was sort of a self-proclaimed biomechanical
23 expert, testified that the Plaintiff's injuries were not
24 caused by the accident. The Nevada Supreme Court said that
25 testimony shouldn't be allowed because there's not an adequate

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1 foundation for it.

2 Here, although the issue in the case is certainly
3 causation, were the injuries the Plaintiff suffered or suffers
4 caused by this accident? What Mr. Ingebretson does is
5 explains the biomechanics of this type of motor vehicle
6 accident. What happens, functionally, to a human body in that
7 position, using someone that -- the Plaintiff's six feet, six
8 inches tall.

9 Actually had him sit in the vehicle in the position
10 that he was in at the time of the accident, according to his
11 deposition, in his actual vehicle, where there's a cage
12 immediately behind him in his work vehicle. And upon being
13 struck from behind, what are the forces, generally, that would
14 be -- that would be placed on the -- on the -- on his body, on
15 his neck, which is claimed to be injured. That is within a
16 recognized field of expertise.

17 It's subject to peer review. It's generally
18 accepted in the scientific community and it's based on
19 particularized facts. And Hallmark says -- is very clear,
20 after they lay out why that doctor couldn't testify about
21 biomechanics, that even in that case, if a proper foundation
22 had been laid, the opinion would have been -- could have been
23 admissible.

24 There's no question that Mr. Ingebretson is
25 qualified. His report is attached to -- I forget if it's

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1 attached to his motion, or opposition or both, but it's there.
2 His calculations, his methods, are transparent, the subject of
3 his methodology. They can cross-examine him. They can take
4 him on voir dire.

5 Certainly, I would -- I would submit, not
6 appropriate to make the determination at this point. We're
7 entitled to attempt to lay the proper foundation as Hallmark
8 requires. Then you can place whatever limitations you feel
9 are appropriate on his testimony, as you're allowed to be the
10 gatekeeper, obviously, for such testimony.

11 And I have to tell you, there's a certain audacity
12 to the argument today. When their pain management doctor
13 testified in his deposition about 10 to 12 days ago, he wants
14 to testify, having looked at the photographs and looking at
15 the damage estimates, that he wants to testify to being
16 qualified to render an opinion in biomechanics, based upon his
17 history as an ER doctor and the fact that he's been in two
18 accidents himself. He wants to be able to say that as an
19 expert, the force of the accident wasn't sufficient to cause
20 the injuries claimed.

21 That's the type of unqualified testimony that
22 Hallmark prohibits and that's basically the subject of another
23 motion, which is going to be heard in the first week of March.
24 So I'd ask the Court to deny the motion outright, or in the
25 alternative, at least allow us the opportunity to lay the

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1 foundation for his testimony at trial, outside the presence if
2 you wish.

3 THE COURT: Very well. Mr. Rogers?

4 MR. ROGERS: Thank you. That is not, at all, how Dr.
5 Fish (phonetic), the pain management physician, testified.
6 But that's an issue for another day. Accusations of audacity
7 aside, it seems that the Plaintiff is arguing that his experts
8 should be permitted to testify about cause, that nobody on the
9 Defense should, that despite the glaring and obvious fact that
10 Mr. Ingebretson never examined the vehicles, saw the
11 Plaintiff's vehicle only after it was repaired, never went to
12 the scene, never measured co-efficient of friction, never did
13 anything that's required of any of the cases we've discussed
14 -- Hurtado (phonetic), Levine and Hallmark -- but he should be
15 permitted to offer accident reconstruction testimony, that he
16 should be permitted to tell the jury the speed at which this
17 accident occurred, the change of force, not estimates.

18 He said the change of force in that vehicle was 12
19 miles per hour. He can't know that. In fact, in his own
20 report, he admits that he lacks sufficient foundation. He
21 writes that he will supplement his report after he has
22 reviewed the medical records in a biomechanical context, and
23 other written discovery is obtained and examined.

24 He did not supplement. The Plaintiff is now asking
25 Your Honor to allow Mr. Ingebretson to supplement on the

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1 stand. That is not permitted. He is a specially retained
2 expert. He has produced a report. He is married to that
3 report. He cannot deviate from it. There is no room to allow
4 him to supplement now. And on the report that we have, it is
5 clear he does not have foundation.

6 Finally, the Plaintiff mistakenly argues that the
7 Defense doesn't seem to dispute the scope of Mr. Ingebretson's
8 proposed expertise. The Defense does, indeed, because Mr.
9 Ingebretson intends to offer a medical opinion. He's not
10 qualified to offer a medical causation opinion. That's all.

11 THE COURT: Mr. Wall?

12 MR. WALL: Well, Judge, part of biomechanics -- there's a
13 part of it, I suppose, that's medical, but he's not giving an
14 opinion to a reasonable degree of medical probability on any
15 of the care, or the treatment or anything like that.
16 Biomechanics is the forces that play on an individual body at
17 the time of an event. And that's -- is that medical?

18 It's not really medical, but it has something to do,
19 obviously, with physiology. The other thing I wanted to note
20 is that there is no dispute, at this point, regarding the
21 speed at which this accident took place, none. So it's not
22 like using Delta V to determine how the accident took place.
23 The mechanism of the accident is undisputed.

24 THE COURT: Did you want to comment on Mr. Roger's
25 comment about supplementing his report, Mr. Ingebretson?

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1 MR. WALL: Probably every expert I've ever seen puts in a
2 paragraph at the end of their report that says if more
3 information becomes available, then I reserve the right to
4 supplement my opinions. Any of the medical evidence that's
5 come in over the time that he's completed his report doesn't
6 add to his findings in his limited area. So he'll be
7 testifying, essentially, from what's in his report. And I
8 don't recall that he was deposed. I don't know that he was.
9 But his report's very clear in that he isn't going to be
10 supplementing on the stand.

11 THE COURT: Any final thoughts, Mr. Rogers?

12 MR. ROGERS: Yes. Speed is disputed and it's never been
13 admitted. The mechanism isn't disputed. The Defendant did,
14 in fact, rear-end the Plaintiff's vehicle. The speed at which
15 that impact occurred has been a dispute since the beginning of
16 this case.

17 THE COURT: Well, Mr. Ingebretson can't testify as to
18 medical causation, but assuming that he stays within his scope
19 of expertise and assuming that a proper foundation can be
20 laid, I'm not inclined to strike him as a witness altogether.
21 Counsel can object if you feel it appropriate at the time, Mr.
22 Rogers.

23 MR. ROGERS: If I may, then I think what I would ask to
24 do at the time of trial is voir dire him before he's allowed
25 to offer any of these opinions.

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1 THE COURT: I think you can do that. The motion is
2 denied with that understanding. Next item that I had on your
3 list, Mr. Rogers, was the matter regarding -- responsibility
4 avoidance, I think, is how you characterized it.

5 MR. ROGERS: Right. We'll get to that page.
6 Responsibility avoidance is a -- it is -- it's a clever method
7 of impassioning a jury. It violates Leochi (phonetic) because
8 it doesn't have any relevance to the negligence claim. The
9 elements of a negligence claim -- in this case, liability
10 isn't part of it because liability has been admitted. It's
11 going to be cause and damages. Responsibility avoidance plays
12 no role in the jury's analysis of these questions.

13 But it does run the risk of getting the jury to use
14 something other than its reason. The question here, then,
15 isn't whether the Defendant avoided responsibility on
16 liability. She did not. And it isn't whether she's avoiding
17 responsibility on an injury claim that hasn't yet been proved,
18 and on which the Plaintiff's own treating providers disagree.

19 In other words, what is the object that she is
20 avoiding responsibility for? You can see that this argument
21 has been used to some effect in the past, but has also been
22 used to prejudice and shouldn't be allowed in this trial.

23 THE COURT: When do you anticipate this issue coming up,
24 Mr. Eglet?

25 MR. EGLET: Well, Your Honor, this issue always comes up.

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1 It comes up in every voir dire jury selection that I've
2 participated in, which is over -- well over 100 now in this
3 jurisdiction. What Defense counsel's really upset about is,
4 this has been a favorite theme of Defense counsel for years,
5 decades. I used it when I was a defense counsel for the --
6 for the dozen years as defense counsel. Then I split when I
7 moved to the side of good injustice and got rid of the black
8 cat.

9 I've turned that on -- I turned the whole personal
10 responsibility on them and said well, wait a minute. This
11 isn't just personal responsibility about the injured person.
12 This is personal responsibility. Is involved in the person
13 who does the injuring. So I started asking.

14 It always comes up anyway. I don't even have to ask
15 the question during jury selection, what people think about
16 people being held personally responsible for their own
17 actions, their own conduct. So it always comes up. It's
18 always in a theme and every juror says, I think people should
19 be held personally responsible.

20 There's nothing wrong with asking that question.
21 How do -- how do people feel about personal responsibility?
22 And how do people feel about people who -- or corporations who
23 have injured someone being held personally responsible or
24 accountable for their actions? And there is a -- there is
25 responsibility avoidance here. This is a rear-end accident.

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1 Right? It's a rear-ender.

2 And we have affirmative defenses that it wasn't
3 their fault, that it was -- it was some third party's fault.
4 Well, you know, they're the ones who put those issues in the
5 case. They're blaming our client on a rear-end accident
6 according to their affirmative defenses or they're blaming
7 some unknown third party which nobody's ever produced.

8 So responsibility is always an issue for the jury
9 and whether the Plaintiff is being personally responsible for
10 their situation or trying to blame all of their problems and
11 injuries on the Defendant and not taking some personal
12 responsibility, which is always a theme the Defendants try to
13 put forward.

14 And it's a theme they're trying to put forward in
15 this case when they argue about the fact that, you know, a lot
16 of these medical issues are not related to what happened in
17 this accident. Well, what's good for the goose is good for
18 the gander, as I know Your Honor always likes to say.

19 Guess what? Responsibility for their own personal
20 actions by the Defendant is always an issue in the case as
21 well. So you know, it's a two-edged sword and there's
22 certainly nothing that prevents us from arguing or suggesting
23 that they be held personally responsible, and accountable and
24 not be able to avoid responsibility by pointing a finger in
25 every direction but themselves.

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1 And that's what this is all about and it's perfectly
2 appropriate theory and argument. And it is not, in any way,
3 shape or form a violation of Leochi. Read the Leochi opinion
4 at least a dozen times. Nowhere in that opinion does it say
5 -- does the Supreme Court say that you cannot argue that
6 someone should be held responsible, or accountable or they
7 shouldn't attempt to avoid personal responsibility.

8 THE COURT: Did we do a -- did you do a jury
9 questionnaire in this particular case? I thought we did.

10 MR. ROGERS: We did.

11 MR. EGLET: We did, Your Honor.

12 THE COURT: And was this subject one of the questions
13 contained in the jury questionnaire? Do you recall?

14 MR. EGLET: I don't remember off the top of my head.
15 Sometimes, in the jury questionnaire, there's a general
16 question about -- and I don't know if it's in this
17 questionnaire or not, Your Honor -- about -- do you think
18 people should be held personally -- do you think people should
19 be held responsible for their -- held accountable for their
20 actions? I can't remember off the top of my head. Sometimes,
21 it's in there. Sometimes, it's not.

22 THE COURT: Mr. Wall?

23 MR. WALL: I think it's in there, but I'm not sure. But
24 it's actually with you for signature, the original, so --

25 THE COURT: It is?

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1 MR. WALL: Yeah. I think we submitted either on Thursday
2 or Friday.

3 THE COURT: Okay. Mr. Rogers?

4 MR. ROGERS: Yes. And the Defense submitted --

5 MR. WALL: They're in there.

6 MR. ROGERS: -- three or four -- three or four additional
7 questions that were to be incorporated into it. Whether that
8 question is in the questionnaire is, well, a smart question.
9 I wish I knew right now. But in response to Plaintiff's
10 position, there's a thinly veiled stopping in the argument.
11 The Plaintiff says that responsibility is always an issue and
12 that's true. Of course it is.

13 The question presented in this motion, though, is
14 responsibility avoidance and the applicability of that theme
15 in a negligence action. It has a great populist appeal, but
16 it has no legal relevance. Plaintiff may have used it as
17 defense counsel and as Plaintiff's counsel. I don't. I never
18 have. It's improper. You can ask the jury to find that the
19 Defendant is responsible. That's fine.

20 But asking the jury to consider responsibility
21 avoidance is tantamount to asking for punishment. It's asking
22 for additional compensation for quote, unquote, not caring.
23 The issues presented to this jury, as Your Honor knows, are
24 simple and responsibility avoidance has nothing to do with it.

25 MR. EGLET: See, they want to call -- they want to call

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1 it responsibility avoidance. They want to use this tag, this
2 phrase when it's what the Plaintiffs are trying to suggest and
3 the Defendants are trying to blame everything, everybody but
4 themselves for what happened to our client. But they want to
5 call it something else. They're not willing to call it
6 responsibility avoidance when they make those arguments that,
7 well, this isn't -- this isn't -- that the Plaintiff should be
8 held personally responsible for her own actions and then he --
9 or he is trying to blame all of his problems on this accident
10 when, in fact, they're related to other things. Okay?

11 It's the same thing. They're going to make --
12 they're going to make that argument. They're going to make
13 that insinuation. Okay? And there's nothing improper about
14 it. At the same time, there's nothing improper about us
15 making our argument that well, wait a minute, ladies and
16 gentlemen, you know, we want to talk about being responsible
17 for your own actions.

18 We want about -- you want us to talk about stand out
19 -- standing up, and being accountable and not trying to blame
20 -- get on something else. That's what they're doing. So you
21 know, they can't just simply call it something else when they
22 do it and call it responsibility avoidance when ours -- and
23 say well, it's okay for us. It's the same thing, Your Honor.
24 It's just the two sides of the same coin and it's -- there's
25 nothing improper about it.

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1 They don't like it. It's a problem. And we see
2 this motion virtually now in every case. They don't like it
3 because we've turned this whole personal responsibility theme
4 that they've used for decades back against them. And that's
5 what this is all about. They want to be able to use it, but
6 prevent us from using it and that's what it's about.

7 THE COURT: You know, I want to go back to the issue of
8 the jury questionnaire again because there was a day when we
9 argued specific questions, probably if there was an objection
10 to this issue, though I've never seen it characterized as
11 responsibility avoidance before.

12 Probably, this argument should have been made when
13 we argued those jury questions. I think it was contained in
14 that jury questionnaire, but I can't be absolutely certain.
15 But my question is this. It's true that Defense wanted some
16 questions put within that jury questionnaire, and I thought
17 Mr. Wall didn't have any opposition to that. Did that occur?

18 MR. WALL: It did, Your Honor. I thought there was going
19 to be just one. I got it, a letter from Mr. Rogers with three
20 additional questions, and I put them all in exactly where he
21 asked me to put them in and submitted it to the Court.

22 THE COURT: Well, the only other thing I want to say with
23 respect to this particular issue was that it's my
24 understanding that Jenny Rish admitted that she was at fault
25 for the accident and then later, after Defendant's answer, she

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1 denied fault. Did you want to comment on that, Mr. Rogers?

2 MR. ROGERS: Sure, sure. It's actually the reverse.

3 When the Defense --

4 THE COURT: The reverse?

5 MR. ROGERS: Yeah. When the Defense first got the case,
6 it denied liability and the Defense is now -- we're exchanging
7 a 2-4-7 stipulation list and that's one of the items that's on
8 it. Is -- we've done the discovery and it's clear that the
9 Defendant caused the accident. So that's -- we're going to
10 admit that.

11 MR. EGLET: It was clear from day one, she rear-ended our
12 client. So this is the -- this is the -- this is a tool they
13 love to use. They go deny liability. By the way, no
14 stipulation's been signed yet and we're, what, a week and a
15 half, two weeks from trial.

16 And they want to deny liability for years while the
17 case is going on, make the Plaintiffs jump through all these
18 hoops, hire experts to establish liability and then on the eve
19 of trial, they want to admit liability and, again, be able to
20 use the responsibility avoidance argument against the
21 Plaintiff, but then be able to come in and say hey, we're
22 reasonable.

23 We're accepting responsibility. We admit this is
24 our fault. It's a game. Okay? It's not -- and it's not
25 proper. He wants to admit liability. That's fine. But he

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1 doesn't get to come into court and say hey, we are here,
2 admitting this was our fault, Your Honor. We -- or ladies and
3 gentlemen, we accept responsibility when it -- and it's not
4 until the eve of trial, and suddenly they want to, you know,
5 drop these affirmative defenses that never should have been
6 filed in the first place and probably would have been subject
7 to Rule 11 if somebody wanted to be really aggressive about
8 this.

9 They've known from day one that this was her -- that
10 this was their client's fault. Their client knew it. And
11 they're the ones who put the case in this situation. They
12 cannot sit here at the 11th and a half hour now, cut off our -
13 - off our ability to challenge their argument, which is
14 nothing more than an avoidance responsibility as well, Your
15 Honor.

16 THE COURT: Mr. Rogers, it was your motion. Any --

17 MR. ROGERS: Yes.

18 THE COURT: -- concluding thoughts?

19 MR. ROGERS: I don't know who they are, but they
20 evidently say a lot and play a lot of games. The game here is
21 that this is the way every case unfolds. After discovery is
22 done, the parties meet and decide, okay, what's -- what are
23 the disputed issues? Let's put them before the jury.

24 If there was a question in the questionnaire about
25 responsibility, I would have objected to it had it extended

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1 anywhere beyond, do you think a person should be held
2 responsible for whatever it is, their -- whatever they're at
3 fault for. Responsibility avoidance, however, I'm confident
4 was not one of the questions in that questionnaire. That is
5 an improper argument and I would have objected to it then,
6 just as I am now.

7 THE COURT: It's your motion, so I don't -- I never heard
8 Plaintiffs characterize this issue as responsibility
9 avoidance. Are you anticipating characterizing this issue as
10 responsibility avoidance?

11 MR. ROGERS: Well --

12 THE COURT: I mean, here's the thing --

13 MR. ROGERS: Yeah.

14 THE COURT: -- I think Mr. Rogers makes a good point that
15 counsel can't argue this issue to the jury. However, if there
16 was a specific question regarding responsibility contained in
17 the jury questionnaire, I think you're entitled to follow up
18 with the jury panelists on an as-needed basis. I think you're
19 entitled to some follow up, so long as counsel isn't arguing
20 to the jury.

21 MR. WALL: Well, we don't use the term -- I don't -- and
22 we don't use the term responsibility avoidance. That's not a
23 term we will -- you will hear us use. That's their term that
24 they've twisted into this whole suggestion that we shouldn't
25 be able to argue that hey, they shouldn't be able to, they

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1 should be held accountable and they shouldn't be able to --
2 you know, it's irresponsible for them to come up and blame
3 everybody else, except themselves, and accept responsibility
4 for what they've done. They're trying to say that's
5 responsibility avoidance.

6 We don't use that term, but we're certainly entitled
7 to make that argument when there's no question they're going
8 to be making the argument that Plaintiff needs to accept
9 responsibility for himself and not try to blame everybody else
10 for his medical condition.

11 I mean, it's the two sides of the same coin. Are we
12 going to use, in the trial, the term -- the absolute phrase
13 responsibility avoidance? No, that's a term that they coined,
14 but what I don't want to happen is when I get -- is when we
15 get up and make the argument well, you know, they need to be
16 held responsible and accountable, and what they've done here
17 is to not to be held responsible and accountable, objection,
18 Your Honor, that's a violation of the Court's pretrial motion
19 on avoidance responsibility. That's what they're trying to do
20 here, Your Honor.

21 THE COURT: Well, I'm seeing two things. I thought Mr.
22 Rogers was talking about this issue as it comes out in voir
23 dire, and I think he makes a valid point. Counsel can't argue
24 to the jury this issue.

25 MR. WALL: No.

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1 THE COURT: Can you argue in closing statements this
2 issue? I suppose if it comes up and it's a reasonable
3 inference, I think you can make that argument. So the motion
4 --

5 MR. WALL: We're not going to argue anything in voir
6 dire, Your Honor. What are we going -- we would ask follow up
7 questions, you know, who here believes in -- that people
8 should be held personally responsible and accountable? Does
9 any -- for their actions? Does anybody disagree with that?
10 And if somebody disagrees then we'll ask, well tell us why.

11 THE COURT: I don't think that's an issue so long as it
12 truly is a follow up question and not just a duplicate
13 question --

14 MR. WALL: Understood.

15 THE COURT: -- of what was contained on the jury
16 questionnaire. The motion is granted in part and denied in
17 part on that basis.

18 MR. ROGERS: Okay.

19 THE COURT: Next item I had on your list, Mr. Rogers, was
20 an item called senate investigation.

21 MR. ROGERS: Okay. In this case, there -- a Senator got
22 a hold of a newspaper and reported that he was investigating
23 one of the Defense medical experts, relative to proper
24 completion of contribution forms for research at his academic
25 hospital. And nothing ever came of the investigation, but the

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1 Plaintiff's bar got their hands on it and have questioned the
2 expert about it and the motion is to prevent any questions or
3 evidence during the trial on this investigation.

4 As pointed out in the motion, the case law is clear,
5 investigation evidence is not admissible. Plaintiff's counsel
6 filed motions to preclude reference to the federal
7 investigation of medical providers that they've used. They
8 submitted a stipulation to the Defense in this 247 exchange we
9 discussed earlier, seeking a stipulation to preclude reference
10 to the federal investigation regarding doctors and some local
11 attorneys. The Defense will happily agree to that stipulation
12 if the preclusion is applied evenly.

13 There's been no finding of wrongdoing. There's -- I
14 think Plaintiff's counsel deposed this expert about a week
15 ago. We weren't able to complete the deposition, he evidently
16 had to leave for surgery. I think the Plaintiff completed his
17 questions and the Defense got to ask only one. The
18 Plaintiff's theme at that deposition was that this doctor was
19 demoted. However, the evidence is and was from that
20 deposition that he remains the chief of the spine surgery
21 unit, used to be called executive director, now it's chief,
22 and he also co-chairs the medical school.

23 Not that any of that is material anyway. What the
24 Defense is moving to exclude is an investigation that hasn't
25 gone anywhere. And the Defense points out that if

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1 investigation evidence is made open in this trial, that it's
2 going to open up a lot of cans of worms because some of the
3 treating providers were also part of the federal
4 investigation. Again, that investigation didn't go anywhere,
5 the Defense doesn't intend to ask those questions, but will
6 have no recourse other than to do so if the investigation
7 evidence on the Defense medical expert comes in.

8 THE COURT: Well, it sounds like we're now re-arguing a
9 motion that we already argued and the Court already ruled on.
10 Mr. Wall, at the time you filed the limited opposition, Dr.
11 Wong's deposition had not yet been taken, that was my
12 understanding.

13 MR. WALL: Correct.

14 THE COURT: Now it has been?

15 MR. WALL: Correct.

16 THE COURT: So what's the status?

17 MR. WALL: Well, let me say first of all that I realize
18 now for the first time why I haven't gotten our 247
19 stipulation back yet, because I wasn't aware until just now
20 that there was a quid pro quo attached to it, that we'll sign
21 off on it assuming that this motion is denied. I wasn't aware
22 of that until just about 45 seconds ago.

23 Yes, we took his deposition next week (sic). Here's
24 what the senate investigation was, that Dr. Wong received over
25 \$450,000 while he was doing clinical research, the companies

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1 that make the drug that he's doing the clinical research on
2 gave him \$450,000 that he failed to report to UCLA. That was
3 the investigation.

4 He testified at our deposition last week that he
5 real -- started out by saying he couldn't really recall what I
6 was talking about. He was the executive director of the UCLA
7 Spine Center, said that well, he gave up that title because
8 all of the directors decided they didn't want to have those
9 titles anymore and it was before this investigation ever
10 occurred. So when the University said don't use that title,
11 well I had already given it up, so I was happy to comply with
12 that.

13 He said that there was no sanction by UCLA as a
14 result of the senate investigation, even that he was promoted
15 as Mr. Rogers pointed out. He couldn't say if he failed to
16 note that the \$450,000 had been given to him when he signed
17 those forms that require that you report anything in excess of
18 \$500. One of the exhibits to the deposition was his previous
19 testimony in another case, where he said that in response to
20 the investigation UCLA removed him as executive director, that
21 he did fail to disclose some of the money he received.

22 And when asked whether the form that he filed was
23 false his response was, it depends on how you define false.
24 That was his prior deposition testimony that was made an
25 exhibit to this deposition testimony and deposition testimony

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1 that I questioned him about last week. At the very least,
2 it's a prior inconsistent statement. At most, it's
3 intentionally deceptive, either way it's relevant to his
4 credibility, and credibility and impeachment is now a huge
5 issue because of what he said in his deposition.

6 Without preparing any new supplemental reports --
7 his previous reports were February of '09, October of '09 and
8 July of 2010. Without preparing any new reports, there was a
9 complete sea change in his opinions. By the way, I heard
10 about two minutes ago that -- asking us to make sure that our
11 experts confined their opinions to their reports. They're
12 married to them is what I heard.

13 So the theme of the deposition was the fact that he
14 changed his opinions markedly. Instead of saying that a
15 portion of what Mr. Simao still suffers from was related to
16 the motor vehicle accident, a portion of his neck complaints
17 that he still has, and for which he had surgery, are a part of
18 the motor vehicle accident, that changed completely at the
19 deposition. Now it's zero percent. He can't recall when his
20 opinion changed, he can't recall when he was even retained on
21 the case, he can't recall when he received new documents.

22 Suddenly, without reference to them in any report,
23 there's six, eight, nine depositions that he's apparently
24 reviewed, maybe within the last few weeks, can't recall, can't
25 recall when I got them -- when I got the depositions, so now

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1 his opinion has changed completely. So his credibility is an
2 issue. Impeachment of his opinions becomes even greater now
3 than it was before his deposition. This is impeachment
4 evidence.

5 Comparing it to the federal investigation here, the
6 major difference is in that prior deposition he admitted those
7 things. He admitted that they removed him as executive
8 director, he admitted that he received the money, he admitted
9 that the forms he filled out neglected to mention it. So you
10 have an admission under oath of certain things relative to his
11 position and his expertise and his qualifications as an
12 expert. That's the difference between whatever they want to
13 use, apparently although it wasn't even in their opposition,
14 oh by the way, I'm taking back my stipulation on the federal
15 investigation. That's the difference between the two.

16 If there had never been an admission, it might be
17 similar, but because there's an admission under oath that he
18 had done all those things then it is important to impeach his
19 credibility, especially given the change in his opinions. I
20 would ask, at least, before Mr. Rogers takes over, at the very
21 least that we should be able to take him on voir dire on this,
22 similar to what was just discussed regarding --

23 MR. ROGERS: Engebrettsen.

24 MR. WALL: -- I think Mr. Engebrettsen outside the
25 presence, if the Court finds that that's necessary.

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1 THE COURT: Mr. Rogers?

2 MR. ROGERS: Thank you. Yes, there is a difference
3 between these two investigations. One of them has to do with
4 the proper completion and disclosure of academic grant forms,
5 the other has to do with admittedly now lying under oath, with
6 regard to the treatment of a patient. Still, the Defense
7 didn't think look, that's enough that investigation evidence
8 should come in. I don't know where the Plaintiff was going
9 with all of this impeachment information, but it has nothing
10 to do with the issue presented, which is does evidence of
11 investigation come in. The answer is it never does. The
12 answer is they know it doesn't. I'm holding one of the orders
13 they obtained excluding the federal investigation of certain
14 treating providers. This simply does not come in.

15 MR. WALL: Let me just correct --

16 THE COURT: Well, I --

17 MR. WALL: I'm sorry to interrupt, but I don't know if --
18 I don't know if the inference was that one of the doctors in
19 this case that treated Mr. Simao lied under oath in any
20 investigation here, that's not what he --

21 MR. ROGERS: That was the issue of the investigation
22 evidence that was excluded before.

23 MR. WALL: But none of those doctors are in this case,
24 so --

25 THE COURT: And I think it's important to make that

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1 clarification, because the Court gave counsel every
2 opportunity to argue that issue. And I think, in fact, I
3 specifically asked Mr. Rogers, do you have any evidence with
4 respect to this case that this issue is relevant and you
5 couldn't come up with any. So I think the record should be
6 clear on that.

7 With respect to this particular issue, Mr. Wall, I'd
8 like to see a supplemental opposition filed now that you have
9 had an opportunity to depose Dr. Wong and I ask you how
10 quickly you can get one filed?

11 MR. WALL: Probably by Thursday.

12 THE COURT: By Thursday? How quickly --

13 MR. WALL: I believe we have the deposition testimony.

14 THE COURT: How quickly can you do a reply, if any, Mr.
15 Rogers?

16 MR. ROGERS: How soon would you like it, Your Honor?

17 THE COURT: Friday?

18 MR. ROGERS: I can try. I -- I will, if I must, yes.

19 THE COURT: Because I understood counsel to say that you
20 have another motion in limine coming up next week, next
21 Tuesday; is that right?

22 MR. WALL: I don't remember if it's -- it might be on the
23 7th.

24 THE COURT: It might be on the 8th, but I don't think it
25 will be on the 7th.

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1 MR. WALL: Okay. Then it might be on the -- it's either
2 the 1st or the 8th, I really --

3 THE COURT: Okay. Then --

4 MR. WALL: It's on the 1st? Okay.

5 THE COURT: Thursday -- on the 1st? And that's the
6 reason why the Court wants you to file a reply as quickly as
7 you're going to have to, because actually Mr. Wall is not
8 given much time to file the opposition because the Court
9 intends to continue this matter to the 1st, the same day as
10 the other matter.

11 MR. ROGERS: Okay.

12 THE COURT: Okay. Thank you.

13 The next matter on the roster I have for you,
14 Mr. Rogers, was an item called treating physician rule, we
15 basically addressed this issue in Plaintiff's motion in
16 limine.

17 MR. ROGERS: Yes.

18 MR. WALL: Well no, I think his motion to limit the
19 testimony of Plaintiff's treating physicians we dealt with in
20 our motion in limine, this motion in limine enforcing the
21 treating physician rule, I think is a little different.

22 MR. ROGERS: She addressed that and she said that the
23 Plaintiff is free to argue that the treating providers are
24 more reliable due to their, I guess, more time spent with the
25 patient.

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1 MR. WALL: That's fine.

2 MR. ROGERS: But the treating physician rule was more or
3 less a presumption given to the jury and we were just asking
4 for an enforcement of -- against that.

5 THE COURT: We already addressed this issue last time,
6 didn't we?

7 MR. ROGERS: Yes.

8 THE COURT: All right. Let's move on then

9 Number 12 was the treating physician testimony.

10 MR. ROGERS: Okay.

11 THE COURT: I thought we addressed that also?

12 MR. ROGERS: Well, we did in part, in response to the
13 Plaintiff's third motion in limine in the omnibus motion. And
14 what we didn't get to though was the point that I'd like to
15 address today, and that is something that's been touched upon
16 over and over, but only subtlety so far, and that is the
17 Plaintiff's duty to disclose all the damages that they're
18 going to be seeking.

19 And what we have is we've gone through the rules
20 that require this, the computation of damages, the duty to
21 timely supplement and failure to do so results in a Rule 37
22 exclusion. The problem here is that the Plaintiff, not
23 uncommonly, will say well, I'm treating, it's not like I can
24 stop just because there's a trial coming. And the analysis
25 that the Court is then put into is all right, if we have a

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1 late disclosure, the question is, is it harmful under Rule 37?

2 And the case law that we have cited, and I've just
3 recently found another case that's a District -- Federal
4 District Court of Nevada case from September 2010 called
5 Dayton Value v. Union Pacific Railroad, holds that this
6 exception should be recognized by the Court, but in the
7 harmfulness analysis. The only question is would new
8 information re -- have to reopen discovery? And we don't know
9 right now whether the Plaintiff intends to change the
10 computation that he's provided. We're fine and ready to
11 proceed to trial, based on the evidence disclosed so far, but
12 if there is anything new, I don't know if it's here today or
13 if it may come in a week or two, we're going to ask the Court
14 to either exclude or reopen discovery.

15 THE COURT: Well, you know, Mr. Rogers, I think you're
16 arguing number 13 on your list, new/undisclosed medical
17 treatment and opinions, because I show that we've already
18 addressed 11 and 12 at the prior hearing. Twelve is titled
19 treating physician testimony. So --

20 MR. ROGERS: There were two motions that touched on the
21 same point, but from different perspectives. The second was
22 the undisclosed treatment motion. That's really where we're
23 going with this one. That one wasn't addressed with liens at
24 the last hearing and if there is nothing new again, there's no
25 concern, but if there is we need to know, we need to know now,

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1 we need to get information to the Defense experts, we may need
2 to conduct additional discovery.

3 THE COURT: Mr. Wall?

4 MR. WALL: Well, just trying to get a handle on where we
5 are here.

6 THE COURT: I think we're on Number 13 new/undisclosed
7 medical treatment and opinions.

8 MR. WALL: All right. There was -- and I don't have the
9 same numbers, I apologize. There was a Defense motion in
10 limine to limit the testimony of the Plaintiff's treating
11 physicians, asking that the Court limit the treating doctors
12 on issues of causation because they're just treating doctors.

13 THE COURT: Yeah, we addressed --

14 MR. WALL: That, I believe, we dealt with.

15 THE COURT: We did.

16 MR. WALL: All right. So that I'm going to -- that would
17 be denied, I guess?

18 THE COURT: We addressed that -- we heard lots of
19 argument, the Court made a pretty thorough ruling.

20 MR. WALL: All right. All right. I'll go back to our
21 motion in limine. Now, the -- so this motion to preclude the
22 medical providers from testifying regarding new or undisclosed
23 medical treatment and opinions. I don't know if they're
24 asking that any future treatment be kept out. They quote Dr.
25 McNulty, who performed the surgery, as saying in his

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1 deposition about a year-and-a-half ago, about six months after
2 the surgery, that if the surgery goes well and he follows up
3 for two years and he's fine, then that's it, but he's still
4 continuing to treat.

5 Their experts say not only was the surgery
6 unnecessary, but it didn't resolve the problem. He is still
7 having pain, he still is seeing medical providers. We
8 continue to supplement with the new records as recently as
9 last week. There was discussion at least about the Defense
10 deposing one of the doctors that he's seeing now, a Dr. Lee.
11 As we all know, he can recover for past medical expenses and
12 treatment and future. You know, where that is -- when they
13 become past and future is basically just the trial date,
14 especially where he's continuing to treat.

15 And I have to tell you, you know, I listened to this
16 about hey, it's just not fair to us, I already told you about
17 what Dr. Wong, one of their experts did in just changing his
18 opinions without any notice last week at the deposition.
19 Their other expert, Dr. Fish, did the same thing two weeks
20 ago. He presented us with brand new opinions, a new report
21 that he held in his hand. I deposed him via Skype, so I still
22 haven't seen it, it still hasn't been produced, it's addendum
23 number five, even though there apparently isn't an addendum
24 two and three, so it goes report, addendum one, addendum four,
25 addendum five. He's changed his opinions that were never in

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1 any of his reports apparently on new documents that he's
2 received that he can't recall when he got them, it might have
3 been about a week before the deposition.

4 And now they come to you saying hey, the Plaintiff's
5 doctors aren't permitted to offer new, previously undisclosed
6 opinions at trial, that it's tactical gamesmanship. He is
7 continuing to treat. There's no undisclosed, hidden opinions.
8 We're supplementing as we receive them, we're giving them
9 everything as we get it, as the rule requires, and even though
10 I -- both sides really, I mean discovery closed, I want to say
11 about October of 2009 before we even got in the case. Since
12 then there have been certain accommodations to take additional
13 depositions on both sides. So it is still continuing to
14 evolve.

15 Unfortunately we can't tell Mr. Simao to stop
16 treating because there's a trial coming up in 30 days, so we
17 are giving them everything as we get it. There's nothing
18 undisclosed, there's nothing hidden and the treatment and the
19 opinions of the treaters are what they are in their reports
20 and I'd just submit it on that. I'd ask that the motion be
21 denied.

22 THE COURT: Mr. Rogers?

23 MR. ROGERS: Yes, on questions of quid pro quo and
24 eleventh hour moves and changes in opinions, the problem in
25 this case right now is that everything changes every week

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1 because the Plaintiff is producing more and more. This isn't
2 an academic motion. This is a practical action for this
3 lawsuit.

4 Something is happening and it's coming to the
5 Defense in piecemeal. The Plaintiff wants to blame the
6 Defense for giving new information as it comes in to the
7 Defense expert so that they can review it. This is the
8 problem with harmful error under Rule 37, is that it requires
9 a reopening of discovery. The purpose of the computation of
10 damages rule and of Rule 26 is timely supplementation is to
11 avoid ambush, to avoid surprises. It's to get everything on
12 the table so that the parties have a chance at understanding
13 the case, evaluating it, either settling it or trying it on
14 its merits, not on surprises.

15 Now, this motion says look, we understand what it is
16 right now, but we don't understand where you're going or if
17 you're going anywhere, but if Plaintiff you're going anywhere,
18 let us know right now because harm is self evident. We have
19 to continue discovery, and so we have motions that are being
20 filed late now that we're hearing on March 1st. The Defense
21 didn't file those. We have all sorts of busyness going on
22 when this work should be behind us.

23 THE COURT: When was the deadline for motion in limine to
24 be filed? Was that extended as well?

25 MR. WALL: Well, what happened was we had a deadline that

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1 was in place, but not quite there yet when this trial was set,
2 and I think this one was moved from the February stack back to
3 the January stack. And so we had a deadline that was up
4 against that new date of the January stack, that when this
5 then got moved to the March stack, that deadline -- I don't
6 know if there's an order that actually moved that deadline or
7 that we have -- or that we agreed look, since there's only
8 five days to file a motion and three days to file an
9 opposition and one day for a reply or something like that, to
10 fit it in that January stack, I don't know if there was a
11 specific order.

12 I can tell you that part of what's been filed that's
13 set for March 1st is as a result of the depositions that were
14 taken within the last week or so. The deposition of Dr. Fish
15 on biomechanics and minor impact and things like that. I will
16 also tell you that from what I recall from Dr. Wong who was
17 deposed last week, it wasn't any new records that made him
18 change his opinion. It was apparently Subrosa video from July
19 of 2008, deposition testimony maybe that -- I think the
20 depositions were probably before the middle of 2009, so there
21 wasn't new information that made the experts change their
22 opinions. And by the way, they have the duty to supplement
23 their reports, the treating doctors do not.

24 THE COURT: Any final thoughts, Mr. Rogers?

25 MR. ROGERS: Yes, just on that last comment, that's the

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1 very point of the motion, is that the treating physicians do
2 too. Different rules govern experts and treating physicians,
3 but Rule 16(1)s computation and 26(e)s obligation to timely
4 supplement covers the Plaintiff's treating providers. That's
5 what we're trying to avoid is eleventh hour surprises from the
6 treating providers saying oh, things are changed now, we have
7 a new treatment plan, things are different, sorry Defense, but
8 we have a trial date so you can't do anything about it, it's
9 coming into evidence. That's the nonsense that shouldn't be
10 allowed to happen here. If there's something happening, just
11 let us know, we'll see if we can do the discovery on it.

12 THE COURT: Now it sounds like we're rearguing some
13 issues from last week as well. Well, here's the thing, this
14 motion is denied, but let me say why it's denied, it's because
15 the way it's drafted, new/undisclosed medical treatment and
16 opinions. It's denied because it's my understanding there
17 aren't any new or undisclosed medical treatment and opinions
18 that have not yet been turned over to the Defense.

19 MR. ROGERS: That's correct. Okay.

20 THE COURT: Number 14, verdict amount?

21 MR. ROGERS: Your Honor, if new information then comes
22 in, we'd seek leave to refile this motion addressing that new
23 information.

24 THE COURT: I think you can raise this issue if it
25 becomes an issue before trial.

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1 MR. ROGERS: Very good.

2 THE COURT: Number 14, verdict amount?

3 MR. ROGERS: Was that a --

4 THE COURT: It was one of your motions, but I think this
5 issue was addressed really in the jury questionnaire.

6 MR. ROGERS: I believe it was, Your Honor.

7 THE COURT: But in any event, you did file it as a
8 motion.

9 MR. ROGERS: Right. And I believe the argument was about
10 you -- discussing verdict amounts in voir dire, is that this
11 motion?

12 MR. WALL: Yes.

13 THE COURT: Yes.

14 MR. ROGERS: Yes, that one was addressed and I understood
15 that you'd entered a ruling on it allowing the parties limited
16 follow up on the jury questionnaire.

17 THE COURT: So we addressed this in Plaintiff's omnibus
18 motion in limine last week?

19 MR. ROGERS: That was my understanding.

20 MR. WALL: We don't specifically reach this one. We did
21 the precluding argument of the case in voir dire and this one
22 we didn't specifically reach. Our oppositions were actually
23 joined, we did an opposition to the two jury selection motions
24 from the Defense together in the same document, but --

25 MR. EGLET: And, Your Honor, there's -- I mean, I can --

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1 obviously we don't have the filled out questionnaires yet, but
2 as the Court knows, I mean this is not our first rodeo in this
3 department, and you know that ever -- that probably 60 to 80
4 percent of the panel is going to check those questions that
5 says that they do think there should be caps on specific types
6 of damages, that they do have issues with multi-million dollar
7 verdicts, et cetera, and there, you know, might be one in the
8 whole panel that says, you know, that they couldn't return a
9 Defense verdict, which I think was one of the additional
10 questions. So the follow up questions are always, you know,
11 first of all, we don't do them individually because then it
12 makes jury selection take even longer, but we do it as a group
13 and then we follow up with the group. We say now look, some
14 of you put in your jury questionnaire and you follow up with
15 these questions.

16 And it's not -- and we've cited, as you know,
17 there's case law, the current and modern case law around the
18 country is that absolutely counsel has to have the ability to
19 go into the jury, whether they have any issues regarding a
20 jury in any type of personal injury case returning with a
21 multi-million dollar verdict. The question isn't asked of the
22 panel, or an individual in the panel, if the evidence shows
23 that, you know, Mr. Plaintiff has special damages of \$2
24 million, and if the evidence shows that Mr. Plaintiff has a
25 general damages in excess of \$4 million, would you be willing

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1 to return a verdict of \$6 million in this case? Nor is it
2 proper for the Defense to say, if the evidence shows that the
3 -- you know, that the accident was not my client's fault, or
4 if the evidence shows that the -- Mr. Plaintiff's special
5 damages are only \$10,000 and his general damages are only
6 \$10,000, would you be able to return with a verdict of
7 \$20,000? That is -- that type of question -- specific
8 question, we agree is basically asking the jury for what their
9 verdict would be.

10 But what is permitted, and what the case law around
11 the country says, and what is commonly done by virtually every
12 department in this jurisdiction, is that counsel is permitted
13 to ask, ladies and gentlemen, do you have any issues --
14 predispositions about personal injury cases that you wouldn't
15 be able to return a multi-million dollar verdict in any kind
16 of personal injury verdict -- or case or do you have some cap
17 in your mind, for example, regardless what type of case, what
18 type of injuries it was, you would never be able to put in
19 your verdict form more than \$10 million?

20 Those are absolutely proper questions because they
21 show that if, in fact, and under the law that if you have a
22 juror who says look, I don't care what kind of case it is, I
23 don't care what the evidence shows, I just can't do that, I
24 don't believe in those type of verdicts or I don't believe in
25 pain and suffering -- damages for pain and suffering, or I

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1 don't believe that anyone should get millions of dollars for
2 pain and suffering. That person has prejudged the case and
3 they have established, under Nevada law and law across this
4 country, that they have a bias and they're not a proper person
5 to sit on this case.

6 Just like if the Defense were to ask look, in any
7 kind of personal injury case, if -- would you have a problem
8 if that -- if that was the appropriate thing to do, to return
9 with a Defense verdict, even if you felt sorry for the
10 Plaintiff? Or, you know, if you found that the -- in any type
11 of personal injury case that the appropriate balancing of the
12 harms was a verdict of \$500, would you have a problem with it?
13 And, you know, and if you have a juror who says -- which on
14 occasion -- not very often, but on occasion says no, I'd have
15 a problem with that, you know, if they're injured and, you
16 know, I'm going to want to give them all the money, regardless
17 of what the facts and the evidence in the case is.

18 Those type of questions are appropriate to ferret
19 out and to make sure that we have a fair and unbiased juror --
20 jury with an open mind. And so if this motion is meant to
21 limit that in any way, that is improper. Most -- in this day
22 and age in personal injury cases, the overwhelming majority of
23 jurors that are dismissed for cause are jurors under those
24 issues or jurors that say, you know, I don't -- I can't -- I
25 can't put money in the verdict form for pain and suffering, I

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1 don't believe in it, those type of issues. And they're
2 absolutely appropriate and they're the only way you can ferret
3 it out is by those questions, Your Honor.

4 THE COURT: Mr. Rogers, any concluding thoughts?

5 MR. ROGERS: Your Honor already ruled on this one. You
6 denied the motion in part, finding that the parties are
7 permitted limited follow up to the jury questionnaire. So I
8 don't have any follow up, that's my understanding of where the
9 Court is going.

10 THE COURT: It sounds like a good ruling. I'll go with
11 that. Partially granted.

12 There was one more motion filed by Plaintiffs,
13 regarding the Subrosa video?

14 MR. WALL: I think that was set for the 1st.

15 THE COURT: Oh, very good, glad to hear it. Take a five
16 minute break.

17 MR. WALL: That's all I had. Can I ask one more thing
18 before we recess? And that is the issue -- I mean, there's a
19 stipulation out there, a 247 stipulation, that has about, I
20 don't know 12 or 15 more motions that we didn't file because
21 of an agreement that they weren't going to be opposed.

22 THE COURT: Well, you address --

23 MR. WALL: If I can't get that signed, I got to file
24 those 15 motions.

25 THE COURT: You did address that orally in the last

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1 hearing, that was the first knowledge I had that there were
2 some other motions out there you thought there was going to be
3 a stipulation with respect to. Mr. Rogers?

4 MR. ROGERS: I'm sorry, Your Honor, I got distracted. I
5 was looking at this note.

6 THE COURT: Well, Mr. Wall said there was a possible
7 stipulation --

8 MR. WALL: The stipulation --

9 THE COURT: -- on some --

10 MR. WALL: -- because I have to file those motions if I
11 can't --

12 MR. ROGERS: Yes, now if it weren't for all of this other
13 busyness, and again it was not a quid pro quo, I simply
14 haven't gotten to that 247. I will today. I got one thing
15 that I'd like to add to, we'll get that 247 issue resolved.

16 MR. WALL: That's fine.

17 MR. ROGERS: And that is that one of the Defense medical
18 experts, he's out of state, is going to be out of the country
19 for the majority of the trial and will be here only on March
20 18th. And so I'd seek leave to call him sometime on the 18th,
21 even if the Plaintiff hasn't yet closed.

22 THE COURT: Have you talked about scheduling of
23 witnesses, since these experts are tough to get in town
24 sometimes?

25 MR. WALL: I have no problem --

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1 MR. ROGERS: We discussed it -- or pardon me, informally.

2 MR. WALL: The 18th would be the Friday of that week, as
3 I understand it, and that's fine.

4 THE COURT: You know, Judge Wiese has access to this
5 courtroom on Friday morning, so it would have to be an
6 afternoon witness and I don't know if we'd be able to get
7 finished with him or not, it's just something to keep in mind.

8 MR. ROGERS: Okay.

9 THE COURT: So I don't know if you want to make
10 arrangements to call him the following Monday, since we may
11 not be able to finish with him on the 18th. Generally, these
12 experts take awhile to get through direct and cross-
13 examination.

14 MR. ROGERS: Yes.

15 THE COURT: And so -- so I leave that to counsel to
16 coordinate. I don't have a problem with it. It's been my
17 experience that counsel generally are pretty amenable to
18 scheduling these various witnesses.

19 MR. ROGERS: That's fine.

20 THE COURT: All right.

21 MR. WALL: Okay.

22 THE COURT: Good luck.

23 MR. WALL: Thank you.

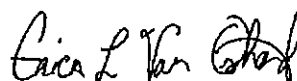
24 MR. ROGERS: Thanks, Judge.

25 [Proceedings Concluded at 10:38 a.m.]

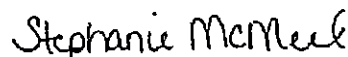
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1 ATTEST: I do hereby certify that I have truly and correctly
2 transcribed the audio/video recording in the above-entitled
3 case to the best of my ability.
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10 ERICA L. VAN OSTRAND, Transcriber

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14 STEPHANIE MCMEEL, Transcriber
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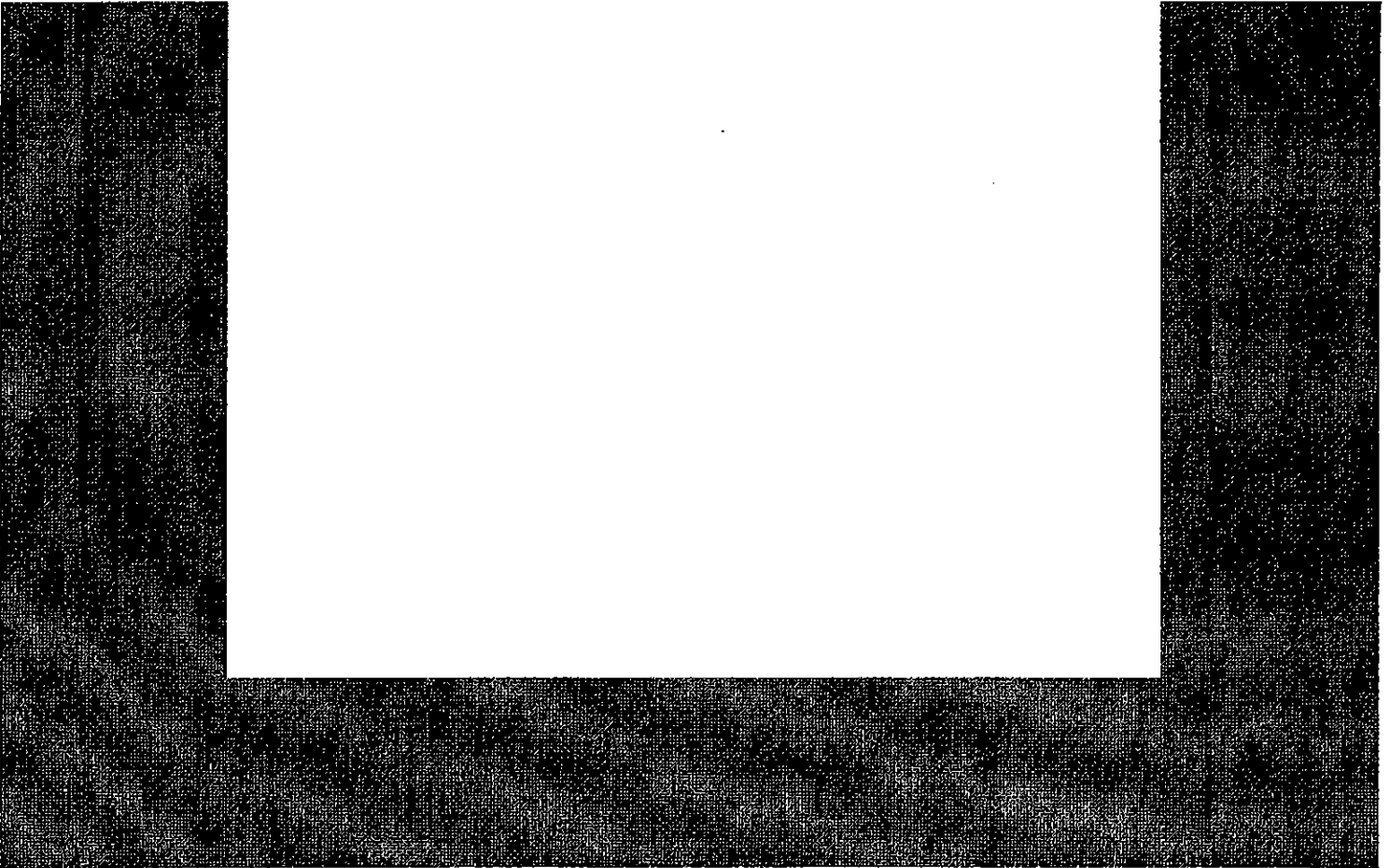
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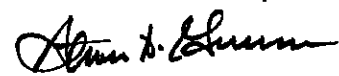


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3 Nevada Bar No. 3402

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21 *Attorneys for Plaintiffs*

22 **DISTRICT COURT**
23 **CLARK COUNTY, NEVADA**

24 WILLIAM JAY SIMAO, individually and
25 CHERYL ANN SIMAO, individually, and as
26 husband and wife,

27 Plaintiffs,

28 v.

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

32 Defendants.

33 CASE NO.: A539455
34 DEPT. NO.: X

35 **ORDER REGARDING**
36 **PLAINTIFFS' MOTION TO**
37 **ALLOW THE PLAINTIFFS TO**
38 **PRESENT A JURY**
39 **QUESTIONNAIRE PRIOR TO**
40 **VOIR DIRE**

41 This Honorable Court, having read the pleadings and papers on file herein regarding

000507
MAINOR EGLET

000507

1 PLAINTIFFS' MOTION TO ALLOW THE PLAINTIFFS TO PRESENT A JURY
2 QUESTIONNAIRE PRIOR TO VOIR DIRE, the parties appearing before the Court on January
3 20, 2011 for hearing, and good cause appearing therefor, the Court rules upon Plaintiffs' Motion
4 as follows:

5 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Allow Plaintiffs to Present a Jury
6 Questionnaire is **GRANTED** in part and **DENIED** in part. Plaintiffs are permitted to present a
7 Jury Questionnaire; however, Questions 33, 34, and 49 are to be removed from the
8 Questionnaire.
9

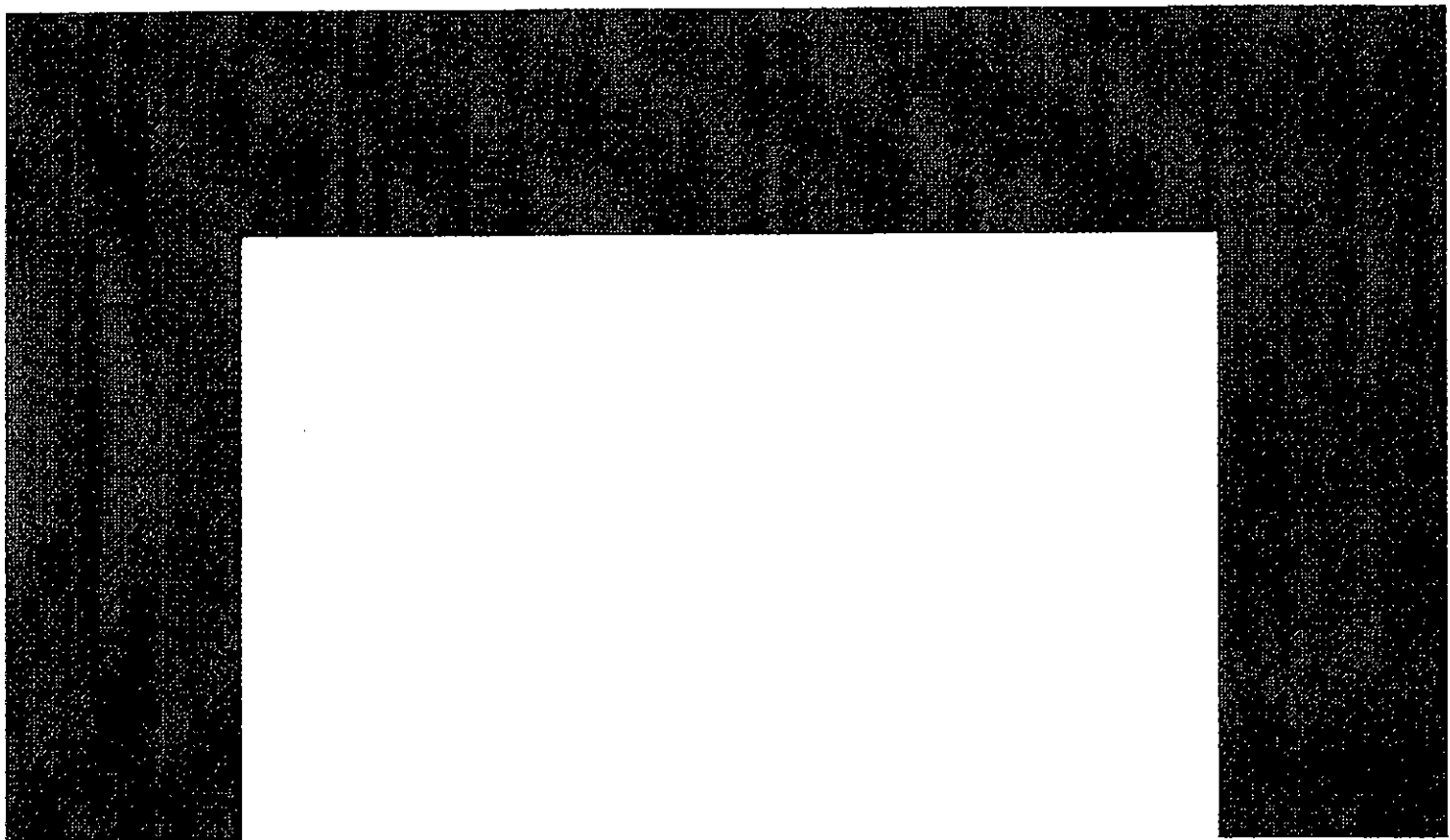
10 **IT IS FURTHER ORDERED** that Defendant is permitted to submit additional
11 questions to be added to the Jury Questionnaire.

12 DATED this 25 day of February, 2011.

13
14
15 *Jessie Walsh*
16 DISTRICT COURT JUDGE

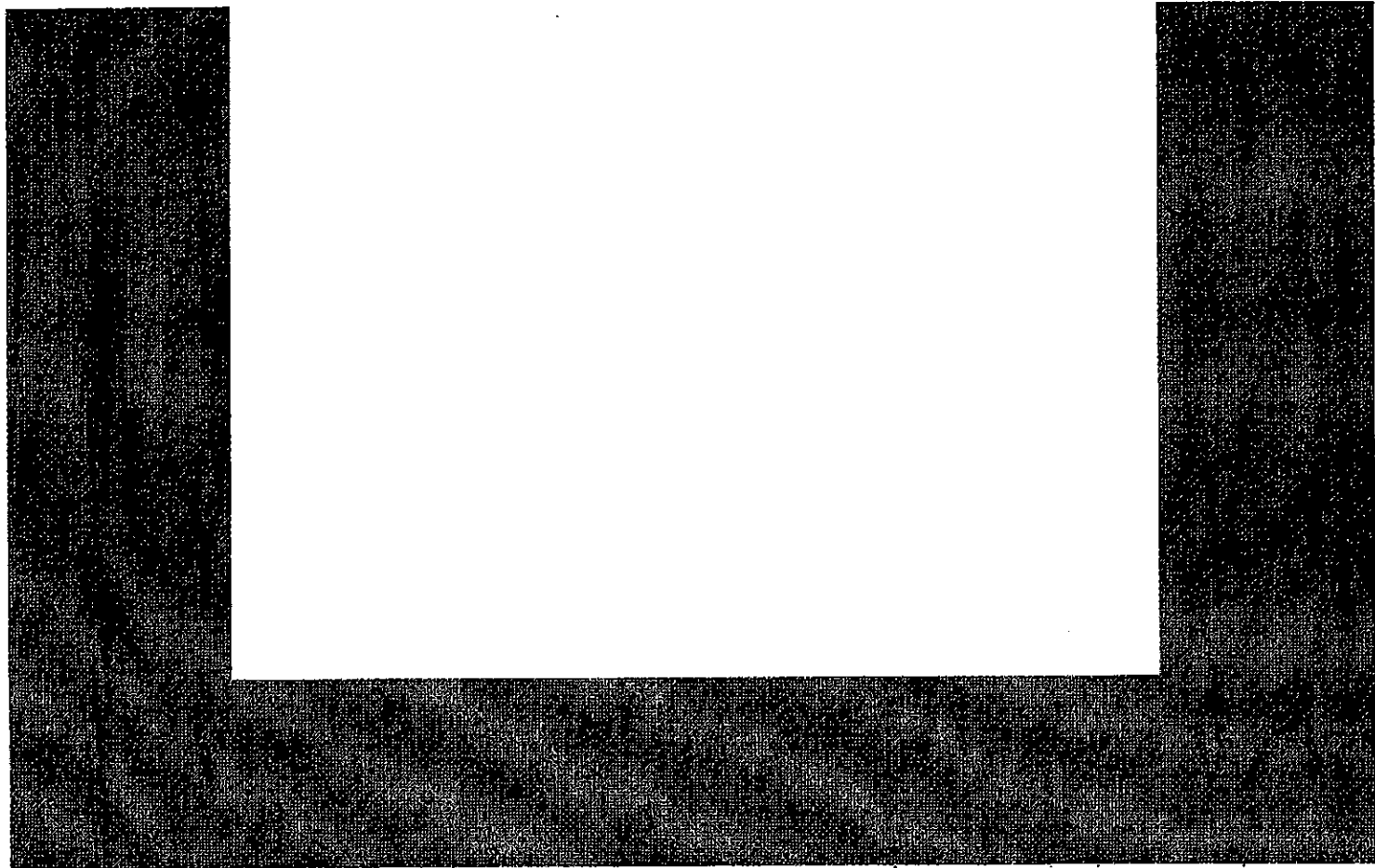
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19 **MAINOR EGLET**

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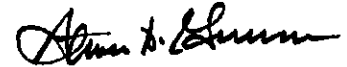


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11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 WILLIAM JAY SIMAO, individually and
14 CHERYL ANN SIMAO, individually, and as
15 husband and wife,

16 Plaintiff,

17 v.

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

21 Defendants.

CASE NO. A539455

DEPT. NO X

22 **DEFENDANT JENNY RISH'S OPPOSITION TO PLAINTIFF'S**
23 **MOTION TO PRECLUDE DEFENDANT FROM RAISING A "MINOR" OR "LOW**
24 **IMPACT" DEFENSE, TO LIMIT THE TRIAL TESTIMONY OF DEFENDANT'S**
25 **EXPERT, DR. DAVID E. FISH, M.D., AND EXCLUDE EVIDENCE OF PROPERTY**
26 **DAMAGE**

27 COMES NOW Defendant JENNY RISH, by and through her attorney, Rogers, Mastrangelo,
28 Carvalho & Mitchell, and hereby submits this Opposition to Plaintiff's Motion to Preclude

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1 Defendant From Raising a "Minor" or "Low Impact Defense," to Limit the Trial Testimony of
2 Defendant's Expert Dr. David E. Fish, M.D., and Exclude Evidence of Property Damage
3 DATED this 25th day of February, 2011.

4 ROGERS, MASTRANGELO, CARVALHO &
5 MITCHELL
6

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

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. Statement of Facts**

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

17 The Plaintiff seeks to conceal from the jury all evidence of motor vehicle accident it will be
18 charged with adjudicating. First, he moves to preclude the medical doctors from even considering
19 the nature of the impact, after nearly all of them, treating providers included, have testified that the
20 likelihood of injury is proportionate to the force applied to the body. Plaintiff further moves to
21 preclude the Defense from arguing this is a "minor" or "low impact" accident. The logical
22 conclusion to this argument is that the Plaintiff's treating providers cannot testify the accident was
23 sufficient to cause injury. Finally, Plaintiff seeks to exclude all evidence, including photographs,
24 of the property damage. Ironically, the vehicle photos comprise the foundation of the Plaintiff's own
25 expert accident reconstruction/biomechanical engineer. The Motion does not clarify whether the
26 Plaintiff seeks to prohibit his own expert from using the photos, as well.

27 ///

28 ///

1 Trials are truth seeking ventures. The jury can arrive at just verdicts only if the truth is
2 admitted. The jury must be presented with evidence of the accident. Without such evidence, the
3 jury could not reach a determination of fact about the accident; it could only speculate. The jury
4 must also learn what information the medical providers and other experts took into consideration
5 in formulating their opinions. Finally, Defendants must not be prohibited from arguing that the
6 subject accident was "minor." The logical conclusion to prohibiting the defense from arguing the
7 accident was minor and did not cause injury would be prohibiting the Plaintiff from arguing that the
8 accident was substantial enough to cause injury. Objective evidence of the accident is relevant. The
9 truth will be served only by admitting the objective evidence of accident, without which the jury
10 could do nothing but speculate.

11 II. Law and Argument

12 A. Medical Doctors are Permitted to Testify That the Force Bears Some Correlation to the 13 Likelihood of Injury

14 Medical experts are permitted to consider the severity of an accident (which the Plaintiff's
15 treating providers call the "mechanism of injury") when formulating their opinions. Courts have
16 long held that physicians are qualified to testify regarding the causal relationship between a motor
17 vehicle accident and the injuries a person sustained. *Santos v. Nicolos*, 897 N.Y.S.2d 701, 703
18 (2003). In giving opinion evidence, medical doctors often testify about "evidence received to assist
19 him in reaching an opinion." *Streight v. Conroy*, 566 P.2d 1198, 1200 (Or., 1977). This evidence
20 often includes photographs of the vehicles. *Id.*

21 Dr. Fish testified that everything he has reviewed in this case, medical records, depositions,
22 surveillance video and vehicle photographs, is relevant to his conclusions, and probative of the
23 alleged injuries. (See, generally, Dr. Fish Deposition, attached to Plaintiff's Motion, pgs. 16-17).

24 Plaintiff posits that medical doctors "are not qualified" to offer testimony taking the accident
25 into consideration. The logical corollary to this argument would be that Plaintiff's doctors could
26 not testify that the accident caused injury. The absurdity of this argument is exemplified by the
27 Plaintiff's failure to provide the court with any supporting authority. The general citation to NRS
28 50.275 applies, in this analysis, to a biomechanical engineer, but that is an entirely different analysis

1 and expertise. Besides, this court already denied the motion to exclude the biomechanical engineer's
2 opinion testimony. Defense medical experts do not intend to offer precise measurements and vector
3 analysis based on photographs, unlike the Plaintiff's biomechanical engineer. Rather, they will
4 supply the common sense proposition that the severity of forces do bear some relationship to the
5 likelihood of injury. The Plaintiff's own biomechanical engineer will admit this. But expert
6 testimony is not needed to discern this common-sense fact.

7 The jury should be permitted to perform their task. Plaintiff's motion should be denied.

8 **B. Plaintiff Cites No Authority In Support of the Motion to Preclude Defendant From**
9 **Describing the Subject Accident as "Minor Impact," Not Sufficient to Cause Injury**

10 Again, Plaintiff cites no authority for the proposition that a party, or even a treating physician
11 cannot submit that injury is not likely from a minor car accident. Instead, Plaintiff relies solely on
12 case law prohibiting a *bio-mechanical* experts from offering medical opinions. While this may be
13 true for biomechanical opinion evidence, this case law is not extended to medical doctors. If it were,
14 the Plaintiff's treating providers would not be permitted to testify that the accident was sufficiently
15 severe to cause injury.

16 In *Brown v. Hove*, 603 S.E.2d 63, 64 (Ga.2004), the plaintiffs contended that the trial court
17 erred in admitting the testimony of the defendant's medical expert, who opined that the plaintiff's
18 injuries were not caused by the subject accident. In reaching this conclusion, the defense medical
19 expert relied, in part, on the nature and mechanics of the impact. *Id.* In challenging this opinion
20 testimony, the plaintiff relied on authority prohibiting biomechanical experts from offering medical
21 opinions. *Brown* rejected this rationale, holding that a medical doctor is "unlike the [expert] in the
22 prior case, who was an accident reconstructionist..." *Id.* at 65. *See also Streight v. Conroy*, 566 P.2d
23 1198, 1200 (Or., 1977).

24 If the Court accepts Plaintiff's logic and precludes the Defense experts from testifying that
25 the accident was "minor," Plaintiff and his providers and experts must likewise precluded from
26 testifying that the accident was sufficient to cause injury.

27 ///

28 ///

1 Nevada courts have long recognized that medical doctors have sufficient expertise to offer
2 opinion testimony regarding injury. The Plaintiff cited no authority for the proposition that a
3 medical doctor cannot include information about the severity of the accident into their analysis. The
4 Motion should therefore be denied.

5 **C. Photographs of the Property Damage are Relevant and Admissible**

6 Plaintiff confuses the admissibility of evidence with the weight such evidence should be
7 given. In Nevada, evidence is relevant and admissible if it makes any contested fact more or less
8 likely. NRS 48.025. The photographs of the property damage are relevant to Plaintiff's alleged
9 injuries.

10 The Plaintiff's own biomechanical engineer will admit the common sense proposition that
11 the likelihood of injury is increased with the severity of the force applied to the body. He is free to
12 opine that this general rule common sense rule does not always apply. That can be contested. But
13 admissibility of the photos cannot.

14 In *Brenman v. Demello*, 921 A.2d 1110 (N.J. 2007), the plaintiff set forth the same argument
15 the Plaintiff herein offers. The court rejected it. The *Brenman* opinion first noted that the
16 relationship between the force of an impact in an automobile accident and the existence or extent
17 of any resulting injuries does not require expert opinion. *Id.* at 1120. Rather, property damage is
18 "but one factor" to be considered in deciding the relationship between the accident and the alleged
19 injuries, and a party is "free to offer expert proofs" regarding the matter. *Id.* In the instant case, the
20 Plaintiff is free to do the same. So is the defense.

21 Next, photographs depicting the property damage are the only way a jury can "visualize" the
22 nature of the accident they will be charged with adjudicating. *Mason v. Lynch*, 878 A.2d 588 (Md.,
23 2005). Thus, photographs of property damage are relevant, admissible and necessary to assist the
24 jury in obtaining an idea of the accident they will be analyzing.

25 The authorities Plaintiff relies on reject the notion that photographs of property damage are
26 never allowed. *Discola v. Bowman*, 342 Ill. App.2d 620, 631 (2003) specifically rejected the
27 proposition that photographs must be excluded without accompanying expert testimony. Rather, "the
28 critical issue was whether the jury can relate the vehicle damage depicted in the photos to the

1 injury..." *Fero v. Griffiths*, 361 Ill.App. 3d 738, 743, citing *Discola*, 342 Ill.App. 3d at 537.

2 In this case, multiple physicians have testified that the force applied to the body is a factor
3 in determining the likelihood of injury from an accident. For example, Dr. Seibel admitted that the
4 severity of force correlates to the likelihood of injury. "However," he added, "with that being said,
5 I have to say that I've seen people who have been in very severe accidents with a lot of force who
6 don't have injuries." Dr. McNulty, who is a medical doctor and an engineer, testified that "in
7 general, there is a correlation between the severity of an accident and the likelihood of injury.
8 However, if the patient had no neck pain before, but did have it after, it doesn't matter how slight
9 the accident was." Dr. Fish, too, testified there is a correlation between forces and the likelihood
10 of injury. Thus, contrary to Plaintiff's argument, the jury will not be "speculating" about the
11 meaning of the photographs. The jury has the capacity to evaluate them from a lay perspective, and
12 to learning the foundation that these physician took into consideration in forming their opinions.

13 Next, the Plaintiff made the photographs relevant for the very reasons he now disputes. On
14 05/22/08, a month after Plaintiff began treating with Dr. Rosler, he rear-ended a car on I-15. He
15 testified he "barely touched it," and that there was no property damage "whatsoever. Not a dent.
16 Not a ding." He thus argued that his subsequent accident caused such little property damage that
17 no one was injured.

18 Finally, these photos are relevant to Plaintiff's credibility. On 01/16/06, the Plaintiff
19 presented to physical therapist, Matt Smith. The Plaintiff told the therapist he was "Struck from
20 behind [at] 55 mph." The photographs depict little damage, thus "make this contested fact more or
21 less likely." NRS 48.025. If not for the photos, the defense would be unjustly deprived of its right
22 to refute the Plaintiff's claim.

23 III. Conclusion

24 The Plaintiff cites no authority for the proposition that photographs are admissible. The
25 Motion should be denied. He cites no authority in support of the motion to preclude medical
26 providers from commenting that the accident was minor, the logical conclusion of which is that the
27 treating providers could not comment that the accident was sufficient to cause injury. Finally, the
28 Plaintiff cites case law applicable to biomechanical engineers in support of a proposition not

1 recognized in the law: that a medical doctor should be precluded from citing a principle the jury
2 already knows – that the force of an impact bears some relevance to the likelihood of injury. It
3 undisputed does causation, “a contested fact more or less likely.” NRS 48.025. This Motion, too,
4 should be denied.

5 DATED this 25th day of February, 2011.

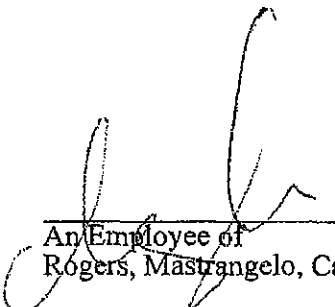
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7 MITCHELL

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13 *Attorneys for Defendant Jenny Rish*
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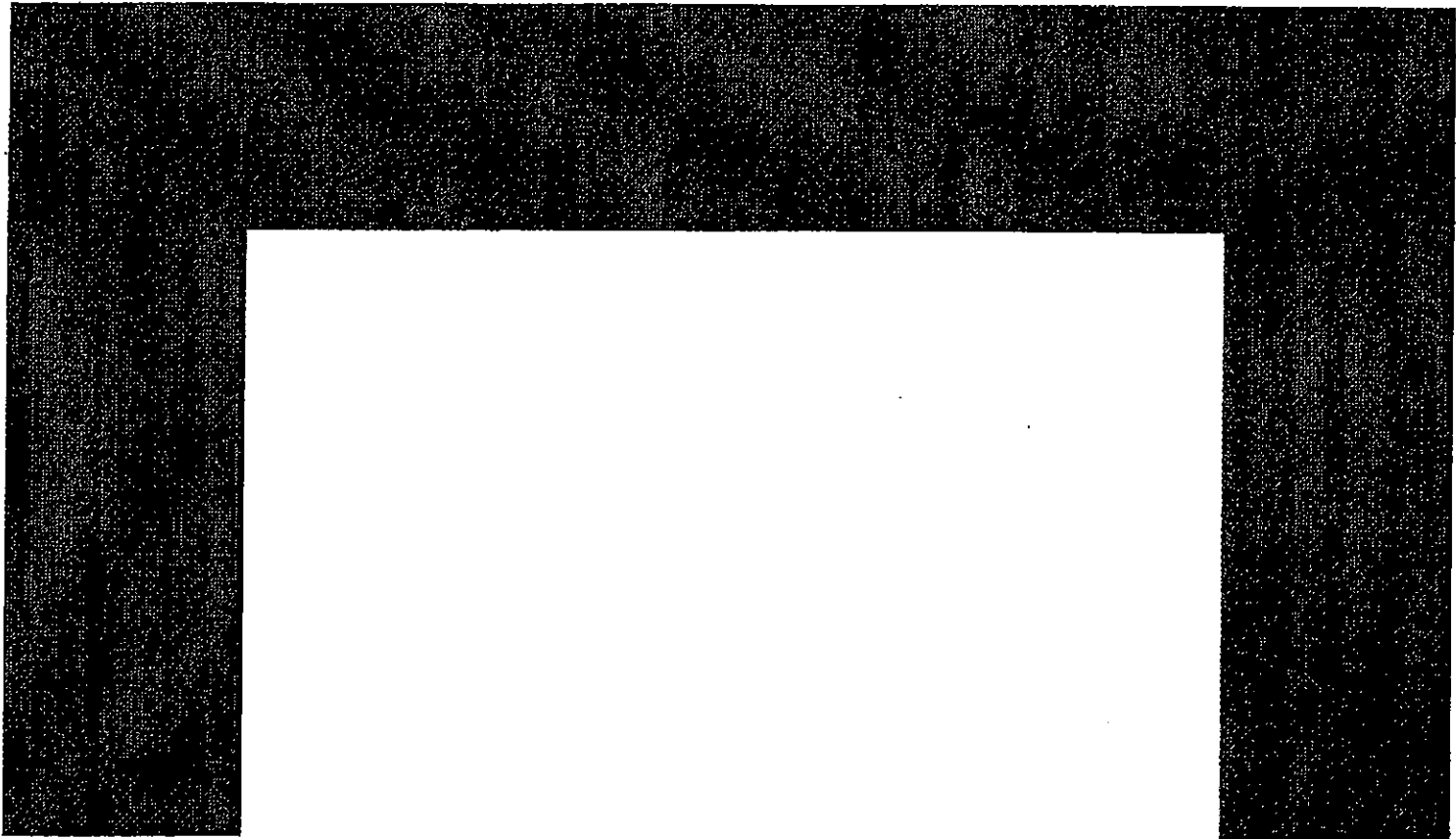
1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of
3 ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 25TH day of February,
4 2011, a true and correct copy of the foregoing **DEFENDANT JENNY RISH'S OPPOSITION TO**
5 **PLAINTIFF'S MOTION TO PRECLUDE DEFENDANT FROM RAISING A "MINOR" OR**
6 **"LOW IMPACT" DEFENSE, TO LIMIT THE TRIAL TESTIMONY OF DEFENDANT'S**
7 **EXPERT, DR. DAVID E. FISH, M.D., AND EXCLUDE EVIDENCE OF PROPERTY**
8 **DAMAGE** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the
9 following counsel of record:

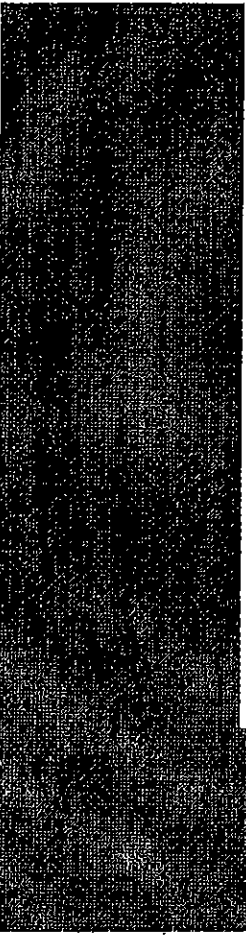
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13 400 South Fourth Street, Suite 600
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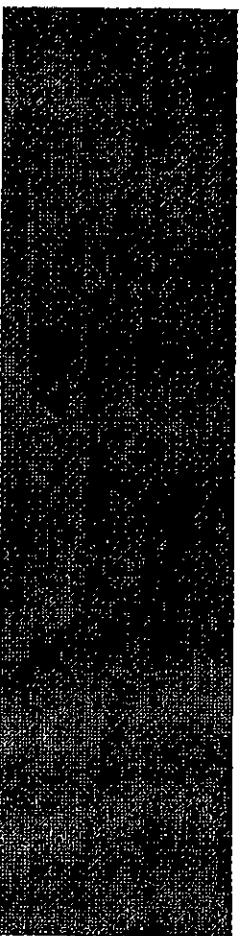
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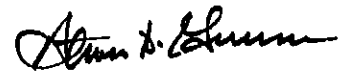
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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' REPLY TO
DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION TO EXCLUDE
SUB ROSA VIDEO**

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

ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT M. ADAMS, ESQ. of the

MAINOR EGLET

000519

1 law firm of MAINOR EGLET, hereby files their Reply to Defendant's Opposition to Plaintiffs'
2 Motion to Exclude Sub Rosa Video.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **ARGUMENT**

6
7 In their original Motion, Plaintiffs challenged the *sub rosa* surveillance evidence as
8 improper impeachment evidence, since it failed to discredit or rebut any of Plaintiff's deposition
9 testimony on his physical limitations as a result of the instant accident. In its Opposition,
10 Defendant claims that the surveillance video is admissible whether it serves to impeach Plaintiff
11 or not. *See Defendant's Opposition to Plaintiff's Motion to Exclude Sub Rosa Video, p.3-4.*

12
13 Defendant cites this Court to the Supreme Court of Missouri's opinion in *Egelhoff v.*
14 *Holt*, 875 S.W.2d 543 (1994), for the proposition that such videos are highly relevant and highly
15 probative of material facts in the case. In *Egelhoff*, the surveillance video was admitted because
16 is showed movement **contrary** to Plaintiff's testimony. *Id.* at 550. Additionally, Plaintiff did
17 not object at trial to most of the videotape, so the issue was viewed on appeal under an abuse of
18 discretion standard. *Id.* at 549-50. Neither of those principles apply in the instant case.

19
20 Defendant also cites as persuasive authority a 1968 opinion from the First District, Fourth
21 Division of the intermediate court of appeals from the State of Illinois, *Mathias v. Baltimore &*
22 *Ohio Railroad Co.*, 93 Ill.App.2d 258 (1968). In *Mathias*, again, the surveillance video was
23 offered to impeach Plaintiff in his contention that he could not perform work (in that case, heavy
24 machinery). No such impeachment is reflected in the instant case, as Plaintiff has not claimed
25 that his injury in the instant case absolutely limited his ability to perform any of the actions
26 shown in the surveillance video.
27
28

1 The only reason that *sub rosa* surveillance video is admissible is as an impeachment tool.
2 It has no other potential relevance. There is nothing in the surveillance video evidence that
3 conflicts with what William indicated in his deposition he was able to do following the accident.
4 Defendant appears to offer the Florida Court of Appeals' opinion in *Marion County v.*
5 *Cavanaugh*, 577 So.2d 599 (1991) for the proposition that surveillance video is admissible even
6 if it is consistent with Plaintiff's testimony. See, *Defendant's Opposition to Plaintiff's Motion to*
7 *Exclude Sub Rosa Video*, p.4. In fact, the Court of Appeals in *Marion County* actually viewed
8 the videotape that was excluded at trial and found that portions of it offered proper impeachment
9 of that plaintiff's claims. *Marion County, supra* at 600.

11 Defendant also cites this Court to *Steele v. Goosen*, 329 S.W.2d 703 (Mo. 1959), a 51
12 year old decision from the Supreme Court of Missouri which upheld the use of a "motion picture
13 film" of the plaintiff, for the proposition that surveillance video is admissible whether it is
14 consistent or inconsistent with Plaintiff's testimony. In fact, the Missouri court found that
15 "[t]here is no question here that the film was not properly identified as a correct representation of
16 plaintiff's activities and his ability to do certain work." *Id.* at 712. As such, the Court found that
17 the plaintiff's claim of prejudice was lacking. *Id.*

19 None of the authorities cited by Defendant are persuasive as to the necessity or
20 admissibility of surveillance video that does not impeach the Plaintiff on any relevant issue.
21 Impeachment evidence is "that which is offered to 'discredit a witness ... to reduce the
22 effectiveness of [his] testimony by bringing forth evidence which explains why the jury should
23 not put faith in [the witness's] testimony.'" *Chiasson v. Zapata Golf Marine Corp.*, 988 F.2d
24 513, 517 (5th Cir. 1993).

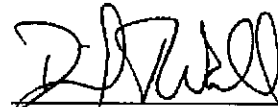
II.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court **GRANT** their Motion to Exclude Sub Rosa Video

DATED this 25 day of February, 2011.

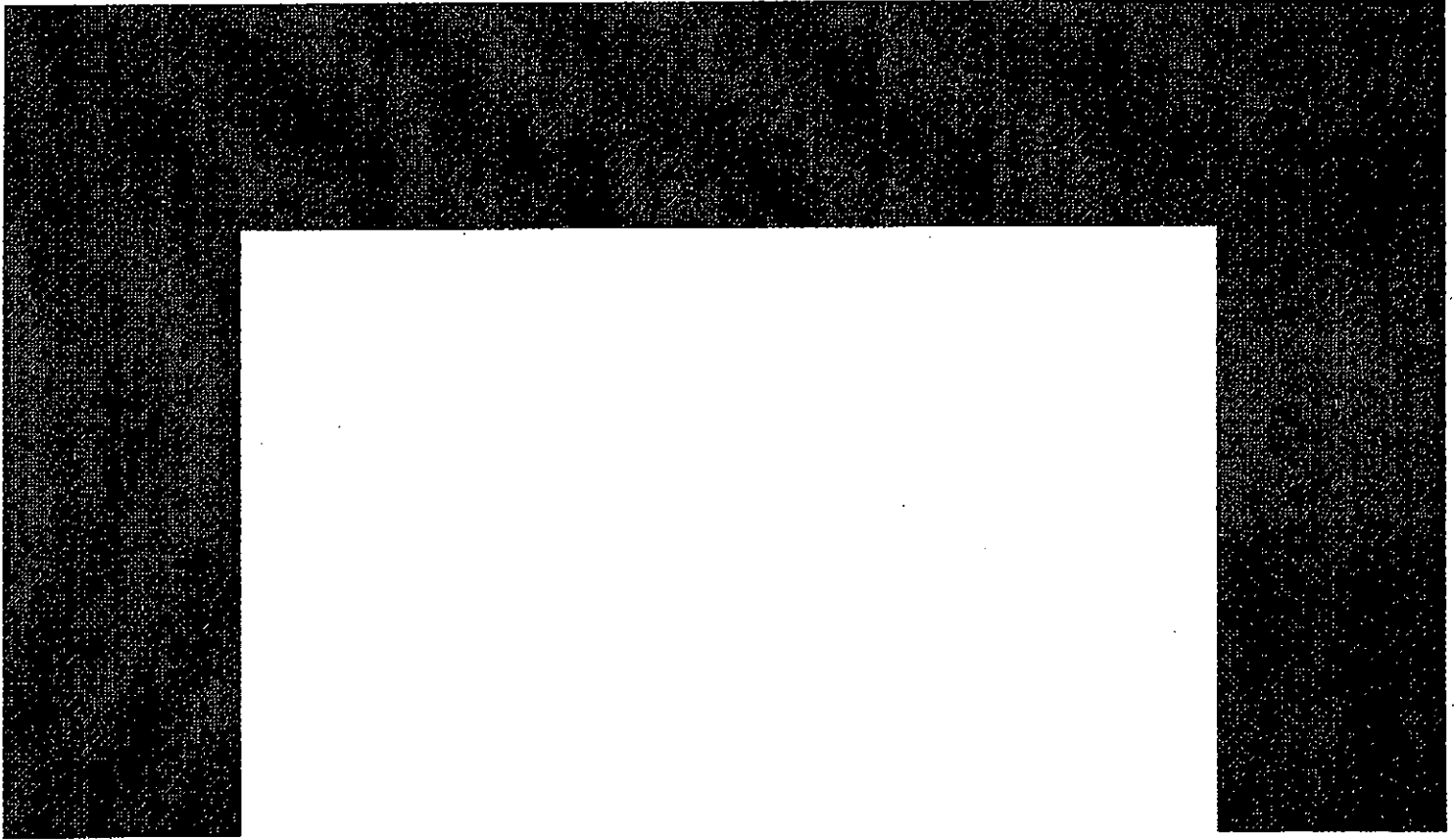
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DAVID T. WALL, ESQ.

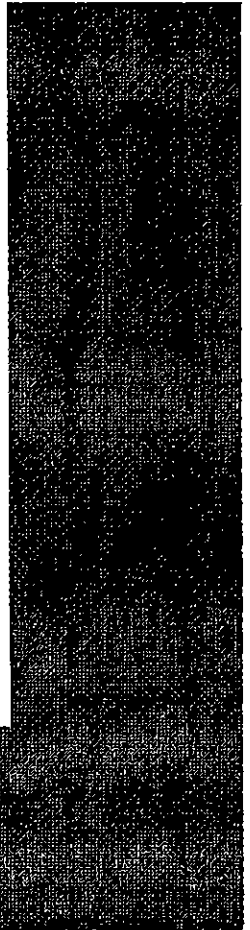
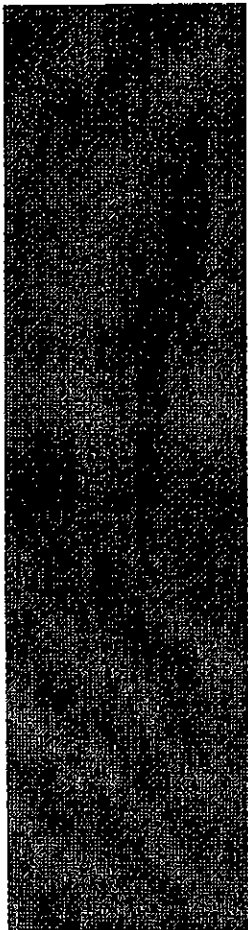
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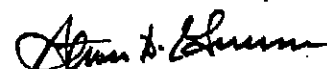
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CLARK COUNTY, NEVADA

CLERK OF THE COURT

WILLIAM SIMAO,

Plaintiff,

v.

JENNY RISH,

Defendant.

CASE NO. A-539445

DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, MARCH 1, 2011

REPORTER'S TRANSCRIPT
MOTIONS HEARING

APPEARANCES:

For the Plaintiff: DAVID T. WALL, ESQ.
ROBERT M. ADAMS, ESQ.
Mainor Eglet, LLPFor the Defendant: STEVEN M. ROGERS, ESQ.
Hutchison & Steffen, LLC

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1 TUESDAY, MARCH 1, 2011 AT 9:01 A.M.

2 THE MARSHAL: Please come to order. Department X is now
3 in session. The Honorable Jessie Walsh, Judge, presiding.

4 THE COURT: Please be seated. Good morning.

5 THE MARSHAL: Please call Page 9, Madam Clerk.

6 THE CLERK: William Simao versus Jenny Rish, A539455.

7 THE COURT: Could we have appearances for the record,
8 please?

9 MR. WALL: Good morning, Your Honor. David Wall on
10 behalf of the Plaintiff.

11 THE COURT: Thank you.

12 MR. ADAMS: Good morning, Your Honor. Robert Adams, also
13 on behalf of the Plaintiff.

14 THE COURT: Good morning.

15 MR. ROGERS: And Steven Rogers on behalf of Defendant,
16 Jenny Rish.

17 THE COURT: Good morning. We have several motions.
18 Where would you like to begin?

19 MR. WALL: We have three, Judge, that I saw. One of the
20 Defendant's and two of ours. We can take ours or his,
21 whatever you prefer.

22 THE COURT: How about Plaintiff's motion in limine to
23 preclude Defendant from raising a minor or low impact defense,
24 et cetera?

25 MR. WALL: All right. This was -- we filed it on an

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1 order shortening time, in part because Dr. Fish's (phonetic)
2 deposition included his intention to testify based on the
3 photos of the vehicles and the damage estimates. It's to
4 preclude evidence of the motor vehicle accident being impact,
5 actually here the officer's report says moderate, but I know
6 we discussed last week during the motions the requirements
7 under Hallmark and Levine and Chote (phonetic), even for a
8 biomechanical engineer, an expert, to testify to certain of
9 those things.

10 Here, you have a doctor who's going to testify based
11 on what he said in his deposition, to biomechanical opinions
12 based on his review of the photos, his experience as a -- as
13 treating people in motor vehicle accidents and the fact that
14 he's been in two motor vehicle accidents himself. That's not
15 the foundation that Hallmark says is necessary to admit his
16 biomechanical opinion and so it's our position that he cannot
17 testify to that and we'd ask for that restriction today.

18 In addition, since there is no expert on behalf of
19 the Defendants to testify that -- about the biomechanics of
20 the accident, the photos and the damage estimates themselves
21 are irrelevant. What I understood from the opposition is that
22 it's their position that there is some common sense
23 correlation between the amount of damage to the vehicle and
24 the amount of injury that results, when in fact that is
25 absolutely untrue, and every single medical provider will

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1 testify to that.

2 They want to raise that somehow by inference, or by
3 argument, before the jury. That this was just a minor impact.
4 It couldn't have caused these injuries, take a look at these
5 photos. There is no expert that will testify that way, and so
6 you can't get around that by just asking the jury to make a
7 speculative leap that they're not allowed to make.

8 We've cited the case law that says you can't argue a
9 correlation between the damage and the injuries without
10 competent expert witness testify. They have none. They want
11 the jury to speculate on what they have no foundation to
12 introduce and that is that moderate damage would equal a
13 moderate injury.

14 There is no consistent thread of truth to that
15 according to all of the medical providers and there's no
16 expert witness testimony that would allow. So we'd ask that
17 not only Dr. Fish be precluded from giving those opinions, but
18 that there be no argument about being a minor impact and that
19 the photos and the damage estimates be precluded. Thank you,
20 Judge.

21 THE COURT: Thank you. Mr. Rogers?

22 MR. ROGERS: Thank you, Your Honor. First, the Plaintiff
23 signed an admission that the photos are authentic, that they
24 accurately depict the damage that was caused by this accident.
25 The Plaintiff also signed an admission that the amount of the

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1 property damage is accurate, so these are undisputed facts.
2 The only question is whether they are relevant. And if you go
3 to the textbook definition the only question is, does it have
4 -- does the existence -- I'm sorry, let me start over. Do the
5 photos have a tendency to make the existence of any fact that
6 is of consequence to the determination of the action more or
7 less probable than it would be without?

8 Now, of course, the photos do. This jury won't be
9 asked to speculate if they see the photos, they'll be asked to
10 speculate if they don't. The Plaintiff went to one medical
11 provider and reported that this was a 55 mile per hour impact.
12 That is clearly untrue and if it weren't for these photos, is
13 that what the Plaintiff would be telling this jury? And how
14 on earth are they to determine what kind of an accident this
15 was without the only objective evidence there is of it.

16 Now, the Plaintiff said that he cited a case that
17 excluded photos. We cited many more that do the opposite.
18 How many trials have taken place in this department where
19 photos are admitted? Where photos are admitted and there's no
20 expert testimony at all? There is no case that stands for the
21 proposition that photos result in speculation. Logic shows
22 that the opposite would be true, though. Without them, the
23 jury can't do but speculate about this accident.

24 Now the problem is not that the photos are possibly
25 not probative; they clearly are. The photos do come in.

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1 They're the Plaintiff's expert's foundation. I mean, the
2 Plaintiff -- if the Plaintiff moves to exclude them from the
3 jury, does he move to exclude them from his own expert, who
4 has nothing but photos and the property damage estimate, to
5 support his biomechanical opinions? Remember, he didn't
6 inspect the vehicles. He didn't go to the accident scene. He
7 didn't do any of the stuff that is normally required of these
8 experts and yet he's going to come in and testify about photos
9 that the Plaintiff doesn't want the jury to see.

10 Now, leaving that point, as obvious as that is, the
11 photos do come in, the Plaintiff next argues that the Defense
12 medical experts cannot rely to any degree on these photos.
13 None of them said that this was a substantial part of their
14 opinion. They said look, it was just a piece of the puzzle.
15 We've looked at all the medical records, the diagnostic films,
16 everything, surveillance, which will be another motion here
17 shortly, and all of this -- all of those pieces come together
18 to help us understand the puzzle of this claim.

19 Again, the Plaintiff doesn't cite a single case that
20 supports the argument that medical doctors can't testify about
21 the likelihood of injury from a car accident. There are no
22 cases out there that stand for that proposition. The
23 Plaintiff cites only cases applying to biomechanics and to
24 accident reconstructionist. And there is no support for the
25 proposition that those cases are extended to doctors, because

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1 if it were the Plaintiff's doctors couldn't get on the stand
2 and testify that, in their opinion, this accident caused the
3 injuries that the Plaintiff complained of. That's the logical
4 conclusion to their position, is that their own providers
5 can't support their claim.

6 So the photos, the property damage estimate, all of
7 these things are relevant and don't require expert testimony
8 and the doctors are allowed to look at them and offer their
9 opinion based on that, plus everything else they've seen.

10 THE COURT: I take it Plaintiff has an accident
11 reconstructionist, but Defense does not?

12 MR. ROGERS: They have a biomechanical engineer, yes.

13 THE COURT: Oh.

14 MR. WALL: Well, here -- see, this has been sort of a
15 thread. First of all, I got to ask, both the opposition and
16 this argument mention our doctors, plural, about testifying
17 and correlating the amount of damage to the amount of injury.
18 The only one I'm aware of is Dr. Fish, from his deposition,
19 but I've heard it now a couple times in the plural form, so
20 I'm not sure where that's going. And our motion was strictly
21 based on Dr. Fish's deposition.

22 And the opposition also says yeah, you know,
23 Hallmark was only talking about biomechanical people. Doctors
24 can testify to biomechanical opinions without any additional
25 foundation. That is absolutely incorrect. There's a -- you

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1 can be a higher standard for someone less qualified to testify
2 on biomechanical opinions as a physician would be.

3 Mr. Rogers said there's no case keeping out the
4 photos. That Davis case that we cited actually excluded the
5 photos as more prejudicial than probative since there's no
6 foundation existing to support the Defendant's argument that
7 there's a relationship between vehicle damage and Plaintiff's
8 injuries, and that's our point. Frankly, if the photos and
9 the damage estimates and Dr. Fish's testimony and anybody else
10 -- any other medical providers testimony trying to correlate
11 this is out -- between the damage and the injuries is out, it
12 may very well be that we don't need Mr. Engelbrecht (phonetic)
13 and this trial will be streamlined even a little bit more.

14 Mr. Rogers says it's relevant. Well, it's relevant
15 to what? It's relevant to allow a jury to make a conclusion
16 that isn't based on any fact or science. That would be the
17 only thing it's relevant to, and therefore it's not relevant
18 to anything because it doesn't make the proof of any fact more
19 likely. And so we'd submit it on the motion.

20 THE COURT: Well, you know, the thing is that if Defense
21 had a witness, an accident reconstructionist or a
22 biomechanical engineer, then I think the photos and the damage
23 estimates come in and that witness could certainly give his
24 opinions, but Dr. Fish, or any medical doctor, may not testify
25 that because there appears to be minimal property damage that

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1 somehow the Plaintiff must not have been injured as much as he
2 claims to have been, pursuant to the Hallmark case. So the
3 motion is granted in its entirety.

4 MR. ROGERS: Your Honor, I -- just to make a record on
5 this. The bulk of the opposition to this motion cited several
6 cases holding that expert testimony is not required for the
7 admission of photographs. The Plaintiff scoured the
8 countryside and found one singular case in Illinois that no
9 one else follows. The jury is qualified to look at this
10 undisputed fact and make a determination about what kind of
11 accident this was, particularly in light of the Plaintiff's
12 representation to his doctors about the severity of this
13 accident. So even if Your Honor has questions about the
14 relevance of it, aside from that it's -- it's admissible for
15 impeachment.

16 THE COURT: I think it's relevant. I don't think the
17 issue is that it's not relevant. I think the pictures are
18 relevant. I think the property damage is relevant, but
19 counsel cannot argue, which it sounds like counsel wants to
20 do, Plaintiff couldn't have been injured very badly because
21 there's very -- there's not very much property damage and
22 there weren't very many expenses to repair the property
23 damage. That would be completely improper and you haven't got
24 a witness who can lay the proper foundation.

25 MR. ROGERS: If -- barring that comment, or argument,

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1 based on the evidence, is the evidence then admissible for the
2 jury's evaluation without it? I mean, can I simply say this
3 is what the accident was and not argue that this accident
4 could not have caused injury based on that photograph?

5 THE COURT: Mr. Wall?

6 MR. WALL: That's exact -- where's the foundation for
7 that going to come from? That there's any correlation between
8 amount of damage shown in a photo and the amount of injury?
9 The only place that can come from is an expert. They have no
10 expert, they have no foundation for that argument, there's no
11 reason then for the photos or the estimates to even come
12 because there is no -- you can't just ask them to accept it on
13 common sense, this scientific principle, which we know to be
14 untrue, and that's why.

15 And by the way, not only is there -- there's
16 Delaware, there's New Jersey, all of the case law that we
17 cited in there, there is no case that says it's okay to allow
18 the jury to speculate in an area that would require expert
19 testimony without any foundation or expert testimony to
20 support it. So that's the basis of our motion.

21 THE COURT: I've made my ruling. Let's move on to
22 Plaintiff's motion to exclude the Sub-rosa (phonetic) video.

23 MR. WALL: All right. And it occurred to me this
24 morning, I'm not sure that you've actually had an opportunity
25 to view the surveillance, which --

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1 THE COURT: No, I haven't, and, you know, that's part of
2 the problem with these motions, I think, as you well know, Mr.
3 Wall, I mean I don't know what the Plaintiff is going to say
4 when he gets on the stand. I haven't seen the video. I have
5 no idea whether the video impeaches whatever testimony he's
6 given by way of a deposition. I don't know any of these
7 things. You, probably of all attorneys in the room, can
8 relate to that issue?

9 MR. WALL: Here's the thing, we're not saying that it's
10 not a proper method of impeachment, because it is, but make no
11 mistake, that's the only reason they're admitted is for
12 impeachment purposes. So what are we impeaching here with
13 this video? In his deposition he was asked, are there any
14 activities that you used to do that you can't do at all?
15 Answer, no. He was asked about the activities that he can do,
16 how has this injury restricted him, in his deposition. He
17 can't sit in a chair for a long time, it's a day-by-day thing.
18 I can't run the buffer as long as I used to and I can't run
19 the carpet cleaning machine very long. It's not that he can't
20 do things, it's that he can't do them for as long as he used
21 to.

22 He was working virtually throughout this case. What
23 I take issue with is their claim that it doesn't matter
24 whether it impeaches him or not, it's still admissible and we
25 can still show this to the jury. The only cases they cite for

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1 that, the Eggelhoff (phonetic) and Steele cases from Missouri,
2 the Mathias case from Illinois and that Marion County case
3 from Florida, don't say that. They all analyze whether the
4 surveillance video is admissible -- actually, one of them is
5 so old it calls it motion pictures -- and tie it to whether or
6 not it's contrary to his testimony or to his evidence of what
7 he can and can't do.

8 Here the video, in its most pertinent parts, shows
9 him taking a carpet cleaning machine out of the back of a
10 truck -- by the way, he then winces in pain and holds his neck
11 -- and then does some repairs -- some work on his truck. It
12 doesn't impeach him, it doesn't show anything contrary to his
13 deposition testimony, it doesn't discredit him, and that's the
14 only purpose for admitting this. And the report, by the way,
15 if it says anything other than what's in the video, is
16 hearsay.

17 Maybe the better way is to defer this until after
18 his testimony -- or at least after his direct examination,
19 give the Court an opportunity then to see what parts of the
20 video the Defense feels impeaches him and then make a
21 determination, because I know you haven't seen it yet. I
22 would suggest that as an alternative.

23 THE COURT: Mr. Rogers?

24 MR. ROGERS: Right. The admissibility of surveillance
25 isn't contingent on the Plaintiff's admissions. What we do

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1 know about the Plaintiff's testimony, and his history, is that
2 he has testified that he had disabling pain that prevented him
3 from work. Strangely, this surveillance is at his workplace.
4 That he could not do heavy labor and he had to delegate tasks
5 that involved bending or lifting and here he is, at work,
6 lifting a heavy machine out of his truck bed and changing a
7 tire on his truck.

8 It's not simply what the Plaintiff told us. It's
9 what he told his medical providers as well. Just before this
10 video was taken, Dr. Grover, a surgeon, reported that the
11 Plaintiff was at wits end and on that basis he was a surgical
12 candidate, because of the pain that he was complaining of to
13 the doctor, and then we see him doing what he does in this
14 video and it is clearly probative of the pain that he, not
15 only might tell the jury about it, but what he was telling his
16 doctors contemporaneous with the time that the video was
17 taken.

18 I understand your concerns about establishing the
19 relevance of it; we'll do that. This is going to be used for
20 impeachment, but it's also admissible for the other reasons
21 outlined in the opposition.

22 THE COURT: There were a lot of cases that you cited from
23 other jurisdictions indicating why the video is admissible,
24 other than just for impeachment purposes, but there weren't
25 any Nevada cases, right?

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1 MR. ROGERS: No, there were not.

2 THE COURT: Mr. Wall?

3 MR. WALL: And those cases that he cited don't say that.
4 They all took a look at what was in the video and what the
5 testimony was and sought to see if the video was contrary to
6 the testimony. And if so, it's proper impeachment, frankly,
7 but those cases don't say you can admit the video for purposes
8 other than an impeachment. They didn't do it in those cases
9 and I'm not aware of cases that suggest that the Sub-rosa
10 video is relevant for anything other than to impeach the
11 Plaintiff or his evidence.

12 THE COURT: Well, if the video impeaches the witness'
13 testimony then it's admissible, or at least portions of it are
14 admissible, but not having seen the video and not having heard
15 the witness' testimony, I'm really not in a position to be
16 able to rule on this motion. I think the Court probably
17 should defer it until after Plaintiff testifies, then the
18 Court, I think, should have an opportunity to review the video
19 if counsel's contention is that the video impeaches the
20 witness' testimony.

21 MR. WALL: As a part of that order then may I ask that it
22 not be used during opening or at any time prior to that?

23 THE COURT: I don't see how it could.

24 MR. WALL: Thank you, Judge.

25 MR. ROGERS: Well, Your Honor, one way that it could is

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1 the doctor's reports that the Plaintiff is going to be
2 admitting into evidence. The ones that I outlined just a
3 moment ago, the ones that say, at the same time that this
4 surveillance was taken, that the Plaintiff was disabled from
5 pain. The video shows otherwise. The Defense is within its
6 right to show the jury the medical record and the surveillance
7 of his conduct at the same time that he's telling his doctors
8 something that seems inconsistent.

9 THE COURT: Well, the way that I read these pleadings,
10 what I understood is that Plaintiff claims to be in a lot of
11 pain and at some point his activities are monitored by a video
12 camera and he's seen changing a tire, I think in one instance,
13 in another instance lifting some kind of equipment out of a
14 truck bed. I don't know how heavy the equipment is that he
15 lifted out of the truck bed. I'm reading this on black and
16 white paper, I have no idea.

17 And then, as Mr. Wall stated -- or at least what I
18 glean from the pleadings and the argument, it sounds as though
19 the argument the Plaintiff seems to be making is yes, he's
20 still able to continue with his normal activities or normal
21 tasks, that's not to say that he might not be in a tremendous
22 amount of pain. That's how I read the pleadings and listened
23 to the arguments. So I don't think the Court can grant your
24 request without knowing more. I mean, people can be in a lot
25 of pain and still continue with their daily activities.

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1 MR. ROGERS: Okay. Could we then supplement with a
2 production of the video and the medical records that I'm
3 referring to?

4 THE COURT: What medical records?

5 MR. ROGERS: The medical records containing those
6 complaints, such as the Plaintiff is at wits end, and on that
7 basis he's a surgical candidate. The records surrounding the
8 time that that video was taken.

9 THE COURT: That was all contained in the written
10 pleadings that the Court reviewed for today's hearing.

11 MR. ROGERS: Right.

12 THE COURT: Those statements --

13 MR. ROGERS: Was it attached?

14 THE COURT: No, but the statements that the Plaintiff was
15 in a great deal of pain, severe and intolerable, that Dr.
16 Grover reported that William was at wits end due to his neck
17 and left shoulder pain, et cetera. I don't know that the
18 medical reports are going to help me much. I would appreciate
19 seeing the video.

20 MR. ROGERS: Okay. Well, we'll supply that then and
21 hopefully there's time then before we begin the openings so
22 that we can make that decision.

23 THE COURT: Depends on how soon you get me the video, Mr.
24 Rogers.

25 MR. ROGERS: Today. Thank you.

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1 THE COURT: Next motion is Defendant's motion in limine
2 to exclude evidence of senate investigation.

3 MR. ROGERS: Okay. The fact is that the senate
4 investigation was withdrawn without a finding of any
5 culpability. The Plaintiff wrote a 15 page treatise on the
6 subject and as the reply points out, got every detail wrong.
7 The Plaintiff tries to relate Grassley's investigation to the
8 California State Commission's investigation and research
9 reports and there's no connection. The federal government
10 wouldn't even have jurisdiction, I don't imagine, over the
11 state of California reporting.

12 The Plaintiff produced no evidence that Senator
13 Grassley's investigation resulted in any finding of dishonesty
14 or bias or anything else, simply that it was dismissed.
15 That's all we know about it.

16 To borrow a phrase from the Plaintiff, that
17 investigation is inadmissible because an investigation -- I'm
18 quoting their moving papers --

19 "An investigation without more fails to satisfy
20 any indicia of reliability for admission into
21 evidence and a court would be correct in ruling that
22 such questioning would be far more prejudicial than
23 probative."

24 So we begin with the understanding that the senate
25 investigation, which is the subject of the motion, is not

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1 admissible. So the Plaintiff next turned to the California
2 Commission stipulation and order. And they argued that this
3 stipulation and order relates to Dr. Wong's -- again I'm
4 quoting -- "To his credibility as an expert witness and his
5 bias in favor of those contributing money to him."

6 However, the very document that they supplied the
7 Court to make their case proves the absolute opposite, because
8 the Commission wrote that that incomplete report did not --
9 and I'm quoting from the Commission -- "Did not have any
10 impact whatsoever on Dr. Wong's research or findings." There
11 is no evidence of bias or of, as the Plaintiff argues, finding
12 in favor of those contributing money to him.

13 So the Plaintiff wants to submit an incomplete form
14 and question Dr. Wong about that. Well, an incomplete form
15 isn't relevant because nobody has found that it goes to
16 credibility, that it goes to truthfulness. Even if under some
17 strained interpretation of what happened, the Court could find
18 that submitting an incomplete form, it has no effect on the
19 research. It could be probative.

20 There is no doubt that that evidence would be more
21 prejudicial than probative. It would be unfairly prejudicial,
22 because not even the Plaintiff understands it. So submitting
23 it to the jury for them to try to figure out would require
24 bringing in all sorts of witnesses to explain what happened.

25 So the California Commission stipulation order isn't

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1 admissible for the reasons outlined in the final reply.
2 Number one, it was disclosed after the discovery deadline.
3 Number two, it is not relevant. An incomplete form, as I
4 said, doesn't have any tendency to prove credibility when the
5 very form itself says there is no bias, that Dr. Wong is
6 innocent of bias.

7 Next, it's not a prior bad act. The Plaintiff seems
8 to want to submit this extrinsic evidence of a stipulation and
9 order without even establishing that the act was bad. There
10 is no finding that it was bad, only that it was incomplete.
11 So with that said, the senate investigation is clearly out and
12 the California Commission stipulation order doesn't come in
13 either.

14 THE COURT: Mr. Wall?

15 MR. WALL: Thank you, Judge, and thank you for giving us
16 a couple different opportunities to brief this after Dr.
17 Wong's deposition. I'll give Mr. Rogers credit, there may be
18 two separate issues here.

19 It started out as their request to preclude us from
20 going into this senate investigation of Dr. Wong. We
21 continued it for his deposition, he actually gave us some
22 answers that were inconsistent with what he had testified to
23 previously on the sanction from UCLA as a result of this
24 senate investigation. In our case he testified there was no
25 sanction at all, in the previous case he had testified he was

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1 removed as the co-executive director of the UCLA Spine Center.

2 We tied this California administrative prosecution
3 to the senate investigation. The supplemental -- is it
4 supplemental reply, whatever he filed that laid out those
5 facts, some of that information we obviously weren't privy to,
6 it separates them out. And so he may be correct that there
7 are two separate things. It means that although -- if they're
8 two separate things, that although the issues were similar,
9 there were apparently two different investigations of Dr. Wong
10 over a several year period.

11 Now, Mr. Rogers says we're trying to make it into
12 our motion to get this California prosecution in under some
13 bad act theory under 48.045(2) and that's not our intention.
14 We thought they were trying to keep all of this out in the
15 motion, the senate investigation and the California
16 Administrative prosecution, because they are tied together
17 somewhat factually. And there's a separation under 50.085
18 between admitting all these documents and questioning Dr. Wong
19 about it as a specific instance of conduct on cross-
20 examination. We don't need a motion -- we've turned this into
21 a motion to get in this California -- we don't need a motion
22 before the Court to have permission to cross-examine him about
23 specific instances of conduct. Given everything there is and
24 the relationship between this and the senate investigation,
25 the more prudent thing to present to you is all of it because

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1 there are some factual ties, to determine the balance between
2 prejudice and probative value, but it's not our motion to
3 bring this in. Frankly, we just need the good faith basis and
4 the truth of what we're bringing as the specific instance of
5 conduct in order to be able to cross-examine him and we have
6 that in the stipulation and order.

7 And I take some issue with this -- what -- the way
8 Mr. Rogers describes this stipulation and order. See, Dr.
9 Wong obviously works for UCLA and under their -- under what
10 they call their Political Reform Act in California, which
11 arose after -- it's hard to relate here in Las Vegas, a bunch
12 of political corruption, they came up with this Political
13 Reform Act, and he's under the auspices of it because it's a
14 state university.

15 And what happens is, if he wants to receive outside
16 money from a medical device manufacturer, for instance, to do
17 some research, they're going to give him some money to do the
18 research, you can't have a conflict of interest because you
19 are already receiving some financial benefit from that company
20 because it waters down the effect of the research. As they
21 said in the stip in order, if someone in Dr. Wong's position
22 fails to disclose his financial interest in an entity on this
23 Form 700U, a review by their conflict of interest review
24 committee would be circumvented. And the reason they have a
25 conflict of interest review committee is because this company

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1 is going to come back later and say a UCLA study found that
2 our product is outstanding, whatever.

3 And so they have this conflict of interest review
4 committee in place just in case the guy that the company wants
5 to review it, that works at UCLA, owns a piece of that
6 business or has some other conflict of interest that would
7 potentially skew his opinions. And this stip and order -- I
8 don't know if it's a stip and order -- stip and decision lays
9 that out, the whole purpose of why he was investigated.

10 And so if the inference is that somehow he just
11 failed to mark a particular box on a form, they found three
12 specific instances where he failed to disclose that he had a
13 financial relationship with three separate companies who
14 wanted him, as a UCLA professor, to do this clinical research.
15 Three separate times in the space of about -- I want to say
16 about a year-and-a-half, but it might be a little different,
17 but they're set forth very clearly.

18 He failed to disclose to this -- so that this
19 conflict of interest group, this committee, could determine
20 what the effect of that is. And, you know, if you report that
21 you're receiving money from this company and they want to give
22 you more to do some research, the conflict of interest
23 committee has the ability to recommend approval of it with
24 some disclosure, they can recommend a reduction or elimination
25 of whatever your financial interest is with that company; Dr.

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1 Wong didn't want that. They can even recommend that certain
2 actions be taken to manage the conflict of interest, including
3 disclosing it before this clinical research takes place. He
4 failed to do that on three separate instances with three
5 separate companies, one of which was the same company that he
6 was being investigated with Senator Grassley's investigation.
7 That's why we made the connection.

8 So frankly, under 50.085, as a specific instance of
9 conduct, I can cross-examine Dr. Wong with that. I'm stuck
10 with his answer. Extrinsic evidence is separate. I wouldn't
11 be able to introduce, under that statute, extrinsic evidence of
12 the specific instance of conduct. So I'm stuck with his
13 answer, but it's absolutely permissible given his -- the
14 evolution of his opinions in this case where credibility
15 becomes an issue and what's gone on in the very recent past
16 regarding his expertise, because I can guarantee you the first
17 thing that's going to happen when he takes the stand is Mr.
18 Rogers is going to very ably lay out his position, his
19 qualifications at UCLA, in order to essentially bolster his
20 credibility, that's what we all do. So it's absolutely
21 appropriate to examine him on this under 50.085.

22 And maybe the senate investigation part of it
23 doesn't come in, but what he's admitted to, as the specific
24 instances of conduct, I have a good faith basis to say he has
25 agreed that he's committed these acts as conflict of interest.

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1 So, I would submit it on that.

2 THE COURT: Mr. Rogers?

3 MR. ROGERS: Yeah, there is no plural in acts. There is
4 one act and that is an admission and a decision that he has
5 done nothing more than submit an incomplete form. The
6 Plaintiff's motion first argues that it shows that he is
7 biased in favor of people that he does research for. The
8 Plaintiff, to their credit, has evidently abandoned that
9 position and now they argue today that it is relevant to a
10 conflict of interest.

11 Again, this -- they don't have a good faith basis
12 for that position. What they presented to Your Honor was
13 about 15 minutes of testimony that they could never support.
14 There are no witnesses who could bring this in and witnesses
15 wouldn't be permitted because it's extrinsic. The only good
16 faith question that they could ask Dr. Wong about this, if
17 anything, is did you submit an incomplete form? There was no
18 finding and no admission beyond that. And you can see that
19 even that is a prejudicial question.

20 This form doesn't stand for the proposition that the
21 Plaintiff argues. Bringing in any of this evidence is far
22 more misleading and prejudicial than it is probative because
23 this evidence doesn't establish credibility or conflict of
24 interest or any of the things the Plaintiff has argued for.

25 THE COURT: Well, this motion as it was drafted, which

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1 reads Defendant's Motion in Limine to Exclude Evidence of
2 Senate Investigation, this motion is granted, Mr. Rogers. Now
3 having said that, the credibility of any witness is always
4 fair game. Okay. I think that concludes the motion.

5 Do we have any other -- more motions we're going to
6 hear before this trial begins?

7 MR. WALL: There were -- there are a couple more that we
8 did on an order shortening time. We had passed -- and in fact
9 I got back today the stipulation. And the good news is
10 there's about 14 motions in the stipulation that we won't need
11 to reach. There was, I think, two that we had had some
12 discussions about some time ago and since then the
13 stipulations -- I'm just going to say that we couldn't come to
14 an agreement on those. So we quickly filed those after we got
15 word from Mr. Rogers and filed those on an order shortening
16 time. So there's, I think, two -- might be three, but they're
17 very brief.

18 THE COURT: Do you know when they're set?

19 MR. WALL: No. I want to say --

20 THE COURT: Do you know, Mr. Rogers?

21 MR. ROGERS: I haven't seen them.

22 THE COURT: You haven't seen them?

23 MR. ROGERS: I have not seen them.

24 THE COURT: You haven't even seen them yet?

25 MR. WALL: Oh no, we sent them over on Friday. I want to

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1 say --

2 THE COURT: They're not on calendar, the Clerk advises
3 me.

4 MR. WALL: I think they were probably submitted for the
5 OST, but we'll double check.

6 THE COURT: I haven't seen them either.

7 MR. ROGERS: Okay.

8 THE COURT: All right. Let me know if this case settles.

9 MR. WALL: Thank you. Do you want us to prepare the
10 order on all three?

11 THE COURT: Mr. Rogers has got one to prepare and you've
12 got two to prepare.

13 MR. WALL: Great. Thank you very much, Your Honor.

14 MR. ROGERS: Thank you, Your Honor.

15 [Proceedings Concluded at 9:40 a.m.]
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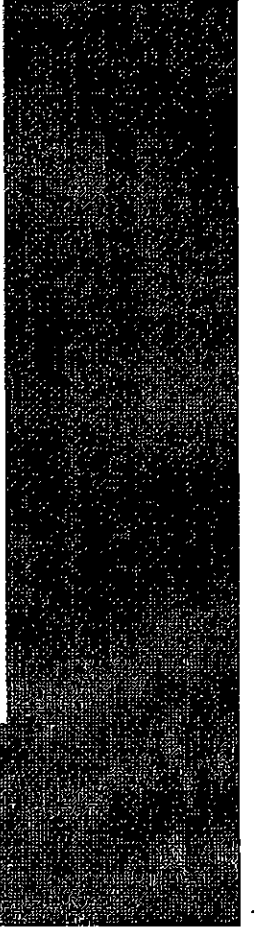
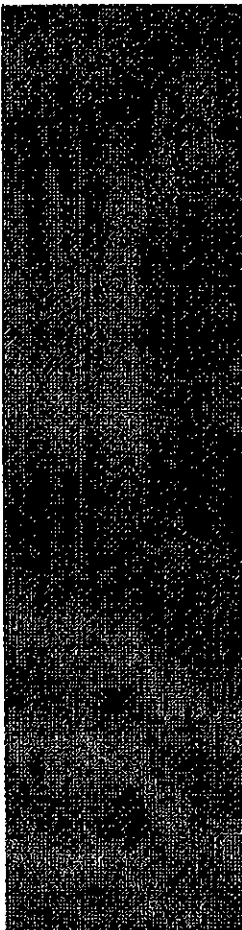
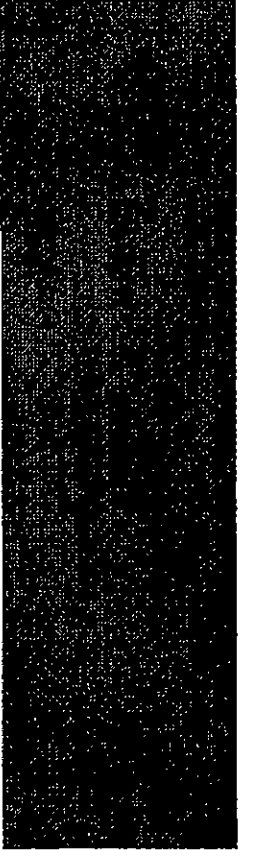
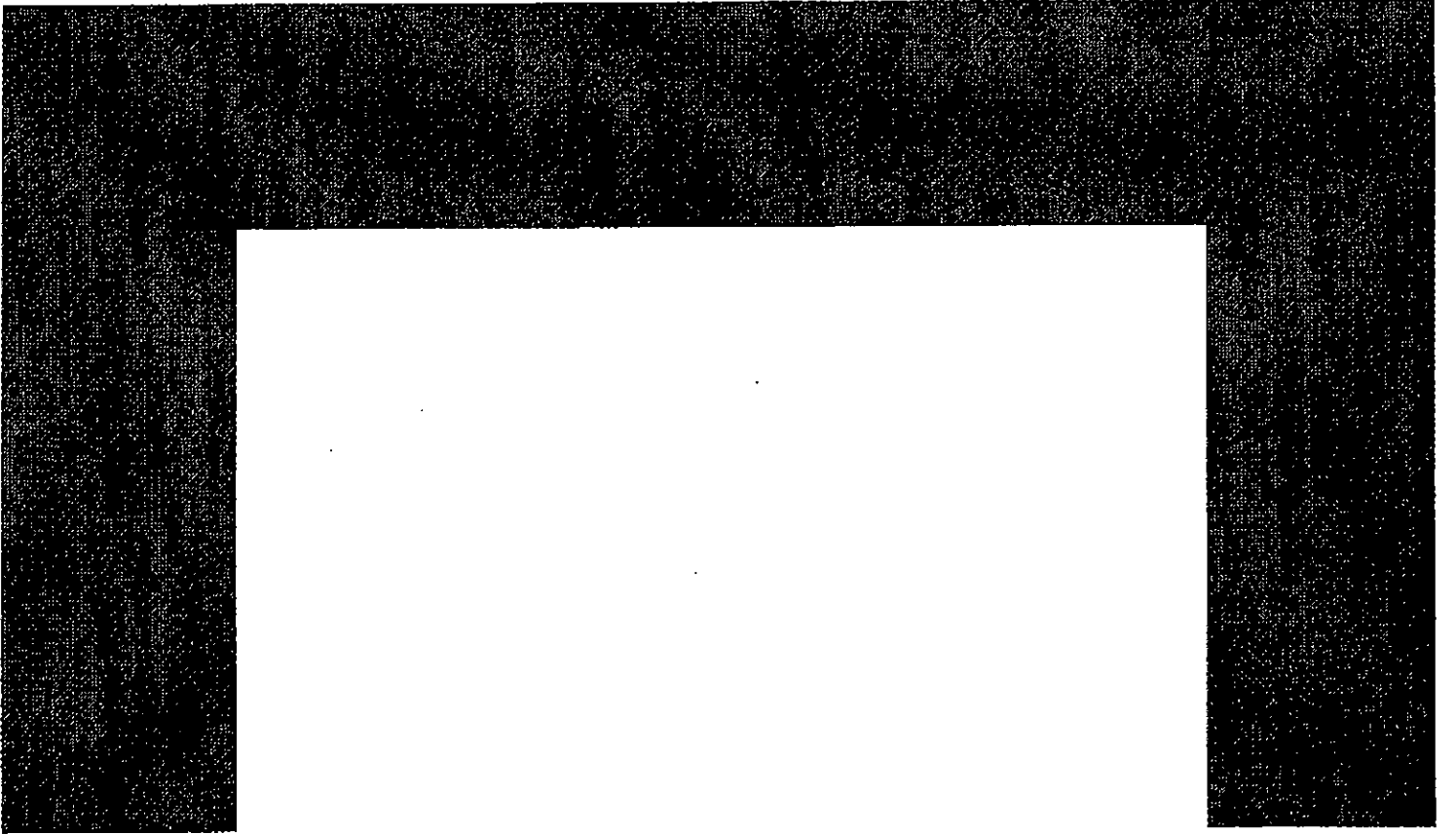
1 ATTEST: I do hereby certify that I have truly and correctly
2 transcribed the audio/video recording in the above-entitled
3 case to the best of my ability.
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Stephanie McMeel

STEPHANIE MCMEEL, Transcriber

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DEPARTMENT X
NOTICE OF HEARING
DATE 3/8/11 TIME 9:00
APPROVED BY pac

MAINOR EGLET

RECEIVED
MAR 02 2011
CLERK OF THE COURT

OLIM

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DAVID T. WALL, ESQ.

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Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

FILED

MAR 02 2011

John H. Blum
CLERK OF COURT

CASE NO.: A539455

DEPT. NO.: X

**PLAINTIFFS' SECOND OMNIBUS
MOTION IN LIMINE**

07A639466

OLIM

Omnibus Motion in Limine

1264726



COME NOW Plaintiffs, WILLIAM and CHERYL SIMAO, by and through their attorneys,

1 ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT A. ADAMS of the law firm of
2 MAINOR EGLET, and hereby file this Second Omnibus Motion in Limine.

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

5 DATED this 28 day of February, 2011.

6 MAINOR EGLET

7 By: [Signature]
8 DAVID T. WALL, ESQ.

9
10 **ORDER SHORTENING TIME**

11 It appearing to the satisfaction of the Court, and good cause appearing therefore, IT IS
12 HEREBY ORDERED that the time for hearing on PLAINTIFFS' SECOND OMNIBUS
13 MOTION IN LIMINE for hearing on the 8 day of Mar, 2011, at the hour of 9⁰⁰ AM
14 a.m., in Department X, in the above-entitled Court, or as soon thereafter as counsel can be heard.

15
16 DATED this 1st day of Mar. February, 2011.

17
18 [Signature]
DISTRICT COURT JUDGE

19 Respectfully submitted by:

20 [Signature]
21 DAVID T. WALL, ESQ.

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

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

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

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

2. That pursuant to EDCR 2.47, Affiant and defense counsel, Steve Rogers, Esq., first discussed the merits of the instant Motion on or around January 6, 2011;

3. That during the telephone conference on January 6, 2011, Mr. Rogers agreed to stipulate to the matters set forth in the instant Motion;

4. That on January 12, 2011, my secretary, Ashley Ganier, sent an e-mail to Mr. Rogers' secretary, Carolyn Mangundayao, attaching the proposed Stipulation and Order for Mr. Rogers' review. *See Exhibit "1;"*

5. That by February 10, 2011, Affiant had not yet received a response from Mr. Rogers' regarding the Stipulation and Order. On this day, Affiant personally gave Mr. Rogers' another copy of the Stipulation and Order at an expert's deposition and was informed that Mr. Rogers' would review the document and return it as soon as possible;

6. That by February 17, 2011, Mr. Rogers' had not responded to or signed the Stipulation and Order. On this date, Ms. Ganier sent another e-mail to Ms. Mangundayao requesting status of the same. *See Exhibit "2;"*

7. That on February 22, 2011, the parties appeared for hearing before this Honorable Court and Mr. Rogers was instructed to provide Plaintiffs' counsel with changes to the Stipulation and Order immediately;

1 8. That on February 23, 2011, Affiant received an e-mail from Mr. Rogers' indicating
2 that he would no longer agree to stipulate to six (6) of Plaintiffs' points, thereby necessitating the
3 instant Motion.

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

5 10. That because the trial date is quickly approaching and because the instant Motion
6 concerns matters that are central to trial, this matter cannot be heard in normal course and it is
7 respectfully requested that it be heard on an Order Shortening Time, pursuant to Court order.

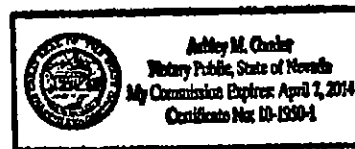
8 FURTHER, AFFIANT SAYETH NAUGHT.

9
10 
11
12 DAVID T. WALL, ESQ.

13 SUBSCRIBED AND SWORN to before me

14 This 28 day of February, 2011.

15 
16
17 NOTARY PUBLIC



18
19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. FACTUAL BACKGROUND**

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

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

III. LEGAL AUTHORITY

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

Construction Co., 87 Wn.2d 85, 549 P.2d 483 (1976).

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

11 **IV. ITEMS SUBJECT TO EXCLUSION**

12 **1. Prior and Subsequent Unrelated Accidents, Injuries and Medical Conditions and**
13 **Prior and Subsequent Claims or Lawsuits.** Plaintiffs' request to exclude prior and subsequent
14 unrelated accidents, injuries and medical conditions and prior and subsequent claims or lawsuits has
15 already been heard and granted by the Court. However, at the time of the hearing, it was understood
16 that Defendants' counsel had agreed to stipulate to exclude the following: 1) any reference to or
17 evidence of William's non-cancerous tumor; and 2) William's involvement in a class action lawsuit
18 against a housing company. It wasn't until after the recent hearing on Plaintiffs' Omnibus Motion in
19 Limine that Defendant's counsel advised that he would not be able to stipulate to exclude this
20 information. As a result, Plaintiffs are forced to file the instant Motion so that this issue can be
21 readdressed by the Court.

22 Any evidence or reference to any prior and/or subsequent unrelated accidents and injuries or
23 conditions must be excluded unless (a) such condition was symptomatic at the time of the injury at
24 issue here, or was (b) a latent pre-existing condition that was made symptomatic by the injury. It is
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1 well settled that causation of injury and damages must be established by medical expert testimony to
2 a reasonable degree of medical probability. See *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev.
3 153, 157, 111 P.3d 1112 (2005); *Layton v. Yankee Caithness Joint Venture*, 774 F.Supp. 576
4 (1991); *Fernandez v. Admirand*, 108 Nev. 963, 973, 843 P.2d 354 (1993); *Brown v. Capanna*, 105
5 Nev. 665, 671-72, 782 P.2d 1299 (1989). "A verdict may not be based on speculation, whether the
6 testimony comes from the mouth of a lay witness or an expert. *Gramanz v. T-Shirts & Souvenirs*,
7 111 Nev. 478, 894 P.2d 342 (1995) (citing *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 682
8 (3d Cir. 1991)). Thus, prior and/or subsequent accidents and injuries may only be admissible if a
9 medical expert testifies to a reasonable degree of medical probability that such prior and/or
10 subsequent accidents and injuries are causally related to the injuries the Plaintiff sustained in the
11 subject crash.
12

13
14 Consequently, as applied to the instant matter, any prior and/or subsequent accidents, injuries
15 and/or medical conditions which the defense's medical expert does not causally relate to a
16 reasonable degree of medical probability to the injuries William sustained as a result of the subject
17 motor vehicle crash are irrelevant and must be excluded. This includes reference to or evidence of
18 William having a non-cancerous tumor in his jaw, which he received surgical treatment for in 2007.
19 This medical condition has absolutely no relevance to the injuries that William received as a result
20 of the instant crash.
21

22 Furthermore, any reference to any other claims or lawsuits involving the Plaintiff, either prior
23 to or subsequent to the instant action, whether the claim or suit arose out of this incident or some
24 other claim or lawsuit, is irrelevant to the issues in this case and presents the danger of unfair
25 prejudice and confusion of the issues. This includes a class action lawsuit that William was involved
26 in against a housing company.
27
28

1 **2. Hypothetical Medical Condition.** Comments or queries about hypothetical medical
2 conditions would result in no more than mere speculation on the part of the jury. A verdict cannot be
3 founded on mere theory or speculation. *Marshall v. Ballys Pacwest, Inc.*, 94 Wash.App. 372, 379,
4 972 P.2d 475, 479 (1999). See, also, *Duthie v. Worker's Comp. Appeals Bd.*, 86 Cal.App.3d 721,
5 150 Cal.Rptr. 530 (1978) (medical examiner's educated guess or speculation is not competent
6 evidence).

7 Hypothetical questions of medical providers involving non-existent medical conditions,
8 symptoms or injuries are also improper. It is anticipated that Defendant will ask William's medical
9 providers hypothetical questions at trial which focus upon non-existent medical conditions,
10 symptoms, or injuries in an effort to confuse the jury and, with no basis in fact, question the causal
11 relationship between the motor vehicle accident and the injuries suffered by William in the subject
12 motor vehicle accidents. Comments or questions of this nature will result in speculation and
13 confusion on the part of the jury, and are, thus, not permitted. *Marshall v. Ballys Pacwest, Inc.* and
14 *Duthie v. Worker's Comp. Appeals Bd. Id.* As such, any such queries should be excluded from
15 consideration by any testifying witness.
16

17 **3. Evidence of the Absence of Medical Records for Any Period of Time Prior to the**
18 **Accident.** This Motion is brought with an abundance of caution based on an issue that has arisen at
19 previous trials. This in no way is an accusation against trial counsel in this matter; however, he
20 would not stipulate to this motion in limine, thereby forcing this request. In the *Messer v. Escamilla-*
21 *Estrada* (Case No. 03-A-467965-C) trial that was before Judge Lee Gates several years ago, Dr.
22 Kreitenberg testified to the jury that the absence of medical records bothered him and that it would
23 have been better if he could have reviewed more medical records from before the subject accident
24 (paraphrase). In that case, there were no other records for him to review. That information was
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1 relayed to the jury; however, upon speaking to the jury after the verdict in that case they informed us
2 that they were really bothered that there were not more pre- accident records to review. No one will
3 ever know how that affected the jury's verdict in that case. There has been at least one other trial in
4 which this argument was presented in the last few years where this counsel has been trial counsel.
5 Such testimony from an expert or otherwise does not assist the trier of fact, but only causes to
6 confuse and mislead. The fact that a plaintiff does not have more pre-accident medical records has
7 no bearing on the injuries he sustains in any given case. Therefore, Plaintiff asks your Honor to order
8 defense from arguing the same if such is his intention.
9

10 It is well settled law in Nevada that a Defendant in a personal injury suit is not entitled to
11 unfettered access to the Plaintiff's entire medical history. *Schlatter v. The Eighth Judicial District*
12 *Court of the State of Nevada*, 93 Nev. 189, 561 P.2d 1342, 1343-44, 1977 Nev. LEXIS 511 (1977).
13 In *Schlatter*, the Nevada Supreme Court cited Nevada Rule of Civil Procedure 26(b)(1) in stating that
14 the scope of discovery in civil actions is limited to matters, not privileged, "which is relevant to the
15 subject matter in the pending action, . . . (emphasis added)" and further found that "[w]here, . . . a
16 litigant's physical condition is in issue, a court may order discovery of medical records containing
17 information relevant to the injury complained of or of any pre-existing injury related thereto." *Id.*
18 (emphasis added) As the issue was a matter of first impression in the State of Nevada, the Court
19 based this particular finding on two foreign cases, *Mattison v. Poulen*, 353 A.2d 327 (Vt. 1976), and
20 *State ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. 1968).
21

22 Accordingly, on the basis of the Court's well-established findings in *Schlatter*, the Defendant
23 in this case is only entitled to William's specific medical records pertaining to his injuries in this
24 case. The defense is also only entitled to prior medical records to the extent such record contain
25 information relevant to the injury complained of. Consequently, under *Schlatter*, the defense's expert
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1 in this case must not be able to comment regarding the lack of William's prior medical history or
2 even suggest that the absence of their medical records for a specified period of time creates a void in
3 their medical history. This would be improper under *Schlatter*, which specifically holds that a
4 defendant is only entitled to "information relevant to the injury complained of or of any pre-existing
5 injury related thereto." *Schlatter*, supra at 1343-49.

6 **4. Any Reference to an Alleged Federal Grand Jury Investigation into Doctors and**
7 **Lawyers in Las Vegas.** As the Court is undoubtedly aware, there were several news stories about a
8 Federal Grand Jury investigation into alleged improper activities by doctors, lawyers, and Howard
9 Awand. Unfortunately, Plaintiffs' lawyers' names were used in some of these stories. A jury
10 questionnaire along with voir dire is the tool that will be used to try to find a fair and impartial jury.
11 Once accomplished, Defendants should be admonished against attempting to introduce, imply or
12 insinuate that Plaintiffs' counsel or the doctors are involved in the investigation in any fashion. To
13 permit such information to be heard by the jury is clearly more prejudicial than probative and must be
14 excluded.
15

16
17 Additionally, the Court should preclude any reference to Plaintiffs' counsel's qualifications or
18 expertise, or the fact that Plaintiffs' counsel focuses on personal injury cases. And the Court should
19 preclude any reference that medical experts in this case have also rendered services to other clients
20 represented by Plaintiff's counsel in the past. *See* NRS § 48.015; 48.025; 48.035; *see also Cancio v.*
21 *White*, 697 N.E.2d. 749 (Ill. 1st Dist. 1998) (defendants' insinuation of "a connection" between
22 plaintiffs' counsel and physicians "was improper, unsupported by the evidence, highly prejudicial
23 and deprived plaintiffs of a fair trial.").

24
25 Also, this issue is distinguishable from Defendant's request to preclude evidence of a Senate
26 Investigation of Defendant's expert, Dr. Jeffrey Wang. Dr. Wang was ultimately sanctioned by
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28

1 California authorities. Defense in the instant case concedes they have no information or evidence
2 alleging any specific wrongdoing against any witness or medical provider.

3 5. **Reference to Attorney Advertising.** Any references related to attorney advertising
4 should be precluded. The law firm of MAINOR EGLET advertises in Las Vegas. A common
5 defense ploy at trial is to negatively and sarcastically reference advertising by MAINOR EGLET to
6 suggest that Plaintiffs' claims have less merit because Plaintiffs' attorneys advertise. Any
7 introduction of such argument is irrelevant, prejudicial, and excludable pursuant to NRS § 48.025
8 and 48.035.

9
10 V. **CONCLUSION**

11 Therefore, Plaintiffs respectfully request that their Second Omnibus Motion in Limine be
12 granted in its entirety.

13 DATED this 28 day of February, 2011.

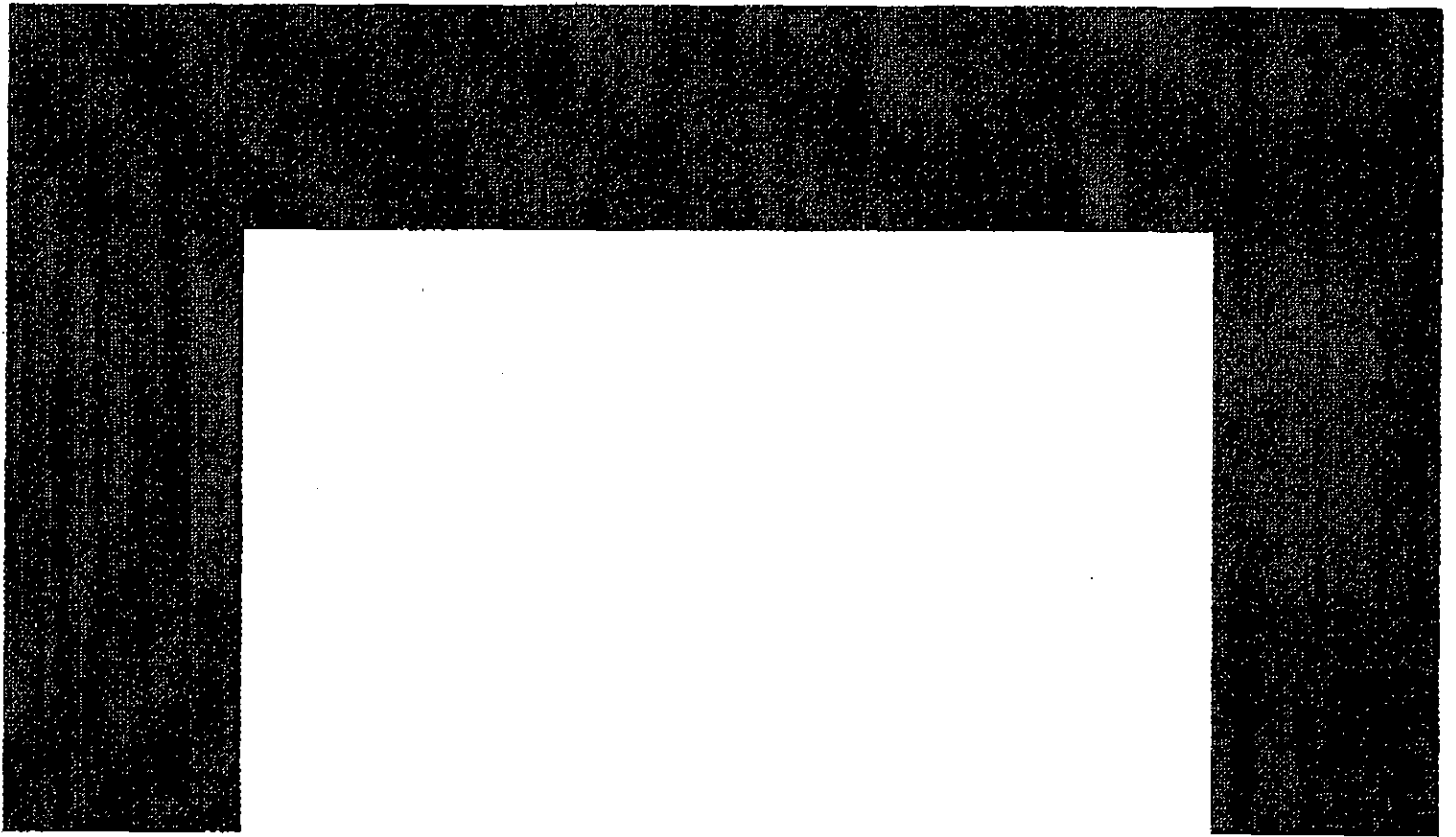
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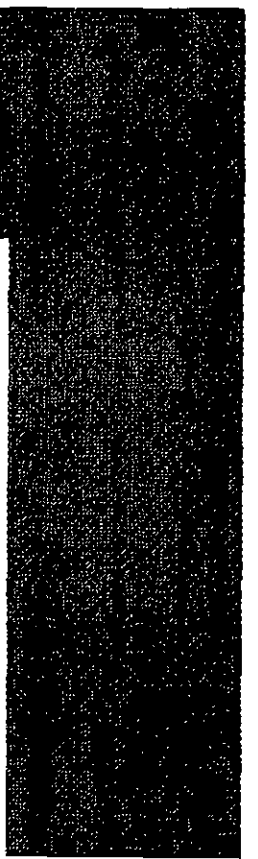
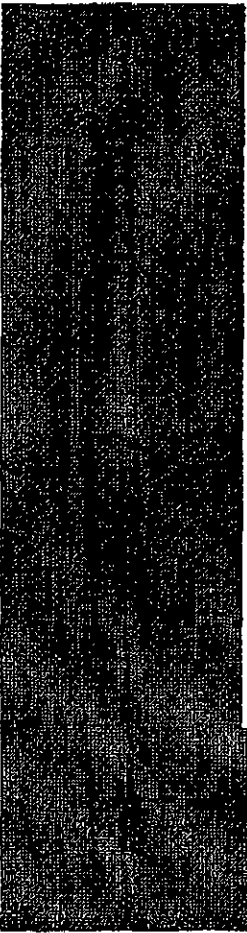
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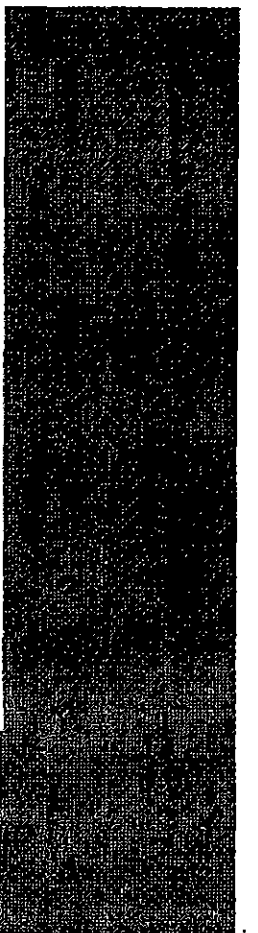
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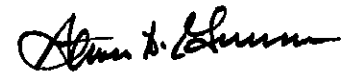
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1 **OPPS**
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5 300 South Fourth Street, Suite 710
6 Las Vegas, Nevada 89101
7 Phone (702) 383-3400
8 Fax (702) 384-1460
9 Attorneys for Defendant Jenny Rish

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

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

12 Plaintiff,

13 v.

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

16 Defendants.

CASE NO. A539455

DEPT. NO X

17
18 **DEFENDANT'S OPPOSITION TO PLAINTIFFS'**
19 **SECOND OMNIBUS MOTION IN LIMINE**

20 COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H.
21 ROGERS, ESQ., and hereby submits this Opposition to Plaintiffs' Second Omnibus Motion in
22 Limine. The Reasons in support of said Opposition are contained in the attached Memorandum of

23 ///

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26 ///

27 ///

28 ///

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

3 DATED this 4th day of March, 2011.

4 ROGERS, MASTRANGELO, CARVALHO &
5 MITCHELL

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

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. Argument**

14 **1. The Plaintiff's Non-Cancerous Tumor and Housing Issues Are Relevant to Emotional**
15 **Distress**

16 Plaintiff moves to exclude any reference to evidence that after the subject car accident he was
17 diagnosed with a tumor, and was involved in a lawsuit over his home. Defendant agrees that these
18 issues did not cause the Plaintiff's physical injuries. However, these issues are probative of
19 emotional distress. If Plaintiff claims general damages, and he does, unrelated causes of emotional
20 distress are relevant. The Plaintiff admitted at his deposition that he suffered emotional distress from
21 concern about the potential of cancer. Of course he did.

22 If Plaintiff is going to allege at trial that he suffered emotional distress from the accident, then
23 evidence of other stressors in his life become relevant. Believing you may have cancer, and
24 struggling with defects in your home are unrelated stressors that must be divulged if a fair verdict is
25 to be reached. Defendant will not argue that the Plaintiff's unrelated stressors go to his bodily injury
26 claim; only to his general damages claims.

27 **2. Hypothetical questions are allowed at time of trial**

28 Plaintiff's motion in limine seeks to exclude all potential hypothetical questions of experts
of which the Plaintiff disapproves. Such exclusion is unwarranted as hypothetical questions that

1 include Defendant's theory of the case are permitted.

2 A non-treating physician may give his expert opinions at trial based upon a hypothetical
3 question. See *Shoshone Coca-Cola bottling Co v. Dolinski*, 82 Nev. 439 (1966). See also *Wallace*
4 *v. State*, 84 Nev. 603, 606 (1968):

5 A hypothetical question need not include all evidence in the case which is relevant to the
6 opinion sought from the witness. The examiner may select those facts from the evidence
7 which are compatible with his theory of the case, and ask for an opinion based upon those
8 facts.

9 A defendant is clearly allowed to ask questions, hypothetical or otherwise, compatible with
10 her theory of the case.

11 **3. Evidence of the Absence of Medical Records for Any Period of Time Prior to the MVA**

12 The Plaintiff argues that a defense medical expert should not be permitted to testify "that the
13 absence of medical records bothered him and that it would have been better if he could have
14 reviewed more medical records from before the subject accident." (Motion, pg. 11, lns. 2-3).

15 The defense does not anticipate the medical experts will so testify, and on that basis, does
16 not oppose the Motion, so phrased. However, this motion is premature and speculative, and could
17 be over broad, considering the nature of the evidence to be presented at trial. Defendant believes
18 the proper course is to wait and deal with any potential issue at trial.

19 **4. Investigation Evidence Is Excluded From Evidence**

20 This court has already held that no investigation can be inquired into at trial. As such, the
21 defense does not oppose this motion.

22 **5. Attorney Advertising can be inquired into during voir dire, but the defense will not**
23 **argue the issue thereafter**

24 Plaintiff's motion in limine seeks to exclude reference to any attorney advertising by
25 Plaintiff's counsel. This subject will likely arise in voir dire. Jurors may be familiar with the ads run
26 by Plaintiff's counsel, or may have formed an opinion based upon attorney advertisements. Defendant
27 may inquire about such potential bias and prejudices. However, the defense does not intend to argue
28 the issue after voir dire.

///