ORIGINAL

Electronically Filed
06/01/2011 09:26:39 AM

CLERK OF THE COURT

JUDG
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph.: (702) 450-5400
Fx.: (702) 450-5451
reglet@mainorlawyers.com
dwall@mainorlawyers.com
badams@mainorlawyers.com
Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

**JUDGMENT**

WHEREAS, a hearing for Default Judgment having come before the Court on April 1, 2011.

IT IS ORDERED, ADJUDGED AND DECREED, that Judgment was hereby entered in favor of Plaintiffs and against Defendant, Jenny Rish as follows:[1]

IT IS ORDERED AND ADJUDGED that Plaintiff, WILLIAM SIMAO, have and recover of the Defendant, JENNY RISH, the following sums:

PAST DAMAGES:

| | |
|---|---|
| Past Medical and Related Expenses | $ 194,390.96 |
| Past Pain, Suffering, Disability and Loss of Enjoyment of Life | $ 1,378,209.00 |
| **Total Past Damages:** | **$ 1,572,599.96** |

FUTURE DAMAGES:

| | |
|---|---|
| Future Pain, Suffering, Disability and Loss of Enjoyment of Life | $ 1,140,552.00 |
| **Total Future Damages:** | **$ 1,140,552.00** |
| **TOTAL DAMAGES:** | **$ 2,713,151.96** |

IT IS ORDERED AND ADJUDGED that Plaintiff, CHERYL SIMAO, have and recover of the Defendant, JENNY RISH, the following sums:

PAST DAMAGES:

| | |
|---|---|
| Loss of Consortium: | $ 681,286.00 |
| **Total Past Damages:** | **$ 681,286.00** |
| **TOTAL DAMAGES:** | **$ 681,286.00** |

IT WAS FURTHER ORDERED that Plaintiffs be awarded and entitled to costs in the amount of $99,555.49.

[1] Exhibit 1 - Judgment





004700

004700

004700

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' past damages in the amount of Two Million Two Hundred Fifty Three Thousand Eight Hundred Eighty-Five and 96/100 Dollars ($2,253,885.96), shall bear pre-judgment interest in accordance with *Lee v. Ball*, 116 P.3d 64, (2005) at the rate of 5.25% per annum[2] from the date of service of the Summons and Complaint, on July 23, 2007 through May 18, 2011 as follows:[3]

**PRE-JUDGMENT INTEREST:**

**07/23/07 THROUGH 05/18/11 = $ 452,231.10**

**(1395 days x $324.18 per day)**

NOW, THEREFORE, Judgment in favor of Plaintiffs, WILLIAM SIMAO and CHERYL SIMAO, is hereby given for Three Million Nine Hundred Forty Six Thousand Two Hundred Twenty-Four and 55/100 Dollars ($3,946,224.55) against Defendant which shall bear post-judgment interest at the current rate of 5.25% or $567.60 per day, until satisfied.

DATED this 31st day of May, 2011.

DISTRICT COURT JUDGE

Prepared & Submitted by:
**MAINOR EGLET**

By: _____
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

[2] Exhibit *Lee v. Ball*
[3] Exhibit Affidavit of Service

004702

# EXHIBIT "1"

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| WILLIAM JAY SIMAO; and CHERYL ANN SIMAO,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH,<br><br>Defendant. | CASE NO.: A539455<br>DEPT. NO.: X<br><br><br><br>**JUDGMENT** |

WHEREAS, a hearing for Default Judgment having come before the Court on April 1. 2011. IT IS ORDERED, ADJUDGED AND DECREED, that Judgment is hereby entered in favor of Plaintiffs and against Defendant, Jenny Rish as follows:

| | |
|---|---|
| William Simao's past medical and related expenses | $194,390.96 |
| William Simao's pain and suffering: | |
| - Past pain and suffering | $493,640. |
| - Future pain and suffering | $1,140,552. |
| - Loss of Enjoyment of Life | $ 905,169. |
| Cheryl Simao's loss of consortium (Society and Relationship) | $ 681,286. |
| Attorneys' fees | $ TBD |
| Litigation costs | $ 99,555.49 |
| TOTAL | $3,493,983.45 |

...

...

004703

004703

004703

IT IS FURTHER ORDERED that Judgment against Defendant, Jenny Rish, shall bear interest in accordance with N.R.S. 17.130 and Lee v. Ball, 116 P.3d 64 (2005).

Dated this 27th day of April, 2011.

Jessie Walsh
DISTRICT COURT JUDGE



004704
004704
004704

004705

004705

# EXHIBIT "2"

LexisNexis

8 of 8 DOCUMENTS

BARRY J. LEE, Appellant, vs. CHRISTOPHER G. BALL, Respondent.

No. 41686

SUPREME COURT OF NEVADA

121 Nev. 391; 116 P.3d 64; 2005 Nev. LEXIS 43; 121 Nev. Adv. Rep. 38

July 28, 2005, Decided

PRIOR HISTORY: [***1] Appeal from a district court judgment granting additur and denying attorney fees and costs. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

DISPOSITION: Reversed and remanded.

COUNSEL: Ronald M. Pehr, Las Vegas, for Appellant.

Piazza & Associates and Carl F. Piazza and David H. Putney, Las Vegas, for Respondent.

JUDGES: BEFORE MAUPIN, DOUGLAS and PARRAGUIRRE, JJ. DOUGLAS and PARRAGUIRRE, JJ., concur.

OPINION BY: MAUPIN

OPINION

[*393] [**65] *OPINION*

By the Court, MAUPIN, J.:

In this appeal, we clarify that a district court's grant of additur is only appropriate when presented to the defendant as an alternative to a new trial on damages.

*FACTS AND PROCEDURAL HISTORY*

The litigation below arose from a car accident in which the passenger in a vehicle, respondent Christopher Ball, sustained injuries after the driver, appellant Barry Lee, negligently turned into oncoming traffic. Ball sued Lee, alleging general and special damages. Unhappy with the results of court-annexed arbitration, Lee requested a trial de novo. Before trial, Lee served Ball with an offer of judgment for $ 8,011.46. After [**66] a two-day trial, the jury awarded Ball $ 1,300. Lee subsequently moved for costs and attorney fees because [***2] Ball failed to recover an amount in excess of the offer of judgment. Ball opposed this motion, requesting a new trial or, in the alternative, additur. After an untranscribed hearing, the district court granted an $ 8,200 additur and awarded Ball prejudgment interest but did not offer Lee the option of a new trial. The district court further calculated prejudgment interest using a pro-rata formula based on the differing statutory rates of interest in effect before the entry of final judgment. Lee appeals, arguing that the district court erred by granting an additur, failing to offer a new trial, and erroneously calculating prejudgment interest. As a result, Lee argues he is entitled to attorney fees and costs.

*DISCUSSION*

*Additur*

Under *Drummond v. Mid-West Growers*, [1] Nevada courts have the power to condition an order for a new trial on acceptance of an additur. [2] In line with *Drummond*, our subsequent decisions have confirmed [*394] a "two-prong test for additur: (1) whether the damages are clearly inadequate, and (2) whether the case would be a proper one for granting a motion for a new trial limited to damages." [3] If both prongs are met, then the district court has [***3] discretion to grant a new trial, unless the defendant consents to the court's additur. [4] The district court has broad discretion in determining motions for additur, and we will not disturb the court's determination unless that discretion has been abused. [5] However, granting additur in the absence of a demonstrable ground for a new trial is an abuse of discretion.

1 91 Nev. 698, 708-13, 542 P.2d 198, 205-08 (1975).

2 *Id.* at 708, 542 P.2d at 205.

3 *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 616, 5 P.3d 1043, 1054 (2000) (citing *Drummond*, 91 Nev. at 705, 542 P.2d at 203).

4 *Drummond*, 91 Nev. at 712, 542 P.2d at 208.

5 *Donaldson v. Anderson*, 109 Nev. 1039, 1041, 862 P.2d 1204, 1206 (1993).

We conclude that Lee has failed to demonstrate that the district court abused its discretion in determining that additur was warranted. First, the hearing during which the district court [***4] orally granted additur was not reported, the parties have not provided a trial transcript in the record on appeal, and the parties have not otherwise favored us with the district court's oral explanation for granting Ball such relief. [6] Second, because the award was substantially less than the conceded proofs of special damages, there is at least some indication that the jury award was "clearly inadequate" in violation of the district court's instructions. Although the jury, acting reasonably, could have disbelieved Ball's evidence concerning alleged pain and suffering and reasonably inferred that he was not injured as severely as claimed, [7] and although the jury was not bound to assign any particular probative value to any evidence presented, [8] it is incumbent upon Lee to demonstrate that the additur, in and of itself, constitutes an abuse of discretion. [9] He has failed to do so.

6 *See Stover v. Las Vegas Int'l Country Club*, 95 Nev. 66, 68, 589 P.2d 671, 672 (1979) (stating "when evidence on which a district court's judgment rests is not properly included in the record on appeal, it is assumed that the record supports the lower court's findings"). We further note that the district court's written order granting additur is silent as to the reasons for this award.

[***5]

7 *See Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000).

8 *Id.*

9 *See Wallace v. Haddock*, 77 Conn. App. 634, 825 A.2d 148, 151-52 (Conn. App. Ct. 2003) (declining to upset an award of additur when the appellant failed to provide transcripts and "failed to seek any further articulation of the court's reasoning for granting the motion for an additur").

We conclude, however, that the district court abused its discretion in failing to offer Lee the option of a new trial or acceptance of the additur. We clarify that, under *Drummond*, additur may not [*395] stand alone as a discrete remedy; rather, it is only appropriate [**67] when presented to the defendant as an alternative to a new trial on damages. [10]

10 *See Drummond*, 91 Nev. at 712, 542 P.2d at 208; *see also Donaldson*, 109 Nev. at 1043, 862 P.2d at 1207 (reversing a district court order and remanding with instructions to grant a new trial limited to damages, unless the defendant agreed to additur); *ITT Hartford Ins. Co. of the S.E. v. Owens*, 816 So. 2d 572, 575-76 (Fla. 2002) (holding the relevant Florida statute requires a trial court to give the defendant the option of a new trial when additur is granted); *Wallace*, 825 A.2d at 153 (finding the relevant Connecticut statute requires parties have the option of accepting additur or receive a new trial on the issue of damages); *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 50 (Minn. 1989) ("[A] new trial may be granted for excessive or inadequate damages and made conditional upon the party against whom the motion is directed consenting to a reduction or an increase of the verdict. Consent of the non-moving party continues to be required."); *Tucci v. Moore*, 875 S.W.2d 115, 116 (Mo. 1994) ("Additur requires that the party against whom the new trial would be granted have, instead, the option of agreeing to additur."); *Belanger by Belanger v. Teague*, 126 N.H. 110, 490 A.2d 772, 772 (N.H. 1985) (mem.) (holding "a jury verdict supplemented with an additur may go to judgment only if the defendant waives a new trial").

[***6] *Prejudgment interest*

Lee argues that the district court erred in calculating both the rate and period of prejudgment interest. We agree and conclude that the district court's calculation was *plainly erroneous*. [11]

11 *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. Such is the case where a statute which is clearly controlling was not applied by the trial court." (citation omitted)).

Under NRS 17.130(2), " a judgment accrues interest from the date of the service of the summons and complaint until the date the judgment is satisfied. Unless provided for by contract or otherwise by law, the applicable rate for prejudgment interest is statutorily determined. " In determining what rate applies, NRS 17.130(2) [*396] instructs courts to use the base prime rate percentage "as ascertained by the Commissioner [***7] of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent."

12 NRS 17.130(2) provides:

> When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

13 NRS 17.130(2); *see also Gibellini v. Klindt*, 110 Nev. 1201, 1208, 885 P.2d 540, 544-45 (1994) (holding that the "or specified in the judgment" language does not permit a judge to vary an interest rate outside of the statutory rate).

[***8] The district court calculated the rate of prejudgment interest using periodic biannual legal rates of interest in effect between May 27, 1999, and March 24, 2003. This was error. Under the plain language of NRS 17.130(2), the district court should have calculated prejudgment interest at the single rate in effect on the date of judgment.

The district court further determined that prejudgment interest accrued from May 27, 1999, to March 24, 2003. NRS 17.130(2) explicitly provides that "the judgment draws interest from the time of service of the summons and complaint until satisfied." Bail completed service of process on June 9, 1999, and the district court entered final judgment on March 29, 2003. Therefore, prejudgment interest accrued beginning June 9, 1999, not May 27, 1999. Accordingly, the district court also erred in calculating the period prejudgment interest accrued.

## CONCLUSION

We hold that the district court erred in granting an additur without providing Lee the option of accepting the additur or a new trial on damages and in calculating prejudgment interest. Accordingly, we reverse the district court's judgment and [***9] remand this [**68] matter for proceedings consistent with this opinion.

DOUGLAS and PARRAGUIRRE, JJ., concur.

004709

# EXHIBIT "3"

SUM

# District Court

## CLARK COUNTY, NEVADA

CLERK OF THE COURT

AUG 10 12 07 PM '07

FILED

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

Plaintiffs,

vs.

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

Defendants.

SUMMONS

CASE NO. A539455

Dept. NO. X

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

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

**JENNY RISH**
**223 NORTH COTTONWOOD DRIVE**
***GILBERT, ARIZONA 85234***

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

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

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

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

Issued at the direction of:

**AARON & PATERNOSTER, LTD.**

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

**CHARLES J. SHORT, CLERK OF COURT**

By: _____ APR 13 2007
*Deputy Clerk*
County Courthouse
200 South Third Street
Las Vegas, NV 89155

PATRICIA BOGGESS

# CLARK COUNTY DISTRICT COURT

## In And For The County Of Maricopa, State Of Arizona

**WILLIAM JAY SIMAO AND CHERYL ANN SIMAO**

Plaintiff(s), Represented By THE PLAINTIFF

**vs.**

**JENN RISH, JAMES RISH, LINDA RISH**

Defendant(s), In Propria Persona

**A 539455**

**Declaration Of Service**

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

**SUMMONS AND COMPLAINT**

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

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

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

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

SECURED

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

**July 24, 2007**

**TYLER TREECE, Declarant**
An Officer Of Maricopa County Superior Court

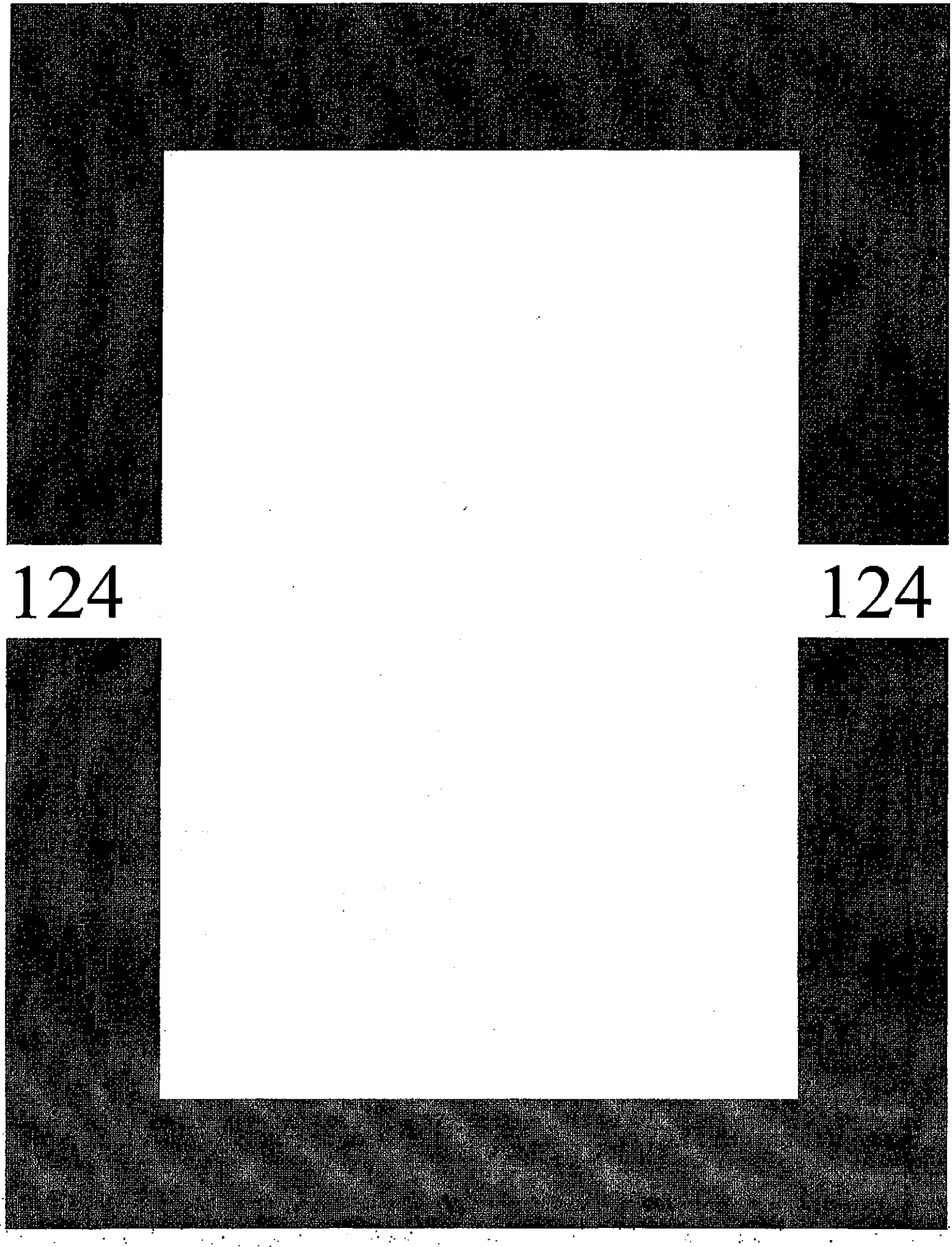
**AAA Landlord Services, Inc.**

**www.aaalandlord.com**

AAA Landlord Services
P.O. Box 30804 Mesa, AZ 85275
480.668.9393 480.668.7403 Fax

004711

004711




004712

004712

004712

Electronically Filed
06/27/2011 11:45:10 AM

CLERK OF THE COURT

ASTA
DANIEL F. POLSENBERG
State Bar No. 2376
JOEL D. HENRIOD
State Bar No. 8492
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,<br><br>Plaintiffs,<br>*vs.*<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE Corporations I through V, inclusive,<br><br>Defendants. | Case No. A539455<br><br>Dept. No. XX |



004713

## AMENDED CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

   Defendant JENNY RISH

2. Identify the judge issuing the decision, judgment, or order appealed from:

   THE HONORABLE JESSIE WALSH

3. Identify each appellant and the name and address of counsel for each appellant:

   DANIEL F. POLSENBERG
   Nevada Bar No. 2376
   LEWIS AND ROCA LLP
   3993 Howard Hughes Parkway, Suite 600
   Las Vegas, Nevada 89169
   (702) 474-2616



004713

STEPHEN H. ROGERS
ROGERS MASTRANGELO CARVALHO & MITCHELL
300 South Fourth Street, Suite 170
Las Vegas, Nevada 89101
(702) 383-3400

*Attorneys for Appellant*

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

ROBERT T. EGLET
DAVID T. WALL
ROBERT M. ADAMS
MAINOR EGLET
400 South Fourth Street
Sixth Floor
Las Vegas, NV 89101
(702) 450-5400

*Attorney for Respondents*
*William Jay Simao* and *Cheryl Ann Simao,*

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

N/A

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court, e.g., date complaint, indictment, information, or petition was filed:

Complaint filed April 13, 2007.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:



004714
004714
004714

This is a motor vehicle accident occurring on April 15, 2005. Plaintiff's complaint alleged negligence and loss of consortium. The case presented for a jury trial on March 14, 2011. On March 31, 2011, plaintiff made an oral motion to strike defendant's answer which was granted. After a prove-up hearing on April 1, 2011, judgment was entered on April 28, 2011, in favor of plaintiff in the amount of $3,493,983.45.

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

N/A

12. Indicate whether this appeal involves child custody or visitation:

N/A

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

No.

DATED this 27th day of June 2011.

LEWIS AND ROCA LLP

By: s/ Joel D. Henriod
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 474-2616

*Attorneys for Defendant Jenny Rish*



004715
004715
004715

**CERTIFICATE OF SERVICE**

Pursuant to Nev. R. Civ. P. 5(b), I HEREBY CERTIFY that on the 27th day of June, 2011, I served the foregoing CASE APPEAL STATEMENT by depositing a copy for mailing, first-class mail, postage prepaid, at Las Vegas, Nevada, to the following:

ROBERT T. EGLET
DAVID T. WALL
ROBERT M. ADAMS
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, NV 89101

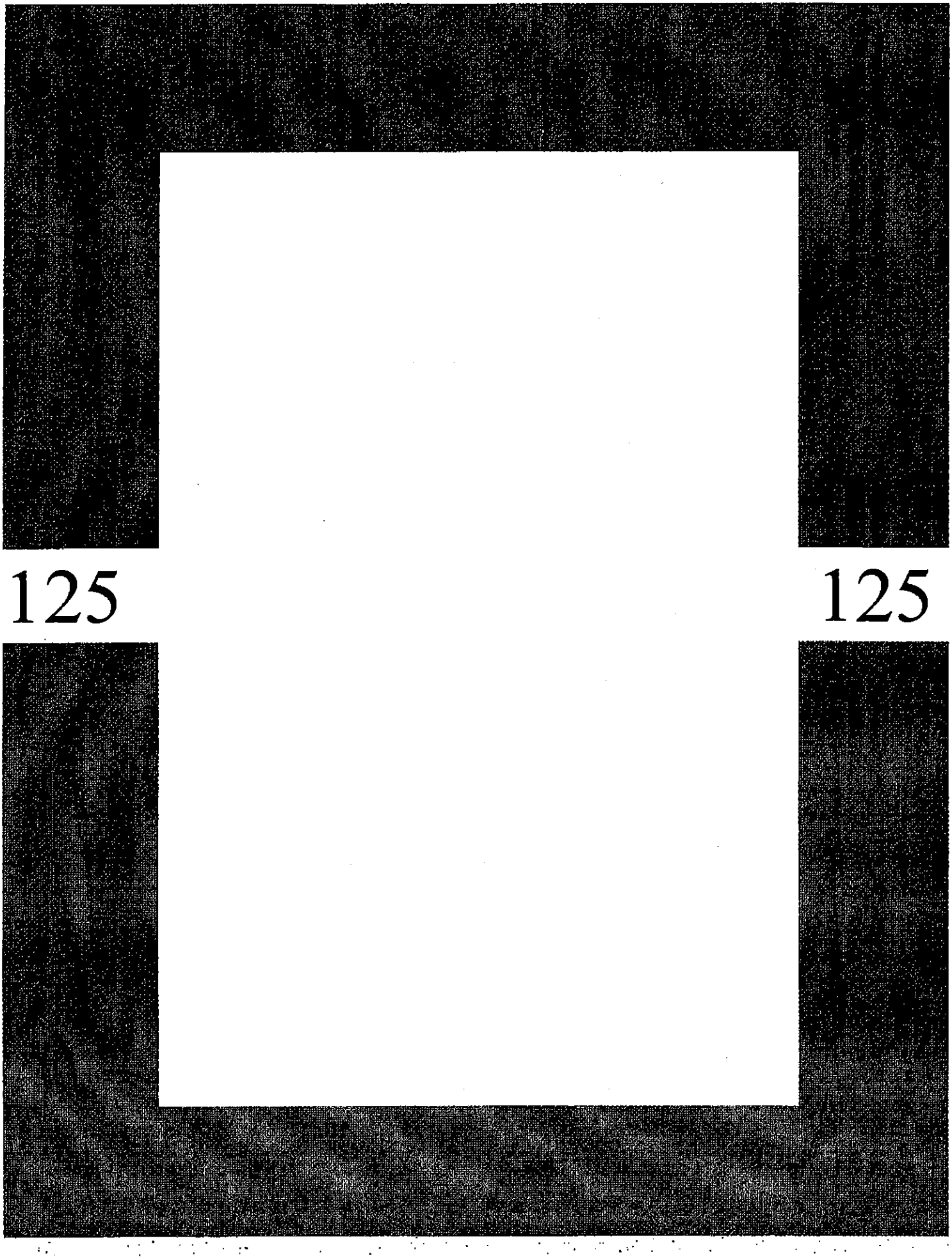
s/ Mary Kay Carlton
An Employee of Lewis and Roca LLP

004716

004716



004716




004717

004717

Electronically Filed
07/06/2011 01:20:29 PM

CLERK OF THE COURT

MCOM
STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Phone (702) 383-3400
Fax (702) 384-1460
*Attorneys for Defendant Jenny Rish*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

**DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits this Motion to Compel Production of Documents.

///

///

///

///

///

///

///

004718

004718

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

DATED this 6th day of July, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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

**NOTICE OF MOTION**

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the foregoing **DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS** will come on for hearing before the above-entitled court on the 11 day of August, 2011, at chambers a.m. in Department X.

DATED this _____ day of July, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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

///

///

///



004719

004719

004719

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. ARGUMENT

A. **Defendant's motion to compel should be granted.**

This personal injury action arises out of a motor vehicle accident ("MVA") that occurred April 15, 2005. Defendant Jenny Rish rear-ended a vehicle driven by Plaintiff William Simao. Plaintiff alleged personal injuries. The trial began on March 14, 2011, and concluded on March 31, 2011, after the Court struck the Answer and dismissed the jury as a sanction for Defendant's purported violation of pre-trial orders. The Court found in favor of the Plaintiff, and awarded damages in the amount of $3,500,000.

During trial, Plaintiff provided expert witness testimony regarding future surgery and future damages which were never disclosed to the Defense prior to trial. Therefore, Defendant attempted several avenues to counter this evidence, including serving a subpoena to obtain the original fluoroscopy images taken by Jorg Rosler. Defendant needed the original images so that her experts, Dr. Wang, Dr. Fish and Dr. Winkler (the latter was not allowed to testify) and Joseph Schifini, could state their opinions regarding the images. The Court ordered the Plaintiff to produce the original flouroscopy images. Unfortunately, the original images were not produced for inspection before or even during trial, and Plaintiff objected to the subpoena of the records.

A new trial is warranted due to new evidence which the party could not produce at trial under NRCP 59(a)(4). The original films, and the opinions of Dr. Winkler and Dr. Schifini regarding them, is certainly new evidence that Defendant could not produce at trial, since Dr. Rosler and the Plaintiff failed to produce them. Defendant requires these records for the new trial and/or the appeal, and thus requests that these documents be produced now.

Defendant is entitled to examine the original films of Dr. Rosler in support of the new trial and/or appeal. Therefore, Plaintiff should be compelled to comply with the Court's order to produce the original films for inspection by Defendant's experts.

While Plaintiff objected to and questioned the validity of allowing such post-trial discovery, Plaintiff did not cite any case law which holds that such a requirement is improper.

## II. CONCLUSION

For the reasons outlined above, the Court should grant Defendant's motion to compel.

DATED this 6th day of July, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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

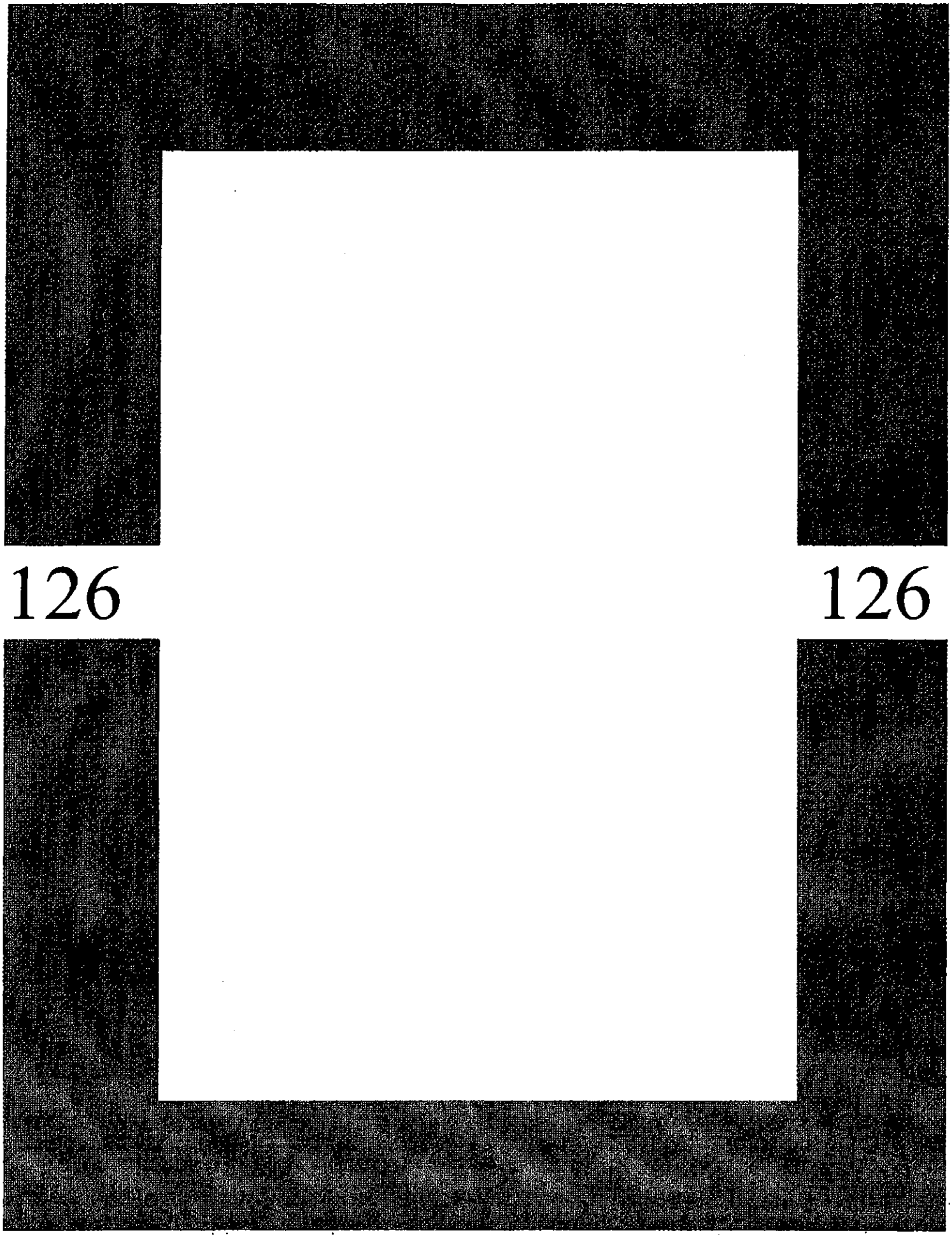
M:\Rogers\Rish adv. Simao\Pleadings\motion to compel films2.wpd



004721

004721

004721



126

126

004722

004722

004722

# REPRINTED RECEIPT

**Office of the County Clerk**
**Clark County Family Court**
**601 North Pecos Rd**
**Las Vegas, NV 89101**

Payor
Lewis and Roca

Receipt No.
**2011-26871-FAM**

Transaction Date
07/6/2011

| Description | Amount Paid |
|---|---|
| On Behalf Of Rish, Jenny | |
| 07A539455 | |
| William Simao, Cheryl Simao vs Jenny Rish | |
| APPEAL BOND | |
| APPEAL BOND | 500.00 |
| **SUBTOTAL** | **500.00** |

**PAYMENT TOTAL** **500.00**

| | |
|---|---|
| Check (Ref #612134) Tendered | 500.00 |
| Total Tendered | **500.00** |
| Change | 0.00 |

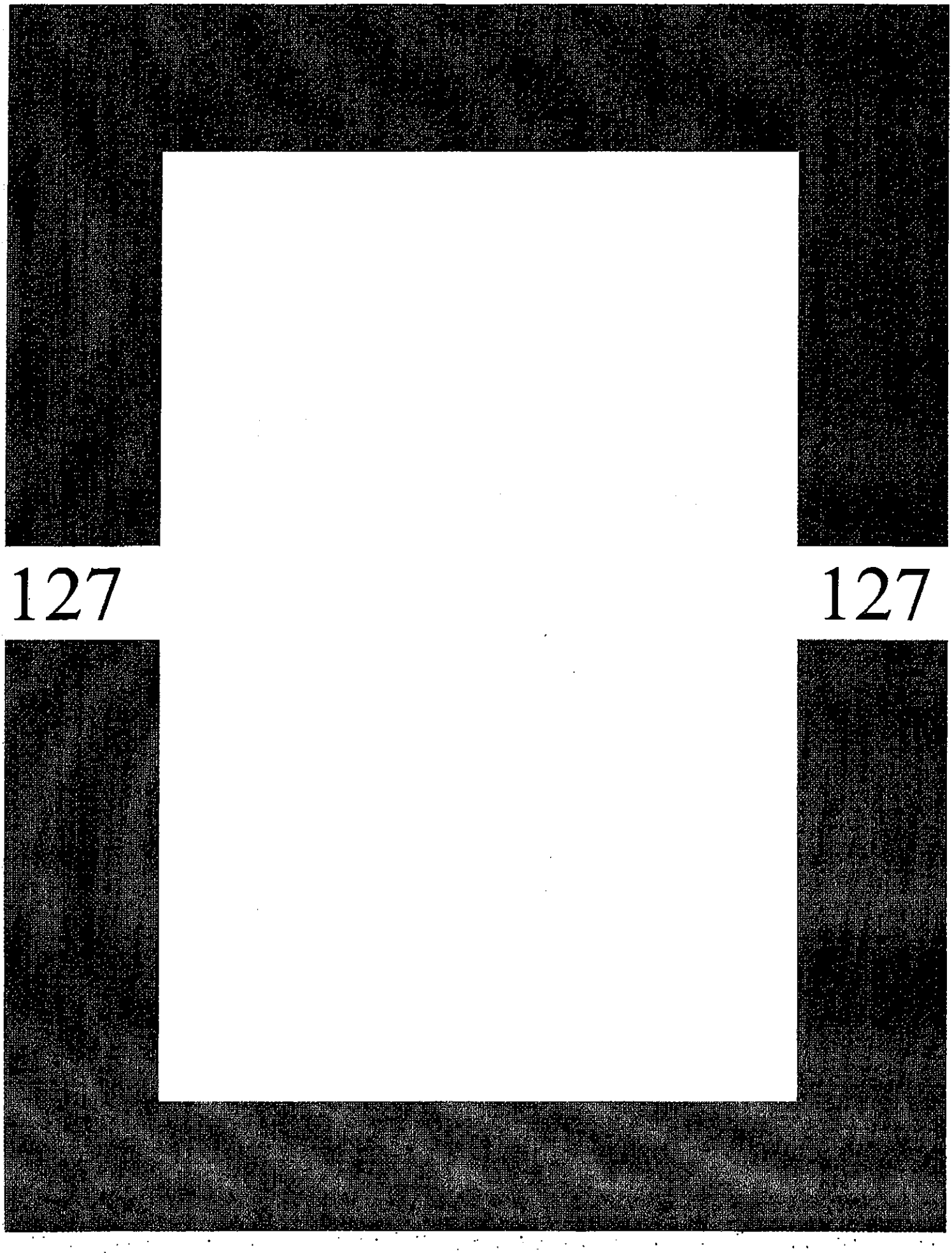
| | | |
|---|---|---|
| 07/06/2011 | Cashier | Audit |
| 11:40 AM | Station WIZ2 | 26616377 |

## REPRINTED RECEIPT

07A539455
RCPT
Receipt
1509082

004723

004723



127

127

004724

004724

Electronically Filed
07/14/2011 02:56:57 PM

CLERK OF THE COURT

RPLY
STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Phone (702) 383-3400
Fax (702) 384-1460
*Attorneys for Defendant Jenny Rish*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

**DEFENDANT'S REPLY TO OPPOSITION TO MOTION FOR NEW TRIAL**

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits this Reply to Opposition to Motion for New Trial.

///

///

///

///

///

///

///

004725

004725

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

DATED this 14th day of July, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

### MULTIPLE PRE-TRIAL ORDERS WERE NEITHER INTENTIONALLY NOR BLATANTLY VIOLATED DURING THE PENDENCY OF TRIAL

Plaintiff's opposition to the motion for new trial incorrectly argues that Defendant blatantly violated multiple pre-trial orders. This was simply not the case. The actual pre-trial rulings by the court were ignored by Plaintiff, and Plaintiff expanded upon the pre-trial rulings in order to exclude a greater amount of evidence. It was Plaintiff, through the EDCR briefs, which misled the trial court as to the substance of the actual pre-trial rulings. Moreover, Defendant never intentionally violated any of the pre-trial orders.

#### A. Plaintiff's Prior (2003) Motorcycle Accident

Plaintiffs' Order on his Motion to Exclude the prior (2003) motorcycle accident reads, incorrectly, "granted in all respects." The Plaintiffs mislead the court in their EDCR 2.67 briefs, and at trial, by again incorrectly advising the Court that the Motion was "granted in all respects." In fact, the transcript of the hearing on the Motion reveals that the Court, in fact, **did not** grant the Motion "in all respects." (See transcript of the 02/15/11 hearing, pages 1 through 8). Following is an exact transcription of the Defendant's argument at the hearing, and the Court's ruling:



004726
004726
004726

MR. ROGERS: I may have misspoke, Your Honor, and I can clarify it, I think, now. The defense has never contended that the motorcycle accident caused a cervical injury. The defense is that there is no cervical injury and that the pain is actually a referral pain from the migraines. That's where the migraines become so central to everything. And we do see, from the medical records, an increased incidents (sic) of treatment for migraines following the motorcycle accident, and that's really what makes it relevant is now we're wondering, okay, what's causing these migraines; how did the motorcycle accident aggravate them; and now you're saying that this subject car accident aggravated them and that's the reason you didn't feel your neck pain for so long. So this isn't about the defense saying, hey, didn't that motorcycle accident cause your neck problems. It's not like that. The defense doesn't have any intention of trying to mislead the jury in that fashion. It's really the migraines we're focusing on.

THE COURT: And it looks like the migraines is a fair issue for you to explore during the course of trial, and the jury can sort it all out, and come to their own conclusions with respect their evaluation of the respective expert witnesses.

MR. ROGERS: Okay.

THE COURT: All right. Next motion.

(See transcript of the 02/15/11 hearing, 7:14 - 8:11)

The Court thus did not grant the Motion "in all respects." In fact, the Court admitted the prior (2003) motorcycle accident to the extent that it caused the Plaintiff's pre-existing headaches.

Then, during Defendant's Opening Statement, the Court sustained Plaintiff's objection to evidence of the 2003 motorcycle accident, and instructed the jury "to disregard the last slide [regarding the motorcycle accident] that was previously shown to you. There was a pretrial ruling which reads, it is hereby ordered that plaintiff's request to exclude and prior and subsequent unrelated accidents, injuries, and medical conditions, and prior and subsequent claims or lawsuits is granted in all respects. And that specifically dealt with a 2003 motorcycle accident." (See 03/22/11 trial transcript, pg. 73, lns. 15 - 22). The Defendant then volunteered to let Plaintiff's counsel review the remaining powerpoint slides for her opening statement. Plaintiff did so, then improperly argued to the Court, "We knew he [defense counsel] was going to systematically violate the Court's pretrial orders." (See 03/22/11 trial transcript, pg. 74, lns. 13 - 14). "As Mr. Wall said at the bench [in a bench conference that was not transcribed], I think it's clear – I think it's abundantly clear that Mr. Rogers is going to try to mistry this case. I think it is abundantly clear that that's what's going on." (See 03/22/11 trial transcript, pg. 75, lns. 6 - 9).



004727
004727
004727

Defendant limited her comments to the motorcycle accident to the headache claim. Plaintiffs objected, and the Court sustained, despite its declaration that the evidence was admissible.

**B. The Plaintiff Wrote Several Incorrect Orders on the Motions in Limine, Which Mislead the Court**

As illustrated above, the Court thus did not grant the Motion to Exclude Plaintiff's prior injuries "in all respects." In fact, the Court admitted the prior (2003) motorcycle accident to the extent that it caused the Plaintiff's pre-existing headaches.

The Court also did not grant Plaintiff's Motion to exclude the surveillance video, but waited until the testimony was going to be heard at trial before determining whether the video was going to played, in whole or in part.

Next, Plaintiff moved to exclude "attorney driven" or "Medical Buildup" case. At the hearing, the defense pointed out that the content of the Motion was more expansive than the title, in that the Plaintiff argued for exclusion of any evidence of the treating medical providers' testimony history and relationships with Plaintiff's counsel. At the hearing, defense counsel pointed out this conflict:

> "[W]hile the motion is entitled an exclusionary motion on our arguments that the case is attorney driven or medical buildup, it moves into areas broader than that, that seems to invite a bigger discussion."

(See 02/15/11 transcript, pg. 32, lns. 8-11). When defense counsel argued for admission of evidence of the treating medical providers' testimony history and relationships with Plaintiff's counsel, the Court responded, "I see that as a different issue." (See 02/15/11 transcript, pg. 34, ln. 24). The Court added,

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

The court continued: "With respect to your other issue regarding a social relationship, do you have any evidence of that? Social relationship between an attorney and an expert witness?" (See 02/15/11 transcript, pg. 35, lns. 5-14). Defense counsel asked to disclose the evidence at the bench, and the Court replied, "You know what, let's trail that issue since it really wasn't an issue in Mr. Wall's motion and we can address it -- maybe we'll take a five minute break and you can address it with Mr.

Wall." (See 02/15/11 transcript, 35:25 - 36:3). Later, when defense counsel raised the argument again, the Court declared, "I think you have the right to bring that and brief it, and the Court will take a look at it. . . . I think both sides have made some very good points, and I'd like an opportunity to think about it rather than just shoot from the hip on this one." (See 02/15/11 transcript, pg. 45, lns. 22-23; pg. 47, lns. 5-7). In short, the Court never ruled on the issue.

**C. Exclusion of Photos**

The Court during pre-trial rulings excluded the officer's report of the incident, not the testimony of the witnesses or the photographs of the incident. In fact, the court made specific reference to those iteme being utilized during trial:

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

MR. ROGERS: Okay.

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

MR. ROGERS: That -- yes.

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

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

THE COURT: Right.

**D. Plaintiff attempted to prejudice the court against Defendant by arguing Defendant was going to mistry the case**

Plaintiffs' opposition cites Plaintiffs' argument to the Court at the opening of the case that the defense "is going to try to mistry this case." The Plaintiffs appear to have had two motivations for making this statement: first, the wholesale exclusion of both prior and subsequent incidents and injuries, and Plaintiffs' undisclosed but intended effort to exclude all evidence of the motor vehicle accident, was so novel and unprecedented that the Plaintiffs forecasted how untenable and unrealistic a viable defense would be; second, the Plaintiffs were conditioning the Court to sanction the defense while surreptitiously expanding the scope of the evidentiary exclusions.

Next, the Plaintiffs also told the Court at the outset of the case that he "expects [the Defendants'] experts are going to do it as well [violate ever-expanding pre-trial exclusionary orders]."

The Court later permitted Plaintiffs' counsel to "instruct" the Defendants' experts what they were allowed to respond only with "yes or no answers," as if the Plaintiffs were presiding over the trial.

Next, Plaintiffs argue that an Order excluding "attorney driven" or a "medical build-up" defense, prevented the defense from eliciting evidence regarding the testimony history of the Plaintiff's treating medical providers. There is no authority for such a proposition. The jury is permitted, and indeed must, receive all evidence of witness bias and/or prejudice. Nevertheless, the Court sustained the Plaintiffs' objection, and excluded evidence of the treating providers' testimony history. The Court then wrong-sidedly permitted the defense to enter evidence of the defense experts' testimony history. The ever-expanding exclusion as to defense evidence, and the inequity of permitting the Plaintiffs to enter impeachment evidence that the Court ruled off-limits to the defense, is self-evident. The Plaintiffs misguidedly highlight this very point by citing the trial transcript of a question the defense asked of Patrick McNulty, M.D., one of the Plaintiff's treating medical providers:

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

(See Plaintiffs' Opposition, p.9, l.28 through p.10, l.2)

As Plaintiffs' counsel correctly points out, "counsel for the Plaintiffs immediately objected, which objected (sic) was sustained. ... ." (Id., p.10, l.3).

***1. Defendants "Repeated Violations" of the "minor impact" Defense Pre-trial Order***

The Plaintiffs' argument pretends (1) that exclusion of all evidence of the motor vehicle accident is supported by the law (2) was unambiguously ordered (3) that the Court did not declare, contrary to the Plaintiffs' interpretation, that percipient witnesses would be permitted to describe the accident; and (4) that Dr. Grover did not open the door by testifying that the subject accident created a "substantial mechanism" of injury.

Next, the Plaintiffs repeatedly represent that the Court "sanctioned Defendant on several occasions and ultimately struck the answer." In fact, the Court sanctioned the defense only once before striking the answer, by doing the very thing the defense advised was the logical conclusion to

exclusion of all evidence of the accident: instruct the jury that the accident either could or did cause injury (because without evidence to support causation, only a presumption would suffice). After the Court read the instruction to the jury, the Plaintiff lost any claim of prejudice. For this reason, along with all the others cited above, striking the answer was unfounded.

Next, the Plaintiffs argue, "there is no correlation between the size of the impact and the potential for injury to the Plaintiff. The Defendant had no credible or admissible evidence suggesting such a correlation... ." In fact, Dr. McNulty testified to the contrary in deposition; he testified that the likelihood of injury is proportionate to the force of the impact.

If the Court expanded the Order on the "minor impact defense" to exclude all evidence about whether the Defendant was injured in the accident, Dr. Grover's characterization of the accident as a "substantial mechanism" changed the analysis. Once the Plaintiffs were permitted to enter evidence that the accident was substantial enough to cause injury, the defense should have then been permitted to cross-examine his characterization of the accident. The Court's refusal to permit such cross-examination was another instance of unequal treatment of the parties. The Plaintiffs' argument that such cross-examination "is simply inexplicable and evidence of intentional misconduct" disregards Dr. Grover's testimony on direct examination.

004731

004731

Still, as Plaintiffs point out, "Plaintiffs' objection was, once again, sustained." (See Opposition, p.15, l.24.) The Plaintiffs further highlight the Court's declaration: "I was really surprised to hear a question posed of [Dr. Grover] regarding Ms. Rish when the Court sustained a previous question regarding Ms. Rish with another witness and ruled that that was not relevant." The defense told the Court that Dr. Grover had opened the door by characterizing the accident as a "substantial mechanism." The Court evidently mis-remembered Dr. Grover's testimony, and responded "I don't think that's what he said." The defense stated that it was, in fact, what he said. The transcript reveals the Court's mis-remembrance.

***2. The testimony of Dr. Fish***

The Plaintiffs' characterization of Dr. Fish's testimony is a deliberate violation of the Court's pre-trial orders pretends that the doctor was not thoroughly "instructed" by Plaintiffs' counsel and the Court. Still, the Order was too vague and ambiguous, and expanding to understand. The Plaintiffs



004731

complain that Dr. Fish testified that he based his opinions on "multiple factors," including the MRI's, the discogram, "the pattern of pain," "the notes that were taken of the events that happened" and "its knowing about the accident itself." (See Opposition, p.17, ll.17-20). Dr. Fish did not say the accident was too minor to cause injury. The Plaintiffs argue that testifying that "knowing about the accident itself" is, itself, a violation of its ever-expanding Order.

*3. Plaintiff sought to exclude the testimony of Dr. Wang based upon one standard, but employed another with their own experts*

Plaintiff's initial EDCR 7.27 brief sought to exclude trial testimony by Dr. Wang by arguing that a party's expert opinions are to be provided, **at the latest.**, 30 days before trial. See Plaintiff's EDCR 7.27 brief at page 28, lines 17-28). However, when Plaintiff's own expert Stan Smith, authored a report **during trial**, and produced to the Defense the day before his testimony, Plaintiff argued that there was no such time requirement for disclosure of the reports.

> My point is, your Honor, is am expert is allowed to rely on the evidence as it comes through – in through trial. We're clear on that through Nevada law. I was under no obligation to give that information to the defense. But I wanted the trial to streamline.

(Trial transcript of 3-30-11, page 10, line 22 - page 11, line 1).

The audacity of Plaintiff's counsel is enormous. To argue, in order to exclude Dr. Wang, that experts reports **must** be provided 30 days before trial, and then subsequently argue, in another confidential trial memorandum, that Plaintiff's counsel and Stan Smith, a Plaintiff's expert, were under no obligation to provide an expert report supplement is incredulous.

Plaintiff clearly misled the court as to the actual discovery rules, in secret confidential trial memorandums, argues both sides of the law depending upon which expert is being discussed, and then has the nerve to state that it is Defendant's fault for not having the information !

Defendant was clearly entitled to a mistrial, or at least a continuance, due to the repugnant actions of Plaintiff. Instead, the trial court granted Plaintiff's motions and accepted their arguments, even though these arguments clearly contradicted the law **which was earlier cited by Plaintiff.**

Plaintiff continuously expanded pre-trial orders, miscited the law to fit their version of evidence, and prejudiced the trial court against Defendant.

*4. The Court's Irrebutable Instruction to the Jury was an Appropriate Sanction*

Based on Dr. Fish's testimony, the Plaintiffs argue the answer could have been stricken, but that he instead offered "an alternative special instruction to the jury directing them to presume that the accident was of a sufficient quality to have caused the injuries of which the Plaintiff complained." (See Opposition, p.18, ll.5-8.) The Court again followed the Plaintiff's lead, and read the presumption instruction.

The Court forced Dr. Fish to fly back to Las Vegas for a second day of testimony, under threat of striking his testimony, then permitted the Plaintiffs' attorney to "instruct" him on how he could testify, then following what Plaintiff characterizes as his violation of the ambiguous Orders, read the presumption instruction as a sanction.

The Court's Order striking the answer, which was drafted by the Plaintiffs, will not be the only record on review. The transcript will take precedence. The transcript demonstrates that the Order striking the answer is as unreliable as were the Orders Plaintiffs drafted on the Motions in Limine.

Next, the Plaintiffs cite the Court's declaration from the bench when ordering the presumption instruction: "The point of the matter was that defense had no witness who could testify that this was a minor impact and no witness who could testify that this was a minor impact that could not have caused the injuries to the Plaintiff, the Plaintiff sustained. Defense simply did not have any witnesses to so testify. That is why the Motion in Limine was granted." (See Opposition, p.20, ll.8-11.) The Court demonstrated in this declaration that the Court had already decided "that Plaintiff sustained" injury in the accident. This decision by the Court resulted in unequal treatment of the parties.

In truth, the Plaintiffs had the burden to prove that the accident caused injury. The Defendants had no such burden. Still, if the Court wished to misplace the burden of proof upon the Defendants, the Court should have permitted the Defendants to cross-examination Dr. Grover's characterization of the accident as a "substantial mechanism" of injury.

The Court should have also permitted the defense to elicit the testimony Dr. McNulty gave at his deposition, that the likelihood of injury is proportionate to the force of an impact. The Plaintiffs argue that because "the Defendants had no admissible, credible evidence to offer to support a 'minor impact' defense, the irrebutable presumption was appropriate... ." (See Opposition, p.20, ll.13-14.)

The presumption instructed the jury that it must decide, as the Court already decided, "the Plaintiff sustained injury in this accident."

***5. The language of the instruction was improperly used by Plaintiff***

The Plaintiff unwittingly tips his hand by arguing, "Since the Defendant had no evidence to support a contention that the nature of the impact and the accident was relevant to the amount of damages, the issues for the trier of fact were not materially affected by the irrebutable presumption instruction." (See Opposition, p.20, ll.26-28.) "The irrebutable presumption instruction imposes a sanction by the Court did not unfairly penalize the Defendants. It simply allowed the jury to irrebutably presume the very fact the Defendants had no admissible evidence to rebut – that the motor vehicle accident was sufficient in character and quality to have caused the injuries suffered by the Plaintiff." (See Opposition, p.21, ll.3-8.)

In short, the Plaintiffs began this trial with the understanding that injury was presumed. Unfortunately, it appears the Court agreed. The Plaintiffs and the Court evidently entered this case with the idea that injury should be presumed. Plaintiffs attempt to downplay the effect of the presumption instruction by declaring that, "The only presumption was that the accident was sufficient in character and quality to have potentially done so [caused injury]. [It] still allowed the jury to consider whether the accident in question actually and proximately caused [Plaintiffs] injuries." (See Opposition, p.21, ll.9-12.)

By this logic, the excluded "minor impact defense," would have allowed the jury to consider whether the accident in question actually and proximately caused the Plaintiff's injuries. When the Court expanded its Order to exclude all evidence of the accident, it had already, de facto, entered the presumption instruction it later used, ostensibly, as a sanction. In short, the "sanction" it entered was already presumed by Plaintiff and the Court prior to any trial testimony.

***6. The Court's Order Striking Defendants' Answer Based on Repeated Violations of this Court's Pre-Trial Orders was not an Appropriate Exercise of Discretion***

The Plaintiffs appear to defend the Order striking the answer based on one purported violation/expansion of the exclusion of "the minor impact defense":

> Particularly disturbing was counsel for Defendants systematic insistence upon asking the Plaintiff and three separate treating doctors whether they were aware of any injuries to passengers in the Defendant's vehicle, despite this Court's clear preclusion of that inquiry after each instance of misconduct. (See Opposition, p.26, ll.16-19.)

As demonstrated above, Dr. Grover's testimony that the accident was a "substantial mechanism" opens the door to inquiry into whether the impact was, in fact, "substantial." Dr. McNulty's testimony at deposition regarding the correlation between force and injury should have been admitted. Finally, percipient testimony about the accident, such as the Plaintiffs' description, should also have been admitted.

Next, the Plaintiff's argues that he "released" his biomechanical expert "in reliance upon the Court's Order granting the Plaintiffs' Motion in Limine." In truth, the Plaintiffs declined to call a biomechanical expert, who lacked foundation to offer any expert opinion since he had not examined either vehicle, because his testimony would have further opened the door to the evidence that Dr. Grover had already opened.

004735

The Plaintiffs repeatedly represent that the Court "opted for less severe sanctions" before striking the answer. In fact, the Court never opted for any sanction other than what the Plaintiffs requested. The Plaintiffs first requested the presumption instruction, which the Court granted. Only later did the Plaintiffs request the sanction of striking the answer, which, again, the Court granted.

Ironically, the Plaintiffs argue that striking the answer was appropriate because "adjudication on the merits was impossible given the severity of the prejudice bestowed upon [him]." In fact, the merits, i.e., the facts, were so completely excluded that any adjudication was impossible to begin with.

The Court's decision to strike the jury is particularly questionable in light of the Court's offense at perceived misconduct by the defense. After the Court declared, days earlier, that it had already decided "that Plaintiff sustained injuries in this accident, its predisposition could not be questioned, and it could no longer be deemed fit to objectively, and without prejudgment, determine whether the accident caused injury.



004735

Plaintiffs' citation to Hallmark, Levine and Choat, in support of the position that factual evidence of an accident is inadmissible, is unfounded.

The rationale behind plaintiff's argument is the faulty assumption that, if an expert cannot offer opinion testimony about a subject, then the jury may not learn facts on the subject. Plaintiff offered no authority for this proposition, and it simply isn't true. For instance, outside the context of medical malpractice, a medical expert is not necessary even to prove medical causation: "A testifying physician must state to a reasonable degree of medical probability that the condition in question was caused by the industrial injury, or sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury." *United Exposition Service Co. v. S.I.I.S.*, __ Nev. __, 851 P.2d 423, 425 (1993).

One of the courts' general concerns about "expert" testimony is the effect of putting a particular witness's opinion on a pedestal. As some courts have indicated, "the problem here (as with all expert testimony) is not the introduction of one man's opinion on another's future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as an "expert") gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact." *Flores v. Johnson*, 210 F.3d 456, 465-466 (5th Cir. 2000). Thus, the court's hesitancy to admit expert testimony is not to shelter juries from facts, but rather to prevent uninformed opinions from invading the province of the jury. C.f., *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992) (danger of speculative expert testimony is the risk that it can "lend a stamp of undue legitimacy" to conclusions that should be left to the jury)(criminal). The court does not bestow the honor "expert" lightly.

Rather, An abundance of Nevada case law has held that in negligence actions, issues of causation are factual issues for the jury to determine. See *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981) (stating that in Nevada, issues of negligence and proximate cause are considered issues of fact for the jury to resolve); see also *Barreth v. Reno*, 77 Nev. 196, 198 (1961); *White v. Demetelin*, 84 Nev. 430, 433 (1968). More specifically, in automobile accident cases, the issue of proximate cause as well as the cause of the damages for which compensation is sought, are issues of fact for the jury to decide. See *Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 467 (1975).

With regard to the matter of injury and damage, it is within the province of the jury to decide that an accident occurred with or without compensable injury. Id. It is for the jury to evaluate the evidence presented and to assess the weight to give that evidence. Thus, an expert need not testify as to causation and damages in order to admit relevant evidence. See *Krause Inc. v. Little*, 117 Nev. 929, 938-39, 34 P.3d 566, 572 (2001) (concluding that a jury did not require a medical expert's testimony to appreciate the extent to which a broken bone causes pain and suffering and what amount of future damages would be appropriate). See also *Brenman v. Demello*, 921 A.2d 1110 (N.J. 2007), which allowed photographs of a "minor impact" into evidence, and allowed argument on the same, without the need for expert testimony:

> In the main, the fundamental relationship between the force of impact in an automobile accident and the existence or extent of any resulting injuries does not necessarily require "scientific, technical, or other specialized knowledge" in order to "assist the trier of fact to understand the evidence or to determine a fact in issue[.]"N.J.R.E. 702. Of course, a party opponent remains free to offer expert proofs for the purpose of persuading the factfinder to overcome an absence of proportionality between the force of the impact and the cause and severity of the resulting injuries. Conversely, a party proponent may tender its own expert proofs to further support the proposition in its case-in-chief-either that slight impact force results in no or slight injury, or that great impact force results in great injury-or to rebut its opponent's assertions. Such expert proofs, however, address the weight to be given to photographs of impact, not their admissibility.

At most the authorities cited by plaintiff stand only for the proposition that, without testimony from a biomechanical expert, a defendant may not extrapolate from the amount of damage to a vehicle the likely severity of resultant physical injury. See *Davis v. Maute*, 770 A.2d 36 (Del. 2001) (vehicle photographs inadmissible); *Eskin v. Carden*, 842 A.2d 1222 (Del. 2004) (same); *DiCosola v. Bowman*, 794 N.E.2d 875 (Ill. Ct. App. 2003) (same). And, even that appears to be a minority position.[1] Undersigned counsel is aware of no authority that would curtail the testimony of the

---

[1] For example, in *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 564, 895 N.E.2d 1125, 1129 (Ill. App. Ct. 2008), the court held that expert testimony on the correlation between vehicular damage and plaintiff's injuries was not needed in order to admit photographs of the parties' damaged vehicles. Similarly, the court in *Ferro v. Griffiths*, 361 Ill.App.3d 738, 742, 297 Ill. Dec. 194, 836 N.E.2d 925 (2005), stated that a trial court has to determine "whether the photographs make the resulting injury to the plaintiff more or less probable" and "whether the nature of the damage to the vehicles and the injury to the plaintiff are such that a lay person can readily assess their relationship, if any, without expert interpretation." Id.

In this case, the jury is entitled to hear testimony and to see evidence that establishes causation or establishes



004737
004737
004737

plaintiff and defendant drivers, based on independent recollections.

Nothing in *Hallmark v. Eldridge* even suggests that biomechanical expert testimony is a prerequisite for percipient testimony about the facts of an accident. Instead, Hallmark teaches that biomechanical engineering is probably not an appropriate subject for "expert" opinion testimony. Indeed, the Nevada Supreme Court cast doubt that expert testimony from a biomechanical expert would ever be admissible: "this court has not yet judicially noticed the general reliability of biomechanical engineering[.]" *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646, 653 n. 27 (2008) (expressing skepticism whether "biomechanics was within a recognized field of expertise" and whether "these types of opinions were generally accepted in the scientific community"). Holding open even the possibility, the supreme court suggested a standard that would be practically insurmountable. To be admissible, an biomechanical opinion would require knowledge and assessment of (a) "the speeds at impact," (b) "the length of time that the vehicles were in contact during impact," ( c) "the distances traveled," (d) "the angle at which the vehicles collided," and possibly even an attempt to "recreate the collision by performing an experiment." *Hallmark*, 189 P.3d at 649, 653. In many cases this information simply isn't available, and the cost of experiments would be cost-prohibitive, especially to plaintiffs.

Under plaintiff's reading of *Hallmark*, no fact testimony about an accident would ever be allowed, because obtaining proper biomechanical expert testimony would be unfeasible. There is no language in *Hallmark*, or any other case from our supreme court, contemplating that absurd result.

---

the extent of damages. There is no requirement that such relevant evidence is admissible only if an expert is willing to testify as to its relevance. See, e.g., *Brenman v. Demello*, 921 A.2d 1110, 1120, 191 N.J. 18, 28 ("We cannot subscribe to the limits of Davis' s logic. In the main, the fundamental relationship between the force of impact in an automobile accident and the existence or extent of any resulting injuries does not necessarily require 'scientific, technical, or other specialized knowledge' in order to 'assist the trier of fact to understand the evidence or to determine a fact in issue' ... expert proofs ... address the weight to be given to photographs of impact, not their admissibility."); *Marron v. Stromstad*, 123 P.3d 992, 1009 (Alaska 2005) ("[W]e decline to adopt the rigid approach represented by [Davis]. We are unaware of any other jurisdiction which has adopted a rule that collision evidence is per se inadmissible without expert testimony, and we decline to do so. The trial court properly has the discretion to weigh the prejudicial and probative value of photographs and other evidence of the severity of an accident."); *Murray v. Mossman*, 329 P.2d 1089, 1091 (Wash.1958) (affirming admission of photographs of accident scene for the limited purpose of showing the force of the impact that caused plaintiff's whiplash injury); *DiCosola v. Bowman*, 794 N.E.2d 875, 881 (Ill.App.2003) ("[W]e are rejecting a bright-line rule ... We do not hold that expert testimony must always be required for such photographic evidence to be admissible.") (ultimately upholding trial court's use of discretion to require expert testimony). Thus, once the evidence is shown to be relevant and admissible under Nevada's Rules of Evidence, expert testimony is not required.



004738
004738
004738

## II.

## CONCLUSION

For the reasons outlined above, the Court should grant a new trial.

DATED this 14th day of July, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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

004739

004739



004739

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 14TH day of July, 2011, a true and correct copy of the foregoing **DEFENDANT'S REPLY TO OPPOSITION TO MOTION FOR NEW TRIAL** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

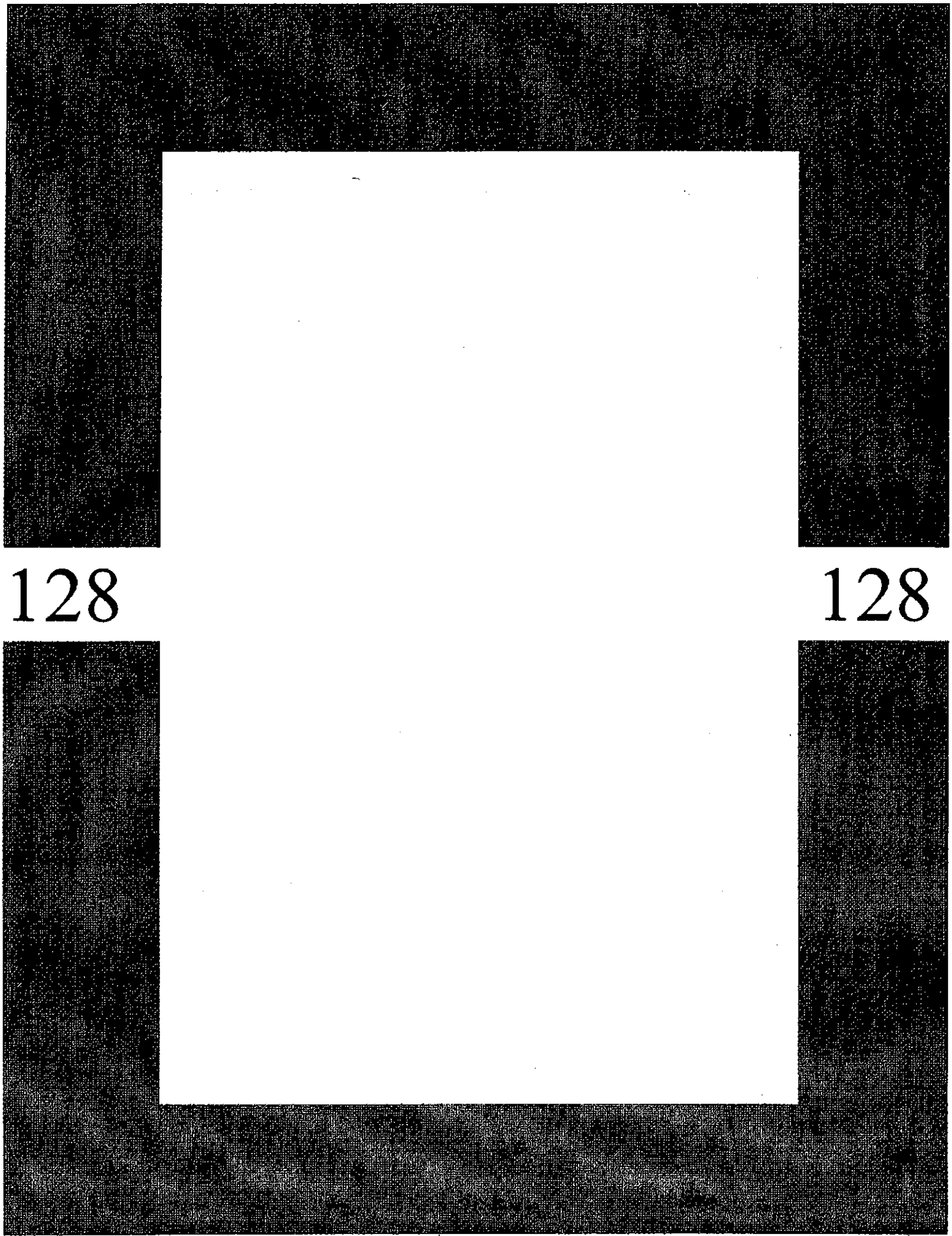
David T. Wall, Esq.
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Telephone: (702) 450-5400
Facsimile: (702) 450-5451
*Attorneys for Plaintiffs*

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

M:\Rogers\Rish adv. Simno\Pleadings\Reply to opposition to motion for new trial.wpd



004740
004740
004740




004741
004741
004741

Electronically Filed
07/14/2011 04:07:40 PM

CLERK OF THE COURT

RPLY
**ROBERT T. EGLET, ESQ.**
Nevada Bar No. 3402
**DAVID T. WALL, ESQ.**
Nevada Bar No. 2805
**ROBERT M. ADAMS, ESQ.**
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
dwall@mainorlawyers.com

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



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X<br><br>**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR ATTORNEYS' FEES** |

COME NOW, 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 law firm of MAINOR EGLET, and hereby submits their Reply

to Defendant's Opposition to Motion for Attorneys' Fees.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

### ARGUMENT IN REPLY

**A. Plaintiffs' Offer of Judgment was Reasonable in its Timing and Amount.**

As a preliminary matter, Defendant's argument that Plaintiffs' claims were not brought in good faith because this was a "minor impact" case must be disregarded. This issue has been argued and briefed *ad nauseam* and Plaintiffs will not spend any time discussing the reasons why this Court properly excluded the "minor impact" defense at trial due to the lack of reliable expert witness testimony. In spite of the appropriateness of excluding this defense, however, the existence or non-existence of a "minor impact" does not translate into a claim that was brought in bad faith. Defendant's attorneys are very experienced in motor vehicle accident litigation and know very well that significant injuries can be caused by a minor impact just as slight injuries (or none at all) might result from a hard impact. Plaintiffs' claims were certainly brought in good faith considering that liability was uncontested at trial and that significant evidence was introduced showing that William was severely injured as a result of Defendant's negligence.

Further, as to the argument that Plaintiffs' Offer of Judgment was unreasonable, it is undisputed that at the time that the offer was made, William had been treating with a spine surgeon, who informed William that spine surgery was indicated. By February 5, 2009, the date of the Offer of Judgment, Mr. Simao was still treating for his neck pain, and had long been recommended for a cervical spine fusion. Again, Defendant's counsel is very experienced and knowledgeable in this sort of litigation and certainly understands the seriousness of a spine surgery recommendation and that an injury that requires spine surgery requires lifelong medical treatment, lifelong pain and suffering, and lifelong changes to one's enjoyment of life. So,

regardless of the actual costs of the medical treatment received at or around February 2009 when the offer was served, given William's serious injuries and recommendations for surgery, the offer was certainly reasonable considering the additional and reasonable damages that the defense should have anticipated from such serious injuries given their litigation experience.

It is clear that well before the trial of this matter that the value of this case was greatly in excess of $799,999.00. Moreover, the Judgment of $3,493,983.45 is direct evidence that Plaintiff's $799,999.00 Offer of Judgment was more than reasonable.

Lastly on this subject, it cannot be ignored that in spite of Defendant's knowledge of Williams injuries and surgery, the most that was ever offered to William was $42,500.00. (*See* Motion at Exhibit "10"). This offer was made in October 2009, several months following William's March 2009 cervical spine fusion. As the defense acknowledges, at that time, William's medical expenses were over $170,000.00 yet they unreasonably only offered a fraction of this amount, refusing to accept responsibility for Defendant's actions. Defendant's low offer speaks volumes as to the unreasonable nature of her stance in this case. Moreover, it unequivocally demonstrates that any offer Plaintiff had made would have been rejected given the Defendant's misplaced assessment of the merits of the case, which surprisingly still persists to this day.

**B. NRCP 68 and NRS 17.115 do not prohibit an attorney fee award based upon a contingency fee agreement.**

In Nevada, "the method upon which a reasonable fee is determined is subject to the discretion of the Court," which is tempered only by reason and fairness. *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 124 P.3d 530 (2005); *University of Nevada v. Tarkanian*, 110 Nev. 581, 594, 591, 879 P.2d 1180, 1188, 1186 (1994).

Despite Defendant's argument, NRCP 68 and NRS 17.115 do not prohibit an award of fees based upon the contingency fee agreement. The defense woefully misconstrues theses rules





004744

004744

004744

to mean that an award of fees based upon the contingency fee agreement is prohibited. There is nothing in the rules, however, that prohibits an award of attorneys fees equal to the contingency fee. In fact, the case law discussed at length within Plaintiffs' original Motion unequivocally establishes that awarding attorneys fees based upon a contingency fee agreement is a function often performed by a trial judge and is not an abuse of discretion. See *Glendora Comm. Redevelopment Agency v. John P. Deneter, Jr.*, 155 Cal.App.3d 465; 202 Cal.Rptr. 389 (1984). Further, NRCP 68 allows an award of **actual** attorney's fees incurred which in this case will be 40% of the amounts recovered on behalf of the Plaintiffs pursuant to the contingency fee agreement.

Although the defense argues that an award based upon the contingency fee is not allowed, she fails to cite to any authority in support of this premise (other than a misinterpretation of the above cited statutes), and does not even attempt to distinguish the case law provided by Plaintiffs to rebut their request for an award of fees equalling the contingency fee for which Plaintiffs' contracted for their attorneys' services.

**C. The Fees Requested on an Hourly Basis and "Lodestar" are not Excessive.**

Defendant next argues that Plaintiffs' attorneys hourly rate of $750 dollars per hour is excessive, claiming the fees are unjustified. According to the Defendant's argument, she would require an itemized billing sheet for the hours worked by each of Plaintiffs' lawyers as well as a description of the work performed. This is not required under *Beattie* or any other law in Nevada. The affidavits submitted by counsel, as officers of the court, are sufficient to establish the amount of time each spent on the development of this case. Importantly, it must be pointed out that Plaintiffs' counsel is being exceptionally reasonable in its calculations of hours spent and by the attorneys who assisted at or during trial. Although fees are only being sought for the hours spent by Mr. Eglet and Mr. Wall, no less than four (4) other attorneys spent considerable time in

the preparation for trial, including Robert M. Adams, Esq., Tracy A. Eglet, Esq., Brice J. Crafton, Esq., and Matthew E. Aaron, Esq. Even though Plaintiffs would be within their right to request an hourly fee for the time spent by each of the attorneys, a more conservative and reasonable approach was utilized. Thus, Defendant's argument that these fees are excessive is simply incorrect and should be soundly rejected.

As to Defendant's argument that 2.5 is an unjustified multiplier, the defense does nothing to support this premise except try to point fingers at what it believes to be inconsistencies in Plaintiffs' arguments without stating anything substantive against the 2.5 multiplier. Defendant's argument in this regard is a nonsensical red herring which provides absolutely no assistance to the Court in makings it determination. Notably, there is no argument made by the defense against the lodestar method, which should be considered to be a concession that this method is appropriate for calculating the fees to be awarded to Plaintiffs. Based upon the law set forth by Plaintiffs in their original brief, the Court would be well within its discretion to utilize a lodestar method based upon the hourly rates of Plaintiffs' counsel, which are reasonable, multiplied by the hours expended and a 2.5 multiplier. *University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1188, 1186 (1989); *see also Ketchum v. Moses*, 24 Cal.4th 1122, 17 P.3d 735 (2001).

**D. Plaintiffs' Request for Applicable Interest is Allowed.**

Defendants' assertion that Plaintiffs wrongly request "punitive interest" is mistaken. First, the interest Plaintiffs' request is specifically authorized by NRS 17.115 and NRCP 68 and Defendant has failed to set forth any analysis as to why this might be incorrect. Defendant's reference to NRS 17.130 misapplies this rule in relation to NRS 17.115 and NRCP 68. The provisions of NRS 17.115 (4)(d)(2), indicate that the Court may award "**any applicable interest on the judgment for the period from the date of service of the offer to the date of entry of**

**the judgment."** NRCP 68(f) states in pertinent part that "if the [Defendant] offeree rejects an offer and fails to obtain a more favorable judgment, (2) the [Defendant] offeree **shall** pay the [Plaintiff] offeror's applicable interest on the judgment from the time of the offer to the time of entry of the judgment." These rules do not have any relation to NRS 17.130 as the defense intimates in that NRS 17.130 has nothing to do with offers of judgment and the interest that is to be assessed for failure to accept a reasonable offer of judgment. In fact the Supreme Court of Nevada has specifically said that "it is appropriate for the District Court to award interest on future damages pursuant to NRS 17.115, which makes no distinction between past and future damages in a judgment." *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995). Although the defense accuses Plaintiffs of misplacing their reliance on *Uniroyal*, her argument is devoid of analysis or law supporting this baseless notion.

## II.

## CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant their Motion for Attorneys' Fees.

DATED this 14 day of July, 2011.

MAINOR EGLET

DAVID T. WALL, ESQ.

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 14th day of July, 2011, a copy of the above and foregoing PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION ATTORNEYS' FEES was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

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

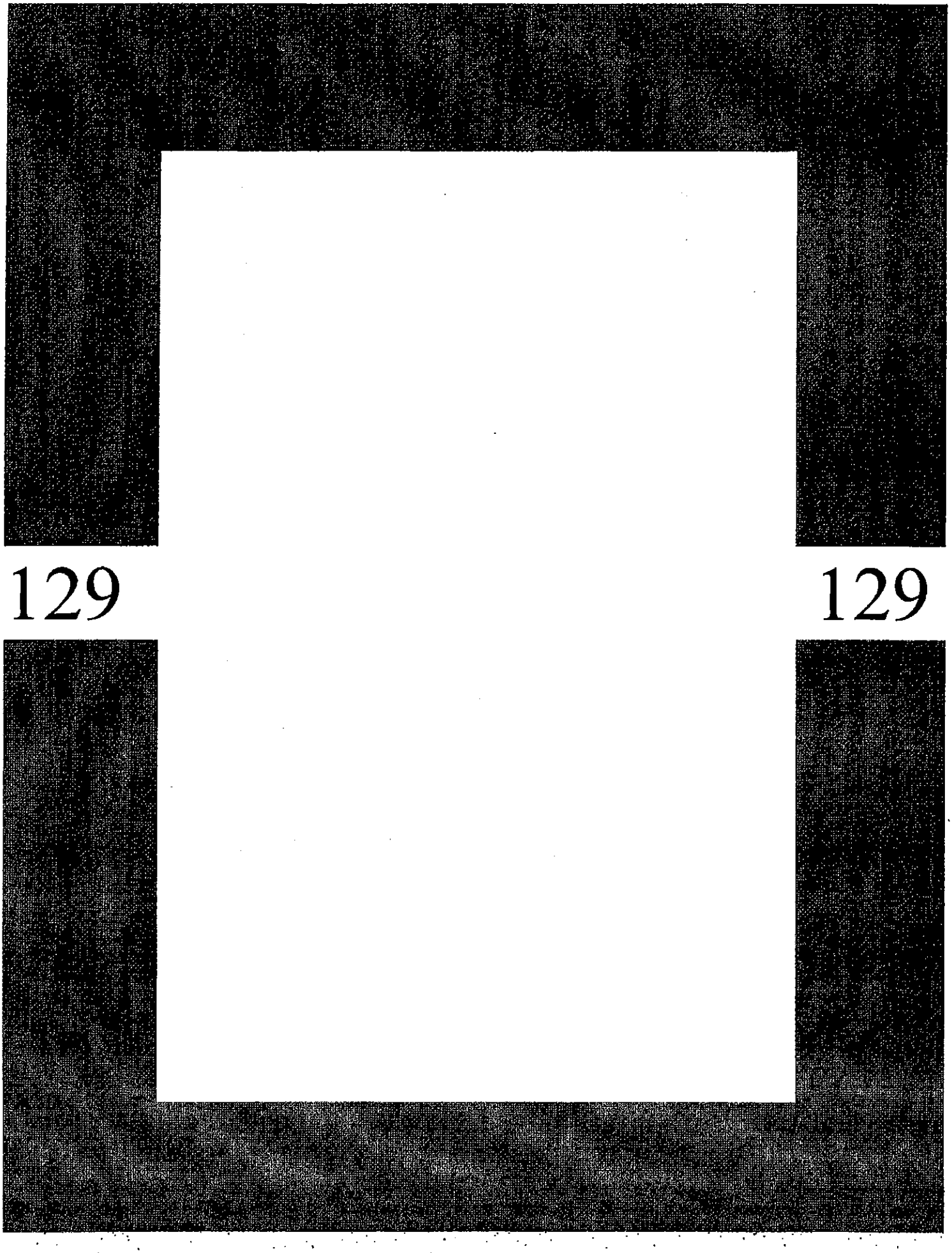
An employee of MAINOR EGLET



004748



004748




004749
004749
004749

# REGISTER OF ACTIONS

## CASE NO. 07A539455

**William Simao, Cheryl Simao vs Jenny Rish**

| | |
|---|---|
| Case Type: | **Negligence - Auto** |
| Date Filed: | **04/13/2007** |
| Location: | **Department 10** |
| Conversion Case Number: | **A539455** |
| Supreme Court No.: | **58504** |
| | **59208** |
| | **59423** |

### PARTY INFORMATION

| | | Lead Attorneys |
|---|---|---|
| **Defendant** | **Rish, Jenny** | **Stephen H Rogers**<br>*Retained*<br>702-383-3400(W) |
| **Plaintiff** | **Simao, Cheryl A** | **David T Wall**<br>*Retained*<br>702-450-5400(W) |
| **Plaintiff** | **Simao, William J** | **David T Wall**<br>*Retained*<br>702-450-5400(W) |

### EVENTS & ORDERS OF THE COURT

07/21/2011 **All Pending Motions** (3:00 AM) (Judicial Officer Walsh, Jessie)

**Minutes**
07/21/2011 3:00 AM
- Plaintiff's Motion for Attorney Fees...Deft's Motion for new trial Following review of the papers and pleadings on file herein, COURT ORDERED, NEW TRIAL DENIED. CLERK'S NOTE: Minutes corrected to reflect new order./pi (8-5-11)

Return to Register of Actions





004750

004750

# REGISTER OF ACTIONS
## CASE NO. 07A539455

**William Simao, Cheryl Simao vs Jenny Rish**

§
§
§
§
§
§
§
§
§

| | |
|---|---|
| Case Type: | **Negligence - Auto** |
| Date Filed: | **04/13/2007** |
| Location: | **Department 10** |
| Conversion Case Number: | **A539455** |
| Supreme Court No.: | **58504** |
| | **59208** |
| | **59423** |

### PARTY INFORMATION

| | | Lead Attorneys |
|---|---|---|
| **Defendant** | **Rish, Jenny** | **Stephen H Rogers**<br>*Retained*<br>702-383-3400(W) |
| **Plaintiff** | **Simao, Cheryl A** | **David T Wall**<br>*Retained*<br>702-450-5400(W) |
| **Plaintiff** | **Simao, William J** | **David T Wall**<br>*Retained*<br>702-450-5400(W) |

### EVENTS & ORDERS OF THE COURT

07/21/2011 **Motion for Attorney Fees** (3:00 AM) (Judicial Officer Walsh, Jessie)
*Plaintiff's Motion for Attorney Fees*

**Minutes**
06/30/2011 3:00 AM

07/21/2011 3:00 AM
- Following review of the papers and pleadings on file herein, COURT ORDERED motion GRANTED pursuant to NRS 17.115 and NRCP 68, Bettie v. Thomas, 99 Nev. 579, John W. Muije Ltd.v. Cummings, 106 Nev, 664, University of Nevada v. Tarkanian, 110 Nev. 581. This case involved a rear end collision that caused serious injury where liability was not disputed. When plaintiffs served the offer, Mr. Simao was still treating for his neck pain and a cervical spine fusion had been recommended. The claim was brought in good faith and the offer of judgment was reasonable and in good faith in both its timing and amount. Defendant admits that the medical damages were over $170,000, sometime after the cervical spinal fusion, yet their best offer was a measly $42,500 in October, 2009. Defendant's decision to reject plaintiffs offer was unreasonable, given the fact that liability was uncontested, and given the lack of evidence that this was a "minor impact". The court awards attorneys fees pursuant to NRS 17.115 and NRCP 68, calculated from the date the offer was rejected, using the lodestar method with a multiplier of 2.5, which reflects the exceptional quality of the legal work, the contingent risk and the extraordinary results. Brunzell. The fees sought are reasonable and justified, especially given the number of hours worked, the qualities of the advocates, the thorough preparation and the results. The plaintiffs are entitled to prejudgment interest pursuant to NRCP 68(f)(2) and NRS 17.115. There is nothing punitive about applying interest to a judgment. It is equitable to note the time value of money which serves to safeguard defendants from being able to lessen their liability simply by drawing out cases for as long as possible. Prevailing party to draft an order for the court's signature.

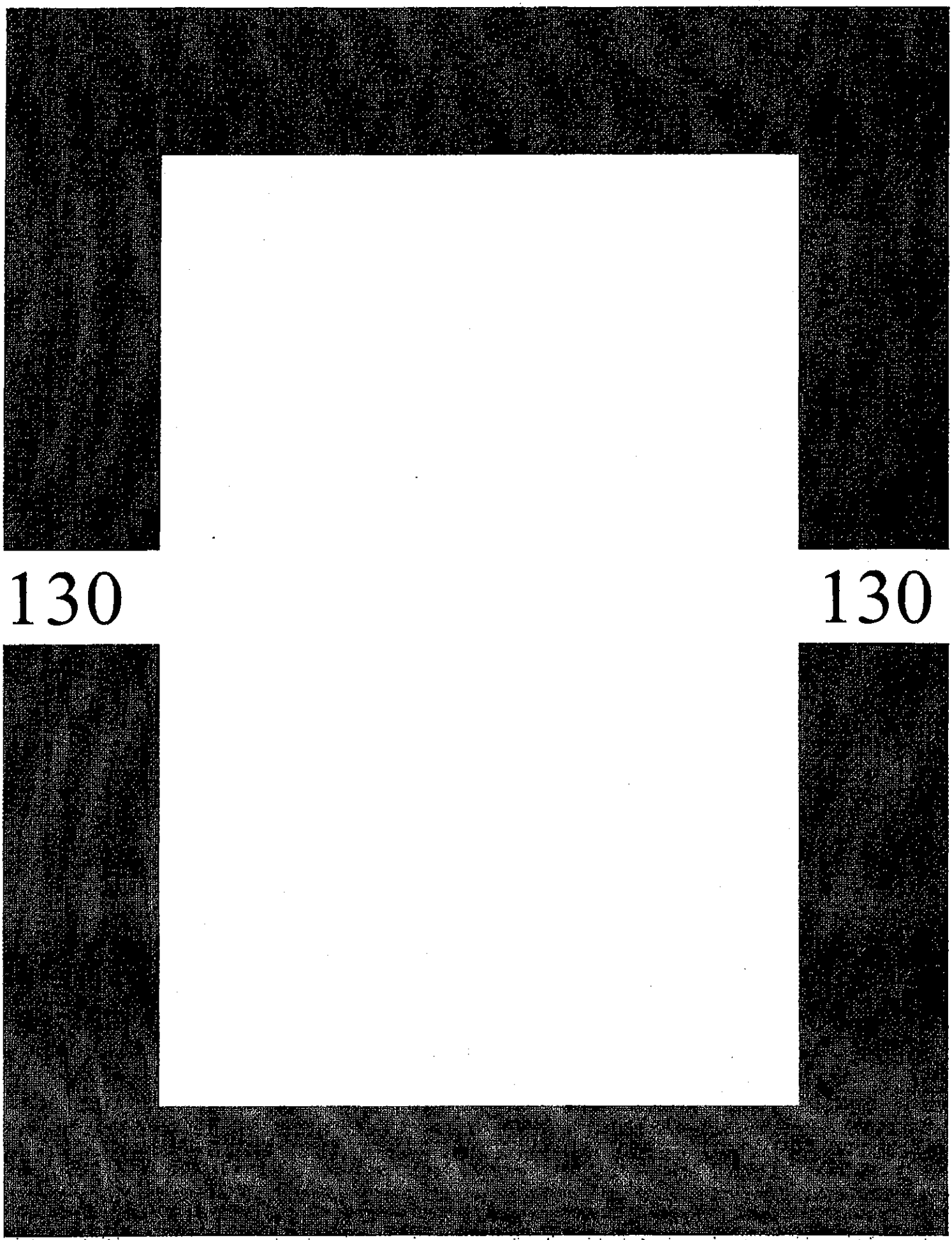
Return to Register of Actions





004751

004751




004752

004752

Electronically Filed
07/25/2011 09:07:27 AM

CLERK OF THE COURT

**ORDR**
**ROBERT T. EGLET, ESQ.**
Nevada Bar No. 3402
**DAVID T. WALL, ESQ.**
Nevada Bar No. 2805
**BRADLEY J. MYERS, ESQ.**
Nevada Bar No. 8857
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
dwall@mainorlawyers.com

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



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455
DEPT. NO.: X

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

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

Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time, the parties appearing before the Court on June 7, 2011 for hearing, and good cause appearing therefore, hereby rules that Plaintiffs' Motion is **GRANTED.**

**IT IS SO ORDERED.**

DATED this 20th day of ~~June~~ July 2011.

**DISTRICT COURT JUDGE**

Respectfully submitted by:

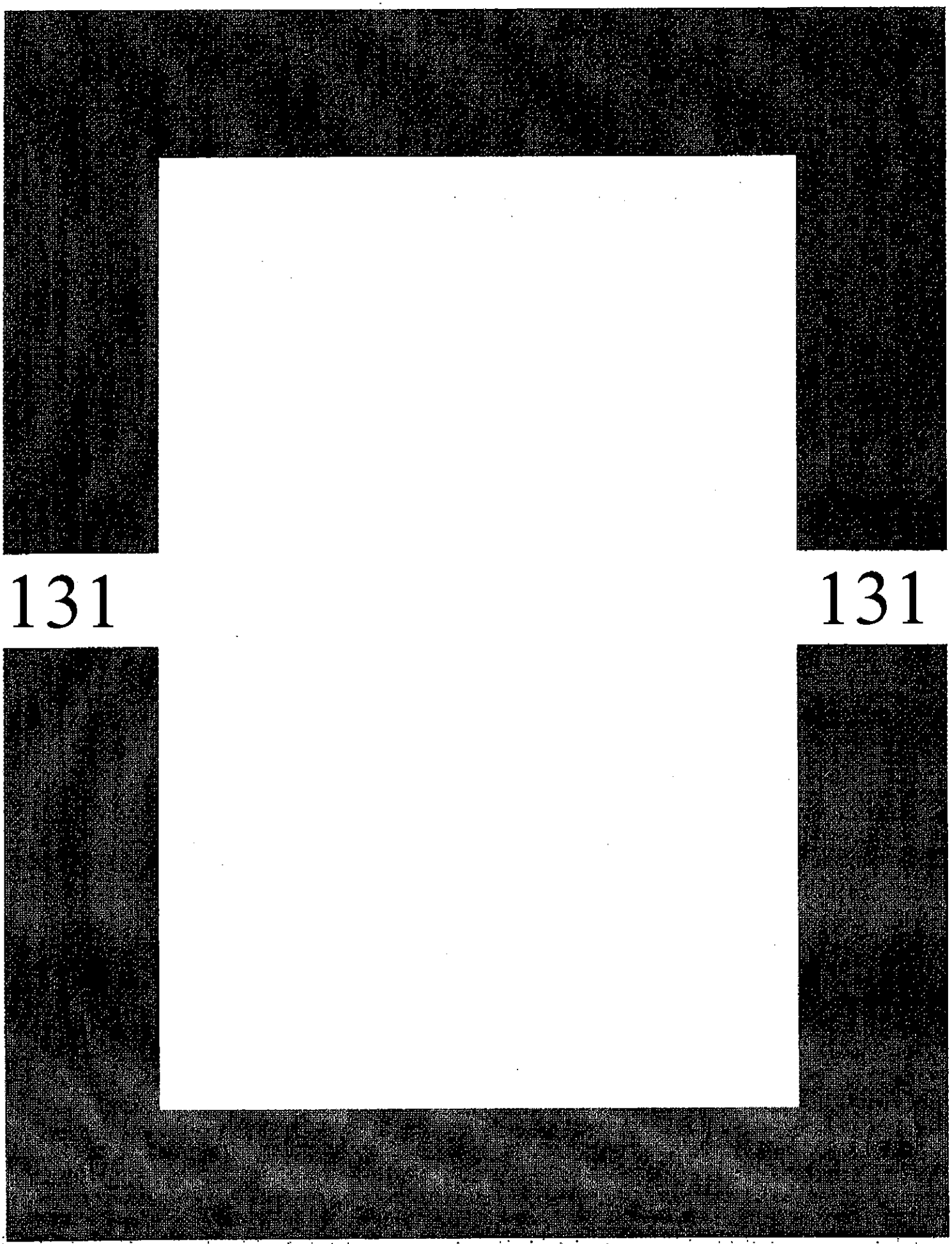
**MAINOR EGLET**

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

Approved as to form and content by:

**ROGERS, MASTRANGELO, CARVALHO & MITCHELL**

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 S. Fourth Street, Suite 710
Las Vegas, Nevada 89101
*Attorney for Defendant*




004755

004755

Electronically Filed
07/25/2011 11:28:10 AM

CLERK OF THE COURT

**NEO**
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
reglet@mainorlawyers.com
dwall@mainorlawyers.com
badams@mainorlawyers.com
*Attorney for Plaintiffs*

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



004756

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

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X<br><br>**NOTICE OF ENTRY OF ORDER** |

004756

PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time was entered in the above-entitled matter on July 25, 2011 and is attached hereto as Exhibit "1".

DATED this 25 day of July, 2011.

**MAINOR EGLET**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Ste. 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs



004757



004757

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 25th day of July, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF ORDER was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

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

An employee of MAINOR EGLET



004758

004758



004758

004759

004759

# EXHIBIT "1"

Electronically Filed
07/25/2011 09:07:27 AM

CLERK OF THE COURT

ORDR
**ROBERT T. EGLET, ESQ.**
Nevada Bar No. 3402
**DAVID T. WALL, ESQ.**
Nevada Bar No. 2805
**BRADLEY J. MYERS, ESQ.**
Nevada Bar No. 8857
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
dwall@mainorlawyers.com

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X<br><br>**ORDER GRANTING PLAINTIFFS' MOTION TO QUASH DEFENDANT'S SUBPOENA DUCES TECUM TO JANS-JORG ROSLER, M.D. AT NEVADA SPINE INSTITUTE ON ORDER SHORTENING TIME** |

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

Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time, the parties appearing before the Court on June 7, 2011 for hearing, and good cause appearing therefore, hereby rules that Plaintiffs' Motion is **GRANTED.**

**IT IS SO ORDERED.**

DATED this 20th day of ~~June~~ July, 2011.

**DISTRICT COURT JUDGE**

Respectfully submitted by:

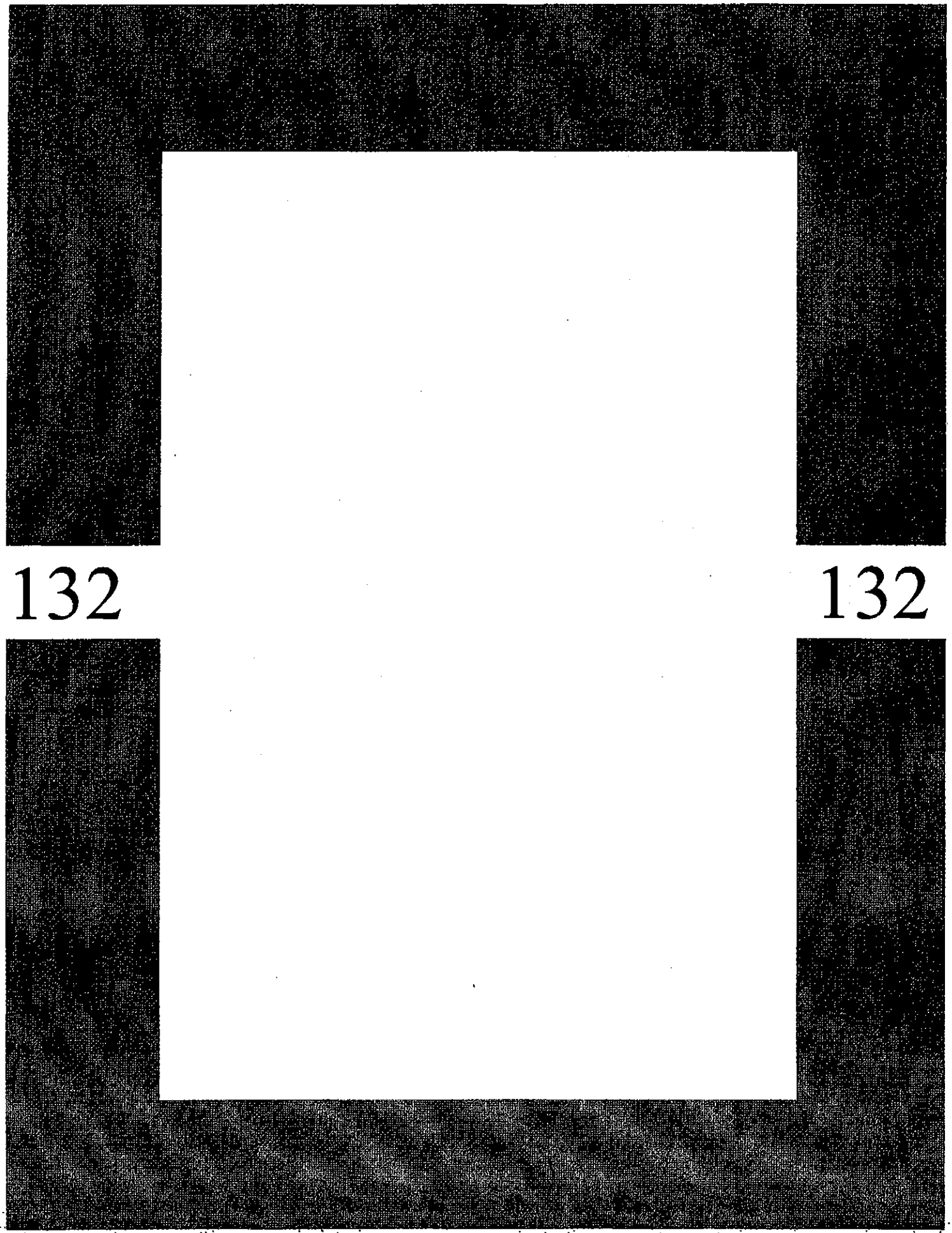
**MAINOR EGLET**

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

Approved as to form and content by:

**ROGERS, MASTRANGELO, CARVALHO & MITCHELL**

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 S. Fourth Street, Suite 710
Las Vegas, Nevada 89101
*Attorney for Defendant*




004762
004762
004762

Electronically Filed
07/26/2011 02:20:17 PM

CLERK OF THE COURT

**OPP**
**ROBERT T. EGLET, ESQ.**
Nevada Bar No. 3402
**DAVID T. WALL, ESQ.**
Nevada Bar No. 2805
**ROBERT M. ADAMS, ESQ.**
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
dwall@mainorlawyers.com

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X<br><br>**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS** |

COME NOW, 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 law firm of MAINOR EGLET, and hereby submits their Opposition to Defendant's Motion to Compel Production of Documents.

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

DATED this 26 day of July, 2011.

MAINOR EGLET

10558

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**STATEMENT OF FACTS**

On May 16, 2011, Defendant served a Subpoena Duces Tecum to Jorg Rosler, M.D. at Nevada Spine Institute, demanding fluoroscopy images taken at the time of Plaintiff William Simao's discogram to be produced no later than May 26, 2011. *See* Subpoena Duces Tecum to Dr. Rosler, attached hereto as **Exhibit "1."** Plaintiffs thereafter filed a Motion to Quash said subpoena given that trial concluded approximately six (6) weeks prior, on March 31, 2011, because of Defendant's repeated violation of pretrial orders. Plaintiffs' Motion to Quash was granted by this Court on June 7, 2011 (*See* Order at **Exhibit "2"**). Defendants' instant Motion to Compel has followed which is more akin to a motion for reconsideration rather than a motion to compel given the Court's ruling on Plaintiffs' Motion to Quash.

Nevertheless, and for the same reasons as those supporting the Court's Order on Plaintiffs' Motion to Quash, Defendant's Motion to Compel Production of Documents should be summarily denied.

## II.

## ARGUMENT IN OPPOSITION

First and foremost, the trial of this matter is done and over with and unless and until a new trial is granted (which it should not), there is no logical basis to allow a party to conduct any amount of ongoing discovery. The purpose of discovery, as this Court and defense counsel is aware, is to prepare a case for trial. Given that the trial in this matter has already concluded, there is no point to conduct post-trial discovery including but not limited to gathering documents and retaining additional expert witnesses. The only conceivable point in time when additional discovery would ever be appropriate in this matter is if a new trial is granted. In Plaintiffs' view, as has been set forth within their Opposition to Defendant's Motion for New Trial, a new trial is not warranted here given the violations of pre-trial orders that took place and the progressive sanctions that were imposed. Defendants' viewpoint obviously differs on this matter but does not justify post-trial discovery.

As to Defendants' argument that the lack of production of these films before or even during trial warrants a new trial, it must be noted that Defendant's instant Motion is one to compel, not for a new trial. Accordingly, Defendant's request for a new trial in the instant Motion is improper and should be disregarded.

Next, as the Court may recall, prior to Dr. Rosler taking the stand, Plaintiff was not in possession of the subject fluoroscopy image. Dr. Rosler brought the image with him to Court on the day he took the stand, which was the first time Plaintiffs' counsel saw the image. During Dr. Rosler's testimony, he referenced the fluoroscopy in his chart, which was subsequently shown to the jury by use of the ELMO. This was the only time Plaintiffs' counsel used the ELMO as trial, which use was necessitated by the fact that Plaintiffs did not possess the film prior and was not able to digitize it for use as an electronic exhibit as per Plaintiff's counsel's usual trial custom.

Thereafter, a copy of the fluoroscopy image brought by Dr. Rosler **was** produced to Defendant during trial, on April 15, 2011, according to the Court's instructions. This is evidence by the Receipt of Copy at **Exhibit "3."** Interestingly, rather than acknowledge the undoubted production of the requested item, Defendant still persists in her denial of receipt, claiming that the "original film" has not been produced. Notwithstanding, while the original has not been produced given the fact that Mr. Simao still receives medical treatment under the care of Dr. Rosler and the film cannot leave his possession, a copy of the subject image should be sufficient to satisfy Defendant's needs. Frankly, the issue regarding the inferiority of a copy versus the original film is presently moot considering the fact that the trial has concluded as a result of Defendant's blatant violations of pretrial orders, which ultimately led to the striking of her Answer and entry of a Default Judgment after a prove-up hearing was conducted. Again, until either a new trial is granted by this Court and/or the Nevada Supreme Court, which is **highly** unlikely considering the fact that this Court was well within its discretion to issue the pretrial orders at issue as well as the sanctions that were imposed, Defendant has absolutely no right whatsoever to conduct any sort of discovery in this matter. Defendant has failed to set forth any precedent whatsoever which supports its position that the post-trial discovery sought is permitted.

Further, with respect to Defendant's mention of Dr. Schifini, he was not ever identified as one of Defendant's trial witnesses. As such, Plaintiff is at a loss as to why Defendant is even bringing Dr. Schifini into this discussion as his subsequent involvement in this matter is wholly irrelevant.

## III.

## CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that Defendant's Motion to Compel Production of Documents be Denied.

DATED this 26 day of July, 2011.

**MAINOR EGLET**

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



004767



004767

004768

004768

# EXHIBIT "1"

SUBP
STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Phone (702) 383-3400
Fax (702) 384-1460
*Attorneys for Defendant Jenny Rish*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

**SUBPOENA – CIVIL**

☐ **REGULAR** ☒ **DUCES TECUM**

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

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

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

004769
004769

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

**ITEMS TO BE PRODUCED**

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

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

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

DATED this 17th day of May, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

Stephen H. Rogers, Esq.
Nevada Bar No. 5755
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Telephone: (702) 383-3400
Facsimile: 702-384-1460
*Attorneys for Defendant Jenny Rish*

**EXHIBIT "A"**

**EXHIBIT "A"**
**NEVADA RULES OF CIVIL PROCEDURE**

Rule 45

**(c) Protection of Persons Subject to Subpoena.**

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

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

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

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

(i) fails to allow reasonable time for compliance;

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

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

(iv) subjects a person to undue burden.

(B) If a subpoena

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

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

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

**(d) Duties in Responding to Subpoena.**

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

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

**AFFIDAVIT OF SERVICE**

State of Nevada )
)ss:
County of Clark )

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

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

EXECUTED this _____ day of _____, 2011.

_____
Signature of person making service



004772
004772
004772

**CERTIFICATE OF SERVICE**

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

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

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell



004773

004773

004773

004774

004774

# EXHIBIT "2"

Electronically Filed
07/25/2011 09:07:27 AM

CLERK OF THE COURT

ORDR
**ROBERT T. EGLET, ESQ.**
Nevada Bar No. 3402
**DAVID T. WALL, ESQ.**
Nevada Bar No. 2805
**BRADLEY J. MYERS, ESQ.**
Nevada Bar No. 8857
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
dwall@mainorlawyers.com

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455
DEPT. NO.: X

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

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



004775

Plaintiffs' Motion to Quash Defendant's Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time, the parties appearing before the Court on June 7, 2011 for hearing, and good cause appearing therefore, hereby rules that Plaintiffs' Motion is **GRANTED.**

**IT IS SO ORDERED.**

DATED this 20th day of ~~June~~ July, 2011.

**DISTRICT COURT JUDGE**

Respectfully submitted by:

**MAINOR EGLET**

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

Approved as to form and content by:

**ROGERS, MASTRANGELO, CARVALHO & MITCHELL**

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 S. Fourth Street, Suite 710
Las Vegas, Nevada 89101
*Attorney for Defendant*

004777

004777

# EXHIBIT "3"

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

CLERK OF THE COURT

ROC
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
dwall@mainorlawyers.com

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

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

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES 1 through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X |

**RECEIPT OF COPY**

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

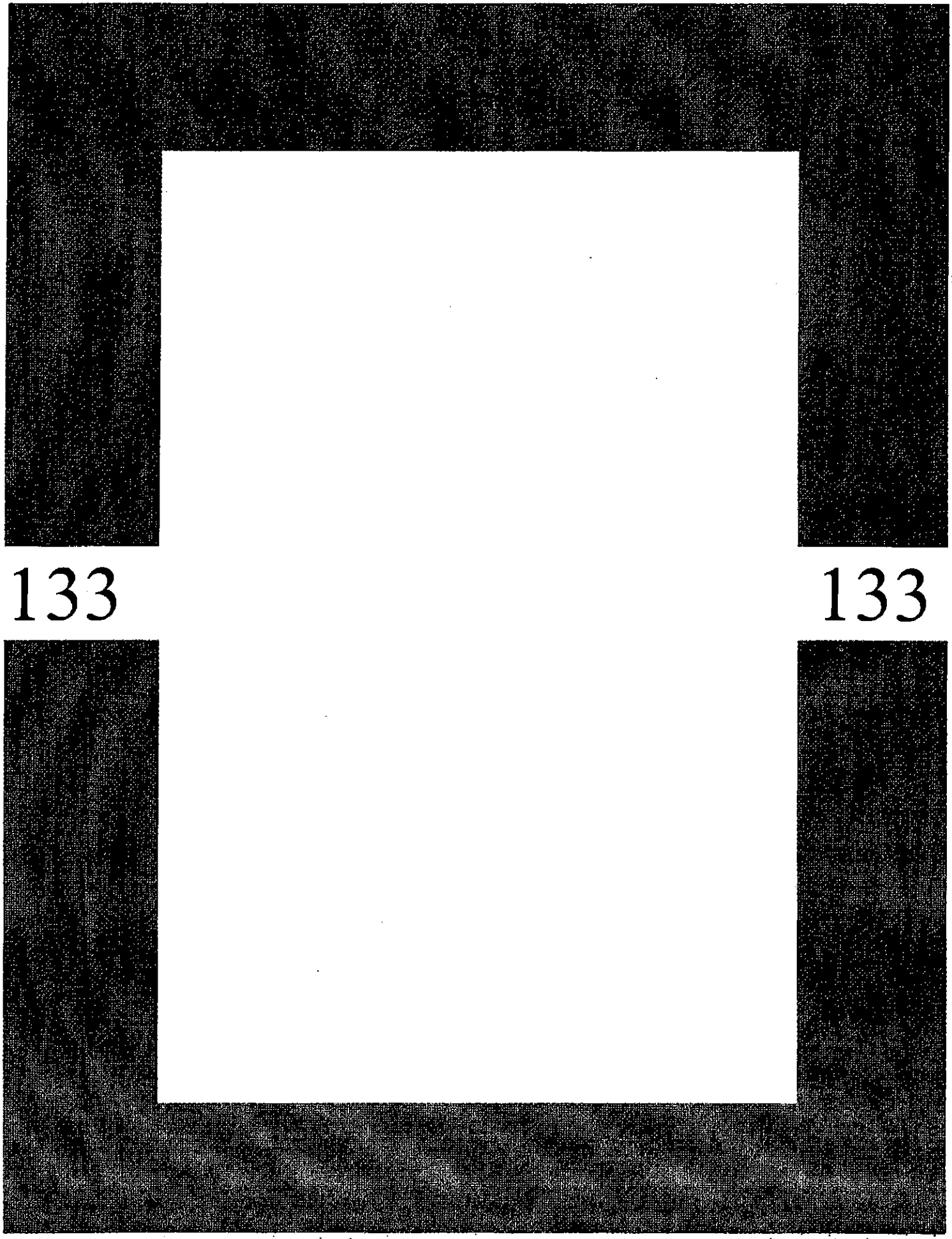
Date: 4/15/11 Time: 4:25

Stephen H. Rogers, Esq.
**ROGERS, MASTRANGELO, CARVALHO & MITCHELL, LTD.**
300 S. Fourth Street, #710
Las Vegas, NV 89101
Attorneys for Defendants





004779
004779
004779





133

004780

004780

# REGISTER OF ACTIONS
## CASE NO. 07A539455

**William Simao, Cheryl Simao vs Jenny Rish**

§
§
§
§
§
§
§
§
§
§

Case Type: **Negligence - Auto**
Date Filed: **04/13/2007**
Location: **Department 10**
Conversion Case Number: **A539455**
Supreme Court No.: **58504**
**59208**
**59423**

## PARTY INFORMATION

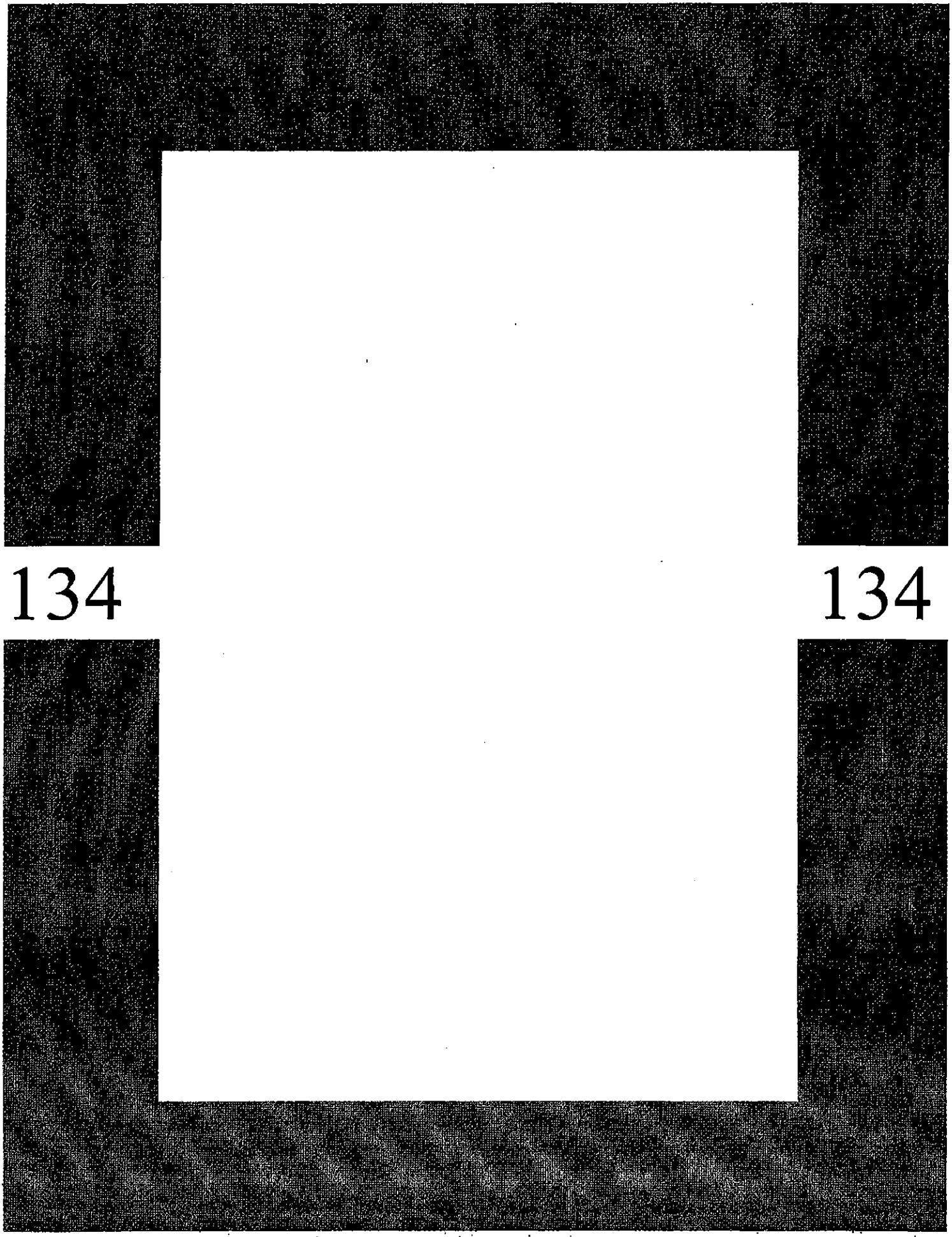
| | | Lead Attorneys |
|---|---|---|
| **Defendant** | **Rish, Jenny** | **Stephen H Rogers**<br>*Retained*<br>702-383-3400(W) |
| **Plaintiff** | ***Simao, Cheryl A*** | **David T Wall**<br>*Retained*<br>702-450-5400(W) |
| **Plaintiff** | **Simao, William J** | **David T Wall**<br>*Retained*<br>702-450-5400(W) |

## EVENTS & ORDERS OF THE COURT

08/11/2011 **Motion to Compel** (3:00 AM) (Judicial Officer Walsh, Jessie)
*Defendant Jenny Rish's Motion to Compel Production of Documents*

**Minutes**
08/11/2011 3:00 AM
- Following review of the papers and pleadings on file herein, COURT ORDERED motion DENIED. Deft. cites no legal authority to support her position that she must have the original, rather that a copy of the fluoroscopy images (which she had previously been provided). Further, Court notes that Mr. Simao is still treating with Dr. Rusler, who maintains the original images.

*Return to Register of Actions*



134

134

004782

004782

4

FILED
AUG 24 10 34 AM '11
CLERK OF THE COURT

**ORDR**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
badams@mainorlawyers.com

MATTHEW E. AARON, ESQ.
Nevada Bar No. 4900
**AARON & PATERNOSTER, LTD.**
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Ph.: (702) 384-4111
Fx.: (702) 384-8222
*Attorneys for Plaintiffs*

07A539455
ORDD
Order Denying
1681988

MAINOR EGLET
EPIC ATTORNEYS

**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

**ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL**

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

2

Defendant's Motion for New Trial, the matter being heard in Chambers on July 21, 2011 for hearing, and good cause appearing therefore, hereby rules that Defendant's Motion for New Trial is **DENIED.**

**IT IS SO ORDERED.**

DATED this 23rd day of August, 2011.

Jessie Walsh
**DISTRICT COURT JUDGE**

Respectfully submitted by:

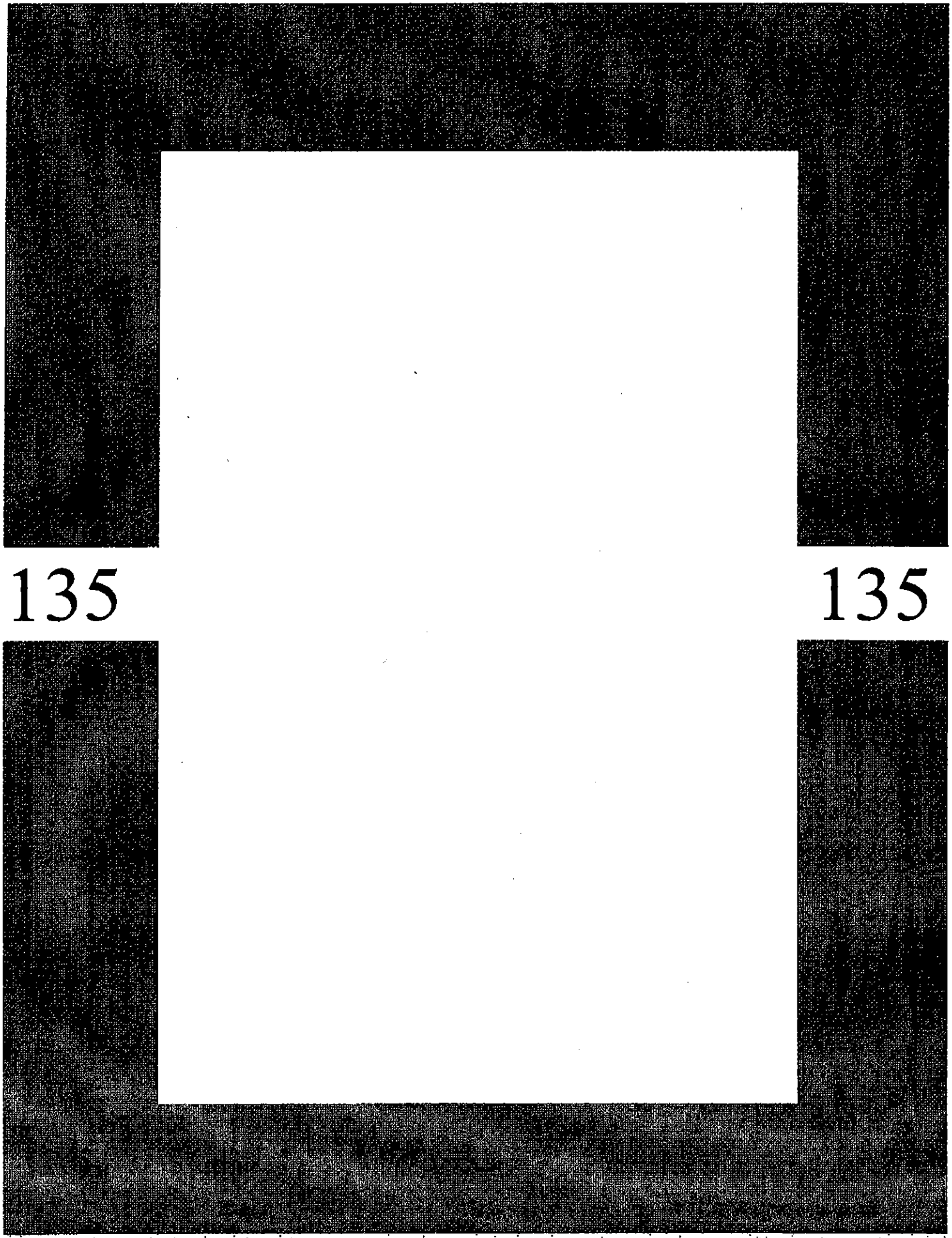
**MAINOR EGLET**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
*Attorneys for Plaintiffs*

MAINOR EGLET
TRIAL ATTORNEYS



004784




004785
004785
004785

Electronically Filed
08/25/2011 02:46:57 PM

CLERK OF THE COURT

**NEO**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
reglet@mainorlawyers.com
dwall@mainorlawyers.com
badams@mainorlawyers.com
*Attorney for Plaintiffs*

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

MAINOR EGLET

004786

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

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X<br><br>**NOTICE OF ENTRY OF ORDER** |

004786

PLEASE TAKE NOTICE that an Order Denying Defendant's Motion for New Trial was entered in the above-entitled matter on August 24, 2011 and is attached hereto as Exhibit "24."

DATED this 25 day of August, 2011.

**MAINOR EGLET**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Ste. 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs



004787



004787

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 25th day of August, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF ORDER was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

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

An employee of MAINOR EGLET

004789

004789

# EXHIBIT "1"

**ORDR**
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
badams@mainorlawyers.com

MATTHEW E. AARON, ESQ.
Nevada Bar No. 4900
**AARON & PATERNOSTER, LTD.**
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Ph.: (702) 384-4111
Fx.: (702) 384-8222
*Attorneys for Plaintiffs*

FILED
AUG 24 10 35 AM '11
CLERK OF THE COURT

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife.<br><br>Plaintiffs,<br><br>v.<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive.<br><br>Defendants. | CASE NO.: A539455<br>DEPT. NO.: X<br><br>**ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL** |

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

Defendant's Motion for New Trial, the matter being heard in Chambers on July 21, 2011 for hearing, and good cause appearing therefore, hereby rules that Defendant's Motion for New Trial is **DENIED.**

**IT IS SO ORDERED.**

DATED this 23 day of August, 2011.

JESSIE WALSH

**DISTRICT COURT JUDGE**

Respectfully submitted by:

**MAINOR EGLET**

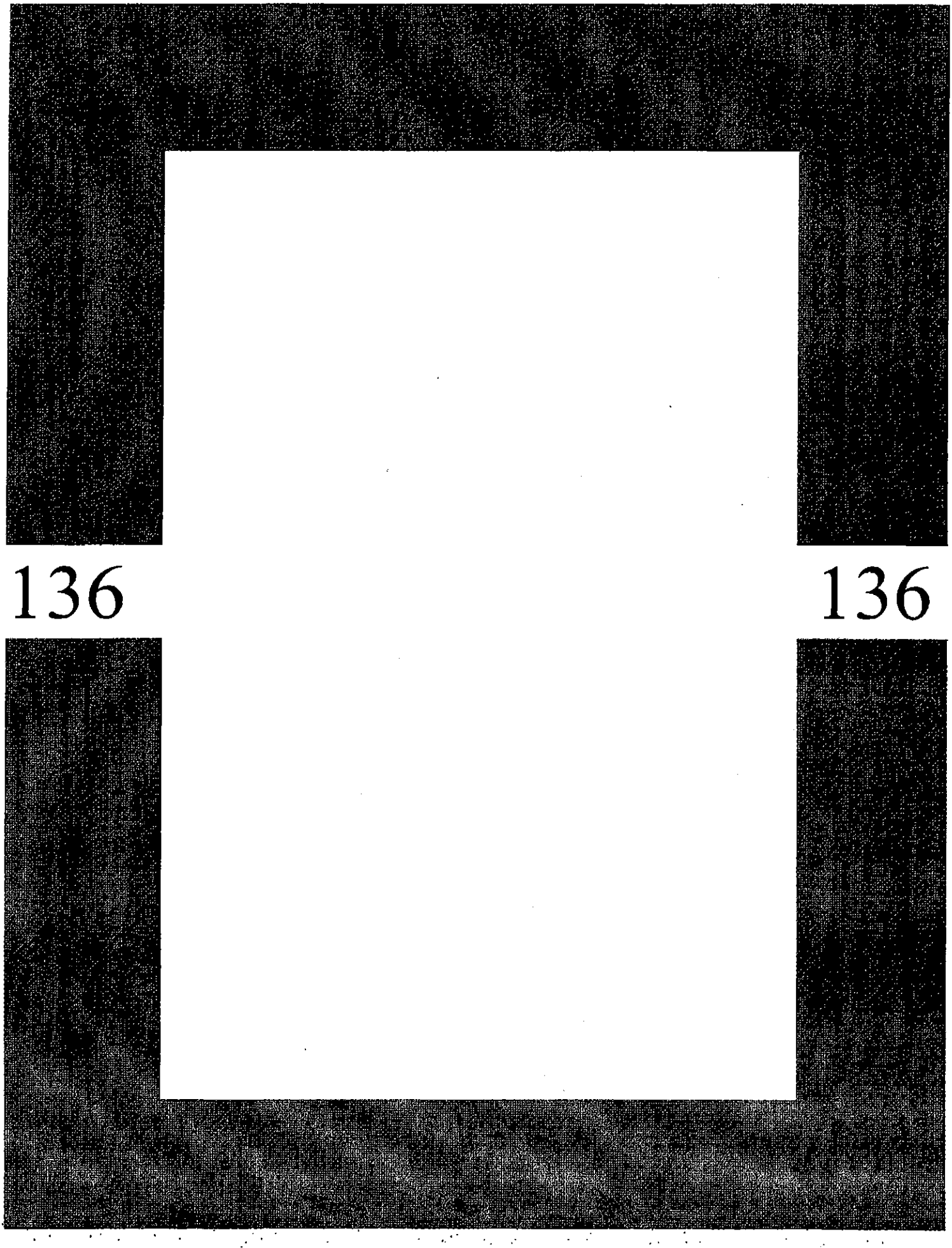
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
*Attorneys for Plaintiffs*



004791



004791



136

136

004792

004792

Electronically Filed
09/01/2011 08:31:20 AM

CLERK OF THE COURT

**ORDR**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
badams@mainorlawyers.com

MATTHEW E. AARON, ESQ.
Nevada Bar No. 4900
**AARON & PATERNOSTER, LTD.**
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Ph.: (702) 384-4111
Fx.: (702) 384-8222
*Attorneys for Plaintiffs*



004793

**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

**ORDER DENYING DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

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

Defendant's Motion to Compel Production of Documents, the matter being heard in Chambers on August 11, 2011 for hearing, and good cause appearing therefore, hereby rules that Defendant's Motion to Compel Production of Documents is **DENIED.**

**IT IS SO ORDERED.**

DATED this 23 day of August, 2011.

**DISTRICT COURT JUDGE**

Respectfully submitted by:

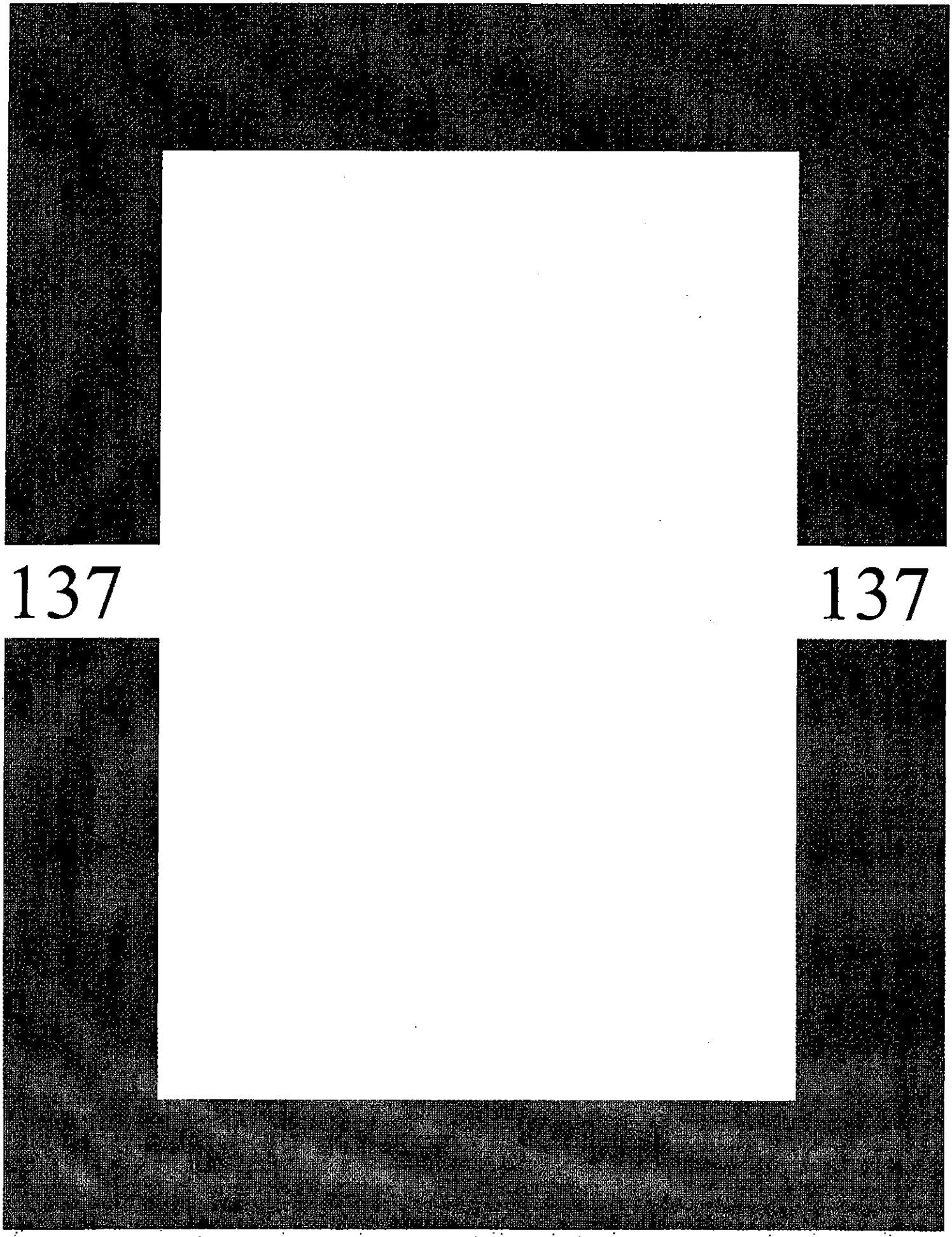
**MAINOR EGLET**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
*Attorneys for Plaintiffs*





004794




004795
004795
004795

Electronically Filed
09/02/2011 10:52:34 AM

CLERK OF THE COURT

**NEO**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
reglet@mainorlawyers.com
dwall@mainorlawyers.com
badams@mainorlawyers.com
*Attorneys for Plaintiffs*

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



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

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A539455
DEPT. NO.: X

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Denying Defendant's Motion to Compel Production of Documents was entered in the above-entitled matter on September 1, 2011.

DATED this 2 day of ~~August~~ September, 2011.

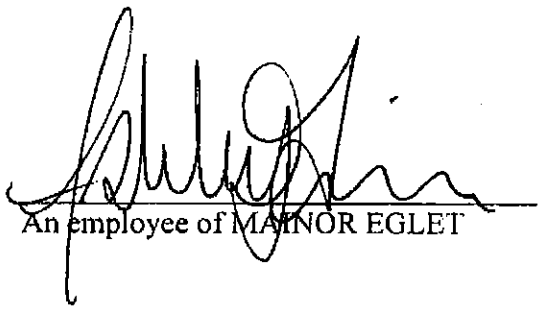
**MAINOR EGLET**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 2 day of September, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF ORDER was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

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



An employee of MAINOR EGLET

004798

004798

# EXHIBIT "1"

Electronically Filed
09/01/2011 08:31:20 AM

CLERK OF THE COURT

**ORDR**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph: (702) 450-5400
Fx: (702) 450-5451
badams@mainorlawyers.com

MATTHEW E. AARON, ESQ.
Nevada Bar No. 4900
**AARON & PATERNOSTER, LTD.**
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Ph.: (702) 384-4111
Fx.: (702) 384-8222
*Attorneys for Plaintiffs*



004799

**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

**ORDER DENYING DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

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

Defendant's Motion to Compel Production of Documents, the matter being heard in Chambers on August 11, 2011 for hearing, and good cause appearing therefore, hereby rules that Defendant's Motion to Compel Production of Documents is **DENIED.**

**IT IS SO ORDERED.**

DATED this 23 day of August, 2011.

**DISTRICT COURT JUDGE**

Respectfully submitted by:

**MAINOR EGLET**

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
*Attorneys for Plaintiffs*





004800

# In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423



JENNY RISH,

Appellant,

*vs.*

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

Respondents.

**APPEAL**

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

**APPELLANT'S APPENDIX**
**VOLUME 20**
**PAGES 4557-4800**

DANIEL F. POLSENBERG
*State Bar of Nevada No. 2376*
JOEL D. HENRIOD
*State Bar of Nevada No. 8492*
LEWIS AND ROCA LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
(702) 474-2616
DPolsenberg@LRLaw.com

STEPHEN H. ROGERS
*State Bar of Nevada No. 5755*
ROGERS MASTRANGELO CARVALHO & MITCHELL
300 South Fourth Street, Suite 170
Las Vegas, Nevada 89101
(702) 383-3400
SRogers@RMCMLaw.com

*Attorneys for Appellant*

# TABLE OF CONTENTS TO APPENDIX

004557

# EXHIBIT "9"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs, | CASE NO. A-539455 |
| v. | DEPT. X |
| JAMES RISH, LINDA RISH and JENNY RISH, Defendants. | |

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

FRIDAY, MARCH 18, 2011

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

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | DAVID T. WALL, ESQ.<br>ROBERT M. ADAMS, ESQ.<br>ROBERT T. EGLET, ESQ.<br>Mainor Eglet |
| For the Defendants James and Linda Rish: | BRYAN W. LEWIS, ESQ.<br>Lewis and Associates, LLC |
| For the Defendant Jenny Rish: | STEVEN M. ROGERS, ESQ.<br>CHARLES A. MICHALEK, ESQ.<br>Hutchison & Steffen, LLC |
| Also Appearing: | JOEL D. HENRIOD, ESQ.<br>DANIEL F. POLSENBERG, ESQ.<br>Lewis and Roca, LLP |

RECORDED BY: VICTORIA BOYD, COURT RECORDER

on Monday at 1:00.

[Jury Out]

THE COURT: You might check with jury services when you take them down. Thank you.

See you Monday.

MR. WALL: There may be a couple issues.

THE COURT: All right. Outside the presence of the jury?

MR. WALL: Yes. I received a, and I don't know if the Court received, a trial brief from the Defense this morning regarding the issue of minor impact. And --

THE COURT: I didn't -- well, I received one that's titled "Trial Brief on Percipient Testimony Regarding the Accident".

MR. WALL: Correct.

THE COURT: Is that the one?

MR. WALL: Yes, that's the one.

THE COURT: Okay.

MR. WALL: And so I don't -- I don't know procedurally exactly what it was when we got it. I'm not sure if it's a motion for reconsideration styled as a motion -- as a trial brief. And we already had a motion for on the minor impact. So I don't know -- what I get from this brief is that they want to introduce testimony to support a minor impact defense. If that's going to come up during opening statement, then I think it's appropriate to reach that issue now.

004559

004559



004559

The Court was very clear in granting our motion to preclude the Defendant from raising a minor or low-impact defense, which included the testimony of witnesses, any physicians who might want to testify as experts regarding some bio-mechanical opinion that a minor impact, which it isn't, whether that could have caused certain injuries. The -- whether they want to introduce testimony from either the Defendant or her -- I think it's daughter-in-law. Daughter-in-law, Linda -- daughter-in-law who was present in the car about this being a minor impact. That's the -- exactly what was precluded in the motion.

So -- so I don't know what it is. If it's a motion for reconsideration, it's not only -- well, it's probably timely, frankly, if it was. And I think it's within ten days of the notice of entry of order. But it doesn't have any of the procedural requirements for a motion for reconsideration because the first step is to seek leave from the Court. You can't just argue the same matters over again.

So -- so I don't know what it is. But before there's an opening statement made by the Defense that raises issues that this Court has already precluded, I think we need to -- to make sure that the Court's order that was entered granting our motion to preclude the Defendant from raising a minor or low-impact defense remains. And I have a copy of the order where it says that "The request to preclude the

004560

004560



004560

Defendant from raising a minor or low-impact defense is granted; and further that the property damage estimates and photographs are excluded."

THE COURT: You know, it's interesting, Mr. Wall, because I saw this this morning also for the very first time. And as I read it I wondered what it was also because the title doesn't really go along with anything that's contained in the motion or even really reflect the law that's cited in the motion. So I'm not really sure what the intent is either.

Mr. Rogers?

MR. ROGERS: Okay. Let's see if I can spell that out, and this is the very issue that Mr. Polsenberg's office has come here to discuss with you on the issues of law. I want to address how this motion came to be, though.

What happened was, there was a motion to exclude a defense that a minor impact cannot cause injury. The Plaintiffs' argument in the motion was that because the Defense did not retain a bio-mechanical engineer they would not be permitted to argue the general proposition that minor impacts cannot cause injury.

The Defense appeared at the hearing and said, "This is not a bio-mechanical case. The Defense is not going to argue that no minor impact can cause injury. The defense is that this minor impact did not cause injury."

And our understanding of your order was that on a

004561

004561

bio-mechanical basis, that general proposition, that minor impacts can't cause injury, is not going to be admitted.

At the 267 conference, which counsel reported so there is a record of this, there was a point where Plaintiff's counsel asked me whether -- whether we were calling the Defendant to the stand. And when he first asked the question I thought it was a -- I didn't even think he was serious. He then asked later on, "Are you going to call the Defendant?"

And I said, "Well, of course I am."

"Well, what is she going to testify to?"

I said, "The facts of the accident."

And he said, "Well, what's the relevance of the facts of the accident?"

And I said, "My goodness, you are not taking the position that this jury will not hear a single fact about this accident; are you?"

And he said, "Yes, that is the meaning of the order."

And I said, "That is not at all what happened at that hearing. And if that is your position, you'll be inviting the jury to do nothing but speculate. How could they possibly reach a determination on the elements of this negligence claim when they don't know a single thing about the car accident?"

He said, "That's our very position."

And so I brought Mr. Polsenberg's office here to address the law, but those -- that's the reason that that brief is before you, is because of this surprise discussion at the 267 conference.

THE COURT: Well, it looks to me like there's two things going on. One, it looks like this is indeed then a disguise, a motion for reconsideration. Number two, there's a whole separate issue about whether or not the defendant testifies. That's all kind of jumbled up in this one motion?

MR. ROGERS: Right. We're not asking for reconsideration about the photos or about the property damage; the things that were excluded as a result of the motion. Perhaps it would be better phrased a motion for clarification because the plaintiff's interpretation of the order is not at all my understanding of what occurred at that hearing. I did not hear Your Honor say that no facts of this accident will be admitted, testimonial or otherwise. I understand that photos are excluded, but not at all the testimony won't be admitted.

THE COURT: Well, I wasn't at the conference. Mr. Wall?

MR. WALL: Well, I have the transcript. May I approach, Your Honor?

THE COURT: Sure. Thank you.

MR. WALL: See, the reason that the photos and the estimates are kept out is because you can't just raise an inference. Look at these photos, it was a minor crash. He

004563

004563



004563

couldn't have been injured the way you say he was. That's why they're out because there's no expert who correlates a minor impact, although this one, even in the police reports is described as moderate. There's no correlation between the size of the impact and the amount of injured. All the doctors have even said there's no -- generally no rule of thumb. There's no correlation. So that's why the photos and damage estates are out.

The motion was to preclude a minor impact defense. That's the title of the motion. The motion itself is very clear when it says the defense and/or experts should be precluded from presenting testimony or argument; that the subject crash was merely a minor impact and not sufficient enough to cause plaintiff's injuries.

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

So that issue, that argument, this crash was too minor to cause these injuries is out. And it's reliably out, and it's correctly out because under Hallmark and Higgs [phonetic] even, they can't make that without an expert since there is no correlation. That argument doesn't make sense scientifically and so it's not admissible.

004564

004564



004564

So the only point to having either the defendant or her daughter-in-law testify that this was a minor impact, this was a tap, we didn't hit him very hard is the exact same conclusion that the photos in the estimates would be for, to say this was too small a crash for him to have been hurt in. That's the only point to it. It's not relevant because relevance is it makes a fact of consequence more or less probable. The only reason to have the defendant or a passenger in her car say this was a minor crash -- the only fact that it might make more probable is the one that can't come in. The defense that it's a minor impact and therefore he couldn't have been hurt.

And in the 267 conference we discussed that because I asked what Jenny Rish, the defendant, or her daughter-in-law, Linda Rish's testimony would be. And on Page 32 of the transcript, Mr. Rogers says:

"She's going to be able to describe the accident. This is what happened. And I mean, how else? The jury's got to know something about this. I know the Judge took the photos away, but the jury is still going to hear about the accident.

I said, "She won't be able to testify to it being a minor impact or anything like that."

Mr. Roger's says, "She might not be able to use that term, but she's going to be able to say this is the accident.

This is what happened. Did you guys take what the Judge said to me that the jury can't hear a thing about this accident?"

I said, "Well, there can't be a defense presented saying this was a minor impact. She granted that motion, I believe, in its entirety."

Mr. Rogers goes on to say, "But the motion was that the defense is precluding that a minor impact can't cause injury. It's not that the jury can't hear the nature of the accident. I mean, the way I look at that if she said that, or if there were an order interpreting things that way, there'd be no way around trying this thing twice. How can the jury not know anything about the accident?"

I responded, "Because there's no correlation between the type of impact and damages. I mean, if you don't have an expert to correlate this impact, was too minor to cause this injury and the testimony of the defendant or the passenger in her vehicle about what the impact, how minor the impact was has no relevance to any fact in issue."

And that's the whole point. So you can't get around your order saying that a minor impact defense can't be presented by presenting witnesses to say it was a minor impact. And the only way that you could is if we somehow opened the door to it. But as it stands -- and I know the Court indicated earlier today that you weren't going to rehear motions, but that's what this is. This is a motion for



004566
004566
004566

reconsideration. And before it comes up in opening and rings a bell that can't be unrung, we wanted to -- and I know -- I guess they wanted to present it as well today. So --

THE COURT: Mr. Rogers?

MR. HENRIOD: Your Honor, may I? Joel Henriod for defendant?

THE COURT: Sure. Why not? Why not? I say, why not?

MR. HENRIOD: Thank you, Your Honor. I'll be very brief. I don't think it goes just to the ultimate issue of whether or not a minor accident could ever cause, or even the ultimate issue for the jury whether or not it did in this case.

I think it goes intermediately, and at very least to plaintiff's creditability. And causation here, the causation of damages, creditability plaintiff -- or plaintiff's creditability is key to that determination. Because when you look at the opinions -- the causations opinions of plaintiff's doctors, ultimately what their assessment is is two factors, a doctor's general notion of what types of accidents can cause what types of injuries. Plus then plaintiff's statements and representations to the doctor about what their symptoms were before the accident, what they were after the accident, and what other events were taking place in their lives in the relevant time period.

So the doctor takes a general knowledge about what's possible and then relies upon the representations of the

004567

004567



004567

plaintiff, what my symptoms were before, what my symptoms were after, the other things that were happening in my life and the relevant time periods. And the doctor says, "Well, then given all of that, yes, I would attribute these damages to that accident."

And I believe that plaintiff's doctors will come in, as they do in every case, and say, "Yes, I attribute all of these damages to that accident." But based entirely on the creditability of plaintiff's representation to the doctor, here we have a representation to one of the care givers that this was a 55 mile an hour accident.

Now, this is why I think it is at most a motion to clarify because I understand having read the briefing on the motion in limine that there is authority for the determination that Your Honor made on the accident photos. I think there's counter authority. I don't think that Nevada would necessarily go that way, but I do see that there is Illinois, Delaware authority keeping out the accident photos.

But there is no authority for is keeping out the percipient witness. The testimony of a percipient witness to say, "This is my recollection of the day." Why? Because it bears on the creditability of the representations about that day the plaintiff is making to his doctors. None of those cases suggest that a defendant can't say, "This is my recollection of the event."

004568

004568



004568

Hallmark doesn't say that. What Hallmark says is that you cannot come in and elevate somebody to the lofty status of an exert and have that expert say to a jury, "Take away from them the ultimate determination in an opinion as to whether or not this accident could have possibly caused these injuries."

But what it doesn't say and what no case that's been cited to you says is that the percipient witness can't come in and say, "This is my recollection of the day." And if that is necessarily out -- I'm sorry, I'll be very brief. If that is necessarily out because there is no correlation between the type of impact and the type of damages you could have, then I think Your Honor would have to reconsider whether or not the subsequent accident comes in.

Because my understanding, having read the motions in limine is that the reason that is out is unrelated, is because a plaintiff's characterization, both the counsel and the Court and to his doctors, that that was just a ding. That it wasn't significant.

Well, I think what's good for the goose is good for the gander. If plaintiff can keep out that second accident on the representation that it was just a small accident and therefore irrelevant, then -- and keep that information from his doctors, then that must come in. Either they're both in or they're both out if the reason that we're doing it is a

categorical rule that there is no correlation between the type or severity of the accident and the type of damages. Thank you, Your Honor, unless you have questions.

THE COURT: Not yet. Mr. Wall?

MR. WALL: Briefly, Your Honor. First of all with regard to the subsequent accident, the subsequent accident is out because neither of their experts related to any condition that he has. That's why it was kept out.

THE COURT: Subject of yet another pretrial ruling.

MR. WALL: Not one doctor was going to testify on behalf of the plaintiff -- and I'm not aware of one in the entire case, and he's had 141 medical visits since the crash that are related to the crash -- says I formed my opinion based on the mechanism of the crash. Not one.

Every single one is talking about the fact that he was asymptomatic before the crash, symptomatic after the crash, looking at what he was treated for on the day of the crash and all of the treatment subsequent to that. So it isn't relevant.

And I've got to tell you, if this is a motion for reconsideration, what I haven't heard yet is why this couldn't have been raised in the prior pleadings, which is one of the -- I'm paraphrasing it, but that's one of the considerations under 80CR224 when it talks about motions for reconsideration.

Now, keep in mind that since the Court correctly

granted the motion restricting the minor impact defense -- and it's very clear in the motion that we're not just talking about some theoretical minor impacts and injuries generally. It is testimony and evidence to preclude that exact defense.

But not only could it have been put in here, but based on the Court's order, as you are aware, we withdrew our biomechanical expert at -- maybe not specifically withdrew him, but we haven't contacted him to prepare for trial. We've prepared for trial in line with the Court's order. So that's why the law in a motion for reconsideration under 80CR224 would be that it has to be something that couldn't have been raised in the initial briefs.

THE COURT: Any final thoughts?

MR. POLSENBERG: Your Honor, just a few if I may?

THE COURT: I hope they're brief, Mr. Polsenberg. It's been a long week.

MR. POLSENBERG: I understand. And you can tell it's Mr. Henriod's brief because it's so well written.

THE COURT: Yes.

MR. POLSENBERG: Judge, if we're talking about Rule 224, really what the Supreme Court has said repeatedly, and most especially in Insurance Companies of the West versus Gibson Tile, is that Rule 224 doesn't preclude the trial judge from the obligation to make the right ruling. And in fact, Justice Moffin [phonetic] concurring in that opinion said it's the

controlling rule is Rule 54. You can't stick with the wrong ruling.

Even if we were required to bring in a reason for why this wasn't raised before, it's obviously what we are saying is that we thought that that original motion that they made went to photographs and to estimates.

Now, you can see why you would need an expert to make the leap from photographs and estimates to the speed. But we don't have that here. We have percipient testimony of the speed. And the fact of an accident is not something you need an expert for.

In United Exhibition Services they talk about two different ways to cause causation. Now, I don't think the defendant has the duty to prove causation, only to refute what they're arguing. But the two different ways are through an expert or through the facts. And so I think it would be a grievous error for the Court to preclude those facts. Thank you, Your Honor.

THE COURT: Okay. Thank you. I appreciate the brief argument.

Here's the thing, I don't know that this motion was really even necessary because the Court's ruling was based on the written pleadings and the argument that the Court heard. And it was a very specific ruling. And I never said defendant can't testify. I don't know what she's going to testify to.

I sure hope she complies with the Court's pretrial orders.

MR. WALL: Well, she can't testify that it was a minor impact.

THE COURT: Right.

MR. WALL: All right.

THE COURT: Right. But I don't know what else she may say. I don't know.

MR. ROGERS: But, Your Honor --

THE COURT: This motion didn't really talk anything at all about what Jenny Rish might testify to, although it's titled trial brief on percipient testimony regarding the accident.

MR. ROGERS: Okay. Let me tell you one thing she has said and then the defend- -- plaintiff's counsel actually used the word. She described the impact as a tap. And what we're not clear on now is what can she say and what can't she say. If she's going to appear before this jury and be asked please describe this accident, where can she begin and where does she end?

THE COURT: I urge you to re-read the order.

MR. ROGERS: Well, the -- you can see that the order has confused plaintiff's counsel and us.

MR. WALL: Not one bit. Not one bit.

MR. ROGERS: That's why we're here.

MR. WALL: No, I'm here because I've got a brief telling

004573

004573

me that what's inadmissible is going to come in and that there was going to be an opening that referenced it.

MR. ROGERS: It's --

MR. WALL: That's why we're here. I'm not confused one bit on a very clear order.

THE COURT: I didn't think you were, Mr. Wall.

MR. ROGERS: The 267 discussion that he just recited to you show that the parties are not clear on this.

THE COURT: Well, I don't know what to tell you then.

MR. POLSENBERG: And I think, Your Honor, it is admissible for the witnesses to say it was a minor impact.

THE COURT: Well, I don't know what to tell you. I'm not going to tell you how to defend your case. I sure would never presume to tell anybody how to try or defend a case. But, you know, I think the order is pretty clear. There was plenty of opportunity to brief it and respond to it. The Court gave counsel lots of time to argue it because that's my standard procedure. I think we've made a pretty clear record. And I just really hope that, you know, both sides would honor the Court's pretrial orders.

MR. POLSENBERG: But, Your Honor, on what we've done today, if I were doing the opening statement I would say to the jury that this was a minor accident.

MR. WALL: And then I would seek contempt.

THE COURT: I would say that would be a problem.

004574

004574



004574

MR. POLSENBERG: And that's why we're asking for direction from you.

THE COURT: I'm not going to -- you know, I can't tell you you can say this, you can't say that, you can say the other. I mean, you're all very smart individuals. You're very respectable lawyers. You're very capable and you're certainly capable of reading and comprehending the Court's order that all the parties briefed and argued.

MR. POLSENBERG: Well, Your Honor, I don't think we briefed and argued this issue. And we certainly would be able to say to the jury that this was just a tap.

THE COURT: Well, I don't think so, Mr. Polsenberg. But I really don't want to engage in any sort of argument. That's not the Court's rule. I think I've done my job to the best of my ability and I would expect all of you to do the same.

MR. POLSENBERG: Here's the problem I have though, the Court said that you wouldn't tell us how to try the case.

THE COURT: Right.

MR. POLSENBERG: I've suggested two things that I would say in opening statement and you've told me both of those I couldn't say. I can't figure out what I can say.

THE COURT: Are you the attorney making the opening statement?

MR. POLSENBERG: No.

THE COURT: Well, then it's not really an issue.

004575

004575



004575

MR. POLSENBERG: Well, it is an issue, Your Honor.

THE COURT: Well, Mr. Polsenberg, I don't want to argue with you.

MR. POLSENBERG: Well, I'll let you argue with Mr. Rogers then.

THE COURT: Well, that's fine.

MR. POLSENBERG: All right.

THE COURT: I've made my ruling. Unless there are any other issues we need to address, I'm inclined to call it a day.

MR. WALL: Judge, in the same order that precluded the low impact defense, there was also a preclusion of any sub-rosa or surveillance video until after the direct testimony of the plaintiff to see whether or not video would impeach any of his testimony. And it wasn't going to be discussed with witnesses or shown during opening or referenced during opening. And I just want to make sure that that order is still in place.

THE COURT: Yes. I'm not revisiting any other pretrial rulings.

MR. WALL: All right.

THE COURT: We've made a very clear record along the way.

MR. ROGERS: I don't --

THE COURT: Mr. Rogers?

MR. ROGERS: Yeah. I don't believe that order, which I

004577

004577

# EXHIBIT "10"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs, | ) | CASE NO. A-539455 |
| v. | ) | DEPT. X |
| JAMES RISH, LINDA RISH and JENNY RISH, Defendants. | ) | |

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

TUESDAY, MARCH 22, 2011

**REPORTER'S TRANSCRIPT**
**TRIAL TO THE JURY**
**DAY 2 - VOLUME 1**

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | DAVID T. WALL, ESQ.<br>ROBERT M. ADAMS, ESQ.<br>ROBERT T. EGLET, ESQ.<br>Mainor Eglet |
| For the Defendants James and Linda Rish: | BRYAN W. LEWIS, ESQ.<br>Lewis and Associates, LLC |
| For the Defendant Jenny Rish: | STEVEN M. ROGERS, ESQ.<br>Hutchison & Steffen, LLC |

RECORDED BY: VICTORIA BOYD, COURT RECORDER



004578

004578

004578

there might have been some significant trauma. And to rule that out, these imaging scans were done. Obviously, I was not there at the time of the accident, so I can't --

Q That scan did rule it out, actually. My question is are you aware of any affirmative or positive signs of trauma as a result of bumping his head?

MR. EGLET: Objection, asked and answered.

THE COURT: Sustained.

MR. ROGERS: Your Honor, he didn't answer.

MR. EGLET: Objection. I think you ruled, Your Honor.

THE COURT: I think he did answer, Mr. Rogers.

BY MR. ROGERS:

Q So beyond the CT scan that was normal, you're not aware of any findings with regard to this bumping of the head?

A That's correct, sir.

Q Do you know anything about what happened to Jenny Rish and her passengers in this accident?

MR. EGLET: Objection, irrelevant, Your Honor. Pretrial motion on this.

THE COURT: It is. Sustained.

BY MR. ROGERS:

Q To the extent that your patient would have provided an incorrect history, your opinion on cause is compromised, correct?

A Correct, sir.

004579

004579



004579

004580

004580

# EXHIBIT "11"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs, | ) | CASE NO. A-539455 |
| v. | ) | DEPT. X |
| JAMES RISH, LINDA RISH and JENNY RISH, Defendants. | ) | |

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

FRIDAY, MARCH 25, 2011

**REPORTER'S TRANSCRIPT**
**TRIAL TO THE JURY**
**DAY 5 - VOLUME 1**

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | DAVID T. WALL, ESQ.<br>ROBERT M. ADAMS, ESQ.<br>ROBERT T. EGLET, ESQ.<br>Mainor Eglet |
| For the Defendants James and Linda Rish: | BRYAN W. LEWIS, ESQ.<br>Lewis and Associates, LLC |
| For the Defendant Jenny Rish: | STEVEN M. ROGERS, ESQ.<br>CHARLES A. MICHALEK, ESQ.<br>Hutchison & Steffen, LLC |

RECORDED BY: VICTORIA BOYD, COURT RECORDER

the Plaintiff with is something that can be caused by something other than just a single traumatic event, correct?

A Yes.

Q It can be caused by something other than a car accident?

A Yes.

Q And the conditions that you observed on the MRI, you can't date them, if I understand you correctly?

A I cannot tell you when they actually occurred.

Q Okay. Now, you first saw the Plaintiff a year after the accident --

A Yes.

Q -- in April of '06?

A Yes.

Q And you don't know anything about the car accident other than what he told you, right?

A It was just simply he said he had a car accident and that's when he -- his problems started.

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

A No, I really didn't go into the other -- into the other details. No, I did not discuss that.

Q Okay. Do you know anything about the folks in Jenny Rish's car?

MR. EGLET: Objection; relevance.

004582

004582

THE COURT: What's the relevance, Mr. Rogers?

MR. ROGERS: Well --

MR. EGLET: May we approach, Your Honor?

THE COURT: Yes.

[Begin Bench Conference]

MR. EGLET: We've already been down this road. Whether anybody was injured or not in Jenny Rish's car or their condition is not relevant. He's already tried this with, I think, Dr. Rosler and the objection was sustained. It's the same thing, Your Honor, it's not relevant.

MR. ROGERS: I'm not sure how it is not relevant. Is this something that there's an order?

MR. EGLET: It doesn't matter whether it's order --

MR. WALL: What would be the relevance other than some argument of minor impact.

MR. EGLET: Yeah, the fact --

MR. WALL: Whether Jenny Rish received --

MR. ROGERS: The relevance is that if one of them were injured or were not, that would be relevant or probative to whether the others were injured.

MR. EGLET: No, no it's not. No it's not. That's the whole point.

THE COURT: Sustain the objection.

[End Bench Conference]

///

004583

004583

THE COURT: Yes. Yes, it was.

BY MR. ROGERS:

Q You know the Plaintiff wasn't transported by ambulance.

A Yes, sir.

Q You know that Jenny Rish --

MR. EGLET: Objection, Your Honor.

BY MR. ROGERS:

Q -- was lifted from the scene.

THE COURT: Sustained.

MR. EGLET: Your Honor, move to strike --

THE COURT: Sustained.

MR. EGLET: -- and ask Mr. Rogers to be admonished for violating another court order.

THE COURT: The jury will disregard Mr. Rogers' last question regarding Ms. Rish.

BY MR. ROGERS:

Q Is it fair to say, Doctor, that your causation opinion is not based on any particular facts about the accident itself?

A It's based on the facts as far as I know them about the accident.

Q As far as you know them is what you've learned from the Plaintiff.

A And my review of the records, which is history

004584

004584

FEMALE JUROR: At 1:00?

THE COURT: At 1:00, please.

[Jury Out]

[Outside the Presence of the Jury]

THE COURT: Okay. Outside the presence of the jurors.

Mr. Wall.

MR. WALL: Judge, there was just one matter that I wanted on the record. Despite the ruling of the Court, despite the arguments we've had outside the presence on the issue of minor impact, in opening statement and with each and every witness so far, there's been a question which leads to a conclusion or an argument about minor impact, whether the Defendant was injured in -- whether the doctor knows whether the Defendant was injured in the accident, which could only potentially be relevant to some argument that the accident was too minor to have caused injury, because she wasn't injured.

Each time we've objected. Each time the Court has sustained the objection. I would look for, frankly, some guidance from the Court on what we can do from here out, because it -- I can only assume that it will continue to occur. And so, I don't know whether a progressive sanction that we'd ask for, that there would be a warning from the Court about before this should happen again. But those are my concerns, and I don't know what other potential relevance there could be to asking a treating physician whether he's

004585

004585

aware of whether or not the Defendant was injured in the accident.

THE COURT: Mr. Rogers.

MR. ROGERS: Okay. Dr. Grover, as the transcript will show, did say that this accident presented a significant mechanism of injury. In fact, he said that more than once. I know that Plaintiff's counsel said at the bench that that was a generic discussion about hyperextension and flexion. It was not. We can get this transcript and review it when we return. That was the import of the discussion today.

But in a bigger sense, the problem is that these doctors are all coming in and describing an impact of sufficient force that it caused the Plaintiff to strike his head on a metal cage. The defense has heard the order from the Court that we cannot use two terms, minor impact and tap. Beyond that, there really is no limitation that we're aware of except that the doctors can get up and call it severe or substantial. And the defense is, of course, entitled to cross-examine that representation.

Now never once in this trial has anyone violated the Court's order. Minor impact and tap have never once been uttered.

THE COURT: Mr. Wall.

MR. WALL: Well, Judge, that wasn't the order. I mean you told them specifically when Mr. Polsenberg asked you if

they could use the words minor impact and tap when they asked you. Based on your order, can I say minor impact? You said no. Can I say tap? You said no.

As we discussed a week ago -- I'm not sure -- the motion precluded any argument, any testimony suggesting or supporting a minor impact defense, because they had no expert to say that this accident could not or would not have caused the injuries complained of. It was a global prohibition of arguing or trying to elicit evidence to support an argument of a minor impact defense. The order itself says that their request -- our request to preclude Defendant from raising a minor or low impact defense is granted.

So we've gone around about this on a number of occasions. And Dr. Rosler -- all the doctors, all they've done is testify to what's in the medical records describing the accident, so --

THE COURT: Well, you know, I --

MR. WALL: The next -- we're going to ask for something significantly more in terms of a sanction the next time it comes up. And I don't know -- I would prefer and I think the case law suggests that you should have an opportunity to address it outside the presence before there's a more significant progressive sanction. But I think we're in the area, certainly, at this point of a progressive sanction.

THE COURT: I think you're right, and I think that the

004587

004587

defense is on notice. I think the order is very clear. I think it clearly has been violated. I was really surprised to hear a question posed of this witness regarding Ms. Rish when the Court sustained a previous question regarding Ms. Rish of another witness and ruled that that was not relevant. So I was really surprised to hear that very same question posed as to Ms. Rish. Yes, I realize she was in the accident, but she's not the reason why we're here.

MR. ROGERS: Well --

THE COURT: Whether she was injured is not the reason we're here in this trial. So I don't know. It does seem to be at this point to be deliberate, Mr. Rogers. And so, I'm inclined to agree that you're on notice. The Court will consider progressive sanctions. I don't know what they will be. I hope there won't have to be any assessed. But I don't know what else to do to try to get you to comply with the Court's previous orders.

MR. ROGERS: Well, you'll recall, Your Honor, that when Mr. Polsenberg came to discuss this, that he and Plaintiff's counsel and -- were stating listen, we're not clear. The Plaintiff's attorney said well, we are. And the defense said well, we're not. We don't know where we have to go because of this. And --

THE COURT: Then I suggest you reread the order. It's pretty clear. It's in black and white, as you said the other

004588

004588

004589

# EXHIBIT "12"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| CHERYL A. SIMAO and WILLIAM J. SIMAO, | ) | |
| Plaintiffs, | ) | CASE NO. A-539455 |
| v. | ) | DEPT. X |
| JAMES RISH, LINDA RISH and JENNY RISH, | ) | |
| Defendants. | ) | |

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, MARCH 24, 2011

**REPORTER'S TRANSCRIPT**
**TRIAL TO THE JURY**
**DAY 4 - VOLUME 1**

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | DAVID T. WALL, ESQ.<br>ROBERT M. ADAMS, ESQ.<br>ROBERT T. EGLET, ESQ.<br>Mainor Eglet |
| For the Defendants James and Linda Rish: | BRYAN W. LEWIS, ESQ.<br>Lewis and Associates, LLC |
| For the Defendant Jenny Rish: | STEVEN M. ROGERS, ESQ.<br>CHARLES A. MICHALEK, ESQ.<br>Hutchison & Steffen, LLC |

RECORDED BY: VICTORIA BOYD, COURT RECORDER

THE COURT: Please come forward to the witness box, sir. You want to stand and raise your right hand.

DR. DAVID ELI FISH, DEFENDANT'S WITNESS, SWORN

THE CLERK: I do. Thank you. Please be seated. State and spell your name for the record.

THE WITNESS: David Eli Fish, D-a-v-i-d E-l-i F-i-s-h.

THE COURT: Whenever you're ready, Mr. Eglet.

MR. EGLET: Thank you.

VOIR DIRE EXAMINATION

BY MR. EGLET:

Q Good afternoon, Dr. Fish.

A Good afternoon, sir.

Q My name's Robert Eglet. I don't think we've met before.

Dr. Fish, I want to go through with you, to make sure it's clear in your mind on the record, what the Court's rulings on this case are, pretrial, and so you understand what you are permitted and not permitted during your testimony to discuss with this Jury, okay?

A Okay.

Q All right. The Court has ruled that Mr. Simao pulling a muscle in his low back 23 to 24 years ago while moving a keg of beer at California Beverage Company is excluded. You may not discuss that, comment upon it, infer it, or imply that it occurred to the Jury. Do you understand

that?

A Yes.

Q The Court has also ruled that a motor vehicle accident that Mr. Simao was involved in 25 years ago, wherein he was pulling a boat with his pickup truck, and another vehicle hit his boat and knocked it off the trailer, that's excluded. You can't comment about that, make any reference to it. Do you understand that?

A Yes.

Q Okay. The Court has ruled that any prior or subsequent injuries, prior injuries or subsequent injuries to this motor vehicle accident that we're here about, and accidents including, but not limited -- including, but not limited -- to the motorcycle accident in 2003 and the motorcycle acc -- and the motor vehicle accident in May 2008, are excluded. Do you understand that?

A No, I don't.

Q Okay. Well, you cannot comment upon that, you cannot -- you're not to refer to that, you cannot state if anything you say is based upon that. You cannot inform the Jury about that. Do you understand that?

A You mean the accident that we're talking about?

Q No, no, no. These other accidents.

A Oh. 2008 --

Q The motorcycle accident.

004592

004592

A The motorcycle accident was in 2005?

Q There's a couple of motorcycle accidents, I believe, Is that -- yes. You cannot --

MR. WALL: There's just -- I think there's some confusion on this.

MR. EGLET: There's just one. Excuse me.

THE WITNESS: Just one, yeah.

BY MR. EGLET:

Q You cannot talk about that. You cannot inform the Jury about that. You cannot state anything about that. You cannot refer to that; imply that it occurred; reference it.

A Okay.

Q Do you understand that?

A I got the motorcycle one. What was the other one?

Q Accident in May of 2008.

A Oh.

Q You understand?

A No. I don't.

Q Well, I'm telling you that's the Court orders. Do you understand that's a Court order?

A I understand the order.

Q Okay. Are you going to comply with that order?

A I will comply as best I can. I mean --

Q Well, are you going to mention that accident to this

004593

004593

Jury?

A It depends on the question, I guess.

Q Well, if you mention that accident to this Jury you'll be in violation of a Court order. Do you understand that?

A Now I do.

Q Do you understand there are ramifications for that?

A No, I don't.

MR. EGLET: Want to explain it to him, Your Honor?

THE COURT: Well, the Court would have a number of opportunities, I suppose, to sanction you. I guess the Court would possibly entertain a motion to strike you altogether as a witness and to advise the Jury to disregard any of your testimony.

I imagine there'd be a number of sanctions that might come to mind.

THE WITNESS: Okay.

BY MR. EGLET:

Q I'll ask you again. Are you going to mention that 2008 accident?

A No.

Q In front of this Jury?

A I hope not.

Q I hope not, too.

A Yeah.

004594

004594

Q Okay. The Court has also ruled that any unrelated medical conditions, with the exception of a mouth tumor, cannot be mentioned or referred to or the Jury cannot be informed of. These unrelated medical conditions include, but are not limited to, high blood pressure, allergies, colds, flu, and high cholesterol.

Do you understand that?

A I can't refer to them?

Q You cannot refer to that. Do you understand that?

A Okay. I understand that.

Q You cannot -- the Court has ruled that you cannot infer or imply that there's been any improper use of prescription medications. Do you understand that?

A Yes.

Q Okay. You cannot testify, infer, imply, insinuate, or in any way suggest that Mr. Simao is a symptom magnifier, a malingerer, manifesting any secondary gain motives, or anything in that area. Do you understand that?

A No.

Q Well, you can't. That's the ruling of the Court. Do you understand that?

A No. I don't understand that.

Q Well, that's the order of the Court, sir.

A Huh.

Q Are you going to comply with that order?

004595

004595



004595

A Yeah, I'll comply, but I don't understand it.
Q You're not a lawyer, are you?
A No, I'm not.
Q Okay.
A I'm glad you pointed that out.
Q Thank you.
So. You are going to comply with that, right? You're not going to suggest any secondary gain, that he's a symptom magnifier, a malingerer, or anything in that area, correct?
A I guess not.
Q Thank you.
The Court has ordered that you can -- that you, nor anyone else, can suggest that this case is a medical build-up case, or attorney or medical-driven. Do you understand that?
A Yeah, I understand that.
Q You under -- you're going to comply with that?
A Absolutely.
Q Okay. You cannot mention any collateral source payment. You cannot mention whether there was insurance payments, whether this is covered under insurance, whether this is covered under Medicare or Medicaid, and you cannot mention whether anybody has any liens on this case, including medical liens. Do you understand that?
A Yes, I understand that.

004596
004596

Q You're going to comply with that?
A Yes.
Q Okay. You cannot mention, at this time, any sub rosa vehicle -- video, any video of our client that may have been taken and shown to you. You cannot talk about that, you cannot mention it, you cannot refer to it in front of this Jury. Do you understand that?
A Not really, but I'll comply if that's what you want.
Q Well, it's what I want; it's what the Court's order is, sir.
A Okay.
Q You understand?
A I understand.
Q Okay. You cannot talk about --
A But can I -- can I clarify that?
Q Yes. Sure. You have a question?
A So there was a video taken of him.
Q Yeah, you --
A I can't say that I looked at any --
Q You cannot.
A -- of the actions within that video?
Q You cannot.
A Or motions within that video?
Q You cannot. Do you understand that?
A (Nodding) Yeah, I understand that.

004597

004597

Q Okay.

MR. ROGERS: Your Honor, I'm not sure that that actually accurately states the order.

MR. EGLET: That absolutely accurately states the order.

THE COURT: Well, the video may not come in at all. If it comes in, it may come in for impeachment purposes, but we don't even know whether -- we don't know what the Plaintiff is going to testify to, so we don't know whether anything that was contained on that video will serve to impeach him.

That was my recollection of the Court's ruling.

MR. ROGERS: That's mine, as well. But there's a nuance here that I think the doctor is suggesting, that isn't being answered by these questions, and that is, if the doctor is asked how the -- what were the Plaintiff's physical abilities, for example, at the time of the independent medical examination, which was close in time to the surveillance, that he would be able to say, well, I examined him and he was able to do X, Y, and Z.

He could also say, also, I'm aware that he could do, for example, lift machinery. Something that was shown in the surveillance, but without even using it as an impeachment tool, he's simply saying, I'm aware that he's capable of doing this.

MR. EGLET: Your Honor, that is absolutely not true. Lord knows that the order of the Court is that this video is

004598

004598

completely and totally excluded until the Court hears the testimony of the Plaintiff and, after it reviews the video, determines whether there's anything the Plaintiff testifies to that is inconsistent with what's in the video, and whether it's proper impeachment or not. That's the Court's order.

Here's the order, right here.

MR. WALL: At the bottom.

MR. EGLET: It is further ordered the Plaintiffs request to exclude sub rosa video is deferred until after Plaintiff's direct testimony, so the Defendant can establish how it impeaches the Plaintiff. Defendant is precluded from showing the sub rosa video or referring to it until that time.

The order is clear.

THE COURT: That is true.

MR. ROGERS: I don't think I'm being clear on this one. Because it's something aside from the reference to the video.

What it is, is knowledge that the doctor has without even disclosing the source of it. He can say --

THE COURT: You know what troubles me, Mr. Rogers. What really troubles me, listening to you. It seems like you're trying to get around the Court's previous ruling. The ruling is really clear. It's right there in black and white, as Mr. Michalek is so fond of saying. It's as plain as it can be.

And what I would hope is that there aren't any questions asked this witness or any answers given by this

004599

004599

witness that would violate a Court order.

MR. ROGERS: All right.

MR. MICHALEK: Your Honor, the only thing I would ask is that maybe at the end of the day, after we've excused the Jury, just -- we won't be able to recall this witness. You know, he'll be out of town performing surgery in UCLA, but we just ask the questions off the record.

That way, at least if the video does come in and there's a later Court ruling on it, we could at least have the transcript and we could read those questions to the Jury, should the Court allow them to be read in a -- you know, at a subsequent time. Certainly, that's not going to happen --

THE COURT: What questions, Mr. Michalek?

MR. MICHALEK: Well, questions about what the doctor did see on the video. I don't know whether those will be relevant. I don't know whether the Court's going to allow them in.

But we could simply do that outside the presence of the Jury, after the testimony. Take up maybe five minutes, and if the Court does rule later on that the video is admissible, we could discuss then whether the doctor's testimony would be admissible at that point, and that can simply be read to the Jury, rather than flying him back out from California to answer those five questions .

MR. EGLET: Your Honor, we have relied on this Court's

rulings. They're the ones who have put this witness on, on this day.

We're not prepared to cross-examine him on this area. We shouldn't have to be prepared to cross-examine him on this area.

THE COURT: Well, let me say this. It's already 1:30. We haven't even let our Jury in yet. Is this the only witness we're going to be with today?

MR. EGLET: Yes, Your Honor.

MR. ROGERS: Yes.

THE COURT: We don't have the ability to go past 5:00 because the Court has been instructed by the County not to incur any overtime costs for staff, given the economic crisis that the country and this state is in. So I doubt very seriously whether we'll have time to even address that question.

Anything else?

MR. EGLET: Yes. Moving on, Your Honor.

BY MR. EGLET:

Q Doctor, the Court has ruled that any photographs of the vehicles involved in this accident or any repair estimates are excluded. I know you were provided photographs and repair estimates. You are not permitted to refer to them, talk about them, or rely upon them. Do you understand that?

A Which specific parts again? The photos?

004601

004601

Q Photographs of the vehicles involved in this accident.

A Uh-huh.

Q And repair estimates of the vehicles involved in this accident.

A What about the accident itself?

Q Yeah, we're going to get to that. You don't get to talk about the accident either. You don't get to talk about -- you've already been excluded to giving testimony as to whether this accident was severe enough or not to cause an injury. You cannot testify about that.

Do you understand?

A No.

Q Well, are you -- let me ask it this way. Are you going to comply with those Court rulings?

A Absolutely, but I don't understand them.

Q Well, I'm not asking you whether you understand the basis of the rulings. I'm just understanding -- asking you if you understand that that is the ruling?

A I mean, I was brought in here to understand the medicine, and that's a component of what I'm understanding --

Q Are you going to comply with the Court's ruling?

A I am obviously going to comply with it, but I don't understand it. I mean --

Q You are not going to --

004602

004602

A -- I'm doing the best I can to --

Q Well --

A This was an accident, was it not?

Q It was a car accident.

A We can't talk about the accident?

Q You don't get to talk about this.

A That seems kind of strange to me.

Q Well --

A I don't understand.

Q We're not going to re-argue the motions in limine.

THE COURT: No, we're not.

MR. EGLET: This is the Court order --

THE WITNESS: I'm not arguing it. I'm just saying I don't want to -- I don't want to be in contempt of court. I don't want to get in trouble.

I'm just saying that it seems strange that we're talking about an accident and I can't even talk about the accident. That just seems strange to me, that's --

THE COURT: You know what seems strange to me? That this witness obviously doesn't have any idea what the Court has ruled prior to these motions in limine.

Were you about to say something, Mr. Wall?

MR. WALL: Actually I was writing a note to Mr. Eglet, to hand it to him.

Obviously, no one told him of the rulings.

004603

004603

THE COURT: Yeah. That really concerns me. I hope that's not the case with the other witnesses Defense intends to call.

MR. ROGERS: If I could just clarify this question that Mr. Eglet just asked, because it was compound. It started out with photographs and property damage estimates, and that is, I believe, something the doctor is aware of.

Then it became a sort of hazy question about not discussing anything about the accident.

MR. EGLET: Well, no. I don't think --

MR. ROGERS: That is a little confusing.

MR. EGLET: I don't think it was hazy. I specifically said -- and this is a very separate court order on this -- that this witness, no Defense witness, is permitted to talk about the mechanism of injury.

You can talk about the fact that there was a motor vehicle accident, that it was a rear-end motor vehicle accident. But they don't get to suggest or imply that it was minor, that it was a tap, that it was low speed, that there was not much property damage, or anything like that, or suggest that it was such a small accident that these injuries couldn't have occurred.

BY MR. EGLET:

Q Do you under -- that is the court ruling. Are you going to comply with that?

004604

004604



004604

A Absolutely I comply with it. I just don't understand it, that's all.

THE COURT: I don't know that it's necessary for you to understand the legal analysis and reason that the Court made the --

THE WITNESS: Yeah.

THE COURT: -- decisions it made --

THE WITNESS: Yeah.

THE COURT: -- after entertaining lengthy argument on both sides by counsel. I think it's only important and necessary that you understand what the Court's rulings are, so that you can follow those rulings and not be in contempt of court.

THE WITNESS: Yeah. I mean, I obviously want to do that. I just, you know, the evaluation of the medical component relies on something happening or an injury that has occurred, and it seems strange that I can't talk about the actual mechanism of that injury. It's just --

THE COURT: I'm hopeful that the questions will be narrow in their focus so that this witness can comply with the Court's orders.

MR. ROGERS: Very good.

THE WITNESS: Yeah, please. I mean, if I -- I don't want to be in contempt of court. It seems like there's a lot of rules on here that I didn't know about, and it just seems

004605

004605

strange to me, that's all.

BY MR. EGLET:

Q That's why we're doing this right now.

A Absolutely. I appreciate that.

Q Next, Doctor, is you may not refer to the Nevada Highway Patrol incident report and the police officer's opinions pertaining to this motor vehicle accident. Do you understand that?

A Yes, I understand that.

Q Okay. We talked about property damage estimates. You can't refer or rely or say anything about them. Do you understand that?

A Yes.

Q Okay. We talked about the nature of the impact of the subject collision, including any reference or comment or testimony that the impact was minor, low speed, a tap, low property damage, anything like that. Do you understand that?

A Yes.

Q Okay. You may not refer to any alleged federal investigation that's going on -- well, it's over with now, but went on here in Clark County regarding some doctors and lawyers here in Las Vegas. Do you understand that?

A Yes.

Q Okay. You understand you cannot refer to yourself as an independent medical examiner.

004606

004606

A What am I?

Q You are a Defense medical examiner. You are not independent. You cannot refer to yourself as an independent medical examiner. You understand that?

A Yes.

Q Okay. You cannot refer or imply or make any statements to the Jury that, well, I can't talk about this, or I can't say this or I can't mention this, because the Court has ruled in pretrial motions, or something to that effect; I can't say this.

Do you understand that?

A I understand that.

Q Okay. You cannot speculate, suggest, or imply that there may be medical records out there on Mr. Simao that you or no one else has never seen. Do you understand that?

A Yes.

Q In other words, you can't say, well, I don't know if there's any medical records prior to this accident which would document that he had a neck pain before this accident, because I don't know, I never saw them.

You can't speculate or hypothesize that something may be out there. Do you understand that?

A I understand that.

Q Okay. Okay, and you are precluded from offering any opinions regarding biomechanics or the nature of the impact of

004607

004607

the motor vehicle collision in this case. Do you understand?

A Can I have a list here, so I can know what they are? I mean, I'm not -- this just seems like a very long list. I hope I remember them all. I mean --

Q Well, the truth of the matter is, you should have been informed of all this. These -- weeks ago --

A Well, I mean, I was informed of some, but I didn't realize this was such a large list. I mean, is there a way I can have it just here, so I can refer to it to make sure?

Q I -- you know -- I don't know. This, this list is --

MR. MICHALEK: Your Honor, if we could have a little leeway on direct examination to lead him through some of the minefields, so that there won't be any sort of mis-citation or misstating of any of those items, I think we'll be fine.

MR. ROGERS: The biomechanical question that Plaintiff's counsel just asked about really is the same as the minor impact and photographs and property damage statement. The doctor's aware, and we'll comply.

BY MR. EGLET:

Q You can't talk about the opinions and what kind of forces you think were imparted in the crash or anybody's body. Do you understand that?

A I understand that.

Q Okay. Any of these orders which I just told you

about that you don't understand; you want clarification on?

A No.

Q Okay.

[Counsel Confer]

BY MR. EGLET:

Q Oh. Oh, finally. The Court has ruled that you may not offer an opinion as to whether Mr. Simao was an appropriate candidate for spine surgery or not. You may not offer an opinion as to whether any of -- whether Dr. McNulty did a necessary or unnecessary spine surgery in this case.

Do you understand that?

A I, I'm not going to say anything about unnecessary spine surgery, but I --

Q You're not permitted to --

A I can't say anything about whether or not he is a candidate for surgery?

Q That's correct. You cannot.

A Okay.

Q Okay.

MR. EGLET: Thank you, Your Honor.

MR. ROGERS: And, Doctor, that was an order entered just before you walked in.

We are -- I think are ready to proceed.

THE COURT: Okay.

MR. ROGERS: Actually, though, could I have just a moment

004610

004610

# EXHIBIT "13"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs, | ) | CASE NO. A-539455 |
| v. | ) | DEPT. X |
| JAMES RISH, LINDA RISH and JENNY RISH, Defendants. | ) | |

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, MARCH 28, 2011

**REPORTER'S TRANSCRIPT**
**TRIAL TO THE JURY**
**DAY 6 - VOLUME 1**

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | DAVID T. WALL, ESQ.<br>ROBERT M. ADAMS, ESQ.<br>ROBERT T. EGLET, ESQ.<br>Mainor Eglet |
| For the Defendants James and Linda Rish: | BRYAN W. LEWIS, ESQ.<br>Lewis and Associates, LLC |
| For the Defendant Jenny Rish: | STEVEN M. ROGERS, ESQ.<br>CHARLES A. MICHALEK, ESQ.<br>Hutchison & Steffen, LLC |

RECORDED BY: VICTORIA BOYD, COURT RECORDER

004611

004611

MR. EGLET: Next slide, Brendan.

BY MR. EGLET:

"Q Can you say to a reasonable degree of medical probability that the surgical procedure done on the left shoulder was the result of the motor vehicle accident?"

And your answer was yes. Correct?

A Correct.

Q The surgery on the left shoulder that wasn't complained of for nine months after the accident. Correct?

A I don't know the specifics other than --

Q Well, let's look some more.

MR. EGLET: Next slide, Brendan.

BY MR. EGLET:

"Q Okay. Now let's move onto the right shoulder. I think you described she did have some right shoulder pain and that she didn't recognize the pain right away because she was dealing with some other issues. Correct?

"A Correct."

MR. EGLET: Next slide.

BY MR. EGLET:

Q Okay. That's the end of that. So Doctor, in Gilbert, where you were an expert for the plaintiff, and where there was a delay of nine months of complaints of shoulder

004612

004612

pain from the day of the motor vehicle accident, you causally related that shoulder injury, including the surgery, to the motor vehicle accident, didn't you?

A In this --

Q Yes or no?

A I was --

Q Didn't you?

A I'm going to answer.

Q It's a yes or no response.

A Well, in this very significant accident, yes.

Q Yes. Yes, you did. Okay.

MR. EGLET: And move for strike everything but yes, Your Honor.

THE COURT: The jury will disregard the witness's statement, anything other than yes.

BY MR. EGLET:

Q You also related Ms. Gilbert's back to the motor vehicle accident which she initially complained of but it was not well addressed for months initially. Correct?

A Correct.

Q Okay. And you testified that her other injuries over shadowed her ability to focus on her other areas of pain. Correct?

A Correct.

Q All right, Doctor. Mr. Simao complained of

004613

004613

But something was brought out in the direct exam -- or pardon me, the cross-exam. That is that the Plaintiff doesn't have any documented records of neck pain for this accident. Now, knowing that, Doctor, how is it that you can reach an opinion to a medical probability that this accident didn't cause the pain that he complained of following this accident?

A Well, it's based on multiple factors. It's based on the actual -- looking at the images of the MRI. It's looking at the discogram and the results of the discogram. It's looking at the pattern of pain. It's looking at the notes that were taken of the events that happened and it's knowing about the accident itself.

MR. EGLET: Objection, move to strike.

THE COURT: The jury will disregard the witness's last phrase.

MR. EGLET: Your Honor, may we approach?

THE COURT: Yes.

[Bench Conference Begins]

MR. EGLET: [Indiscernible] motion on the record, outside the presence?

UNIDENTIFIED SPEAKER: [Indiscernible] motion now. That's it.

THE COURT: Okay. Go ahead.

MR. ROGERS: Shall we finish him, and then give the

motion?

UNIDENTIFIED SPEAKER: Not at the rate he's going.

UNIDENTIFIED SPEAKER: Not at the rate he's going.

MR. ROGERS: [Indiscernible] that's just about it.

THE COURT: What's left?

MR. ROGERS: That's just about it is what I mean, Your Honor.

UNIDENTIFIED SPEAKER: Well, what does that mean? One question? [Indiscernible].

MR. ROGERS: Well, I guess if he can't finish this answer, then I can look at my notes briefly [indiscernible].

THE COURT: Why don't you take a moment to do that.

MR. ROGERS: Thank you.

[Bench Conference Ends]

MR. ROGERS: Okay, Doctor. That's all I have. Thank you.

THE WITNESS: Okay.

THE COURT: Ladies and gentlemen of the jury, there's something we need to discuss outside your presence as a matter of law, so I'm going to ask that you take about a 10-minute break. And I need to give you your obligation not to discuss this case, form, or express any opinion or do any research.

[Jury Out]

THE COURT: Outside the jury's presence, Mr. Wall --

MR. WALL: I think the doctor can be excused. The -- we

004615

004615



004615

don't have any more recross, Your Honor.

THE COURT: Very well.

MR. ROGERS: You're done.

THE WITNESS: Thank you.

MR. WALL: Judge, we have requested the sidebar outside --

THE COURT: Thank you.

MR. WALL: -- of the presence of the jury and I want to make a record on a request that we have, that we have talked about at the bench today, prior to that last question and answer from Dr. Fish and that we talked about on Friday. And that's this issue of minor impact. You know the history. There was -- an original motion in limine specifically sought to preclude the Defendant from raising a minor impact defense.

The whole defense -- we said in the motion the Defense must be precluded from commenting upon the dynamics of the motor vehicle crash and from arguing, suggesting or insinuating at trial that the crash was a minor-impact or low-impact collision and not significant to cause -- enough to cause Mr. Simao's injuries. It was based on the clear law, saying that this biomechanical opinion has to be made by a qualified expert and Defense had none.

So you can't argue or have your witnesses try to establish that the motor vehicle accident was somehow too minor to cause the injuries he suffered.

004616

004616

We also asked in the motion to limit the testimony of Dr. Fish regarding any minor-impact or biomechanical opinion and to preclude admission of the vehicle photos or damage estimates, all for the exact same reason, because the only reason they'd be relevant is to set up a minor-impact argument, that this vehicle accident was too minor to cause Mr. Simao's injuries without any expert testimony, without any testimony whatsoever, that would actually justify that conclusion. The Court granted the motion.

The order said, specifically, it is hereby ordered that Plaintiff's request to preclude Defendant from raising a minor- or low-impact defense is granted. The order also said neither Dr. Fish nor any other Defense expert shall opine regarding biomechanics or the nature of the impact of the subject crash at trial. It also said it's further ordered that Plaintiff's request to exclude the property damage photos and repair invoices is granted.

I would submit to the Court it doesn't get a whole lot clearer than that. At the 2.67 conference on March 10th of this year, it was clear that this was an issue for the Defense. Mr. Rogers appeared to be under the impression that the order from the Court was only that the Defendant can't argue a minor impact couldn't cause injury, but not that the evidence of this accident being minor was excluded.

I don't know how you glean that from the papers, and

004617

004617



004617

the order and the hearing, but that was his understanding before trial. So we had the discussion on the record, outside the presence, on March 18th, 2011. Mr. Rogers was here. Mr. Poulsenberg [phonetic] was here.

Again, the Court made it clear that any evidence of a minor impact defense, to set up any argument that this motor vehicle accident was too minor to cause the injury is precluded. They asked, well, can we say minor impact in opening and you said no. They said, can we say tap in opening, and you said no.

And at that point, we also argue that the motion itself and the order were very clear about what the Court precluded. Then began the systematic violations of the Court's order and I'm only talking about minor impact, not any other violations of any other court orders. In the opening, on page 63 of the transcript, Mr. Rogers minimized the potential impact of the motor vehicle accident, sought to introduce evidence from the Defendant's deposition regarding the nature of the motor vehicle accident on page 64, said he will get to describe the motor -- Ms. Rich [phonetic] will be -- will get to describe the motor vehicle accident and we're very much looking forward to our opportunity to do that on page 65.

During the cross-examination of Dr. Rosler, this question -- did you know anything about what happened to Jenny

004618

004618

Rish and her passengers in the accident? That was March 22nd, page 84 of the transcript. The only possible purpose of that is to raise some argument that, since she wasn't hurt, the impact must not have been severe enough to cause an injury to my client. We objected. It was sustained.

The examination of Dr. Fish last Thursday -- during the voir dire portion when we asked him whether he understood the orders in this case, he was apparently unaware of all of them, specifically the issue of minor impact. During the cross-examination of Dr. McNulty, a question whether he knows whether or not Ms. Rish was injured in the motor vehicle accident -- that's the transcript of March 25th on page four.

THE COURT: Who did he pose that question to, Mr. Wall?

MR. WALL: Dr. McNulty. Again, the only purpose is to raise some minor impact defense. The objection, which was immediate, was sustained. During the cross-examination of Dr. Grover, same day, last Friday, the question whether he knows whether or not the Defendant, Jenny Rish, was injured in the accident -- again, I think it's on page 140, but I'm not sure. Again, the only purpose is to raise a minor-impact defense.

There's no other potential relevance about whether the Defendant, or anyone in her car, was injured in the accident. The objection was sustained. There was a discussion on the record before we left yesterday regarding -- or before we left on Friday, regarding this issue again. I

004619

004619



004619

made a record that I thought that, at some point, progressive sanctions would be necessary.

And if it -- if it occurred again, the same violation of the same court order, that we would seek a progressive sanction. Dr. Fish, in his cross-examination, tried to distinguish the Gilbert case by saying, well, yes, in that very significant motor vehicle accident, and distinguished it from this one.

Just a moment ago, his opinion as to why there is no causation -- or he has an opinion that there's no causation of Mr. Simao's injuries from this accident, among the things he listed were the MRIs -- that's fine -- the pattern of pain -- that's fine -- the events that occurred -- I don't know what that means.

And then he said, and then knowing about the accident itself, which again, raises the issue that the Defense and Dr. Fish continue to try to maintain, without any expert testimony, that this was a minor impact, not sufficient enough to cause Mr. Simao's injuries. So we're asking for that progressive sanction now. Frankly, in reviewing the case law, I think that it would not be inappropriate for us, at this point, to strike the answer.

But what we're going to ask for, instead, is an intermediate sanction of a special jury instruction in the way of an adverse inference, or a rebuttable or irrebuttable

004620

004620

presumption instruction. And the standard that the Nevada Supreme Court has looked at from Bass Davis [phonetic], in reviewing a court's adverse inference instruction or presumption instruction, is as follows.

If the Trial Court, in rendering its discretionary ruling on whether to give an adverse inference instruction, has examined the relevant facts, applied a proper standard of law and utilizing a demonstratively rational process, reached a conclusion that a reasonable judge could reach, then affirmance is appropriate.

And the standard for what action to take comes from the Young case, Young v. Ribeiro [phonetic], the 1990 case where the Supreme Court upheld the ultimate sanction of dismissing a complaint for repeated violations. In that case, it was discovery violations, but the standard from Young applies also in lesser sanctions.

And there's -- factors for the Court to consider before either taking an action as extreme as striking the answer or some lesser sanction such as a burden or a presumption instruction are the following. One of the factors is the degree of willfulness of the violation of the Court's order. There have been so many warnings in this case and a complete failure to not only instruct Dr. Fish, but to abide by the Court's order in the questions asked of the treating physicians.

004621

004621

This is a clear continuing violation, based on the questions that were asked of not only Dr. Fish, but Dr. Rosler, Dr. McNulty and Dr. Grover. And for those three, it was the exact same question that was objected to each time. Another factor is the extent to which the non-offending party would be prejudiced by a lesser sanction. At this point, the bell has been rung so many times that just directing the jury to disregard it at this point is insufficient.

Would a lesser sanction of an irrebuttable presumption be appropriate? That is what we are suggesting to the Court in lieu of striking the answer. Another factor is the severity of the sanction, relative to the severity of the abuse. If we're talking about striking the answer, it would need to be a very significant discovery abuse.

But it's also relevant here because the next factor is the feasibility or fairness of an alternative, less severe sanction than actually striking the answer. The sanction should fit the violation, based on the case law that's come down -- Foster [phonetic], the Goodyear case. The whole issue here is, they're trying to say this is a minor impact when there's no evidence to support that it was too minor to cause my client's injuries, no evidence, no expert evidence, no evidence whatsoever.

So the sanction of an irrebuttable presumption, an instruction to the jury that there is an irrebuttable

004622

004622

presumption that the motor vehicle accident was sufficient to cause the type of injury claimed to have been suffered by the Plaintiff fits the violation. It would allow the jury to irrebuttably presume the very fact that they have no admissible evidence to contest.

One of the other factors under Young is a policy favoring adjudication of the merits. And I -- and I absolutely recognize this. So we're not asking, at this point, to strike the answer. But again, they have zero admissible evidence. They have zero evidence whatsoever to support this theory of minor impact.

So the Court wouldn't be taking away their ability to do anything that they would otherwise be able to do, because they have no evidence to foster this minor-impact defense. Another factor is whether the sanctions unfairly penalize a party for the misconduct of his attorney. I would focus on the word unfairly. Here, again, they're not being precluded from doing anything that they would ordinarily have the ability to do because they don't have any evidence that ties minor impact to the injuries.

So it's not unfairly penalizing them at all. All it's doing is telling the jury that this argument that they persist in trying to make, forgetting the fact that they have no evidence of it, but that the Court has clearly and repeatedly precluded them from doing, is to tell the jury that

004623

004623



004623

there is an irrebuttable presumption that the nature of this particular motor vehicle accident would be sufficient to cause the injuries suffered by Mr. Simao.

They still have the right to argue whether it did in this case. They still have the right to argue whatever they want about the treatment being reasonable and necessary, which is the focus of their case. But it just prevents them from continuing to violate a court order by raising a minor-impact defense when they have no evidence to support it. That would be our request at this point, but if it continues, we're not stating for the record that we wouldn't argue to strike the answer at some future time.

THE COURT: Mr. Rogers?

MR. ROGERS: Thank you, Your Honor. The Defense would request the opportunity to brief this. It appears that Plaintiff came prepared for this argument in a fashion that the Defense is not prepared off the cuff. It seems that this is, at a minimum, an excessive remedy for something that Your Honor observed. You know that Defense -- neither Jenny Rish nor counsel -- attempted in any fashion to elicit testimony about the accident. I think everybody here knows this. And there truly was no game being played at all.

I did everything I could to steer him right to the medicine. And that was -- well, you saw the consequence. I do believe that this is a harsh remedy and I'd ask, at a

004624

004624

minimum, for the opportunity to be able to brief it because Jenny Rish will be charged with quite a sanction for something that I don't think she -- and I know that I had anything to do with.

THE COURT: Let me ask you something, Mr. Rogers, and that is this. I mean, you've been here the whole time. You know perfectly well what this witness testified to.

MR. ROGERS: Yes.

THE COURT: You were here when he was admonished. What do you think is an appropriate sanction, given his willful violation of the Court's orders?

MR. ROGERS: Well, that's a question I'd truly appreciate the opportunity of being able to brief. I didn't know that this would be coming today. I didn't know that the Defense would be facing a motion such as this today. And I'm, frankly, not clear on all the available sanctions. I simply suggest that an irrebuttable presumption on something as vague as cause of the Plaintiff's alleged injury, which covers a wide array of conditions -- he isn't simply claiming what injury; he's claiming several -- that it seems that there's a remedy that better fits Dr. Fish's testimony than that.

And I've made assurances to you and to Plaintiff's counsel that I am meeting with the witnesses that we're calling and advising them of the Court's orders. The problem is that the medicine in this case is something that really

004625

004625



004625

should be brought to the jury's attention.

And striking witnesses seems too much, particularly when, for example, Dr. Fish's testimony stands on its own without any comment about the accident because he was talking about the diagnostics, and the clinical presentation and things that are strictly limited to the medicine. And I think you saw that it was -- a thing that he seemed to be able to separate was the accident and the medicine. I can meet with Dr. Wong [phonetic], who is testifying tomorrow, and tell him, do not make this mistake. Keep the accident separate.

The Court has ordered that the accident is out, that any evidence of this accident, you're not to comment on it. And if there's a further violation even after that, we can revisit it. I don't anticipate there will be. But I know you're not looking forward. You're looking back right now at Dr. Fish. And on that question, all I can say is, I would like the opportunity to brief it before the Court makes a decision on -- a ruling on the motion.

THE COURT: Okay.

MR. WALL: A couple things, Judge -- first of all, to say that they didn't have some inkling that this would occur -- that's why I made the record I did Friday afternoon. Secondly, with great respect to Mr. Rogers, to say that neither he nor his client elicit any of this is absolutely incorrect.

004626

004626

He's the one who asked Dr. McNulty, are you aware of whether or not the Defendant was injured in this accident? Objection, sustained, discussion at the bench about why it isn't coming in, because it's minor impact and there's an order in place. Asked the same question. Actually, Dr. Rosler was first -- same thing. Asked the same questions of Dr. McNulty, I would say, within five minutes of the beginning of cross-examination, the exact same question, objection, discussion at the bench, minor impact, sustained.

Hours later, same day, the same question asked of Dr. Grover on cross, exactly the same issue. Did he elicit it from Dr. Fish today? I can't say it's the same as what he did last week. But to say that at no time did he elicit any response for the violations that I've talked about is incorrect.

Finally, an irrebuttable presumption -- that means the jury can presume that this accident could be or is sufficient enough to cause the type of injury that my client suffered. It's not a rebuttable presumption because there is no evidence to be able to rebut it. It just means that they can't continue to raise this issue of minor impact, that the accident was too minor to cause his injuries because they're not allowed to.

There's no evidence to support it. There's no law that supports it. There's no expert that supports it. So in

004627

004627



004627

-- if it was a rebuttable presumption, if you said, you know what, ladies and gentlemen, there's a rebuttable presumption that the accident was significant to cause the type of injuries that Mr. Simao suffered, that opens the door to them to be able to try to rebut it by having their client say well, you know, it was just a tap, or to have Dr. Fish say, well, it seems like it was just a tap, according to Ms. Rish.

So that's why it's an irrebuttable presumption. They can't rebut it. That's what your motion -- that's what your order was, that they can't rebut it. They can't even raise it. Now that they've thrown it out there, and they've thrown it out there recently with Dr. Fish, which is why it needs to be addressed right now with the jury, is the jury needs to be instructed that there is an irrebuttable presumption that the accident in question was sufficient to cause the type of injury that Mr. Simao complains of.

Did it cause that injury? That's still an open question, so causation is -- we're not getting an instruction on causation, just to eliminate this minor-impact defense.

THE COURT: Something --

MR. ROGERS: If I may.

THE COURT: -- further, Mr. Rogers?

MR. ROGERS: If I may, right. I limited my comments to Dr. Fish's testimony. The testimony or questioning of the other witnesses really was borne of something that I'm afraid

004628

004628

the Court is unpersuaded by, and that is that the Defense has stated from the outset that we're not sure where we stop.

We know that we can't say minor impact and we know we can't say tap, but what we can say is something that I know that this has been not well received by the Court. But that's the truth. We haven't ever commented on anything relating to the severity of the impact, and that's why Dr. Grover's testimony seems such a moment to the Defense because he, in our view, characterized the impact in a fashion that it seemed the Court wouldn't allow.

But whether we can say, for example, as we did in opening statement, that the accident occurred in stop-and-go-traffic, we just don't know where we're allowed to go and where we're not allowed to go. There was no intention at any point to violate the Court's order. It was simply trying to figure out where it ends.

And that's what the point of the opening was. And as to the questions asked of Drs. McNulty, and Grover and Rosler, one of the questions, actually, that we intended to ask, but the objection was brought, was whether the doctor was aware that the Plaintiff drove from the scene. I was never aware that, that might be a problem, that, that might offend or violate the Court's order.

I was going to ask that -- the doctor next, did you know that Jenny Rish drove from the scene? Those were the

004629

004629

words that I was going to speak, but as soon as I said Jenny Rish, the objection came. Not knowing that -- whether Jenny Rish drove from the scene might violate this order, the problem is this. There's an order on a motion, striking the Defense that a minor impact can't cause injury.

Now, that much, I do understand. I get that that's the Court's order. But can we describe the facts of the accident? And I -- and if we can, I don't know where to stop. I don't know whether I can say Jenny Rish drove from the scene, as we've said. I don't know whether I can say or have Jenny Rish testify that this is what happened, that this is how I arrived at the scene and this is what I was doing five minutes before. I just don't know what I can and can't do.

There is no intent here to violate the order. It truly is a problem of not knowing. So if we have a clear order saying, listen, you can't say this and you can't say that, I won't. I won't ask another witness, were you aware that Jenny Rish wasn't injured, were you aware that she drove from the scene. I just don't know what it is of those questions that I'm not permitted to ask a witness.

And I don't say this to frustrate you. I can tell that you seem unpersuaded by it, and for that, I'm sorry. But the truth is, I am not clear.

THE COURT: Well, you know, these -- I'm sorry. Were you finished --

004630

004630



004630

MR. ROGERS: I am.

THE COURT: -- Mr. Rogers?

MR. ROGERS: I am.

THE COURT: These pre-trial motions in limine were extensively briefed and argued. And I don't have the particular motion in limine in front of me, the one that precluded Defense from arguing that this was a minor impact, and also that, furthermore, that this minor impact couldn't possibly have caused the injuries to Plaintiff, that Plaintiff sustained.

But the point of the matter was that Defense had no witness who could testify that this was a minor impact and no witness who could testify that this was a minor impact that could not have caused the injuries to Plaintiff, that Plaintiff sustained. Defense simply didn't have any witnesses to so testify. That's why the motion in limine was granted.

MR. ROGERS: Okay. No --

THE COURT: You know, I think --

MR. ROGERS: -- expert witness, I think it was, Your Honor.

THE COURT: Right. No expert witness, which is --

MR. ROGERS: Right.

THE COURT: -- what would be required to, you know, come to those conclusions. That's exactly what would be required. So you know, you're right. You know, I'm not persuaded by

004631

004631



004631

that argument. We've heard it before and it's not persuasive. I think the motion should be granted.

Trying to think of a sanction that's suitable -- I don't know what other sanction the Court could impose. Plaintiff is not asking that the answer be stricken. Plaintiff's not even asking that the entire testimony of Dr. Fish be stricken. Plaintiff's asking for an irrebuttable presumption. And I think, reviewing the factors laid out in the Bass Davis case, that, that's an appropriate sanction, so the motion is granted.

MR. ROGERS: And again, Your Honor, may I -- may I brief that, but before a final decision --

MR. EGLET: Your Honor, we --

MR. ROGERS: -- is reached

MR. EGLET: This bell has got to be unrung right now with this jury and we cannot wait. If he wants to file a brief after that fact -- but the Court's ruled.

THE COURT: I've made -- I've made my ruling.

MR. EGLET: We can draft this, based on Mr. Wall's research. And I think he basically said it out loud a minute ago, that the -- and we can draft this instruction for the Court to give as soon as the jury comes back.

THE COURT: Well, then, I wish you would because I wasn't able to draft it in my own mind at this particular moment. It's late in the afternoon. Let's take a five-minute break.

004632

004632

MR. WALL: Thank you, Your Honor.

MR. EGLET: Thank you, Your Honor.

[Recess]

[Outside the Presence of the Jury]

THE COURT: Okay. Outside the jury's presence.

Mr. Wall.

MR. WALL: Judge, I crafted an instruction that reads as follows.

"The Defendant has, on numerous occasions, attempted to introduce evidence that the accident of April 15, 2005, was somehow too minor to cause the injuries complained of. This type of evidence has previously been precluded by this court. In view of that, this court instructs the members of the jury that there is an irrebuttable presumption that the motor vehicle accident of April 15, 2005 was sufficient to cause the type of injuries sustained by the Plaintiff. Whether it proximately caused those injuries remains a question for the jury to determine."

And if you need it to see what's stricken --

THE COURT: Mr. Rogers.

MR. ROGERS: I have proposed revisions. First, that the prefatory paragraph, everything up to this Court instructs the members of the jury, not be provided in this instruction.

004633

004633

THE COURT: So the instruction would read how?

MR. ROGERS: It begins this court instructs the members of the jury that this is an irrebuttable presumption that the motor vehicle accident of April 15, 2005 was sufficient to potentially cause the type of injuries sustained by the Plaintiff. Whether it proximately caused those injuries remains a question for the jury to determine.

THE COURT: So is that language you read just now the same language as Mr. Wall's, only without the preceding statements?

MR. ROGERS: Yes, except for one word, and that is sufficient to cause is the way the Plaintiff wrote it. The way the defense suggested it is sufficient to potentially cause.

MR. WALL: My position is that that last sentence that says whether it actually caused or proximately caused the injuries is the question for the jury, which is the -- a question for the jury to determine, which takes away the idea that the Court is telling them that this crash caused these injuries.

As for the initial part, I think the jury needs to know why, in light of the fact that this has been raised on a number of occasions, why the Court is giving them this instruction at this point in time. And that's why I prefaced it with the language that I did.

004634

004634

Do you want to see it?

THE COURT: Please.

MR. WALL: May I approach, Your Honor?

THE COURT: Yes. If I can read your writing.

MR. ROGERS: When you're done with that, Your Honor, I have a couple of points I'd like to add.

THE COURT: Sure. Okay. Mr. Rogers.

MR. ROGERS: Thank you. The suggestion from the defense that the instruction begin with this court and go forward from there --

THE COURT: No, it proposes the Defendant has --

MR. ROGERS: I'm sorry?

MR. WALL: It's --

MR. ROGERS: Oh, no. Remember, I said the defense objects to that prefatory paragraph --

THE COURT: Right.

MR. ROGERS: And has requested that the instruction read from the words this court.

THE COURT: Uh-huh, okay.

MR. ROGERS: And however, what the defense is suggesting that that instruction be supplied to the jury along with all the other instructions. The sanction that the Court is entering is substantial. And reading it now with that prefatory paragraph to the jury is far more substantial and prejudicial to the defense than the simple instruction would

004635

004635

be along with -- provided along with all the other instructions to be given to the jury.

And I guess an admonition charging the defense right now as it reads would truly be devastating to Jenny Rish's case. It might very well end the case for her, and I think that would be excessive.

THE COURT: Mr. Wall.

MR. WALL: I think Mr. Rogers is partly correct. I think that when we give the instructions to the jury at the close of the case, that it should only -- it shouldn't have that prefatory language and it should probably begin from this court or even right in that area. We're talking about nearly, maybe more than, a half a dozen violations of this particular order alone. The last thing they heard was a rush to the bench after Dr. Fish testified that one of the reasons there's no causation is knowing about the accident itself. He's told them that the knows about the accident, and the accident itself is insufficient to cause the injuries that Mr. Simao complains of. And because that has been clearly precluded by the Court, I got to tell you, Mr. Eglet and I begged him at the bench not to ask the question, because we knew that Dr. Fish would go beyond where he was supposed to go. Actually, this was, I guess, recross. So it came out again on recross.

But for the repeated violations, I think the first part of that instruction -- they need to know why they're

getting this instruction at this point in time, especially with the last thing they heard.

THE COURT: Well, did you have something further, Mr. Rogers?

MR. ROGERS: Yeah. It's just the fact that these instructions, when they're read to the jury, come along with a form instruction that tells them that they're to consider all of those instructions and the laws equally and not to prioritize one over the other.

Here, reading this instruction out of order and at this point in time, would be -- as I said earlier, would simply devastate the defense.

MR. EGLET: This is -- well, the defense has duck this hole. Whether it devastates them or not, I don't know. I think that's an over-exaggeration of the situation -- of this instruction. But these instructions are curative -- this is a curative instruction, Your Honor. Curative instructions are given during the trial when the curative instruction needs to be given. That's why it has to be given now. It has to be given to this jury before we just, you know, go on to the end of the trial and all this is forgotten about and this is drilled into their head, all these, you know, violations. It's got to be done now. It has to be done now, so that it actually cures the problem and they understand, and they now look at this case, from this point forward with that

004637

004637

understanding. It is imperative that this instruction be given now, Your Honor.

THE COURT: Well, I think the instruction does have to be given now. It is a curative instruction. And I'm only inclined to make a minor change to it, frankly, Mr. Wall. The language that you've got here reads "The Defendant has, on numerous occasions, attempted to introduce evidence that the accident of April 15, 2005 was, somehow, too minor to cause the injuries complained of." I'm inclined to remove the somehow. I think it's sort of argument. But the rest of the instruction, I'm inclined to leave it intact.

I agree with counsel that when the jury gets all of the rest of the instructions, this instruction needs to be pared down just to the cite to the irrebuttable presumption language. So it will have to be refined.

MR. WALL: That's fine, Judge. What's the last sentence that's written there?

THE COURT: Whether it proximately caused those injuries remains a question for the jury to determine.

MR. WALL: Probably after that should say under further instruction from the Court.

THE COURT: Do you agree, Mr. Rogers?

MR. ROGERS: No. I mean that's confusing.

MR. WALL: All right. We'll take it out.

[Counsel Confer]

004638

004638



004638

THE COURT: Anything else or can we bring our panel in?

MR. EGLET: Bring them in.

MR. ROGERS: No.

THE COURT: What have we got after this?

MR. EGLET: We've got Dr. Arita waiting in the hall. We're ready to put him on right -- Your Honor, as soon as you read the instruction.

MR. WALL: We won't--

MR. EGLET: In fact, we can have him on the stand.

MR. WALL: We won't finish him.

MR. EGLET: We won't finish him today. We're going to have to bring him back on Wednesday. They have Dr. Wong tomorrow. So we're going to bring him back on Wednesday and finish him.

THE COURT: Will we finish Wong tomorrow?

MR. EGLET: Yeah, we'll finish Wong tomorrow. Well, I mean unless -- look, I haven't met Dr. Wong, but I can't imagine -- my review of his depositions is he's not like Dr. Fish. Let me just put it that way.

THE COURT: We're not going to try to do more than Dr. Wong though, are we?

MR. EGLET: No, just Dr. Wong.

THE COURT: Okay. All right. Let me see if I can find where my bailiff went.

[Pause]

004639

004639

004640

# EXHIBIT "14"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs, | ) | CASE NO. A-539455 |
| v. | ) | DEPT. X |
| JAMES RISH, LINDA RISH and JENNY RISH, Defendants. | ) | |

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

THURSDAY, MARCH 31, 2011

**REPORTER'S TRANSCRIPT**
**TRIAL TO THE JURY**
**DAY 9 - VOLUME 1**

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | DAVID T. WALL, ESQ.<br>ROBERT M. ADAMS, ESQ.<br>ROBERT T. EGLET, ESQ.<br>Mainor Eglet |
| For the Defendants James and Linda Rish: | BRYAN W. LEWIS, ESQ.<br>Lewis and Associates, LLC |
| For the Defendant Jenny Rish: | STEVEN M. ROGERS, ESQ.<br>CHARLES A. MICHALEK, ESQ.<br>Hutchison & Steffen, LLC |
| Also Appearing: | DANIEL F. POLSENBERG, ESQ.<br>Lewis and Roca, LLP |

RECORDED BY: VICTORIA BOYD, COURT RECORDER

Q And you got out of your van to go back and talk to Mrs. Rish?
A I did.
Q Did you need help getting out of your van?
A I did not.
Q And when you went back there to talk to Mrs. Rish, what did you discuss?
A I asked her if she was all right.
Q What did she say?
A She said she was.
Q Did you have any other discussion with her?
A I don't believe so.
Q Now, we've heard several times through this trial that an ambulance came to the scene.
A Yes.
Q And that you declined treatment.
A I did.
Q And the paramedics didn't transport anyone from Mrs. Rish's car?
MR. WALL: Objection. Your Honor --
THE COURT: Sustained.
MR. WALL: -- may we approach?
THE COURT: Sustained. No need to approach. Sustain the objection.
MR. WALL: Well --

004642

004642

# EXHIBIT "15"

**CHARLOTTE BINAKONSKY, Individually and as mother and next friend of the minor children; JANE MARILYN BINAKONSKY, minor child of the deceased; RACHEL DARA BINAKONSKY, minor child of the deceased; LUCY ANN BINAKONSKY, minor child of the deceased; EMILY BINAKONSKY, minor child of the deceased, Plaintiffs-Appellants, v. FORD MOTOR COMPANY, Defendant-Appellee.**

**No. 99-2308**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

***4 Fed. Appx. 161; 2001 U.S. App. LEXIS 2323***

**December 4, 2000, Argued**
**February 15, 2001, Decided**



**NOTICE:** [**1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *2001 U.S. App. LEXIS 6637.*

**PRIOR HISTORY:** Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey II, Senior District Judge. (CA-95-2529-H).

**DISPOSITION:** AFFIRMED.

COUNSEL: ARGUED: Martin Henry Freeman, FREEMAN & FREEMAN, P.C., Rockville, Maryland, for Appellants.

Robert Whitefield Powell, Office of the General Counsel, FORD MOTOR COMPANY, Dearborn, Michigan, for Appellee.

ON BRIEF: Grace R. den Hartog, Joseph K. Reid, III, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia; Paul F. Strain, VENABLE, BAETJER & HOWARD, L.L.P., Baltimore, Maryland, for Appellee.

**JUDGES:** Before NIEMEYER, WILLIAMS, and TRAXLER, Circuit Judges.

**OPINION**

[*162] PER CURIAM:

David Binakonsky died after he drove his 1988 Ford Econoline van head-on into a tree and the van caught fire. His wife and children (the "family") then filed a wrongful death action against Ford Motor Company. The district court granted judgment as a matter of law in favor of Ford, and the family appeals. We affirm.

I.

The family's case against Ford is premised [**2] on the "crashworthiness" doctrine. That is, the family does not contend that a defect in the van caused the initial accident, but that "a defective product or a defectively designed product caused or aggravated injuries after the initial accident." *Binakonsky v. Ford Motor Co., 133 F.3d 281, 284 (4th Cir. 1998)* ("*Binakonsky I*"). According to the family, the van's defective [*163] design caused the fuel lines to rupture on impact and Binakonsky died not

from the initial impact, but from a gasoline-fed post-collision fire. The district court granted summary judgment to Ford, but this court reversed much of the district court's opinion and remanded for trial. *See Binakonsky I, 133 F.3d at 291.*

Prior to trial, the district court ruled against the family on several pre-trial motions, including a motion by the family seeking to give collateral estoppel effect to a state court jury verdict against Ford in an action alleging similar fuel-line defects, [1] the family's motion seeking to preclude any evidence of alcohol use by Binakonsky on the day of the crash, and the family's attempt to prevent Ford from raising misuse and assumption of the risk as affirmative [**3] defenses. The family also requested that the district court recuse itself, which the court declined to do. The case then proceeded to trial.

1 The family's appeal of the district court's collateral estoppel order was dismissed by this court as interlocutory.

Just before the family's design defect expert was to take the stand, the district court excluded certain documents that the family intended to introduce through the expert. After discussing the ruling with the expert, counsel for the family returned to the courtroom and made the following statement:

> I have consulted with [the design defect expert] and explained to him the Court's rulings on the exhibits you have ruled on today, as well as other matters. But mainly on the exhibits you ruled on today. In his words, he says that the factual basis of his opinion[] has been gutted and that he, therefore, cannot express an opinion based on a factual basis. Accordingly, because of the Court's ruling, and because of the information I received from [**4] our expert witness, we'd rest.

J.A. 696. The court brought the jury back in, and the family formally rested its case. Counsel again stated that the family's expert could not testify because the "factual underpinnings for his opinion[] have been gutted," and that "if we can't make the case through our expert witness on liability, . . . there is no basis for going forward." J.A. 698.

After the jury was dismissed, counsel for the family, at the urging of the district court, made a brief proffer of the evidence that would have been submitted on the question of damages. Counsel did not proffer the expert's reports "because they are no longer accurate, because of the fact that you have ruled out those exhibits." J.A. 701. Ford then moved for judgment as a matter of law based on the family's failure to present any evidence of a design defect or proximate cause. Counsel for the family stated that the expert's deposition, which had been submitted to the court by Ford during its motion, should be considered as the family's proffer of its evidence of proximate cause, but still insisted that the court's ruling "gutted" the expert's testimony as to the existence of a design defect. [**5] The district court granted Ford's motion for judgment as a matter of law, and this appeal followed.

II.

On appeal, the family raises numerous issues, including the appropriateness of the district court's voir dire of the jury panel, the denial of the motion to recuse, and the propriety of various evidentiary rulings. Before we can consider these issues, however, we must determine the effect of the family's resting of its case without presenting any expert testimony and the resulting [*164] grant of judgment as a matter of law in favor of Ford.

The family does not challenge on appeal the granting of the motion for judgment as a matter of law. In fact, counsel for the family conceded at trial that there was no evidence of a design defect at the time the family rested. The family, however, contends that the district court's exclusion of the documents upon which the expert intended to rely left it no choice but to withdraw its expert and rest its case.

The difficulty with this argument is that counsel for the family did not put the expert on the stand to explain on the record how and why the exclusion of the documents made it impossible for him to testify. All we have is counsel's statement [**6] that the expert said the ruling gutted the factual basis for his opinion. While we do not doubt counsel's word, the absence of a record makes it extremely difficult for us to determine whether an error occurred and, if so, to determine in the context of the entire proceeding whether the error warrants reversal. Nevertheless, we will address this issue as best we can given the record before us.

For purposes of this opinion, we will assume that the

district court erred by excluding the documents that led to the expert's refusal to testify. As we explain below, however, this error is insufficient to excuse the family's resting without establishing a *prima facie* case. *Rule 703 of the Federal Rules of Evidence* states:

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

*%Fed. R. Evid. 703* (emphasis added). Because there is no suggestion that the documents at issue are not [**7] "of a type reasonably relied upon by experts in the particular field," the district court's exclusion from evidence of some of the documents upon which the family's expert intended to rely in no way precluded the expert from relying on those documents during his testimony. *See, e.g., Redman v. John D. Brush & Co., 111 F.3d 1174, 1179 (4th Cir. 1997)* ("*Federal Rule of Evidence 703* permits the admission of expert opinion testimony even though the expert has relied on evidence that is inadmissible . . . ., [provided the inadmissible evidence is] of a kind reasonably relied on by experts in the field."). We are thus baffled by counsel's seeming acceptance of the expert's claim that the exclusion of the documents "gutted" the factual basis for his opinion.

Moreover, even if the exclusion of the documents would have prevented the expert from relying on them when giving his opinion, it is apparent from the record before us that the expert still could have testified that various defects existed. First, the district court admitted the document that counsel for the family described as "the single most important document in the case." J.A. 655. In addition, the family's expert [**8] had previously issued a report and given deposition testimony in which he concluded that the van's fuel system was defective, evidence that this court found to be sufficient to withstand Ford's previous motion for summary judgment. *See Binakonsky I, 133 F.3d at 290* ("The plaintiffs have produced sufficient evidence about the fuel delivery system to submit the issue of unreasonable dangerous design to the jury."). The report listed the documents the expert had reviewed when [*165] reaching that opinion, and none of those documents were in the group excluded by the district court. Although the report anticipated that documents produced during discovery would be used as further support for the expert's opinion, the design defect opinion expressed by the expert in his report and during his deposition was in no way dependent on the review of additional documents. Thus, even without relying on the excluded documents, the expert nonetheless could have testified about the existence of design defects. While that opinion may have been less expansive than the family and the expert would have liked, it would in any event have been an opinion sufficient to prevent the granting of judgment [**9] as a matter of law. Given these circumstances, we again are puzzled by the family's apparent capitulation to the expert's refusal to testify.

Clearly then, the exclusion of the documents, even if incorrect, created no legal impediment to the expert's testifying as to the existence of a defect, and the district court's exclusion of the documents can in no way be viewed as preventing the family from presenting its case. Instead, it was the family's inexplicable acquiescence to the recalcitrant expert witness that prevented the family from establishing its case. That error, however, is not one that can be corrected on appeal. If the family had put its expert on the stand to explain his understanding of the effect of the district court's exclusion of the documents, then perhaps our analysis here would be different. But given the record before us, we can reach no other conclusion.

III.

Because the family's failure to present a *prima facie* case was not effectively compelled by any improper rulings of the district court, the court quite correctly granted Ford's motion for judgment as a matter of law. And the granting of judgment as a matter of law renders unnecessary the consideration [**10] of many of the issues raised by the family on appeal.

Because the case never went to the jury, the family's challenge to the district court's refusal to bifurcate the liability and damages portions of the trial is moot, since the bifurcation was intended to limit the prejudicial effect of certain evidence upon the jury. And because the jury never rendered a verdict, the manner in which the court conducted voir dire is likewise moot.

For similar reasons, we need not consider the family's evidentiary challenges to the district court's

refusal to limit evidence of Binakonsky's use of alcohol on the day of the accident and his history of drug and alcohol abuse. Because this case was not decided by a jury but instead was decided by the court as a result of the family's failure of proof, any improper evidence of the decedent's drug or alcohol use is irrelevant.

Finally, the family's challenge to the district court's pre-trial exclusion of certain evidence is likewise moot. It appears that this challenge encompasses much of the evidence that was excluded by the court during trial and led to the expert's refusal to testify, and we have already concluded that the refusal to admit that evidence [**11] cannot excuse the family's failure to present a *prima facie* case. As to any evidence not included in that ruling, the family does not suggest that the admission of that remaining evidence would have established the existence of a design defect in the Binakonsky van or would have affected the expert's willingness to testify after the other documents were excluded. Therefore, even if the documents had been admitted, the district court still would have granted Ford's motion for judgment as a matter of law.

[*166] Only two issues raised are arguably cognizable on appeal notwithstanding the entirely proper grant of judgment as a matter of law--the district court's denial of the family's motion for recusal and the court's refusal to give collateral estoppel effect to a state court verdict that was adverse to Ford. [2]

> 2 Ford contends that none of the issues raised by the family should be considered. According to Ford, the family was unhappy with the way the trial was proceeding and simply chose not to continue at a point when counsel for the family conceded there was insufficient evidence of a design defect. Ford thus characterizes the inevitable granting of judgment as a matter of law as a consent judgment from which the family is not entitled to appeal. Ford argues that after the district court excluded the documents, the family should have continued with its case. According to Ford, if the jury returned a verdict in favor of Ford, then the family could appeal and its challenges could be evaluated in the context of a full record, against which the prejudicial effect of any errors by the district court could properly be evaluated. Ford contends that by refusing to follow the proper procedure and voluntarily electing not to proceed with its case, the family has waived its right to challenge any aspect of the trial. Because we resolve the issues of collateral estoppel and recusal in Ford's favor, we need not address this argument.

[**12] A.

A trial judge must disqualify himself in any case "in which his impartiality might reasonably be questioned," *28 U.S.C.A. § 455(a) (West 1993)*, or in cases in which "he has a personal bias or prejudice concerning a party," *28 U.S.C.A. § 455(b)(1)*. A judge's refusal to recuse himself "is reviewed only for abuse of discretion." *United States v. Gordon, 61 F.3d 263, 267 (4th Cir. 1995)*.

In this case, the family contends that the district court's actions during the course of the proceedings revealed an "extrajudicial predisposition against alcoholics and drunk drivers" that clouded the court's judgment. Brief of Appellants at 42. According to the family, the district court's "repeated references" to Binakonsky as an "incorrigible alcoholic and drug addict," Brief of Appellants at 42, which are for the most part contained in various written orders issued by the district court, demonstrate that the court was so biased and prejudiced against the family's case that recusal was required. We disagree.

The Supreme Court has explained the circumstances that must be established before a judge must recuse himself:

> Opinions [**13] formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

*Liteky v. United States, 510 U.S. 540, 555, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994).* "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." *Id.* (internal citations omitted).

In this case, there was evidence presented during the course of the proceedings establishing [**14] that Binakonsky was drinking on the day of the accident and had a history of drug and alcohol abuse problems. [*167] The district court's recounting of this evidence in its orders is entirely unremarkable and does not indicate that the court relied on knowledge gained outside the protracted proceedings of this case. And the district court's rulings and other comments identified by the family do not reveal such "deep-seated" antagonism by the district court that would "make fair judgment impossible." While the district court may have frequently ruled against the family and may have approached the case in ways the family believed was improper, the family has simply failed to establish that recusal was required. *See Gordon, 61 F.3d at 267-68* ("The Supreme Court has made crystal clear. . . that litigants may not make the trial judge into an issue simply because they dislike the court's approach or because they disagree with the ultimate outcome of their case.").

B.

The collateral estoppel issue involves a jury verdict in a Maryland state court case. [3] When considering the preclusive effect in federal court of a state-court judgment, federal courts must apply the law of the [**15] state rendering the judgment. *See 28 U.S.C.A. § 1738 (West 1994); Marrese v. American Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985).* Under Maryland law, collateral estoppel applies if (1) the issue decided in the prior adjudication is identical to the issue as to which collateral estoppel is sought in the present adjudication; (2) the prior adjudication was a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior adjudication; and (4) the party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate the issue in the prior suit. *See, e.g., Colandrea v. Wilde Lake Cmty. Ass'n, Inc., 361 Md. 371, 761 A.2d 899, 909 (Md. 2000).*

3 The family contends that the collateral estoppel issue must be considered because if the district court had given collateral estoppel effect to the state court action, then liability would have been established without expert testimony, thus rendering improper the grant of judgment as a matter of law. Even if the state-court judgment established the existence of a design defect, expert testimony would have been required to give the jury a context for evaluating the state court finding of a design defect and to establish proximate cause. The family seemed to suggest at oral argument that had the state-court verdict been given collateral estoppel effect, the district court's exclusion of the documents at trial would not have affected the expert's willingness or ability to testify about proximate cause. While we have real reservations about relying on this hyper-attenuated speculation about what might have happened at trial, we nonetheless will address the collateral estoppel issue out of an abundance of caution.

[**16] In the state court case, the plaintiff owned a 1987 Ford F-150 pickup truck and was burned in a post-collision fire. The plaintiff's expert testified at trial that various manufacturing and design defects combined to cause the fire after the collision. Among the defects identified in that case were the use of incorrectly sized rivets and rivet holes, defective welds, improper placement of the fuel filter, the use of plastic connectors for the nylon fuel lines, and the absence of "antisiphon" valves in the fuel lines. The jury returned a verdict in favor of the plaintiff. Through special verdict forms, the jury found that the truck's rivets were defectively manufactured and that the truck's "fuel system" was defectively designed.

In this case, the family contends that the nylon fuel lines were severed or disconnected during the collision and that the fuel system as designed allowed fuel to be continually injected into the engine compartment, thus feeding the post-collision [*168] fire. The design defects identified by the family include the use of nylon fuel lines, the use of plastic connectors on the fuel lines, and the absence of "anti-siphon" valves.

Although there obviously is some [**17] overlap between the liability theories in the state court case and

this case, there are important differences in the cases that counsel against the application of collateral estoppel. While the truck in the state court case and the van in this case had similar fuel injection systems with nylon lines, the configuration of the system and placement of the lines was different in each vehicle. In addition, the family's expert believed that the nylon fuel lines were defective in and of themselves, while the expert in the state court action did not believe the lines themselves to be defective, but criticized the use of plastic connectors on the lines. Moreover, the state-court expert contended that the placement of the fuel filter was a contributing cause of the fire in that case, an issue that is wholly absent from the case at bar.

The state-court jury found only that the "fuel system" was defectively designed, without specifying whether it was the use of plastic connectors, the placement of the fuel filter, the absence of antisiphoning valves, or a combination of all of those problems that rendered the fuel system defective. Given the factual differences between this action and the state-court [**18] action, the differences in defects identified in each case, and the uncertainty about the precise basis for the state-court jury's finding, we agree with the district court that the finding of a fuel-system design defect in the state court action should not have been given collateral estoppel effect in this action. *See Colandrea, 761 A.2d at 909* ("Collateral estoppel is not concerned with the legal consequences of a judgment, but only with the findings of ultimate fact, *when they can be discovered*, that necessarily lay behind that judgment." (emphasis added)); *cf. Board of County Supervisors v. Scottish & York Ins. Servs., Inc., 763 F.2d 176, 179 (4th Cir. 1985)* (reversing district court's collateral estoppel ruling given the "impossibility of winnowing out the specific grounds upon which the jury based its general verdict where it was instructed that it could base liability on any one or more of six different theories").

IV.

To summarize, we conclude that the district court properly granted Ford's motion for judgment as a matter of law after the family rested without presenting any expert testimony. Because the district court's prior rulings [**19] did not prevent the family from presenting a *prima facie* case, the granting of judgment as a matter of law moots many of the issues raised on appeal. As to the denial of the motion to recuse and the denial of the family's collateral estoppel motion, the only issues that arguably can be considered on appeal notwithstanding the granting of judgment as a matter of law, we find no error in the district court's rulings. Accordingly, the decision of the district court is hereby affirmed.

*AFFIRMED*

004650

# EXHIBIT "16"

DISTRICT COURT

CLARK COUNTY, NEVADA

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

DEPOSITION OF ROSS SEIBEL, M.D.

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

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

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

004651

004651

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

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

Q. Okay.

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

Q. Okay, I see. And just for the record, the June 10 and June 11 records that you testified about, Doctor, we've read off plaintiff's counsel's computer; right?

A. Correct.

Q. Let me shift gears here. Do you have a future treatment plan for the plaintiff?

A. I don't right now in front of me.

Q. Okay. Well, will that be formulated upon determining the plaintiff's response to that epidural injection?

004652

004652

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

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

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

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

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

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

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

But go ahead.

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

004653

004653

BY MR. CRAFTON:

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

A. -- diagnostic and --

Q. -- diagnostic and --

A. -- two is therapeutic.

Q. -- therapeutic. Let's talk about diagnostic first.

A. From a diagnostic standpoint, based on the last time I saw him, I would pursue again a selective nerve-root block at the C4 level.

Q. What would be the purpose of that? Would you explain?

A. To see if he's having C4 nerve-root mediated pain caused by the compression of the nerve root.

Q. Is that it? I mean, at this point in time.

A. Yes.

Q. Okay. And what -- assuming that that has a positive outcome, what would be your treatment options for -- or your treatment recommendations for him?

A. Again, from my perspective, I'm not the spine surgeon. But my job is to provide some diagnostics, but also some therapeutic interventions, which range from the modalities we mentioned before. Would it be a medication management or a repeat steroid injection? Or consider re-referral back to the surgeon to see if he

004654

004654

felt there was any other surgical interventions that could help alleviate this based on those diagnostic results.

Q. And assuming the result was negative, what would be your next step?

A. If the result was negative, I'd probably continue to do myofascial treatments for him, medication management. He may not have any further interventional or surgical modalities that are available to him.

Q. At that point in time, is it foreseeable to you that he would be recommended for, say, an implant of an electronic stimulator or other type of pain-relief modality, such as the Morphine pump for --

A. I could see where some might consider that an option. I don't consider a Morphine pump or any intrathecal device right now a likely option for that.

Q. No, I understand right now. But I'm saying -- and I understand that there still has to be further workup with Mr. Simao; is that fair?

A. Yes.

Q. But those are two foreseeable options, assuming that he receives no relief from other types of therapeutic modalities, such as the ones we've discussed?

A. I could see where somebody would think that's a

004656

004656

# EXHIBIT "17"

## Surgery Center Procedure

Patient: WILLIAM J. SIMAO EMRN: 1641554
Encounter: Nov 11 2010 8:15AM

DESCRIPTION OF PROCEDURE:

The patient was identified in the pre-operative holding area. A peripheral intravenous catheter was in place. The risks, benefits and alternatives were discussed in detail with the patient and written informed consent was obtained. The patient was brought to the fluoroscopy suite where they positioned themselves in the supine position on the fluoroscopy table. Standard monitors including ECG, blood pressure, and pulse oximetry were placed. The patient's cervical region was prepped and draped in a sterile fashion.

LEFT C3-4

In the right anterior oblique fluoroscopic view, the C3-4 neural foramen was identified. 1% lidocaine-MPF was used to anesthetize the skin and subcutaneous tissues overlying the target point. The posteromedial aspect of the C4 superior articulating process at the waist of the foramen was identified. Selected needle was advanced to this point under fluoroscopic guidance. When the C4 superior articulating process was contacted, the needle was gently walked ventromedially into the posterior portion of the foramen. Needle tip position confirmed on AP and lateral fluorscopic views. Negative aspiration for blood and CSF. 0.5 mL of non-ionic contrast injected easily and demonstrated outline of the C4 nerve root and spread proximally through the foramen into the lateral epidural space. This was viewed in the oblique, AP, and lateral views. After repeat negative aspiration for blood and CSF, injectate was administered without difficulty. Needle was withdrawn into subcutaneous tissue, flushed and withdrawn.

Patient tolerated the procedure well and was transferred to the PACU in stable condition.

004657

INJECTATE:

1 mL BETAMETHASONE (CELESTONE) 6MG/ML

0.5mL 1% LIDOCAINE (preservative free)

004657

Follow up: Arranged by Pain Management clinic.

**Signature**
Signed By: Nader Helmi DO; 11/14/2010 8:35 AM PST; Author.

# *Procedure Follow-Up*

**Southwest Medical Associates, Inc.**
**Southwest Medical Associates, Inc. P.O. Box 15645**
**Las Vegas, NV 89114-5645**
(702)877-8600

| | | | |
|---|---|---|---|
| Patient: | WILLIAM J. SIMAO | EMRN: | 1641554 |
| | 121 BEAR COAT COURT | Age/DOB: | 47/May 08, 1963 |
| | HENDERSON, NV 89002 | | |
| | | Home: | (702)296-9275 |
| Encounter Date: Nov 12 2010 10:47AM | | Work: | |

**PROCEDURE FOLLOW-UP**
Spoke with pt post procedure he states he is feeling great.
**Signature**
Signed By: Casandra Haney ; 11/12/2010 10:48 AM PST; Author.

004658

004658

004659

004659

# EXHIBIT "18"

# *Clinic Follow-Up*

**Southwest Medical Associates, Inc.**
**Southwest Medical Associates, Inc. P.O. Box 15645**
**Las Vegas, NV 89114-5645**
(702)877-8600

Patient: WILLIAM J. SIMAO
121 BEAR COAT COURT

HENDERSON, NV 89002

EMRN: 1641554
Age/DOB: 47/May 08, 1963

Home: (702)296-9275
Work:

Encounter Date: Nov 23 2010 9:20AM

**INTERVAL HISTORY**

S:The patient comes in today for a followup of a left C3-4 transforaminal epidural steroid injection completed by Dr. Helmi on November 11, 2010. The patient states he appreciated a 75 to 80% reduction in his left upper extremity pain with this procedure. He is quite happy with the results.

He also states that he had recently been evaluated by Dr. Daniel Lee, orthopedic spine surgeon for a second opinion as it relates to his neck. He did state that he had apparently some rather severe stenosis and did discuss with him the possibilities of surgical interventions should he not get better with procedures at this office.

P:The patient is currently appreciating a 75 to 80% reduction in his left upper extremity symptoms and left-sided neck pain with this most recent transforaminal epidural steroid injection. At this time, no additional interventional treatments are required. We did however discuss the possibilities of additional procedures should his symptoms return. The patient will follow up p.r.n.

Terry Robichaud, PA-C m2/kls/apj Date:

DD: 11/23/2010
DT: 11/24/2010 10:25:41.

**Active Problems**

Bulging Disc (C4 - C5) (722.0)
Cervical Postlaminectomy Syndrome (722.81)
Cervical Radiculopathy (723.4)
Cervical Radiculopathy At C4 Nerve Root; Left (723.4); Secondary to facet hypertrophy.
Cervicalgia (723.1); With LUE radiculopathy.
Common Migraine (Without Aura) (346.10)

Episodic Tension-type Headache (339.11)

Migraine Headache (346.90)
Myalgia And Myositis (729.1)
Nicotine Dependence (305.1)

**0265**



004660
004660
004660

# Clinic Follow-Up

Patient: WILLIAM J. SIMAO EMRN: 1641554
Encounter: Nov 23 2010 9:20AM

Visit For: Preoperative Exam (V72.84)

**Allergies**
Penicillins.

**Current Meds**
Butalbital-APAP-Caff-Cod 50-325-40-30 MG Capsule;TAKE 1 CAPSULE AS NEEDED EVERY 4-6 HOURS FOR HEADACHES; Rx

Zomig ZMT 5 MG Tablet Dispersible;one tablet at migraine onset, repeat after 2 hours if needed, not to exceed 2 tabs in 24 hours; Rx
Oxycodone-Acetaminophen 5-325 MG Tablet;TAKE 1 TABLET EVERY 4 TO 6 HOURS AS NEEDED FOR PAIN.; Rx
Cyclobenzaprine HCl 5 MG Tablet;TAKE 1 TABLET 3 TIMES DAILY AS NEEDED.; Rx
PredniSONE 20 MG Tablet;take 2 po daily for 5 days; Rx

Naproxen 500 MG Tablet;TAKE 1 TABLET 3 TIMES DAILY PRN pain take with food or after meals; Rx.

**Assessment**
- Cervical postlaminectomy syndrome (722.81)

**Orders**
99213 Est Pt Limited.
Follow up PRN.

**Signature**
Signed By: Maliha Barikzi MA I; 11/23/2010 9:04 AM PST; Author.
Signed By: Terry Robichaud PA-C; 11/29/2010 8:05 AM PST; Author.

004661
004661



004661

004662

# EXHIBIT "19"

**NEVADA ORTHOPEDIC & SPINE CENTER**

P.O. Box 36550
Las Vegas, NV 89133-6550

1505 WIGWAM PKWY, SUITE 330
HENDERSON, NV 89074

(702) 878-0393

| | |
|---|---|
| Patient Name: | WILLIAM J SIMAO |
| Patient ID: | 316811 |
| Date of Birth/Age: | 05/08/1963 47 yrs, 9 mths |
| Date of Examination/Report: | 02/24/2011 |

## ORTHOPEDIC EVALUATION

CHIEF COMPLAINT: This is a 47-year-old who is status post ACDF C3 through C5. He has mostly axial neck pain. He can see pain management. There are no surgical indications at this time.

PHYSICAL EXAMINATION: Motor and sensory is satisfactory.

DIAGNOSTIC STUDIES: MRI was re-reviewed most recently because the other one was done a year and a half ago. It shows no significant stenosis within the neural foramen of C3-4.

ASSESSMENT/PLAN: As above.

Daniel D. Lee, M.D.

/tr
DD: 02/24/2011
DT: 02/28/2011
Confirmation Number: 572

Dictated, not edited.
cc: JAMES METCALF MD



004663
004663
004663

004664

004664

# EXHIBIT "20"

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

UCLA

SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ORTHOPAEDIC SURGERY
Physical Medicine and Rehabilitation
UCLA School of Medicine
1250 16th St. 7th Floor
Tower Building, Room 715
Santa Monica, CA 90404

OFFICE: 310.319.3815
FAX: 310.319.3055
EMAIL: dfish@mednet.ucla.edu

# Independent Record Review Addendum # 5

**DATE OF REVIEW:** February 9, 2011

**RE:** SIMAO, William

**DATE OF INJURY:** 04/15/2005

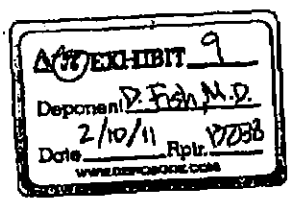
To Whom this May Concern:

I was asked by the law offices of Rogers, Mastrangelo, Carvalho and Mitchell to review the additional medical records and imaging of William Simao. I was also asked to give my opinions, based on these records, as to assessment of medical damages caused by the accident, causation, future care needs, necessity for treatment, and overall recommendations. All of my opinions below are based on a reasonable degree of medical probability.

I am currently full time faculty member at UCLA Medical Center. My position is Director of Physiatry and Interventional Pain Management at the UCLA Spine Center. I am board certified in Physiatry and Pain Management. I have provided by CV.

**RECORDS REVIEWED:**

1. Kathleen Hartmann, RN, BSN, CCM, CLCP Updated report 11/8/2010



UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

UCLA

SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ORTHOPAEDIC SURGERY
Physical Medicine and Rehabilitation
UCLA School of Medicine
1250 16th St. 7th Floor
Tower Building, Room 715
Santa Monica, CA 90404

OFFICE: 310.319.3815
FAX: 310.319.5055
EMAIL: dfish@mednet.ucla.edu

## IMPRESSION AND DIAGNOSES:

Related to the motor vehicle accident of April 15, 2006:

1. Non specified myofascial pain, resolved.

Unrelated to the motor vehicle accident of April 15, 2006:

1. Migraine headaches.
2. Degenerative cervical spine disease.
3. Left shoulder subacromial bursitis.
4. Myofascial pain and muscle spasm.
5. Mandible Extraction Deformity.
6. Occipital Neuralgia.

004666

004666

## COMMENTARY AND MEDICAL DECISION MAKING:

I reviewed the updated LCP authored by Ms. Hartmann's on November 8, 2010 and this report addendum for Mr. Simao is only for evaluation purposes as there is no doctor patient relationship implied. Evaluation is consistent with history and previous physical examination by treating physicians. All records sent to me are reviewed for the purpose of a medical decision based upon the events of the current pain complaints. The opinions of this report are based upon examination of Mr. Simao and/or review of the medical records provided to me. All of my opinions have been rendered with a reasonable degree of medical probability but are preliminary to the extent that there is relevant information that I have not yet had the opportunity to review.

My opinions in regards to Mr. Simao are based upon my clinical experience as an active treating Physiatrist who specializes in Physiatry, Pain Medicine, and Electrodiagnostic Medicine. I am currently on staff at the UCLA School of Medicine in the UCLA Spine Center and the UCLA Medical Center. I am involved with resident and fellowship training of physicians at UCLA and must maintain updated and clinically relevant evidence-based guidelines for treatment of patients that fall within the standards of



004666

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ORTHOPAEDIC SURGERY
Physical Medicine and Rehabilitation
UCLA School of Medicine
1250 16th St. 7th Floor
Tower Building, Room 715
Santa Monica, CA 90404

OFFICE: 310.319.3815
FAX: 310.319.5055
EMAIL: dfish@mednet.ucla.edu

care. I would approach the patient as I would approach any patient with similar pain complaints as a treating physician. Based also upon my forensic review of the records, I made the following conclusions.

In summary, Mr. Simao was involved in a motor vehicle accident in which he was a restrained driver, struck from behind on April 15, 2005. The accident report noted moderate damage to the vehicles. Both were driven away. Mr. Simao was the only vehicle occupant who reported injury. He complained of headaches and neck pain. Four hours after the accident he went to the Urgent Care where he was given conservative treatment and ruled out for significant trauma. Mr. Simao had a significant history of headaches with treatment consistently for four years prior to the MVA of April 15, 2005. Post MVA, Mr. Simao did not pursue any aggressive treatment options from May 2005 to October 2005 and his care was sporadic and related to his pre-existing headaches. His first visit of May 5, 2005 to the Southwest Medical Associates had complaints of headache and no neck pain. The physical examination revealed a neck that had full range of motion as the assessment was a closed head injury and no mention of neck symptoms or pain. It was not until October 6, 2005 that his neck pain began to be an issue as he complained of shoulder pain radiating to his neck, for which he was again evaluated and underwent radiographs which were reported as normal for the cervical spine. It was not until December 12, 2005 that he was started on pain medications for neck pain assessed as a cervical strain and January 16, 2006 he began therapy for his neck, which was nine months post-MVA. It was noted on a routine follow up of May 6, 2005 that Mr. Simao was being seen only for headache complaints which was just before the CT of the BRAIN on 5/13/05 that revealed a normal unremarkable head CT. The subsequent MRI of the BRAIN on 5/23/05 was found to be a normal unremarkable MRI for age with no abnormal enhancing lesions.

The updated life care plan (LCP) authored by Kathleen Hartmann indicates that Mr. Simao will need future medical care with a cervical spine surgery revision, therapy to accompany the surgery, and medications for the treatment of pain in the neck regions as well as additional trigger point injections, medial branch blocks, and/or transforaminal epidurals. She now notes that this will be required quarterly evaluations by Dr. Seibel for a lifetime based upon his pain complaints, increasing age, and work. It should also be noted that Mrs. Hartmann believes that therapist describe the need for 6 visits per year for a lifetime after fusion of the spine.

The LCP notes that a Dual King adjustable bed is needed for sleep improvement over 4 hours as suggested by Mr. Simao and that this bed would help with assistance for mobility and independence.

The new LCP further states that a complication can cause the need for additional surgery and a dorsal column stimulator



004667
004667
004667

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ORTHOPAEDIC SURGERY
Physical Medicine and Rehabilitation
UCLA School of Medicine
1250 16th St. 7th Floor
Tower Building, Room 715
Santa Monica, CA 90404

OFFICE: 310.319.3815
FAX: 310.319.5055
EMAIL: dfish@mednet.ucla.edu

As for the totals of costs when compared to her previous LCP the following is noted:

Projected evaluations is now $ 0.00

Future Medical Care Routine has been increased from $9,669.00 to $31,175.00
This is due to the quarterly visits with pain management, Dr. Seibel for a lifetime.

Future Surgical Care $249,677.00 to $427,560.00
This is due to a change in the trigger point, epidural and selective nerve root block injections from 2 in a lifetime to annual injection for 31 years of all three procedures. The visits to Dr. Seibel have been dramatically increased yearly.

Projected Modalities increased from $4,200.00 to $15,660.00
This is due to the PT visits being done annually instead of every other year need.

Diagnostic and Laboratory needs increased from $12,096.00 to $18,565.00

Medication and Supply needs decreased from $96,068.00 to $6,754.00

A total LCP amount of $338,620 to $389,899 increased to projected $301,267 to $513,027

004668

004668

**SUMMARY OF NEW LCP AND OPINIONS:**



004668

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

UCLA

SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ORTHOPAEDIC SURGERY
Physical Medicine and Rehabilitation
UCLA School of Medicine
1250 16th St. 7th Floor
Tower Building, Room 715
Santa Monica, CA 90404

OFFICE: 310.319.3815
FAX: 310.319.5055
EMAIL: dfish@mednet.ucla.edu

Based upon the new records and my previous opinions, the following are my opinions for Mr. Simao:

1. Mr. Simao had a significant history of headaches with treatment prior to the MVA of April 15, 2005. He had issues with headaches consistently for four years before the MVA in question. Post MVA, Mr. Simao did not pursue any aggressive treatment options from May 2005 to October 2005 for his neck and his care was sporadic and related to his pre-existing headaches. It was not until October 6, 2005 that his neck pain was advised to his health care providers and he did not start PT until January 16, 2006 that he began therapy for his neck, nine months post-MVA. The PT note at that initial visit indicated that his neck pain had been present for over six months and began after an MVA in April 2005. Furthermore, the Southwest Medical Associates progress note of December 21, 2005 indicated that his neck pain was worsening from two weeks prior or the beginning of December 2005. The LCP again has a discussion of surgery to the cervical spine but the symptoms of the cervical spine is clearly not related to the MVA of 4/15/05 as they began seven months to nine months after. I continue to disagree with the spinal injections, discograms, cervical spine surgical intervention, medications, home furnishings, and routine treatment. The treatment for the cervical spine after 5/6/2005 is not related to the MVA. The examination at SWMA had no pain in the neck with FULL RANGE OF MOTION on October 6, 2005 and therefore would be in medical probability a normal neck examination as the pain in the neck would be a referral pain from his chronic migraine headaches.

004669

2. Mrs. Hartmann again did not comment on the updated LCP that since the surgery to the cervical spine did not help his pain that the surgery was not a reasonable treatment for his cervical spine. She and Dr. Seibel have failed to realize and acknowledge that Mr. Simao has chronic headaches and the cervical spine surgery was not indicated for this diagnosis. Mrs. Hartmann has now indicated that even after surgery to the cervical spine, annual spine injections would be required and has increased the cost in her LCP erroneously. There is no evidence based medicine that would indicate the necessity and indications for yearly injections after surgery. Not only would this imply that the surgery did not work for the problem, but places undue risk to Mr. Simao for complications. Since Mr. Simao continues to complain of pain in his neck, shoulder, and head after both spine surgeries, it is with medical probability, the symptoms are not due to the April 15, 2005 MVA, but due to his chronic headaches. Treatment to the cervical spine is unrelated to the MVA, thus the LCP should not include such treatment.

3. The new LCP has indicated that Mr. Simao would need a life time of pain management with Dr. Seibel which is not related to the MVA, but would be related to his chronic headache condition. Any treatment to Mr. Simao after May 16, 2005 would be related to the pre-existing headaches and not to the MVA. Therefore any pain management that is being done in the LCP has no merritt for the cervical spine pain, but would be related to a pre-existing headache condition. The increase in future medical care routine is not reasonable, necessary, or related to the MVA of April 15, 2005.



004669

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

UCLA

SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ORTHOPAEDIC SURGERY
Physical Medicine and Rehabilitation
UCLA School of Medicine
1250 16th St. 7th Floor
Tower Building, Room 715
Santa Monica, CA 90404

OFFICE: 310.319.3815
FAX: 310.319.5055
EMAIL: dfish@mednet.ucla.edu

4. Mrs. Hartmann has indicated in the LCP that BOTH cervical epidurals (ESI) and selective nerve root blocks (SNRB) would be needed. What Mrs. Hartmann fails to realize is that these injections are exactly the same procedure and therefore would not be a separate entry or procedure. The difference between the SNRB and ESI is the placement of the needle location which is still in proximity to the neuroforamen of the cervical spine. Performance of both injections would not only be duplication, but unreasonable and unnecessary when treating cervical radiculopathy. The LCP should not include both of these procedures and would be used in this LCP only to increase value to the overall numbers and not have any medical merritt for use with treatment of any patient.

5. The projected modalities section has been quadrupled from $4,200.00 to $15,660.00 due to the PT visits being done annually instead of every other year in the original LCP. The use of this much PT each year is not only unrealistic and medically unreasonable, it would be considered medical fraud. PT is reserved for treatment of an acute process with defined goals. Using PT for a chronic condition not only defeats the purpose of spine surgery to cure the pain, but is unnecessary for treatment when a patient reaches a maximal medical status. The LCP indicating a lifetime of annual PT is done only to increase the value of the LCP and not with any reason for standard medical treatment.

6. There is no cervical spine source for Mr. Simao's migraine headaches. He had a previous history of migraine headaches and a previous MVA. The cervical MRI in 2006 was reported to demonstrate C3-4 and C4-5 disc protrusions and other degenerative changes without compression effects on the C4 or C5 nerve roots. Two years later on 4/30/2008 the actual images that I reviewed were not significantly changed and show no pathology that can explain his complaints. There would be no reason to perform any more imaging as it relates to the MVA, nor is there a reason to perform a discogram between the first and second surgery. The LCP has indicated in the Diagnostic and Laboratory Needs that $15,077.00 is needed for a discogram to prepare for the second surgery after the first done on 03/25/09 by Dr. McNulty. I would not consider the first discogram done to be reasonable based upon the MVA and therefore any additional discograms or revision surgery to the cervical spine would be unnecessary based upon the April 15, 2005 MVA.

7. For home furnishings, Mrs. Hartmann has indicated that Mr. Simao requires a Dual King Adjustable Bed to help with change in position and comfort, independence in mobility transfers and safety. By this standard, every cervical spine surgery patient would need a Dual King Adjustable Bed and obviously this is not the norm or even considered a reasonable request. Mr. Simao, based upon the video Surveillance demonstrates that any injury from the MVA on April 15, 2005 recovered as there were no deficits of function or restrictions or limitations that can be seen three years after the MVA. On the video, Mr. Simao did not display any range of motion limitations, lifting precautions, or functional deficits consistent with a



004670

004670

004670

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

UCLA

SANTA BARBARA • SANTA CRUZ

DEPARTMENT OF ORTHOPAEDIC SURGERY
Physical Medicine and Rehabilitation
UCLA School of Medicine
1250 16th St. 7th Floor
Tower Building, Room 715
Santa Monica, CA 90404

OFFICE: 310.319.3815
FAX: 310.319.5055
EMAIL: dfish@mednet.ucla.edu

cervical spine problem that required any interventions or surgery. The LCP that continues to include a shower bench, hand held shower, front wheeled walker, cervical collar, and Dual King adjustable bed is unnecessary and unrelated to the MVA. Mr. Simao is obviously independent and safe so that he does not require an adjustable bed. The addition of this home furnishing is done merely to increase the value of the LCP and not medically relevant based on the facts.

8. The updated LCP has decreased accurately the need for Fiorinal with codine as this is treatment for chronic headaches which is what Mr. Simao is currently being treated for with pain management. The $90,000.00 projected cost for this medication was appropriately removed from the medication lists, but given that the Mrs. Hartmann and Dr. Seibel have failed to appropriately diagnose Mr. Simao's true pain complaints of chronic headache, this accurate omission is an indication that the headaches are the source of Mr. Simao's treatment needs and has nothing to do with the cervical spine.

004671

9. Assuming the MVA caused a strain injury, the treatment before May 6, 2005 would be related to the MVA, but any treatment after this date would not be related to the MVA. Given the history of a previous MVA, his job description of a manual laborer, the reported delay in onset of pain, a previous history of migraine headaches, the MRI showing no traumatic pathology, and his lack of response to cervical spine surgery, any necessary treatment in relation to the MVA ended on May 6, 2005. All new and updated LCP references to future medical care would be unnecessary based upon the MVA. There is no indication that based upon the MVA, a dorsal column stimulator, cervical degenerative arthritis, and need for revision surgery to the cervical spine is necessary.

004671

10. It is important to note that I have not seen any medical records from medical doctors for treatment that is included in her life care plan, such as hardware removal or adjacent segment disease.

**David E. Fish, MD, MPH**
Chief, Division of Interventional Pain Physiatry
Associate Professor, UCLA Department of Orthopaedic Surgery
Physical Medicine and Rehabilitation, UCLA Spine Center
Electrodiagnostic Medicine, Pain Medicine
David Geffen School of Medicine at UCLA

004672

004672

# EXHIBIT "21"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs, | ) | CASE NO. A-539455 |
| v. | ) | DEPT. X |
| JAMES RISH, LINDA RISH and JENNY RISH, Defendants. | ) | |

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

WEDNESDAY, MARCH 30, 2011

**REPORTER'S TRANSCRIPT**
**TRIAL TO THE JURY**
**DAY 8 - VOLUME 1**

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | DAVID T. WALL, ESQ.<br>ROBERT M. ADAMS, ESQ.<br>ROBERT T. EGLET, ESQ.<br>Mainor Eglet |
| For the Defendants James and Linda Rish: | BRYAN W. LEWIS, ESQ.<br>Lewis and Associates, LLC |
| For the Defendant Jenny Rish: | STEVEN M. ROGERS, ESQ.<br>CHARLES A. MICHALEK, ESQ.<br>Hutchison & Steffen, LLC |

RECORDED BY: VICTORIA BOYD, COURT RECORDER

TABLE OF CONTENTS



004674

004674

EXHIBITS



004675

004675



004675

WEDNESDAY, MARCH 30, 2011 AT 12:54 P.M.

[Outside the Presence of the Jury]

THE COURT: [Audio Begins] -- that needs to be addressed. And counsel know that there's an issue with respect to the way that the exhibits have been marked? Clerk has advised me.

MR. WALL: The way they've been marked?

THE COURT: No.

MR. ADAMS: She wants you to put in front of the jury what's admitted.

MR. WALL: Oh, okay.

MR. ROGERS: Okay, wait one moment. I still didn't get an answer to a couple questions.

THE COURT: We really don't have time to address this argument now. We intend to bring our jury in. I think you can make this record at a later point in time.

MR. MICHALEK: Actually, Your Honor, the problem is I can't. They're expecting to bring Stan Smith in today to testify. And the problem is I need to have the opportunity to make my record beforehand which is why I contacted the Court at 12:30 to say we had an issue. And I'm sorry that MR. ADAMS, you know, we certainly are happy to have him raise his issue regarding Dr. Wang but we requested a half hour beforehand to discuss this very important issue. The Plaintiff's counsel --

MR. ADAMS: You were already scheduled --

004676

004676

MR. MICHALEK: -- has dropped on us an expert report of Stan Smith yesterday at 1:32 p.m. while we were here in the courtroom. They served it upon our office. Now this report adds 2.6 million dollars in future life care based upon the testimony of Dr. McNulty. It is not appropriate, Your Honor, during trial to supplement an expert report with new opinions and adding 2.6 million dollars to the testimony. There's no authority for that whatsoever.

There is a time and a place for a cutoff of discovery and I understand that the experts can supplement their reports. But during trial, a new opinion of 2.6 million dollars? Without even one judicial day's notice to the Defense? That is clearly improper, Your Honor. There is no way that Mr. Smith should be able to discuss the cost of future life care when he provides this opinion in a new expert report to us less than 24 hours ago and it wasn't even given to us here at counsel table. It was sent back to us to our office.

And then again this morning, there was a second supplement of purported to be future care based upon Dr. Wang's testimony. We need to have an opportunity, you know, to get these experts report timely and they weren't provided timely. There is no authority that you can supplement during trial an expert report of a new opinion. This is clearly improper, Your Honor. So I would ask that Mr. Smith be

004677

004677

precluded from giving any future life care opinion based upon this new information which was never disclosed and it's under 16.1 or 26 and certainly not timely.

Secondly, Your Honor, if you're not going to do that, then I request a continuance and a mistrial so that we can hire our own expert to go over these numbers and these figures that they haven't been provided. And certainly there doesn't seem to have been any time that we can get these witnesses in even if I could find one on a spur of the moment and bring them in here between now and Wednesday when there seems to be the Court's issues. So my solution would be just mistrial, continue it, you know, a month or two and we'll get the proper expert.

But the Defense can't be prejudiced. We are irrevocably prejudiced by this. And I will note, Your Honor, that when you granted their motion to allow Dr. McNulty to testify, the argument from the Plaintiff and Mr. Adams was well, they were provided notice four months ago. There was an expert report and it provided notice of the future surgery. I don't agree with that. But let's take that as true. If that's true, Your Honor, then this report should have been given to us four months ago. It can't be -- it's got to be equal. If we were on notice four months ago that there was a need for a future surgery, then this expert should have given his report to us four months ago. Not yesterday. And so, you

004678

004678

know, the rules have got to be applied both ways. If that was your Court's ruling, then this expert's got to be precluded from giving a life care opinion that wasn't disclosed to us less than 24 hours ago.

THE COURT: Mr. Adams.

MR. ADAMS: Here's the deal, Your Honor, we keep rehashing everything that we kind of rehashed throughout the course of this trial. They start with their premise that the spinal cord stimulator is a surprise to them. Let's just rehash what we already argued and you've already ruled on. Number one, they took Dr. Seibel's deposition on August 20th, 2010. He put them on notice. Number two, Kathy Hartman put them on notice when she put the spinal cord stimulator in their report.

Now let's talk about what they did when they got that report. They filed a motion in limine before this Court to exclude Kathleen Hartman and this Court ruled if the foundation is laid during trial, she's permitted to testify. That's the second time they were put on notice.

Now this is the incredible one. How do they even get out of this? They had the opportunity to hire the right expert. They hired Dr. Fish and as Mr. Eglet attaches a Court's exhibit yesterday, the February 9th, 2011, one month before this trial, Dr. Fish generated a report. It's a Court's exhibit. In there, Dr. Smith renders opinions with

004679

004679

regard to the spinal cord stimulator. How they can say it's a surprise when it's their own expert, Your Honor?

Now, starting from the premise that the spinal cord stimulator is not a surprise because it clearly isn't a surprise. They next try to attack Dr. McNulty. Dr. McNulty, they attack in the two ways. They say, first of all, he should give us a report. Okay. Or he should be excluded. Yet again we've argued this in pretrial motions. You specifically ordered on all fours by the way on the case law in Nevada, I can go through the drafter's note to 16.1 or I can go through the Piper case, but that's already been argued. As the Court knows, treating physicians don't need to author an expert report. The foundation for the spinal cord stimulator was laid through Dr. McNulty as a treating physician. Piper says that he can do that for prognosis, future care, future medical needs and his past treatment by the way.

Next what do they do? They try to say that if a treating physician doesn't give a report or doesn't give a report, then he should be excluded altogether based on the fact he didn't comply with the report. Perhaps the most disingenuous argument made of all in their brief, they cite the Leiper, L-E-I-P-E-R, v. Margolis case for that standpoint. Mr. Wall actually pulled that case. The Leiper case and I'm just going to read from the hold it, Your Honor. Well, let me

give you a little bit of facts. The District Court in that case based on Defense motion excluded the treating physician. So the treating physician wasn't able to testify. Okay. On appeal, the Supreme Court says and I quote, we conclude that the District Court abused its discretion in prohibiting Leiper, the Plaintiff's physician, from, or excuse me, the Plaintiff from calling Dr. Miller as a witness. So they overturned that ruling. So this Court has been consistent with Nevada law with regard to all these issues that we've been discussing, okay.

Why are they trying to exclude Dr. McNulty's opinion? Why are they trying to exclude the spinal cord stimulator which we know that they were already put on notice of? Because they know Dr. Smith is going to come in and testify. Our expert, who they did not oppose, they didn't oppose by the way, okay, the four million -- what his opinions were, but based as this Court knows and I guess I'll get the statute just so that we're clear for the record. Nevada statute allows for -- I've got too many pieces of paper here. And the statute is NRS 50.285 allows for expert opinions to form opinions as the evidence is presented at or during trial. Specifically, NRS 50.281, subsection 1. The facts or data in the particular case upon which an expert bases his opinion or inferences may be those perceived by or made known to him, the expert, at or before the hearing.

004681

004681

In this case, when Dr. McNulty testified, we've been ordering the daily transcripts. We provided the daily transcripts to Dr. Smith. Dr. Smith then used the information that was presented in this Court from the daily transcript, from Dr. McNulty's testimony and refined his opinions based on the evidence that came in at trial, okay?

Now, one thing that Mr. Michalek has said, I agree with. There's no obligation to give them a report. And there isn't. There is no obligation for me to give Stan Smith's updated report to Mr. Michalek. But I figure Mr. Michalek and the Defense would come in here and say guess what, these are new opinions. We don't even know what the base of his opinions are. We can't see how he calculated those opinions. Some in an effort to streamline this trial, I gave them that report. No way did I give them the report from Dr. Smith's opinions from when Dr. McNulty testified. But yesterday, after Dr. Wang testified with regard to the adjacent seminal breakdown. I sent that information also to Dr. Smith who generated another report. And 20 minutes after I receive it, I sent it over to Defense counsel and I have ROCs for both reports.

My point is, Your Honor, is an expert is allowed to rely on the evidence as it comes through -- in through trial. We're clear on that through Nevada law. I was under no obligation to give that information to the Defense. But I

004682

004682

wanted the trial to streamline. I didn't want the cross-examine to be -- cross-examination to be belabored and they're not knowing what's going on. So I gave it to them. That's why I gave it to them. So if they're like berating the point if we're giving them information, you know, then I apologize for that. I just wanted to streamline the way the evidence and the way this case is going to pursue.

Going back to my original premise, they were on notice at least three times of the spinal cord stimulator. So the fact that somebody testifies to it at the time of trial, they cannot claim surprise especially when one of those prongs is their own expert.

MR. MICHALEK: Your Honor, the only thing I can to that is I am stunned. I am stunned that counsel would ignore the obligations under 16.1 and 26. The statute that counsel cited in no way reduces the obligation of counsel to provide to opposing counsel a supplement, a timely supplement of the expert report. And the fact that he says well, he's just trying to streamline things. To provide notice 24 hours ahead of time or less than 24 hours ahead of time? No, that's clearly improper.

The fact is, Your Honor, they had a duty, every expert is under the duty to timely and properly supplement the reports. And that occurs prior to trial. Not even during trial. This is an entirely new opinion. It's just not even a

004683

004683

basic supplementing the numbers, which is one thing. This is -- this expert, Mr. Smith, had never heard of the testimony of Dr. McNulty before. And he's giving a totally new opinion based upon that testimony. So it's not something basic like a supplement, you know, where maybe some interest rates have changed and there's a higher figure. That at least I could understand. This is an entirely new opinion that we were never given notice of.

Now, counsel makes reference to well there was notice four months ago. I disagree with that. But let's assume that's true, Your Honor, that they were on notice four months ago or we were on notice of four months ago. They had the obligation for the last four months to provide us a supplement of this expert's report. You cannot withhold a supplement to the report if both sides are on notice and wait to spring it at trial. That's what's called trial by ambush. That does not happen in Nevada. That's why we have the Rules of Civil Procedure. The rules are there so that if an expert improperly supplements his opinion that expert is stricken. That's why we have the rules. And clearly there was no compliance with these rules. There was no proper supplementation. At 1:32 p.m., Mr. Rogers and I are here in trial. I'm not being aware of any notice. He can send it to my office but certainly no one's there. I guess arguing with counsel earlier, he is saying we called Ms. [sic] Eglet. I

004684

004684

guess they did contact Ms. Mastrangelo by sending the supplement there. So I mean it sort of goes both ways.

We're being held to different standards here. These guys should never -- Mr. Smith should not be allowed to testify. He did not timely supplement his report. The future damages should be stricken and if that's not stricken, then I request a continuance and a mistrial so I can find my own expert. Dr. Wang, unfortunately is not familiar with the numbers as he testified yesterday. He can't comment upon the surgeries in Las Vegas. I have no way to counter Dr. McNulty's opinions. I have no way to counter Dr. Smith's opinions. And so we are irreparably harmed. If this information were to go forward, I request either exclusion on this basis or a mistrial and a continuance.

MR. ADAMS: No way to counter Dr. McNulty's opinions. Dr. Fish authored a report. They could have countered it through Dr. Fish. They chose not to. He testified in his report that it wasn't reasonable. That's the position they took. Instead of, okay, giving, you know, this information that our economists or having Dr. Smith, you know, or Dr. Fish rebut it, you know, when he was testifying. They didn't choose to do that. Okay.

One component I guess -- one of the other areas and I forgot to mention in my earlier argument is, they're attacking Dr. McNulty from being able to render this opinion

004685

004685



004685

when he hasn't seen the Plaintiff in a year. Well, as Dr. McNulty testified, his partner Dr. Lee is seeing my client. And in fact, it was just last month, okay, right at the time of the authored report by Dr. Smith when Dr. Lee said that he is recommending pain management. Not a future surgery. With regard to the repair. So at that point, last month, at the time that Dr. Smith authored his report, they had the most updated information. Again, Dr. Lee, treating physician, doesn't need to author a report. He put it in his medical records. That's what the treating physicians do. They had ample notice of this as late as last month from their own expert and from one of the treating physicians here. They just can't claim surprise. And for them just to disregard NRS 50.285 that experts can't formulate opinions on evidence that comes in at trial is just incredible. I mean why else would we have that statute?

With regard to the timeliness, we got the transcript the day before -- the day I got the transcript, I sent it to Dr. Smith. That next morning I get the report. I do the supplement. I did serve it at their office because that's how they've been serving me medical records in this case. Figured I'd use the same method of delivery. And then when Dr. Smith gave me his second report based on the testimony of Dr. Wang from yesterday, I gave it to them within 20 minutes of receiving it. There's no prejudice here because they have

004686

004686

their own economist. He's drafted a 35-page report in which he talks about his, you know, his qualifications. I mean there's no prejudice to them. They've got -- and he said he's not even available till Monday, they've got geez, four, what four days for him to look at this report. Actually two reports, of which I was under no obligation to even give them.

I mean they should have used this -- if I didn't give them the report, they would have to use the same method that I used. Getting the transcript, sending to their expert, their expert take the time, extrapolate, read the transcript and then formulate his opinions. Here I've shortcutted that circuit for them and just given them the reports.

MR. MICHALEK: Your Honor, he keeps referring to these treating physicians. We're not talking about treating physicians and we're not talking about notice. I've already explained to the Court that we can go back four months and say the Defense is on notice. The Plaintiffs are on notice, too. Stan Smith is an economic expert. He is not a treating physician. He has a responsibility under the NRS 16.1 and 26 to timely supplement his reports. He did not do so.

Secondly, Mr. Scoob [phonetic] as the Court is aware is a rebuttal expert. Not -- and we didn't give him opinions of his own. He is simply here to rebut the opinions and the methodology of Stan Smith regarding economic damages. So no, I can't simply give numbers to some expert, his rebuttal. He

004687

004687

can't come up with numbers on his own.

So we are irrevocably prejudiced by this. Again, I'll keep it simple. The fact is if we were on notice four months ago of some expert in a deposition saying hey, there is a future damages, then they were on -- at that obligation, if they wanted Stan Smith to come into this courtroom and testify about 2.6 million dollars in futures, he needed to supplement his report prior to trial. He did not do so. It was not timely. We were not on notice of it. It has nothing to do with the treating physician. This is an expert that has a responsibility to disclose. He did not timely disclose. I'm not asking for him to be stricken in full. I just want the 2.6 million that he says that we weren't on notice of prior to trial, that be, for him to be excluded.

If not, then I got to request a continuance so that I can get experts to counter this stuff, Your Honor.

THE COURT: Mr. Michalek, the objection's noted for the record. The motion is denied, the motion for mistrial is denied. Let's bring our jury panel in.

MR. WALL: Your Honor, can I bring my first witness in, too?

THE COURT: Yes.

[Jury In]

THE COURT: Please be seated, ladies and gentlemen. Counsel stipulate to the presence of the jury?

004688

004688

Q In your opinion, the Plaintiff's complaints are not the direct result of this car accident?

A Okay. I think you're taking that out of context because what you just read had to do with the facet hypertrophy and you're asking if that was caused by the accident and I said no, I don't believe it was caused by the accident. It was a degenerative change. I agree to that. But as far as the pain problem in general being caused by the accident, I don't -- that is different from what you're asking about the facet hypertrophy.

Q Turn to page 81.

A Okay.

Q Lines 16 through 24.

A Right.

Q If you would read that to yourself.

A Okay.

Q And I'll recite it. And read along with me.

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

004689

004689

A Exactly.

Q All right. So if we use the 15-percent number, do you have -- have you calculated out both what it would be under the average value of life of 5.4 million, and also with your conservative number of 4.1 million?

A Just the 4.1 -- just the 4 --

Q Just the 4.1?

A Only the 4.1 million.

Q All right. What did you come up with as 15 percent based on your --

A A 15-percent impairment rating would be 603,000, and then I mean the computer can compute it to the nearest dollar. But I'm not suggesting we know it that precisely. But 603,454 if you want to get that precise, but I think to the nearest thousand is probably --

Q And what about if we use 30 percent?

A So if we use 30 percent it's really -- it's double that number. It's 1,206,884. We could think of it also for each ten percent. Each ten percent is roughly 402,000.

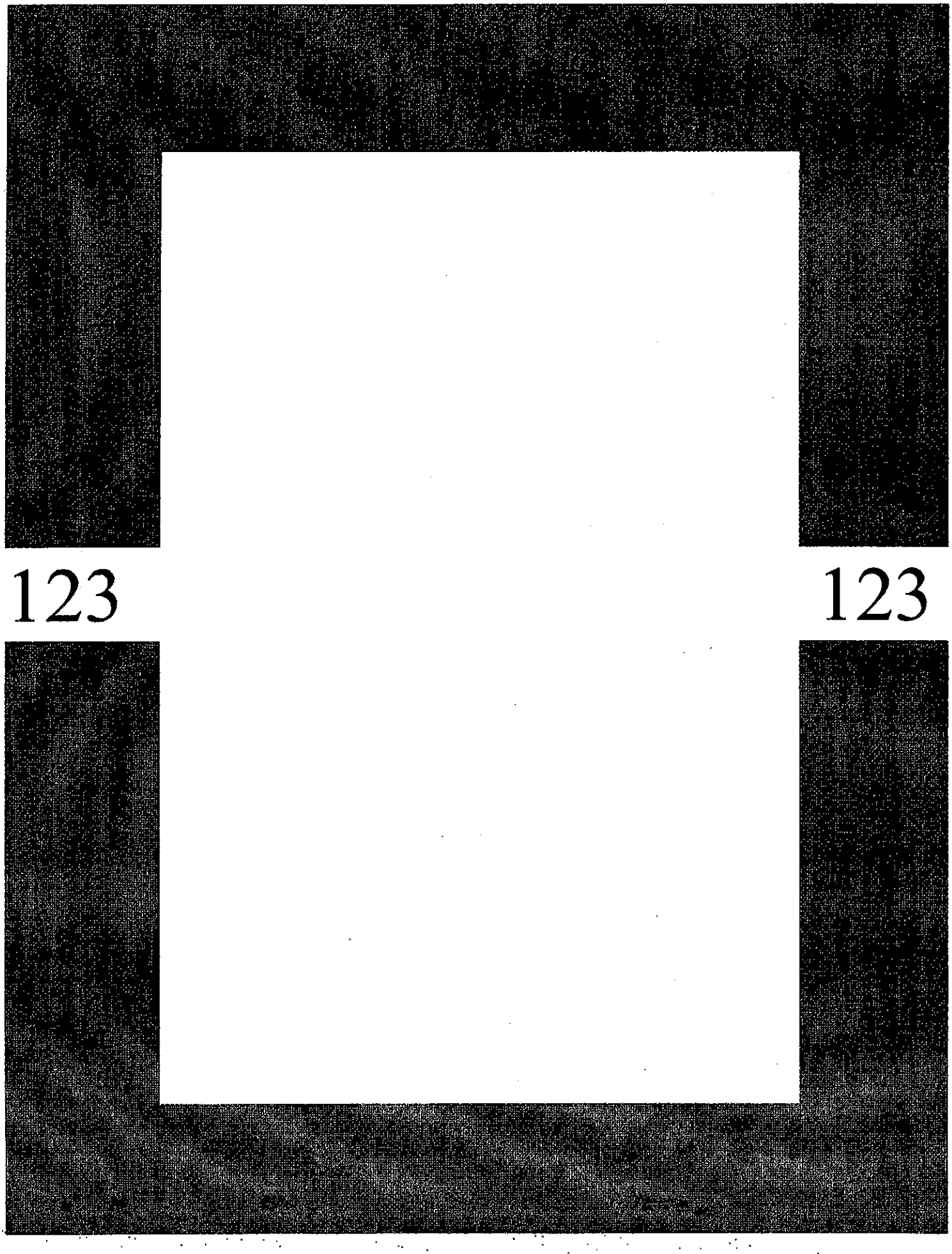
Q So how much of this loss of enjoyment of life for Bill Simao is pain and suffering?

A It's not; it's not. This is -- you need to think of this as independent of pain and suffering.

Let me give you just an -- this is -- if we look at what we will invest to reduce the risk of death, and it's the

004690

004690




004691

004691

Electronically Filed
06/27/2011 11:44:35 AM

CLERK OF THE COURT

AMEN
DANIEL F. POLSENBERG
State Bar No. 2376
JOEL D. HENRIOD
State Bar No. 8492
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,<br><br>Plaintiffs,<br>*vs.*<br><br>JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE Corporations I through V, inclusive,<br><br>Defendants. | Case No. A539455<br><br>Dept. No. XX |

**AMENDED NOTICE OF APPEAL**

Please take notice that defendant JENNY RISH hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;
2. "Decision and Order Regarding Plaintiffs' Motion to Strike Defendant's Answer, filed April 22, 2011";
3. Judgment, filed April 28, 2011;
4. Judgment filed June 1, 2011, notice of entry of which was served via hand delivery on June 2, 2011; and



004692

004692

004692

5. All rulings and interlocutory orders made appealable by any of the foregoing.

DATED this 27th day of June 2011.

LEWIS AND ROCA LLP

By: s/ Joel D. Henriod
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 474-2616

*Attorneys for Defendant Jenny Rish*

004693

004693



004693

**CERTIFICATE OF SERVICE**

Pursuant to Nev. R. Civ. P. 5(b), I HEREBY CERTIFY that on the 27th day of June, 2011, I served the foregoing NOTICE OF APPEAL by depositing a copy for mailing, first-class mail, postage prepaid, at Las Vegas, Nevada, to the following:

ROBERT T. EGLET
DAVID T. WALL
ROBERT M. ADAMS
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, NV 89101

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



004694
004694
004694

# EXHIBIT A



004695

004695

EXHIBIT A

LINA

NJUD
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
**MAINOR EGLET**
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph.: (702) 450-5400
Fx.: (702) 450-5451
badams@mainorlawyers.com
Attorneys for Plaintiffs

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

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

**NOTICE OF ENTRY OF JUDGMENT**

**PLEASE TAKE NOTICE** that the Judgment, was entered with the above entitled Court on the 1st day of June, 2011, a copy of which is attached hereto.

DATED this 1st day of June, 2011.

**MAINOR EGLET**

By: _____
DAVID T. WALL, ESQ.

MAINOR EGLET

004696

004696

**RECEIPT OF COPY**

RECEIPT OF COPY of the foregoing file stamped **NOTICE OF ENTRY OF JUDGMENT** in the matter of **SIMAO v. RISH, et al** is hereby acknowledged:

_____ Date: _____ Time:_____

Stephen H. Rogers, Esq.
**ROGERS, MASTRANGELO, CARVALHO & MITCHELL, LTD.**
300 S. Fourth Street, #710
Las Vegas, NV 89101
Attorneys for Defendants

Jakiba Y. Walker Date: 6/2/11 Time: 11:07 a.m.

Daniel F. Polsenberg, Esq.
Jowl D. Henriod, Esq.
**LEWIS AND ROCA, LLP.**
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89129
Attorneys for Defendants

MAINOR EGLET

004697

004697

004698

004698

# EXHIBIT "1"