

In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

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Tracie K. Lindeman
Clerk of Supreme Court

JENNY RISH,

Appellant,

vs.

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

Respondents.

APPEAL

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

**APPELLANT'S APPENDIX
VOLUME 22
PAGES 5017-5105**

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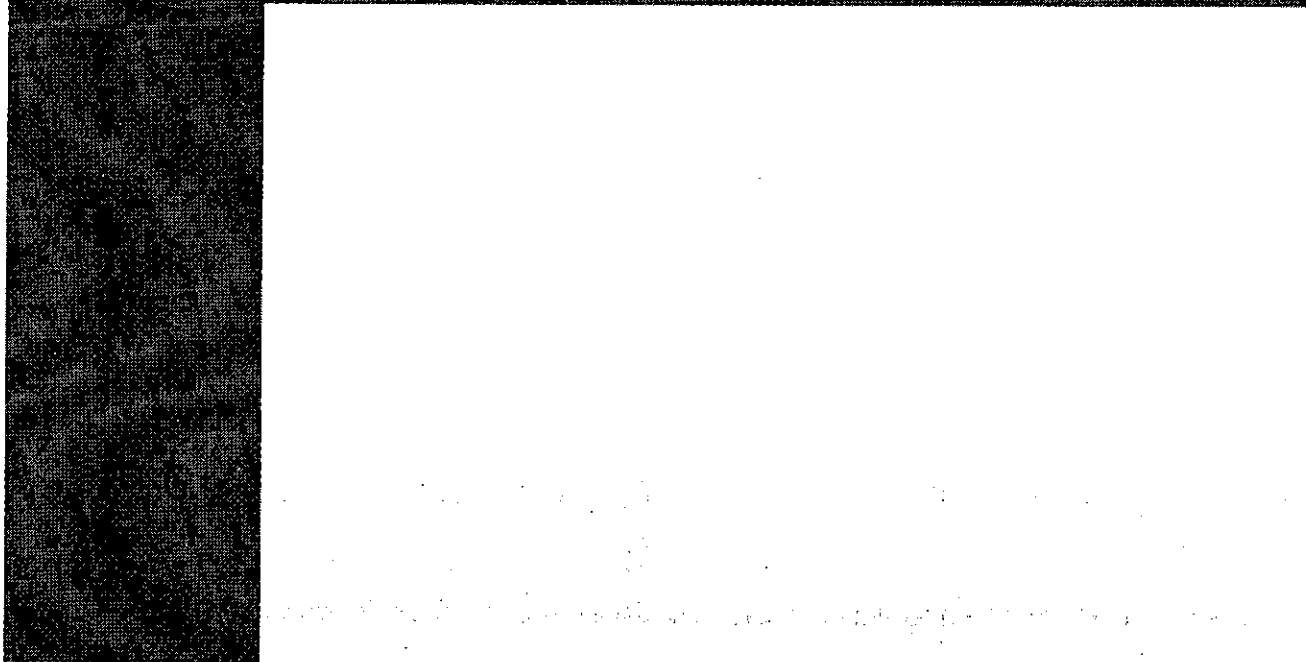
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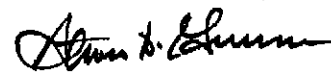


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 ORIGINAL



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

WILLIAM SIMAO and
CHERYL SIMAO,

Plaintiffs,

vs.

JENNY RISH,

Defendant.

CASE NO. A-539455

DEPT. NO. X

TRANSCRIPT OF
PROCEEDINGS

****Partial Transcript****

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

PORTION OF JURY TRIAL - DAY 12
(BENCH CONFERENCES)

TUESDAY, MARCH 29, 2011

APPEARANCES:

FOR THE PLAINTIFFS:

DAVID T. WALL, ESQ.
TRACY A. EGLET, ESQ.
ROBERT M. ADAMS, ESQ.
ROBERT T. EGLET, ESQ.

FOR THE DEFENDANT:

STEPHEN H. ROGERS, ESQ.

COURT RECORDER:

VICTORIA BOYD
District Court

TRANSCRIPTION BY:

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JUL 13 2012

CLERK OF THE COURT



1 LAS VEGAS, NEVADA, TUESDAY, MARCH 29, 2011, 1:42 P.M.

2 (This transcript contains bench conferences only)

3 * * * * *

4 (Bench conference began at 1:42 p.m.)

5 THE COURT: There's no evidence that he's taught any
6 of the doctors that testified for the plaintiff's treating
7 physicians in this case and that's what his question implied,
8 that he's taught these doctors. He may have taught other
9 doctors, but he hasn't taught these doctors.

10 MR. ROGERS: Well, I can ask him.

11 THE COURT: Is that what you want?

12 MR. ROGERS: I said, such as these doctors.

13 MR. EGLET: [Inaudible].

14 MR. ROGERS: [Inaudible] doctors such as these.

15 THE COURT: Oh, then he needs to clarify.

16 MR. EGLET: Let's clarify it.

17 THE COURT: Sustain the objection for clarification.

18 (Bench conference ended at 1:42 p.m.)

19 * * * * *

20 (Bench conference began at 1:50 p.m.)

21 MR. EGLET: Dr. Wang is not a neurosurgeon. He's an
22 orthopedic spine surgeon, okay? He did not do a residency in
23 neurosurgery, so.

24 THE COURT: I didn't hear him --

25 MR. EGLET: So, yeah. There --

1 THE COURT: -- [inaudible].

2 MR. EGLET: I would object to the neurosurgery.
3 Orthopedic spine surgery, yes. But not neurosurgery.

4 THE COURT: Um-hum.

5 MR. ROGERS: He talked of how he's a professor in
6 both of those departments, a full professor at UCLA.

7 MR. EGLET: But that doesn't mean he's an expert in
8 neurosurgery. He didn't do a neurosurgical residency. He
9 can't -- I mean, they're two -- they approach the spine from
10 two different methods, so.

11 THE COURT: We heard about the spine surgeon and I
12 think you adequately laid a foundation with respect to that
13 speciality. But we didn't really hear much --

14 MR. EGLET: And none of his reports --

15 THE COURT: -- [inaudible].

16 MR. EGLET: -- in this case go to neurosurgery
17 anyway. It's all orthopedic spine surgery. All his opinions
18 in his reports and orthopedic spine surgery opinions, not
19 neurosurgery. So, I don't see --

20 MR. ROGERS: You know, he's not going to be getting
21 into brain surgery, in this case, if that's the plaintiff's
22 concern.

23 MR. EGLET: It doesn't -- it doesn't matter. He's
24 not a neurosurgeon.

25 THE COURT: Then why do you need -- why do you need

1 to so qualify him?

2 MR. ROGERS: Simply because he appeared qualified by
3 virtue of his full professorship in both departments of UCLA.

4 THE COURT: So, do you want to at restate your
5 motion?

6 MR. ROGERS: We just requested for the admission of
7 the expert as -- as an expert in those two areas.

8 MR. EGLET: I'm --

9 THE COURT: So do you want to restate, or would you
10 rather that I suggest that he can give testimony with respect
11 to the orthopedic --

12 MR. ROGERS: Okay. I'll restate it.

13 THE COURT: -- specialty.

14 MR. ROGERS: Okay.

15 (Bench conference ended at 1:51 p.m.)

16 * * * * *

17 (Bench conference began at 2:00 p.m.)

18 MR. EGLET: This question is still vague and
19 ambiguous because there are all different levels as the
20 testimony and the evidence has been there -- there are all
21 different levels of internal disc disruption. If you have a
22 milder, or mild internal disc disruption, or you could have a
23 more severe internal disc disruption. So there's no
24 clarification here as to what that is with respect to this --
25 this witness.

1 We went through the same thing with Dr. Fish. He's
2 giving these very broad strokes about, you know, injuries to
3 the spine or disc -- you know, disc injuries. And they don't
4 -- I asked him to clarify in the last objection and all he did
5 was add internal disc disruption and specified the specific
6 levels.

7 It still doesn't focus what we're talking about,
8 which is this specific patient. So he's asking for a broad
9 stroke with the gambit of patients, whatever they are, that he
10 treats and we still haven't even laid the foundation for what
11 type of patients he treats. We don't even know if he treats
12 patients who come in with internal disc disruption, or if he
13 treats patients just -- that just come in with structural
14 injuries in a trauma center to their spine.

15 So there's no foundation. And the question is so
16 vague and broad and ambiguous that it doesn't mean anything in
17 concept to this case.

18 Also, what he has seen with his other patients I
19 don't think is relevant to this particular plaintiff. It's
20 not relevant what some other case, or multiple cases he may
21 have, if he's treated other people, it's not relevant to this
22 case. What's relevant is this patient -- this patient is not
23 a statistic. He's an individual.

24 THE COURT: Mr. Rogers?

25 MR. ROGERS: Your Honor, actually, we've been

1 referring to expertise on a presentation basis throughout this
2 trial, how does this symptom [inaudible] expert said if this
3 is a traumatic injury, how does it typically present. This
4 isn't any different from the questions that have been asked
5 and answered throughout this trial.

6 Counsel has pointed out areas he'd like to be able
7 to cross-examine him on. But the foundation is there.
8 Clearly, he's been accepted as an expert on someone who's
9 performed surgery on all types of conditions to the spine.

10 And the question is narrowly limited, because it's
11 exactly this condition that the plaintiff claims in this case.

12 MR. EGLET: The foundation is not the witness's
13 qualifications. The foundation is with respect to the
14 specific type of injuries we have here. There's been no
15 foundation about that.

16 And second of all, it's not relevant as to what
17 other, you know, what other patients he's -- he has -- he has
18 -- he's worked on, because we don't -- we can't -- we're
19 comparing apples to oranges. We don't know what the extent
20 of that disc disruption was. We don't know if it was a full
21 blown herniation. We don't know if there was nerve
22 impingement. We don't know if there was cord impingement.

23 None of those things happened here. We didn't have
24 a full blown herniation. We don't have any cord impingement.
25 We don't have any nerve impingement. That's been the

1 testimony.

2 This is simply a tear in the disc. So it's
3 completely different. It's way overbroad and it's not
4 focused, Your Honor. It's the same thing that happened with
5 Dr. Fish.

6 THE COURT: Sustain the objection.

7 (Bench conference ended at 2:03 p.m.)

8 * * * * *

9 (Bench conference began at 2:06 p.m.)

10 MR. EGLET: Once again, what are we talking about
11 here? Are we talking about a disc, like that's been
12 completely blown out, or are we talking about a simple
13 internal disc disruption? We have an annular tear. It's so
14 vague and ambiguous, and that's the problem with Dr. Fish's
15 testimony, and that's why the other physicians came in and
16 literally laughed at it when we gave that example, because it
17 talked about, remember, Doctors Grover and Dr. McNulty,
18 there's a spectrum, a scale of injuries.

19 And he's painting this with this broad stroke that,
20 well, if there's disc disruption, if there's -- or if there's
21 injury to the disc, well, yeah, you can have those kind of
22 structures destroyed if it's -- you know, if you completely
23 obliterate everything there and you wipe out the disc.

24 But when you have a tear, it's a spectrum. And
25 again, so the objection is, it's vague, overbroad, ambiguous,

1 the same as the other objection.

2 MR. ROGERS: Your Honor, this time, however, I
3 prefaced the question with the fact that the doctor has
4 reviewed all of the medical records. And he is limiting his
5 opinion to the injuries that the plaintiff has claimed as a
6 result of this incident.

7 MR. EGLET: No --

8 MR. ROGERS: Takes into consideration everything;
9 the MRI's, the diagnoses, the surgery, the discogram. He's
10 reviewed it all, and he's already made a record of that.

11 MR. EGLET: It is --

12 MR. ROGERS: So his opinion is limited to the injury
13 that the plaintiff is claiming.

14 MR. EGLET: He didn't preface the question that way.
15 He did not preface the question that way. He's claiming he
16 prefaced the question that is it -- could the plaintiffs have
17 had internal disc disruption without destroying all the
18 structures surrounding the disc, because that's what he's
19 talking about. That's what Dr. Fish said.

20 He says, oh, yeah, it would've had to destroy all
21 the structures surrounding the disc. Well, it's a spectrum.
22 If you're on the high end of the spectrum, yeah, that may be
23 the case. But not when you're down here where we are, where
24 it's simply internal disc disruption, a tear.

25 And so it's way overbroad, Judge. It's the same

1 thing. It's the same thing.

2 THE COURT: You know, here's the thing. I thought
3 it was such an odd analogy that Fish gave as you posed -- what
4 you posed it to this witness. But [inaudible] the Court
5 sustains the objection.

6 MR. ROGERS: Okay.

7 (Bench conference ended at 2:08 p.m.)

8 * * * * *

9 (Bench conference began at 2:13 p.m.)

10 MR. EGLET: They're showing an -- they're showing an
11 x-ray of somebody that's not our client.

12 THE COURT: Is that right?

13 MR. EGLET: On the right. It's never been produced.
14 Never been displayed [sic].

15 MR. ROGERS: It's simply demonstrative.

16 MR. EGLET: And it's never been identified, never
17 shown to us ever.

18 MR. ROGERS: Plaintiff has shown demonstratives
19 throughout the trial that -- that have never been disclosed to
20 the defense.

21 MR. EGLET: We have not shown an x-ray or an MRI of
22 a patient who's not even in this case, so.

23 THE COURT: Well, I'm surprised you put something up
24 and the implication is that it's the plaintiff's x-ray. But
25 that's not the plaintiff's x-ray.

1 MR. EGLET: It's not the plaintiff's x-ray.

2 MR. ROGERS: He didn't imply that. In fact, he
3 said, this is of a different patient.

4 MR. EGLET: He's trying to show an x-ray of somebody
5 -- some other patient who allegedly had -- I don't know if
6 he's claiming this person had soft tissue injuries and try to
7 say, see, compare. Here's somebody with soft tissue injuries
8 and their x-ray. We've never seen this. We've never had our
9 experts be able to review this. This is -- you can't do that.

10 MR. ROGERS: A perfect example of something that the
11 plaintiff has done in this case that's exactly like this is,
12 the defendant requested a fluoroscopy of the CT scan, the
13 discogram CT. And the plaintiff never produced it.

14 We requested it in the subpoena to Dr. Rosler's
15 office, as well, and never got it. Dr. Rosler, however, came
16 to Court and had it.

17 There are documents that have been shown to this
18 jury by the plaintiff that have not been disclosed to the
19 defense.

20 MR. WALL: That was part of his medical report and
21 we didn't get it. They could've --

22 MR. ROGERS: It should've been part of his medical
23 report. It was not.

24 MR. EGLET: That was part of Dr. Rosler's medical
25 report and we didn't have it. He had it here with him in

1 trial and pulled it out, and they didn't object, okay? There
2 was no objection.

3 MR. WALL: They could've marked it as an exhibit.

4 THE COURT: [Inaudible].

5 MR. EGLET: They could've marked it as an exhibit if
6 they wanted to. But they don't --

7 MR. ROGERS: Throughout -- throughout trial this has
8 gone on though. The spinal cord stimulator's a perfect
9 example.

10 MR. WALL: They were of the plaintiff.

11 MR. EGLET: What --

12 MR. ROGERS: There was never any disclosure on that
13 either.

14 MR. EGLET: Actually --

15 MR. ROGERS: And they had films.

16 THE COURT: Well, we've already made a record
17 [inaudible].

18 MR. EGLET: We've already made -- and we've actually
19 got a further record to make on that, because I want to --
20 remind me. I'm going to put in their report of Dr. Fish, who
21 specifically addressed the spinal cord stimulator and said our
22 client didn't need one. So they were clearly on notice. It's
23 in one of his reports.

24 THE COURT: [Inaudible].

25 MR. EGLET: So that's just -- but that's an issue

1 that has nothing to do with this. They're showing a --
2 they're showing an actual x-ray --

3 THE COURT: Um-hum.

4 MR. EGLET: -- of somebody who is not the plaintiff
5 in this case. It's somebody who I guess who allegedly had
6 some soft tissue injuries, to try to say, see, here's a person
7 who had real injuries and this is what their x-ray would've
8 looked like.

9 Nobody's claiming any fractures or anything in here.
10 So this is just unbelievable.

11 MR. WALL: Everything --

12 THE COURT: Well --

13 MR. WALL: -- we've shown has been of our client.

14 MR. EGLET: Yeah.

15 THE COURT: Everything, what?

16 MR. WALL: Everything we've shown --

17 MR. EGLET: Everything we've shown has been of our
18 client, not somebody --

19 THE COURT: I understand.

20 MR. EGLET: -- we don't even know who it is.

21 THE COURT: I just want the record to reflect that
22 this is the first time I'm hearing the narrow large complaint
23 about something that occurred with Dr. Rosler's testimony. I
24 didn't know you had any objection to any evidence that was
25 reviewed during the course of his testimony. I think the

1 record should be clear on that. I'm hearing this for the
2 first time.

3 The Court sustain's this objection.

4 MR. ROGERS: [Inaudible].

5 MR. EGLET: Can the jury be admonished that they
6 were to disregard his testimony during that x-ray and ignore
7 it [inaudible] x-ray.

8 MR. ROGERS: Well, then the defense does intend
9 however to show an animation at this point.

10 MR. EGLET: I have not seen this animation.

11 MR. ROGERS: I haven't seen any of the plaintiff's
12 either. And in particular, again, relating back to
13 [inaudible].

14 MR. EGLET: We weren't doing it -- we didn't present
15 any evidence of animations. Those were in our opening
16 statement. If you're going to present this as evidence, it
17 has to be an exhibit that's been marked and we have to have
18 seen it. And it's not.

19 THE COURT: Will you -- before you did your opening,
20 there was some discussion of the animation. [Inaudible] Mr.
21 Wall was here and reviewed it.

22 MR. EGLET: Yeah.

23 THE COURT: Was that provided to Mr. Rogers before
24 trial?

25 MR. EGLET: Yes, he had --

1 MR. ROGERS: No, it was not.

2 MR. EGLET: -- the opportunity to review the
3 animations. He was told what they were, and they never asked
4 to review the animations. We've never even been told about
5 this animation. And that's in opening statement. That's not
6 evidence. This is [inaudible] they're producing.

7 MR. ROGERS: This is not evidence, it's
8 demonstrative [inaudible] --

9 MR. EGLET: It's evidence --

10 MR. ROGERS: -- [inaudible] showing it to explain --

11 MR. EGLET: It's -- he's using --

12 MR. ROGERS: -- his testimony.

13 MR. EGLET: -- the evidence in this testimony. It's
14 evidence, Judge.

15 THE COURT: Let's take a 10 minute break.

16 (Bench conference ended at 2:17 p.m.)

17 * * * * *

18 (Bench conference began at 2:42 p.m.)

19 MR. EGLET: See what this witness is doing -- they
20 obviously talked to him during the break -- is he's getting
21 that testimony in, what I objected to, without Mr. Rogers
22 asking him the question. He's going into, well, you have to
23 all these structures torn up before you have injury to the
24 disc.

25 My objection was that the question was broad, vague,

1 overbroad, vague, ambiguous. It doesn't isolate the situation
2 here. And he's saying, typically, which he's talking about
3 other patients.

4 So, basically what they done now is they've
5 circumvented the Court's Order sustaining the objection,
6 talked to him in the hallway during the break. And so he's
7 coming up and just giving this testimony when there's no
8 question pending. And he's circumventing the Court's Order
9 where you sustained the objection to this very testimony,
10 Judge.

11 MR. ROGERS: The objection was as to the diagram and
12 to the unrelated x-rays. It wasn't --

13 MR. EGLET: No.

14 MR. ROGERS: -- to the testimony.

15 MR. EGLET: No.

16 MR. ROGERS: His testimony always has been, that in
17 his opinion, there was no traumatic injury to these discs.

18 MR. EGLET: I'm not talking --

19 MR. ROGERS: That's nothing new. That was disclosed
20 in --

21 MR. EGLET: I'm not --

22 MR. ROGERS: -- deposition and in reports. There
23 was no Order on that question.

24 MR. EGLET: I'm not talking about -- he has a short
25 memory. I'm not talking about anything we argued outside the

1 presence with the diagram that never been -- never been
2 disclosed. I'm talking about the previous objections that
3 were made up here that were sustained, that the witness was
4 precluded from going into.

5 And now they're just circumventing the Court's Order
6 by not actually asking a question, but having him come up in
7 front of the jury and give that testimony; typically this,
8 typically that. And it has nothing to do with this case, or
9 the specific injuries in this case.

10 I object, and I would ask that this testimony be
11 stricken.

12 MR. ROGERS: There has been complete disclosure on
13 the issue that he's discussing right now. And he is speaking
14 specifically of the plaintiff's condition.

15 MR. EGLET: No, he's not. He's saying, typically.
16 Typically, you see this, typically --

17 MR. ROGERS: No.

18 MR. EGLET: -- you see that. He said -- you'll
19 notice, I didn't come up here when he's saying -- when he was
20 saying, I didn't see any injury to to the disc. When he said
21 that testimony, he was pointing to the -- the --

22 THE COURT: Um-hum.

23 MR. EGLET: -- spine. When I came up and objected
24 was when he starts talking about the other structures around
25 the disc, the ligaments and muscles, which he's going into

1 right now. That's what he's going into. That's what you
2 sustained the objection on.

3 They're circumventing this Court's Order by not
4 asking him the question, just having him explaining. I mean,
5 you've got -- it is so painfully obvious what they're doing
6 it's incredible. I mean, I don't know how many times we have
7 to go through these violation of Pretrial Orders, and now
8 violating the Court's Orders on sustaining objections. How
9 much longer does it have to go on?

10 MR. ROGERS: And I'm not clear on what objection the
11 means, Your Honor. Is it that the question is vague, or it's
12 -- it calls for a narrative?

13 THE COURT: There's two things. One, he's
14 testifying in narrative without a particular question being
15 posed. And two, he's testifying generally rather than
16 specifically as to this plaintiff.

17 So, sustain the objection on both of those grounds.

18 MR. EGLET: And I ask --

19 MR. ROGERS: Now what --

20 MR. EGLET: -- the jury be admonished to disregard
21 his last testimony.

22 MR. ROGERS: Well, I mean --

23 MR. EGLET: Regarding what typically occurs.

24 MR. ROGERS: Your Honor, every witness who has
25 gotten on the stand has talked in terms of typical.

1 MR. EGLET: No, they haven't.

2 MR. ROGERS: For example, to say that this surgery
3 is generally 85 to 90 percent successful, what does that have
4 to do with the plaintiff when it wasn't successful? They're
5 talking in typicals, or generalities. Every doctor -- I can
6 go on with examples of this -- is talking about, this is how
7 this condition presents. This is how this treatment is
8 generally done.

9 This is no different from what all of the treating
10 providers have testified to.

11 MR. EGLET: Well, he again, he's comparing apples to
12 oranges. The 85 percent to 90 percent success rate is in
13 direct response to their two experts' opinions in this case,
14 that if the C3-4, C4-5 disc would've been -- were injured in
15 this case, then when he had the surgery his pain should've
16 gone away.

17 And so those are in response to the fact that, well,
18 yeah, 85 to 90 percent of the time that happens. But 10 to 15
19 percent of the time, it doesn't. And Mr. Simao fell into that
20 10 or 15 percent of the time. So it went directly to this
21 patient.

22 He's -- it's a totally different comparison.

23 THE COURT: I think it is. I think it is. Let's
24 move on.

25 MR. ROGERS: Okay.

1 (Bench conference ended at 2:47 p.m.)

2 * * * * *

3 (Bench conference began at 2:54 p.m.)

4 MR. EGLET: I'm going to object and move to strike
5 this testimony. This witness has never stated in any report
6 or in his deposition and to a reasonable degree of medical
7 probability our client has a rotator cuff tear. He's talking
8 about possibilities, okay, in these tests.

9 So they're irrelevant, just like everything else.
10 And they're talking about possibilities as to a reasonable
11 degree of medical probability. He's suggesting to this jury
12 that my client has a rotator cuff tear, but he can't state
13 that to a reasonable degree of medical probability, and it was
14 never disclosed in any of his reports that this is his
15 opinion, or in his deposition.

16 MR. ROGERS: He's already testified that these tests
17 are not that sensitive. That these are the findings --

18 MR. EGLET: No, he talked about --

19 MR. ROGERS: -- [inaudible] physical exam.

20 MR. EGLET: -- the Spurlings [phonetic] test not
21 being that sensitive. He didn't say, these tests were not
22 that sensitive. He simply described the test and said they
23 are suggestive of a rotator cuff injury. He has never
24 testified or stated in any report that my client had a rotator
25 cuff injury. So it's improper.

1 MR. ROGERS: He's -- he didn't say that in his
2 opinion the plaintiff has this condition. I simply asked, to
3 your knowledge, has the plaintiff undergone any treatment
4 [inaudible].

5 MR. EGLET: It doesn't matter. It's suggesting --
6 it's suggesting to the jury to speculate that my client may
7 have a rotator cuff injury and that may be the problem.
8 That's the whole reason for the -- Morsicato [phonetic] is
9 doing exactly what the Supreme Court said the doctor cannot
10 do, in Morsicato.

11 MR. ROGERS: No, but Morsicato --

12 THE COURT: Why would you ask this question if
13 there's no evidence of --

14 MR. ROGERS: Because -- because what we're doing is
15 going through the physical exam and what did those positive
16 findings indicate. And then how do they correlate with
17 diagnostic studies. And that's how the plaintiffs are trying
18 to substantiate --

19 MR. EGLET: No.

20 MR. ROGERS: -- the conclusion reached by their
21 physician.

22 MR. EGLET: He is suggesting --

23 THE COURT: So you want [inaudible] the jury into
24 thinking there is an issue here that there's no evidence of?

25 MR. EGLET: Right.

1 MR. ROGERS: What I'm saying is that these findings
2 -- the plaintiff has more or less characterized to the jury is
3 sacrosanct. Over and over, Doctors McNulty and Grover talked
4 about the Spurling [inaudible] and how important it was that
5 the Spurlings test was administered by them, but not before,
6 and how that distinguishes their examination from all the
7 previous providers.

8 MR. EGLET: We're not talking about a Spurlings
9 Test. We're past that testimony.

10 THE COURT: I know.

11 MR. EGLET: We're talking about these tests --

12 MR. ROGERS: It's the same concept.

13 MR. EGLET: No, it's not. It's the Mirrors and
14 Hawkins test which are rotator cuff injury tests. He's
15 suggesting to this jury that my client had a rotator cuff
16 injury. I would -- I want -- I want a curative instruction to
17 this jury that there is no evidence that Mr. Simao had a
18 rotator cuff injury in this case, because that is the state of
19 the evidence.

20 MR. ROGERS: It's not at all. That's not --

21 MR. EGLET: It is, too.

22 MR. ROGERS: -- [inaudible].

23 MR. EGLET: It has to be to a reasonable degree of
24 medical probability. This is a clear violation Morsicato.

25 THE COURT: Sustain the objection.

1 (Bench conference ended at 2:56 p.m.)

2 * * * * *

3 (Bench conference began at 3:03 p.m.)

4 MR. EGLET: That testimony was clear that they've
5 seen disc injuries --

6 MR. ROGERS: [Inaudible] --

7 MR. EGLET: -- excuse me -- disc injuries, not
8 spinal cord injuries. They never said -- in fact, what they
9 said is, well, yeah, if you get a severe spinal cord injury,
10 you may see these injuries to the structures surrounding the
11 disc. But what their testimony was, no, there's a -- sorry --
12 there's the -- the -- I can't remember the term that Dr.
13 McNulty used, but there's a range of injuries.

14 And they talked about the severe spinal cord
15 injuries where you end up paraplegic or quads that you may
16 have injuries to the surrounding structures of the cord and
17 the disc. But when it comes to just a disc injury, you're not
18 going to see necessarily -- in fact, most often not those type
19 of injuries.

20 So that completely misstates their prior testimony.

21 MR. ROGERS: Actually, I took a note of that
22 testimony as it was given and it does not misstate it.

23 MR. EGLET: Your note's wrong. It absolutely
24 misstates it. They've never said that an injury to the spinal
25 cord can't cause injuries to the surrounding structures. They

1 were talking about discs. He's completely misrepresenting the
2 record in this case.

3 THE COURT: Ask you to rephrase it, please.

4 Sustain the objection, ask you to rephrase.

5 (Bench conference ended at 3:05 p.m.)

6 * * * * *

7 (Bench conference began at 3:06 p.m.)

8 MR. EGLET: This opinion was never, ever, ever
9 disclosed by this witness in this case. First of all, it's
10 incredible -- I've been doing this for 24 years and I've never
11 heard a spine surgeon make that statement. It's a lie.

12 But second of all, it has never been disclosed in
13 any reports. I mean, this is a huge opinion, and it's never
14 been disclosed in any reports, or in any testimony in his
15 deposition, ever, has he given this opinion.

16 They're required under the disclosures to give us
17 all the opinions in their written reports, quite frankly, of
18 any opinion that their expert's going to give. This was never
19 given and they're simply trying to bootstrap what happened
20 with Dr. Fish in this case, in here.

21 THE COURT: [Inaudible].

22 MR. EGLET: This is absolutely --

23 THE COURT: -- Mr. Rogers. How is this relevant?

24 MR. EGLET: -- improper.

25 THE COURT: This case isn't about a spinal cord

1 injury. How is this testimony even relevant?

2 MR. ROGERS: Well, he -- he shifted from a
3 discussion of the cord to the disc. That's the relevance of
4 it. And second, [inaudible] --

5 MR. EGLET: He just -- he just testified -- he
6 just --

7 MR. ROGERS: Let me finish, please. He did testify
8 that, in his opinion, there was no disc injury as a result of
9 this accident and that, in part, it's because there's no
10 evidence of damage to the surrounding structures. This
11 isn't --

12 MR. EGLET: That's -- was not his testimony --

13 MR. ROGERS: -- [inaudible].

14 MR. EGLET: -- he just gave. That's --

15 THE COURT: Not just now it wasn't.

16 MR. EGLET: -- not what he just said. That's not
17 what he just said. That's what he said awhile ago, which I
18 didn't object to. What this witness just said right now is
19 that in his -- is that you cannot have a disc injury without
20 injuring the surrounding structures of the spine. Just from a
21 pure medical scientific basis, that is intellectually
22 dishonest.

23 Aside from that, it's a huge opinion in this case
24 that it has never been disclosed in any document, or in any
25 deposition testimony. They cannot just spring an opinion like

1 that on us, in trial, with their paid specifically retained
2 expert.

3 MR. ROGERS: But it's -- there's nothing new to
4 this, Your Honor. I know that plaintiff's counsel
5 characterizes it as new, and does so with a certain enthusiasm
6 that might seem to persuade. But it is not new. It's not
7 groundbreaking. This is nothing that -- that plaintiff's
8 counsel hasn't encountered before.

9 This -- I mean --

10 MR. EGLET: No, I --

11 MR. ROGERS: -- you can't say that you've never
12 encountered this.

13 MR. EGLET: -- have never encountered this ever,
14 with -- in any spine case, where any defense expert has come
15 in and said, that in order to injure a disc, you have to
16 injure the surrounding structures of the disc, which will show
17 up in an MRI, which is his testimony. It's absolutely false.
18 It's scientifically not true.

19 But aside from all that, aside from the fact it's
20 intellectually dishonest, it is an opinion that is nowhere
21 disclosed in any report or deposition from this witness. Have
22 you noticed that Mr. Rogers, in response here, hasn't said,
23 oh, yes, it was here, in his report.

24 MR. ROGERS: No, I did a moment ago.

25 MR. EGLET: Here it is in his -- no. It's never

1 been disclosed. Not this opinion. The opinion -- his opinion
2 that my client's discs were injured was disclosed. But this
3 opinion that you cannot have a disc injury without injuring
4 the surrounding structures has never been disclosed by this
5 witness.

6 MR. ROGERS: It was discussed at the deposition.

7 MR. EGLET: No, it wasn't.

8 MR. ROGERS: It -- plaintiff's counsel has done a
9 fairly effective job leading the defense counsel up here to be
10 doing something it is not. We are not being tricky here.
11 There is nothing new about this testimony. There's nothing
12 new about this evidence.

13 MR. EGLET: Okay. It is not in any report ever
14 disclosed. It's a failure to disclose under 16.1. I request
15 it be stricken from the record.

16 THE COURT: Sustain the objection.

17 (Bench conference ended at 3:10 p.m.)

18 * * * * *

19 (Bench conference began at 3:18 p.m.)

20 MR. WALL: Okay.

21 MR. EGLET: [Inaudible] question [inaudible]

22 misstates --

23 MR. WALL: Your --

24 MR. EGLET: -- what the instruction was.

25 THE COURT: Um-hum.

1 MR. EGLET: The Court read the instruction to the
2 jury. And now he's trying to -- obviously, he's trying to get
3 around that instruction with this witness.

4 And also, there is a Motion in Limine as to whether
5 this accident, this witness cannot even testify as to
6 whether --

7 MR. WALL: What was the question?

8 MR. EGLET: -- this accident --

9 MR. WALL: What's the question at the end of this?

10 THE COURT: Yeah, I was wondering the same things.

11 MR. ROGERS: Yeah. The question is, that the Court
12 has instructed the jury that this accident could've caused
13 injury. You've testified that it did not. What are the bases
14 for that opinion. And then I'm --

15 MR. WALL: Well, just --

16 MR. ROGERS: -- nearly done.

17 MR. WALL: Why do you have to go with what her Order
18 was?

19 MR. EGLET: [Inaudible].

20 MR. WALL: Her Order was very clear. If you want to
21 ask him, did it cause a certain injury, that's one thing. But
22 to -- but to couch it in terms of her Order, I think is
23 inappropriate with this witness.

24 THE COURT: Um-hum.

25 MR. ROGERS: What is [inaudible].

1 MR. EGLET: Here's the other problem. Are you done?

2 MR. WALL: Yeah.

3 MR. EGLET: [Inaudible] couching the instruction
4 [inaudible] misrepresents what the instruction is.

5 THE COURT: I think it does.

6 MR. ROGERS: I don't think it does at all.

7 MR. EGLET: It absolutely does.

8 THE COURT: Well, here's the instruction.
9 [Inaudible].

10 MR. EGLET: We can have the Judge read the
11 instruction again.

12 MR. ROGERS: No. The instruction simply reads that
13 there's a presumption that the accident was sufficient to
14 cause injury.

15 MR. EGLET: [Inaudible].

16 MR. ROGERS: [Inaudible] use that language.

17 MR. EGLET: Well, [inaudible].

18 MR. ROGERS: That's fine.

19 MR. WALL: Why do you have to keep --

20 MR. EGLET: [Inaudible] this is -- this is not
21 closing argument, Judge. I mean, he's using that
22 instruction --

23 MR. ROGERS: The distinction is simply this. The
24 instruction allowed the jury to make a final determination.
25 And so I'm asking Dr. Wang, what supports your determination

1 that injury was not caused, and then he'll just revisit what
2 we've discussed and we're done.

3 MR. EGLET: He doesn't have the preface [inaudible]
4 question the instruction.

5 THE COURT: I agree.

6 MR. EGLET: He doesn't [inaudible].

7 THE COURT: I agree. Sustain the objection. Ask
8 you to rephrase that.

9 (Bench conference ended at 3:20 p.m.)

10 * * * * *

11 (Bench conference began at 3:22 p.m.)

12 MR. WALL: Now he's just suggested that [inaudible]
13 he denies it, but it might be there.

14 MR. EGLET: Yeah, that's exactly what his --

15 MR. ROGERS: Look, you guys --

16 MR. WALL: That violates --

17 MR. EGLET: -- question just suggested that he --

18 MR. ROGERS: I've --

19 MR. EGLET: -- just denies it --

20 MR. ROGERS: -- I've --

21 MR. EGLET: -- that it might be there. Now, we need
22 a curative instruction on this Judge.

23 THE COURT: But wait a minute. Wait a minute. You
24 don't really --

25 MR. WALL: Holy crimeny.

1 THE COURT: -- [inaudible] with this because it
2 looks like it could be -- his answer could, I mean, easily
3 violate any number of previous Orders. So I'm not really sure
4 what you're intending to elicit by this question.

5 MR. ROGERS: Just how is it that this opinion can be
6 true when the plaintiff says he didn't have it before.

7 THE COURT: And what do you think the answer's going
8 to be?

9 MR. ROGERS: I don't know.

10 MR. EGLET: Well, that's --

11 MR. ROGERS: This is an open-ended question.

12 MR. EGLET: That's a big problem. That's
13 [inaudible] --

14 MR. WALL: It has to be a --

15 MR. ROGERS: That's the risk of direct.

16 MR. WALL: -- reasonable degree of medical
17 probability if he's going to give some other cause for his --

18 MR. EGLET: [Inaudible].

19 MR. WALL: -- neck pain.

20 MR. EGLET: Because he just -- he just started
21 talking about, well, neck pain is multi-factorial. There
22 could be a lot of reasons for neck pain. That's why
23 [inaudible] Morsicato, okay? He's saying -- basically what
24 he's saying is, I don't know. That was his answer in his
25 deposition was, I don't know. Now, he's speculating. Well,

1 it could be a lot of things; it could be this, could be that.
2 That's a violation of Morsicato [inaudible].

3 THE COURT: Well, if he's going to respond to the
4 question, "I don't know," that's probably an acceptable
5 answer. But the question as posed, I think, is fairly --

6 MR. WALL: He's [inaudible].

7 MR. EGLET: He's not going to say, "I don't know."

8 THE COURT: -- fairly dangerous --

9 MR. EGLET: We don't know that.

10 THE COURT: -- considering -- considering the
11 pretrial ruling. So I'm going to ask you to rephrase the
12 question. Sustain the objection.

13 (Bench conference ended at 3:23 p.m.)

14 * * * * *

15 (Bench conference began at 3:25 p.m.)

16 MR. EGLET: I'd like to know what the plan is,
17 because there's no way I'm going to finish this witness by
18 5:00 o'clock.

19 MR. ROGERS: I told the Court at the outset that Dr.
20 Wang doesn't have the kind of availability to come back, that
21 we should get through those matters fast so that they can get
22 done. That's something that I can't cure, I've been assured
23 of that.

24 THE COURT: I don't know what to tell you.

25 MR. EGLET: Well, if I don't finish my

1 cross-examination at 5:00 o'clock and it's time to recess, I'm
2 going to move to strike this witness.

3 MR. ROGERS: Well, let's move fast then.

4 MR. EGLET: Well, I'm going to move at the pace that
5 I need to move to get the questions out.

6 THE COURT: Let's proceed.

7 (Bench conference ended at 3:26 p.m.)

8 * * * * *

9 (Bench conference began at 3:45 p.m.)

10 MR. ROGERS: I don't know what this has to do with
11 the plaintiff's injury claim, because no one has recommended
12 adjacent level fusion.

13 MR. ADAMS: The point is, he's going to recommend
14 it. He's been -- he's been recommending it through his prior
15 testimony. And, I mean, he's testifying. We've made his
16 accommodation. He's testifying during our case in chief,
17 although that's just a technicality. There's case law
18 throughout the country, and two cases, particularly in the
19 Ninth Circuit, that allows a plaintiff to prove an element of
20 their damages --

21 MR. ROGERS: Bob, keep it down a little.

22 MR. ADAMS: -- through a defense witness. Through a
23 defense witness. That's consistent with Nevada law, Nevada
24 Pattern Jury Instruction 2.01. It says, In determining
25 whether any proposition has been proved, i.e. an element that

1 is claimed, you should consider all the evidence, bearing on
2 the question, without regard to which party produced it.

3 We aren't precluded from proving an element of our
4 damages through a defense witness, which is --

5 MR. ROGERS: Then -- then the --

6 MR. ADAMS: -- what we plan on doing, Your Honor.

7 MR. ROGERS: Then they're certainly exceeding the
8 scope of the direct. I mean, this isn't cross-examination on
9 any of his testimony. He's never offered an opinion on this.
10 And I can't tell you how many times the plaintiff objected to
11 his testifying to things that they said weren't disclosed
12 before. And now they seek to elicit a previously undisclosed
13 opinion from him? Is that --

14 MR. ADAMS: This is [inaudible].

15 MR. ROGERS: -- [inaudible] this is craziness.

16 MR. ADAMS: He did testify to that on direct
17 examination, not with a fine pinpoint pen, with a broad stroke
18 when he said no treatment after May of '05 is related.

19 MR. WALL: That's right.

20 MR. ROGERS: What does that have to do with
21 [inaudible]?

22 MR. ADAMS: Because this is a future medical
23 treatment --

24 MR. WALL: [Inaudible] --

25 MR. ADAMS: -- [inaudible] according to your

1 witness.

2 MR. ROGERS: But what does that have to do with
3 this?

4 THE COURT: Well, here's the thing. Mr. Adams has
5 correctly stated the law, and I think given the testimony that
6 the jury has heard thus far, this is fair game. So, overrule
7 the objection.

8 MR. ROGERS: All right.

9 (Bench conference ended at 3:47 p.m.)

10 * * * * *

11 (Bench conference began at 4:05 p.m.)

12 MR. ROGERS: Very quickly.

13 THE COURT: Go ahead.

14 MR. ROGERS: It's not relevant. It's not relevant
15 in that they haven't established a need for a number they
16 intend to post in front of the jury. And second,
17 reasonableness is generally a local standard. Necessity and
18 standard of care are national.

19 But if the Doctor has testified that he doesn't know
20 the charges because he works at an academic hospital and he's
21 not from here, what are they asking him about reasonable
22 charges in Las Vegas for?

23 MR. EGLET: I'm allowed to ask him this. If he
24 doesn't know, he doesn't know. Our case is not over, Judge.

25 THE COURT: Well, I know that. He's already

1 answered the question a [inaudible].

2 MR. EGLET: Yeah.

3 MR. ROGERS: I'm sorry?

4 THE COURT: He's already answered.

5 (Bench conference ended at 4:05 p.m.)

6 * * * * *

7 (Bench conference began at 4:26 p.m.)

8 MR. ROGERS: Dr. Arita, in particular.

9 MR. EGLET: I didn't ask Dr. Arita. I never said
10 Dr. Arita. I said Rosler, McNulty and Grover. That's what I
11 said. Listen to my questions. So if your objection is about
12 Arita, that wasn't the question.

13 MR. ROGERS: It was. It was over Arita.

14 MR. EGLET: Well, that's -- I didn't ask about that.

15 THE COURT: All right. Let's proceed.

16 (Bench conference ended at 4:26 p.m.)

17 * * * * *

18 (Bench conference began at 4:55 p.m.)

19 MR. EGLET: I've probably got 30 to 45 minutes, so I
20 don't know what the Court wants to do. But that's where I am.

21 MR. ROGERS: He can't come back.

22 THE COURT: And I would expect there would be some
23 redirect?

24 MR. ROGERS: I do have a little, yes. But no -- not
25 very long.

1 THE COURT: So --

2 MR. ROGERS: 5, 10 minutes.

3 THE COURT: So when do you want to bring him back?

4 MR. ROGERS: I don't think we can.

5 MR. EGLET: That's a problem. He says he won't --
6 can't come back.

7 MR. ROGERS: This has -- this has now happened twice
8 though. I mean, it doesn't --

9 THE COURT: That's the problem with these half days.

10 MR. ROGERS: Well, it's -- Dr. Wang is not available
11 to come back.

12 THE COURT: Well, then I don't know what to tell
13 you, but I'm not in a position to do anything other except ask
14 you to bring him back.

15 MR. EGLET: I mean, I can -- I don't know. I can
16 try to get through in 30 minutes, but I just -- you know, I've
17 been going very fast. I've skipped a lot of stuff. I
18 probably have some other stuff I can skip. But, you know --

19 MR. ROGERS: Let's speed it up, you guys.

20 MR. EGLET: -- I'm do the best I -- I have sped up.
21 You know what, I've been going really fast with this witness.

22 THE COURT: I think you've been moving along, but I
23 don't intend to cut him short, even if you finish in 30 or 40
24 minutes. I don't know that it's realistic to assume that you
25 can follow-up in 5 or 10 minutes.

1 MR. ROGERS: I think it is.

2 THE COURT: So --

3 MR. EGLET: I'm just asking for the Court's
4 guidance, whatever you want to do. Obviously, you know our
5 position. The witness can't come back. Whether we move to
6 strike him, but I'm willing to try to finish today. So
7 whatever the Court wants to do.

8 THE COURT: I think he's going to have to come back.

9 MR. ROGERS: I don't think he can.

10 THE COURT: Hum?

11 MR. ROGERS: I can ask him. I'm -- I'm told this is
12 a -- this was our shot. That's why he's taken out of order.

13 THE COURT: [Inaudible].

14 MR. ROGERS: So what do we do?

15 THE COURT: I don't know what we can do. Can I --
16 Mr. Eglet, Mr. Wall? Let me ask you about tomorrow's
17 schedule.

18 MR. EGLET: We have Dr. Arita --

19 MR. WALL: Coming back.

20 MR. EGLET: -- returning. And we have Dr. Smith.
21 And tomorrow is the only day he's -- I mean, we've pushed him
22 to the limit. He's -- he's going to be out of town after that
23 so we've got to get him done tomorrow.

24 THE COURT: Who are you starting with?

25 MR. EGLET: Arita, I think. But it could be Smith.

1 We haven't coordinated them [inaudible]. It will be one or
2 the other. Arita's going along pretty fast. I don't expect
3 he's [inaudible] we'll have time to do both I would suspect.
4 And we potentially could have time to finish this witness
5 tomorrow, if that's what the Court's talking about. But we
6 have got to get, you know, we've brought Dr. Arita -- this
7 will be the third or fourth time he's been down here, you
8 know, so.

9 MR. ROGERS: Then let's --

10 MR. EGLET: He's been waiting in the hallway.

11 MR. ROGERS: Can we stay an additional half hour and
12 get Dr. Wang's testimony completed?

13 THE COURT: Even if you can finish in 30 minutes,
14 you still have to do --

15 MR. ROGERS: Only 5 to 10 minutes --

16 THE COURT: And then --

17 MR. ROGERS: -- as I promised.

18 THE COURT: Well, then that puts us beyond the --

19 MR. EGLET: And I may have recess, so. I'm sure I
20 will, but.

21 THE COURT: I think you'll have to work out the
22 details with him. I need to admonish our jury here.

23 MR. ROGERS: So we're done?

24 THE COURT: Yeah.

25 (Bench conference ended at 4:58 p.m.)

26 * * * * *

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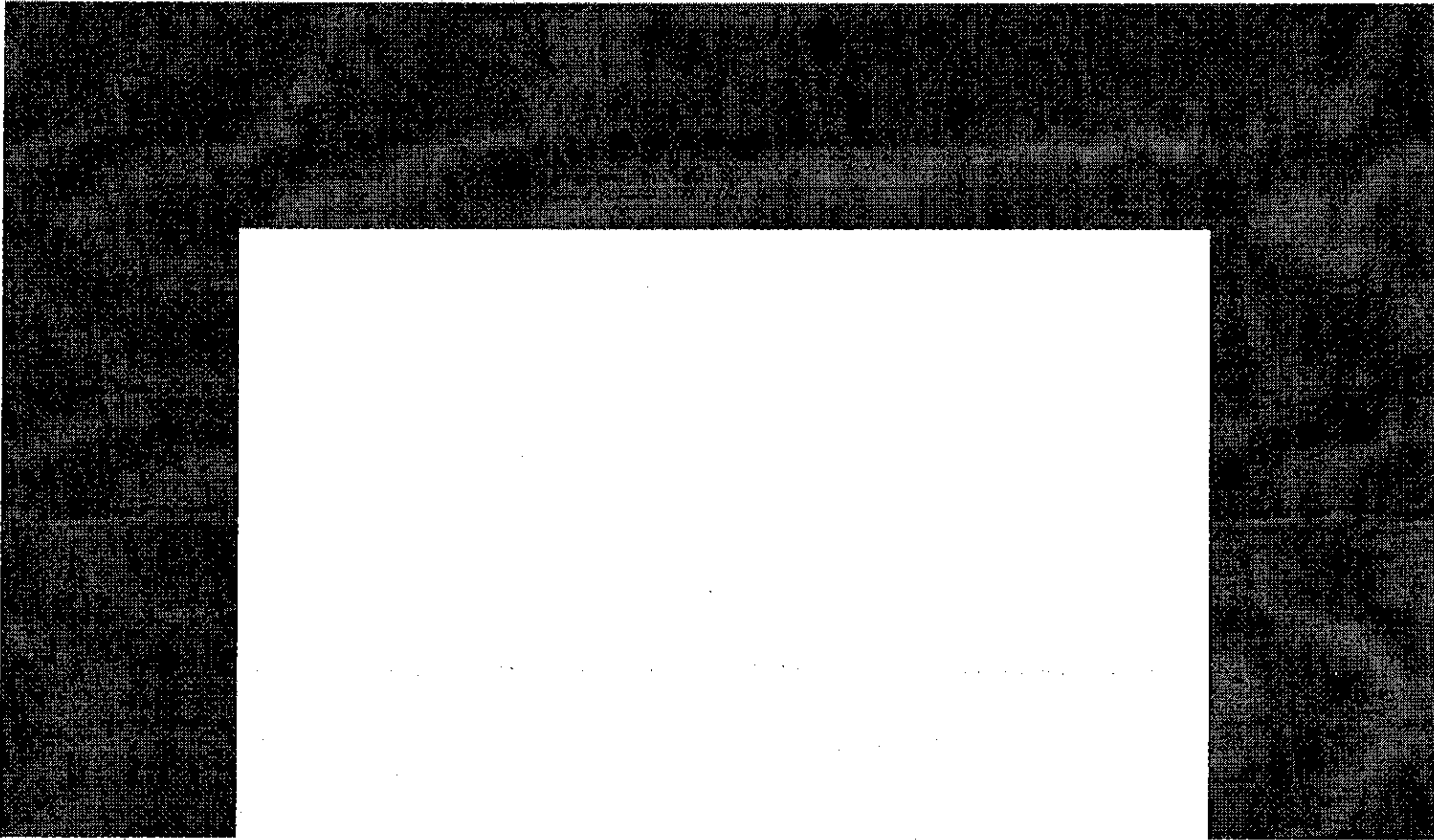
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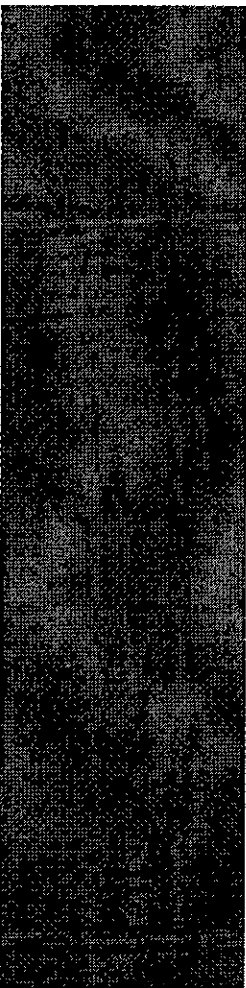
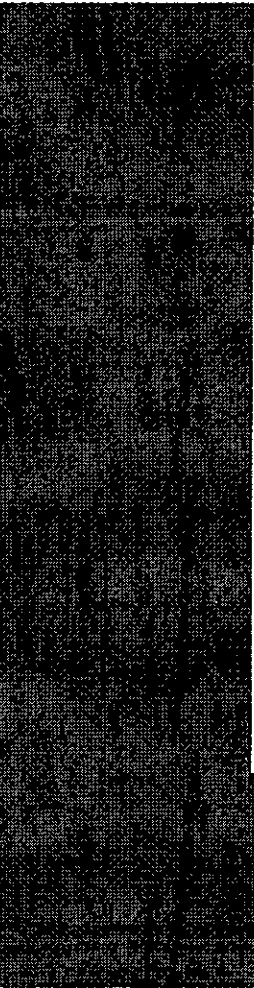
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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

WILLIAM SIMAO and	.	CASE NO. A-539455
CHERYL SIMAO,	.	
	.	DEPT. NO. X
Plaintiffs,	.	
vs.	.	
JENNY RISH,	.	TRANSCRIPT OF
	.	PROCEEDINGS
Defendant.	.	**Partial Transcript**

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BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

PORTION OF JURY TRIAL - DAY 13
(BENCH CONFERENCES)

WEDNESDAY, MARCH 30, 2011

APPEARANCES:

FOR THE PLAINTIFFS:

DAVID T. WALL, ESQ.
TRACY A. EGLET, ESQ.
ROBERT M. ADAMS, ESQ.
ROBERT T. EGLET, ESQ.

FOR THE DEFENDANT:

STEPHEN H. ROGERS, ESQ.
CHARLES A. MICHALEK, ESQ.COURT RECORDER:VICTORIA BOYD
District CourtTRANSCRIPTION BY:VERBATIM DIGITAL REPORTING, LLC
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005058

1 LAS VEGAS, NEVADA, WEDNESDAY, MARCH 30, 2011, 1:32 P.M.

2 (This transcript contains bench conferences only)

3 * * * * *

4 (Bench conference began at 1:32 p.m.)

5 MR. WALL: If the objection is he ought not to be
6 able to review his records. In his deposition, Mr. Rogers
7 asked him, on page 20, to review all of the records from April
8 15th, 2005, forward, from Southwest Medical. He even took
9 about a 5 or 10 minute break to allow Dr. Arita to review them
10 all. That's on page 50.

11 He asked for his conclusions based on that limited
12 review of the records. That's on page 51 of the deposition.
13 He asked him to comment on those records, pages 52 and 53 of
14 the deposition.

15 Then the conclusions that he made he presented to
16 the jury in his opening statement. So at this point, he has
17 adopted that, based on his request that this witness review
18 the record.

19 MR. ROGERS: No, but what's happening here is that
20 the Doctor is not offering an opinion regarding the
21 plaintiff's condition, or his symptoms, or his treatment as he
22 did in the deposition. He's actually discussing things like
23 templates, and forms used by Southwest Medical.

24 MR. WALL: I [inaudible].

25 MR. ROGERS: He's never -- he's never been

1 designated in this area, and he's never offered an opinion in
2 this area. That's not something that a treating provider
3 testifies to.

4 MR. EGLET: He was a -- he was a treating physician
5 at Southwest Medical, and so he is essentially the person most
6 knowledgeable to Southwest Medical, not an expert. So he's
7 allowed -- as part of his treatment, he reviews other
8 physicians' records. He's allowed to rely on anything in the
9 records of Southwest Medical.

10 And, as Mr. Wall pointed out, Mr. Rogers -- if there
11 -- if there is even any possibility this door wasn't opened,
12 it was opened by him in the deposition by having him review
13 these records.

14 MR. ROGERS: Well, that was limited to the treating
15 physician testimony. This is something of a different nature.

16 MR. EGLET: Treating physicians are allowed to give
17 opinions regarding causation, diagnosis, other records they
18 relied on.

19 MR. WALL: [Inaudible] is the only one, and that's
20 been [inaudible].

21 THE COURT: Okay. Overruled for the record.

22 (Bench conference ended at 1:25 p.m.)

23 * * * * *

24 (Bench conference began at 1:58 p.m.)

25 MR. WALL: Here's what's taking place. We gave him

1 a limited amount of the records available to him when he
2 deposed him, [inaudible] jury during opening statement. I
3 have the right to have him explain why he made that conclusion
4 and what it was based on.

5 MR. ROGERS: Well, and what I gave him at the
6 deposition was the records that the plaintiff had produced.
7 The deposition makes that clear, that I handed the Doctor all
8 the records that the plaintiff had produced at that time.

9 Now, there's an additional problem here. He's never
10 been disclosed as an expert. He's now commenting on other
11 doctors' records, including Dr. Rosler's, that have nothing to
12 do with Southwest Medical where he was working.

13 Also, the plaintiff just asked this doctor why he
14 concluded as he did. Your Honor has heard a motion, filed by
15 the plaintiff, seeking to exclude issues of secondary gain.
16 It was Dr. Arita who testified that the reason why he would
17 not recommend surgery for this plaintiff was secondary gain.

18 The plaintiff has now opened the door to this issue,
19 Dr. Arita's concealing it from the jury in his answer. The
20 fact was, his testimony under oath was the reason why, was
21 because of his opinion due to inconsistencies between the
22 physical exam and the pain complaints. Between the films and
23 the complaints, and the plaintiff's pain response to
24 injection, and taking all of this information into
25 consideration, he would recommend against surgery, because in

1 his opinion, the plaintiff exhibited signs of secondary gain.

2 That was his strictly medical opinion that he
3 offered. That's why we opposed that Motion to Exclude that
4 issue. Now, that the plaintiff has asked him about that and
5 opened the door to it, the defense is entitled to
6 cross-examine him on all the reasons why he recommended
7 against surgery.

8 MR. WALL: You excluded that testimony, because it
9 was entirely speculative. It was [inaudible] I don't know.
10 It was so speculative [inaudible] deposition [inaudible].

11 MR. ROGERS: You asked him why, and he said
12 [inaudible].

13 THE COURT: You said the characterization is
14 incorrect [inaudible] Doctor's testimony at the deposition was
15 incorrect.

16 MR. WALL: The deposition testimony related him to
17 [inaudible] --

18 MR. ROGERS: I'll show it to you.

19 MR. WALL: -- [inaudible].

20 MR. ROGERS: No.

21 MR. WALL: But -- but --

22 MR. ROGERS: One moment, Your Honor.

23 THE COURT: Did he use those words?

24 MR. ROGERS: He said specifically --

25 THE COURT: [Inaudible].

1 MR. ROGERS: -- [inaudible] his patient. He said
2 especially this patient. When he used the term "secondary
3 gain" he was speaking directly about the plaintiff when he
4 said --

5 THE COURT: Let's see the deposition.

6 MR. ROGERS: Yes.

7 (Pause in the proceedings)

8 THE COURT: Let's take a break. Let's give the jury
9 a break [inaudible].

10 MR. ROGERS: Okay.

11 (Bench conference ended at 2:01 p.m.)

12 * * * * *

13 (Bench conference began at 2:30 p.m.)

14 MR. ROGERS: The plaintiff's counsel repeatedly
15 objected to any comments by Dr. Fish, a pain management
16 physician, on surgery. We'll recall that there was some
17 concern about that. Plaintiff's counsel and the Court said
18 that he seemed excessively tongue-tied about surgery
19 questions.

20 And now plaintiff has solicited testimony from this
21 pain management physician about surgery. The Court's already
22 entered a ruling on this.

23 MR. EGLET: Ruling that the motion on Dr. Fish, and
24 the limit of his testimony on surgery was that because he is a
25 surgeon, he was not a -- a spine surgeon -- he could not come

1 in here and state that the spine surgery was unreasonable, or
2 unnecessary.

3 But Dr. Arita is talking about, from a pain
4 management physician's perspective is that just like Dr.
5 Rosler testified to, and just like I elicited from Dr. Fish on
6 cross-examination, is sometimes these surgeries don't work,
7 sometimes they don't make the patient better, sometimes they
8 make the patient worse.

9 That doesn't make the surgery -- the decision to do
10 surgery necessarily unreasonable. So it's two different
11 things. And Dr. Rosler testified to that. And I elicited
12 cross-examination of Dr. Fish on that very subject.

13 What Dr. Fish was specifically excluded from doing
14 was coming in and saying, yeah, Dr. McNulty should've never
15 done this surgery. It's a different situation. It's apples
16 and oranges.

17 MR. ROGERS: Yeah, but --

18 THE COURT: It's -- it's entirely different. And
19 furthermore, the question posed by Mr. Wall to this witness
20 was not objectionable. So I think you need to listen
21 carefully to the question before you make your objection.
22 Overruled.

23 (Bench conference ended at 2:32 p.m.)

24 * * * * *

25 (Bench conference began at 2:49 p.m.)

1 THE COURT: Thank you. What page?

2 MR. ROGERS: 79. Or, well --

3 MR. EGLET: Yeah. The question -- the question's
4 actually on page 78. And the answer starts at the middle of
5 page 78, and goes through most of 79.

6 MR. ROGERS: Is there any of that language, though,
7 in there, that we discussed. That's -- that's what I'm doing,
8 is trying to keep the record clean, Your Honor.

9 If all of that's fine, I'll -- I'll read it over.

10 MR. EGLET: Can I finish reading it?

11 THE COURT: [Inaudible] the beginning when we were
12 proposing to [inaudible].

13 MR. EGLET: Can I finish reading it? Let's see.

14 THE COURT: [Inaudible] the beginning, Mr. Rogers.

15 MR. ROGERS: I'm sorry?

16 THE COURT: I don't know where you're proposed --

17 MR. ROGERS: Well, Mr. Eglet --

18 THE COURT: -- to begin and --

19 MR. ROGERS: -- Mr. Eglet's --

20 MR. EGLET: He was begin --

21 THE COURT: -- where you propose to end.

22 MR. EGLET: -- he was beginning on line 8, on page
23 79, which is in the middle of the answer. And that's why I
24 had a concern.

25 MR. ROGERS: You'll see, it's all the same though.

1 It's -- it's not taking anything out of context.

2 (Pause in the proceedings)

3 MR. ROGERS: All right. I'll read it from the
4 question.

5 MR. EGLET: I think -- I think now that I've read
6 it, it's fine. He can read it from there. I don't have any
7 problem with it. [Inaudible].

8 (Bench conference ended at 2:51 p.m.)

9 * * * * *

10 (Bench conference began at 3:07 p.m.)

11 MR. EGLET: Your Honor, we have Dr. Smith from
12 Chicago. And this is the only day he was available. We
13 didn't know that there was going to be all these hearings
14 outside the presence of attorney -- of the jury today which
15 burned -- mistrial motions and everything, which burned
16 literally an hour-and-a-half today.

17 And now it's clear that this cross-examination is
18 going on much longer, and it's after 3:00. We've got to get
19 this witness on, and out of here today. So we need to stop
20 this witness's testimony, because he's local. We can bring
21 him back. And get Dr. Smith on and off now.

22 MR. ROGERS: Yes, I'm nowhere near done.

23 MR. EGLET: Yeah.

24 THE COURT: Okay. When can this witness return? Do
25 you have any idea?

1 MR. EGLET: We'll have to talk to him. I mean, you
2 know, I'm not sure. But we'll get him back.

3 THE COURT: Okay.

4 (Bench conference ended at 3:08 p.m.)

5 * * * * *

6 (Bench conference began at 3:30 p.m.)

7 MR. MICHALEK: Glad I finally got up here. Your
8 Honor, the fact is, just reading his qualifications, but it's
9 the foundation. He hasn't actually spoken what the
10 plaintiff's -- he doesn't know what they personally feel,
11 their value of lost life is. Under Banks v. Sunrise Hospital,
12 I think there's a foundation that this witness can't meet,
13 i.e. actually speaking to the individual involved and getting
14 their understanding.

15 So I would object to this witness on foundational
16 grounds. And I would say, either allow me the opportunity now
17 to voir dire him, regarding his actual knowledge of the
18 plaintiff -- well, that's why we're --

19 MR. EGLET: Well, that's --

20 MR. WALL: He's already testified that he
21 interviewed them.

22 MR. EGLET: Yeah. He testified that he interviewed
23 them and, you know, this is his qualifications portion of
24 economics. We've offered him as an economics --

25 MR. WALL: [Inaudible] cross-examination.

1 MR. EGLET: This is cross-examination, so.

2 THE COURT: Did you say he hadn't interviewed?

3 MR. MICHALEK: I have the depositions of William
4 Simao that says he's never spoken with Stan Smith, and never
5 spoken with anybody from his office. So yes, I would offer
6 that --

7 MR. EGLET: Well, this witness just testified that
8 he has spoken with him, so --

9 THE COURT: [Inaudible] I was just wondering
10 [inaudible] --

11 MR. EGLET: -- you know, if the foundation is made
12 through this witness.

13 MR. WALL: It's not a foundational.

14 THE COURT: Overruled as to foundation. I think it
15 may be fodder for cross-examination.

16 (Bench conference ended at 3:31 p.m.)

17 * * * * *

18 (Bench conference began at 4:31 p.m.)

19 MR. WALL: So, are you going to ask the economics
20 professor to discuss whether -- whether there's a reasonable
21 degree of medical probability of a certain procedure?

22 MR. EGLET: He's going to try to [inaudible] this
23 witness [inaudible] whether Dr. McNulty's testimony was to a
24 reasonable degree of medical probability [inaudible] our
25 client would require this spinal cord stimulator in the

1 future. It's so improper.

2 THE COURT: [Inaudible].

3 MR. MICHALEK: [Inaudible].

4 MR. EGLET: Excuse me. Let me finish, please.

5 MR. MICHALEK: Sure.

6 MR. EGLET: This gentleman is an economist --

7 THE COURT: Um-hum.

8 MR. EGLET: -- who based calculations based on
9 numbers [inaudible]. It's the jury's -- to determine whether
10 Dr. McNulty --

11 THE COURT: Right.

12 MR. EGLET: -- gave that testimony or not. Counsel
13 can argue in his closing argument, but it's not appropriate
14 for cross-examination of the economist as to whether a spinal
15 cord stimulator is reasonable, necessary, is actually
16 recommended by Dr. McNulty or not. It doesn't make any
17 difference.

18 MR. MICHALEK: It goes to the foundation of his
19 opinion, Your Honor. He testified that he had not been -- he
20 did not read Dr. McNulty's --

21 THE COURT: Please will you keep your -- I'll ask
22 you to please keep your voice down, Mr. Michalek.

23 MR. MICHALEK: Oh, sure. He did not -- he did not
24 read the entire testimony of Dr. McNulty. I'm simply
25 foundationally making him aware of what Dr. McNulty actually

1 said. That is certainly appropriate.

2 THE COURT: Please keep your voice down, Mr.
3 Michalek.

4 MR. WALL: It's no different than asking Dr. McNulty
5 to calculate the present value. Guess what? He's not
6 qualified. It's not his --

7 THE COURT: Right.

8 MR. WALL: -- his expertise.

9 THE COURT: Here's the thing. Given this witness's
10 answer to your last question, I don't think any of this is
11 relevant. This is not his area of expertise. It's pretty
12 plain. You need to take the slide down, Mr. [inaudible].

13 (Bench conference ended at 4:32 p.m.)

14 * * * * *

15 (Bench conference began at 4:33 p.m.)

16 MR. EGLET: I'd like to point out, that slide was
17 not up when we approached the Bench. That it was put up as we
18 were approaching.

19 THE COURT: Yeah, I believe it was. I believe it
20 was.

21 MR. EGLET: I want his -- his tech admonished not to
22 do that again.

23 MR. MICHALEK: Well, first, Your Honor, if there's
24 any admonishment, I'm the one who asked the tech to put it up,
25 so I don't think an admonishment --

1 MR. EGLET: While we're approaching the Bench. Then
2 I want him admonished.

3 MR. MICHALEK: Oh, no. No, no. I asked that it --
4 I asked that it be placed up, okay? I approached and I
5 started to ask the question. You made an objection. We came
6 up here. But it was -- I believe it was already up.

7 MR. EGLET: It was not up.

8 MR. MICHALEK: Well --

9 THE COURT: Let's carry on. It's late in the day.
10 Let's carry on.

11 (Bench conference ended at 4:34 p.m.)

12 * * * * *

13 (Bench conference began at 4:35 p.m.)

14 MR. EGLET: We withdrew that -- that report was
15 based on a life care plan presented by a Ms. Hartman
16 [phonetic], a nurse. We sent them formal notice that we
17 withdrew her as a witness, and we withdrew that life care
18 plan.

19 So, those calculations have nothing to do with the
20 spinal cord stimulator that Dr. McNulty testified to last
21 week, or the adjacent segmental breakdown that Dr. Wang
22 testified to yesterday. So he's trying to mislead this jury
23 about calculations that are based on a life care plan that has
24 not been presented into evidence and has been withdrawn, and
25 they've received notice that it's been withdrawn.

1 So I would ask that his last question be stricken
2 and he be admonished not to mislead this jury, when he's been
3 instructed -- they've been formally instructed that those
4 numbers have been withdrawn.

5 MR. WALL: We followed the exact procedure --

6 MR. MICHALEK: But they're allowed to withdraw the
7 -- Kathleen Hartman. But the fact is, he wrote a report
8 detailing what the economic losses are. Now, that's changed
9 in the last 24 to 48 hours, according to this --

10 MR. WALL: Do you know how to whisper?

11 MR. MICHALEK: -- 24 to 48 hours, according to this
12 witness.

13 MR. EGLET: Do you know how to whisper?

14 MR. MICHALEK: Sorry. That's changed in the last 24
15 to 48 hours. So, I think that it's certainly relevant to this
16 [inaudible].

17 MR. EGLET: It's not relevant if it's -- his
18 calculations are based only on evidence that's been presented,
19 and that evidence has not been presented. It's been
20 withdrawn. We specifically followed the rules to withdraw
21 that. What he's doing is unethical and he should be reported
22 to the Bar for it.

23 THE COURT: Well, here's the thing. If the report
24 has been withdrawn, then Hartman's figures are not relevant.

25 Sustain the objection.

1 MR. EGLET: I ask that his last question be struck.

2 THE COURT: Very well.

3 (Bench conference ended at 4:36 p.m.)

4 * * * * *

5 (Bench conference began at 4:43 p.m.)

6 MR. WALL: There's an objection [inaudible].

7 MR. EGLET: That wasn't the objection. You didn't
8 read the answer.

9 MR. WALL: It hasn't gone to it yet.

10 MR. EGLET: He was asked a question and then skipped
11 a whole bunch of answers and stuff.

12 THE COURT: Wait a minute, wait a minute. Before we
13 even go there, if you're -- if you're attempting to use this
14 to impeach him, this doesn't -- nothing that I saw on the
15 screen --

16 MR. EGLET: It doesn't even impeach him.

17 THE COURT: -- impeaches his answer.

18 MR. MICHALEK: It says right here, Your Honor,
19 [inaudible] Stan Smith. And question, Personally or
20 [inaudible] in any way? Not that I recall.

21 MR. EGLET: He said he didn't.

22 THE COURT: Right.

23 MR. MICHALEK: [Inaudible].

24 MR. EGLET: That's what he said on the stand, too.

25 THE COURT: The statement that he gave here on the

1 stand in person in front of the jury is not contradicted by
2 that testimony.

3 MR. EGLET: Stan Smith said the first time he
4 [inaudible].

5 MR. MICHALEK: Your Honor, it goes on [inaudible]
6 goes on to say, Have you discussed that with anybody --

7 MR. EGLET: No, no, no.

8 MR. MICHALEK: -- other than Mr. Rogers.

9 MR. EGLET: No, no, no.

10 MR. MICHALEK: And they say, No.

11 THE COURT: Discussed what --

12 MR. EGLET: No, no, no.

13 THE COURT: -- with [inaudible]?

14 MR. EGLET: Yeah, household -- his division of
15 household services. That's --

16 THE COURT: [Inaudible].

17 MR. EGLET: -- what he's skipping over. He's
18 misleading this jury.

19 MR. MICHALEK: [Inaudible] starts there, actually,
20 wrote an expert report --

21 MR. EGLET: So what?

22 MR. MICHALEK: -- discussing the household services.
23 And the plaintiff's [inaudible] household services. So
24 whether he spoke to the plaintiff regarding this item is
25 certainly relevant.

1 MR. EGLET: It doesn't impeach his --
2 THE COURT: Have you got --
3 MR. EGLET: -- testimony, Judge.
4 THE COURT: -- anything in there that impeaches what
5 he said, because I haven't seen it yet.
6 MR. MICHALEK: It's right there.
7 MR. EGLET: You have no idea what you're doing, do
8 you?
9 MR. MICHALEK: You know what --
10 THE COURT: That's not appropriate --
11 MR. MICHALEK: I'm not [inaudible].
12 THE COURT: -- Mr. Eglet.
13 MR. MICHALEK: The fact is, this does say that the
14 plaintiff has never spoke with either Mr. Smith or anybody
15 from his office.
16 THE COURT: Where does it --
17 MR. EGLET: It says it about --
18 THE COURT: -- say that?
19 MR. EGLET: -- household services --
20 THE COURT: Where does --
21 MR. EGLET: -- counsel.
22 THE COURT: -- it say that, Mr. Michalek?
23 MR. MICHALEK: Stan -- Stan Smith wrote in the
24 expert report regarding the household services. So the fact
25 that no member of his office spoke with him regarding it, is

1 certainly [inaudible].

2 THE COURT: Where does it say --

3 MR. EGLET: Your question was about --

4 THE COURT: Where does it say in the transcript --

5 MR. EGLET: -- willing --

6 THE COURT: -- what you're telling me?

7 MR. EGLET: Your question was about willingness to
8 pay and hedonic damages, not household services. And then you
9 tried to impeach him with this. This doesn't impeach him.

10 MR. MICHALEK: Second, Your Honor, it says, Okay.
11 Has anyone other than me asked you for the fact that this
12 accident has had on your marriage -- relationship. Since the
13 last deposition? Yes. I guess we can [inaudible].

14 MR. EGLET: The depo?

15 MR. MICHALEK: -- questions. Right.

16 MR. EGLET: [Inaudible].

17 MR. MICHALEK: Not that I can recall.

18 MR. EGLET: And how long [inaudible].

19 THE COURT: You didn't ask him any question about
20 that one.

21 MR. MICHALEK: I haven't gotten to that point yet,
22 Your Honor. But the point is, he was hired to discuss
23 household services, loss prevention [inaudible] and the
24 hedonic damages. This deposition transcript shows he didn't
25 talk about household services, and he didn't talk about

1 discussion of the effect on the relationship.

2 THE COURT: Let me see it, because it looks --

3 MR. EGLET: Well, okay, first --

4 THE COURT: -- [inaudible] I'm not sure it's
5 accurate.

6 MR. EGLET: See, here's the thing, Judge, is I just
7 said a moment ago when we were up the last time, we also
8 withdrew -- we did not -- he didn't -- there's nothing on
9 direct about loss of household services.

10 THE COURT: Um-hum.

11 MR. EGLET: We didn't present a --

12 THE COURT: That's true. That's true.

13 MR. EGLET: -- loss of household services claim in
14 this case. We haven't presented it to the jury. So he
15 doesn't get to cross-examine him on household services,
16 because we didn't ask for that.

17 THE COURT: That's true.

18 MR. MICHALEK: They did talk about [inaudible] loss
19 of consortium [inaudible] the fact is --

20 MR. EGLET: What pages does that start on, Judge?

21 THE COURT: Page 36, at the bottom.

22 MR. EGLET: This is all household services.

23 MR. WALL: I know, we didn't ask for it.

24 MR. EGLET: This is all household services.

25 THE COURT: Will you just give me a chance to read

1 it?

2 (Pause in the proceedings)

3 THE COURT: This kind of jumps around, so I'm not
4 sure.

5 MR. EGLET: It's household services, Judge.

6 MR. MICHALEK: The last page -- the last page is not
7 [inaudible]. That's [inaudible].

8 MR. EGLET: That's a different depo.

9 THE COURT: Okay. The household issues isn't even
10 an issue, because it's not --

11 MR. EGLET: It's -- no, we didn't present it.

12 THE COURT: -- an issue [inaudible].

13 MR. EGLET: This is all household services.

14 THE COURT: This first part you just showed the jury
15 doesn't impeach him. And I don't know how else you intended
16 to use this, because you haven't asked him any questions about
17 loss of consortium.

18 MR. MICHALEK: Well, I didn't ask him whether
19 [inaudible] spoke with the plaintiff regarding a loss of
20 relationship.

21 MR. EGLET: He didn't ask him that.

22 THE COURT: You haven't asked him a question of --

23 MR. MICHALEK: No, I'm saying, I intend to ask him
24 now.

25 MR. EGLET: Okay. So where is that in the depo,

1 that it impeaches him?

2 THE COURT: Where is that?

3 MR. EGLET: Where is -- where is he impeached by
4 that in the depo?

5 MR. MICHALEK: Right here.

6 MR. EGLET: What page is that?

7 MR. MICHALEK: It's 40 [inaudible]. Has anyone
8 other than me asked you [inaudible] relationship.

9 THE COURT: I can't hear you.

10 MR. MICHALEK: It starts right here.

11 MR. EGLET: What page is that?

12 MR. MICHALEK: That's 37, line 20.

13 MR. EGLET: Line what? Okay.

14 THE COURT: And what's the answer?

15 MR. MICHALEK: "Not that I can recall."

16 THE COURT: No. No, no, no, no, no, no. He said --
17 the clarification by his attorney at the time says, "Since the
18 last deposition?" Mr. Rogers says, "Yes." Mr. [inaudible] I
19 guess we can assume that for all questions?" "Right." Then
20 he says, "Not that I can recall."

21 See, he likes to leave out all this stuff that
22 clarifies it.

23 MR. MICHALEK: The plaintiff's deposition was in
24 2008, prior to Stan Smith ever being hired by plaintiff's
25 counsel, prior to there being any surgery. So after that

1 point in time, Mr. Rogers asked whether anybody had talked to
2 you about it.

3 There's no way that Mr. Smith talked to the
4 plaintiff, or anybody from his office talked to the plaintiff
5 before there was even a hiring date, which would be April of
6 two thousand [inaudible].

7 MR. EGLET: It doesn't mean you get to leave it out
8 when you --

9 MR. MICHALEK: [Inaudible].

10 MR. EGLET: You don't get to leave stuff out in the
11 deposition. You read it to the jury.

12 MR. MICHALEK: [Inaudible] he was asked whether
13 there was a discussion with anybody other than Mr. Rogers
14 about --

15 MR. EGLET: Okay. Well, let me --

16 MR. MICHALEK: -- his loss [inaudible].

17 MR. EGLET: Let me point something out. Here's the
18 problem with this, okay? The interview about the loss of the
19 marriage relationship was with Mrs. Simao. She's the one who
20 has the loss of consortium claim, not Mr. Simao. So the
21 interview would've been with her.

22 Now, if he's got somewhere in her deposition where
23 she says, nobody asked her about those questions, when -- then
24 that's fine. But this has nothing to do with Mr. Simao. Mr.
25 Simao doesn't have a loss of consortium claim. That belongs

1 to his wife.

2 THE COURT: Right.

3 MR. EGLET: This is so incredibly improper, I can't
4 believe it.

5 THE COURT: Sustain the objection. Let's continue.

6 (Bench conference ended at 4:50 p.m.)

7 * * * * *

8 (Bench conference began at 4:58 p.m.)

9 MR. EGLET: How does he get to put this up in front
10 of the jury?

11 MR. WALL: Is he going to publish this book?

12 MR. EGLET: He can't publish this book.

13 MR. WALL: This is --

14 MR. MICHALEK: Your Honor --

15 THE COURT: Hum?

16 MR. EGLET: You can't publish this book.

17 MR. MICHALEK: Your Honor, it's his book. He relies
18 upon it. He uses it in his report that he's [inaudible]. It
19 is a learned treatise --

20 MR. WALL: Actually, he said it wasn't.

21 MR. MICHALEK: -- actually --

22 MR. EGLET: Actually, he said it wasn't --

23 MR. MICHALEK: Can I --

24 MR. EGLET: -- a learned treatise.

25 MR. MICHALEK: [Inaudible] interrupt. He was being

1 modest. He said --

2 THE COURT: Ask you to keep your voice down, please.

3 MR. MICHALEK: He said it was a learned treatise.

4 THE COURT: He didn't say that, Mr. Michalek. He
5 did not say that.

6 MR. MICHALEK: He said it was relied upon generally
7 in the community.

8 MR. EGLET: No, he didn't.

9 MR. MICHALEK: Yes, he did.

10 MR. EGLET: No, he didn't.

11 MR. MICHALEK: He was being modest. But he said,
12 other people have used it. It's a textbook.

13 MR. EGLET: No, you used that.

14 MR. WALL: He said it's a basic textbook.

15 MR. EGLET: It's a basic --

16 MR. MICHALEK: It is --

17 MR. EGLET: -- textbook.

18 MR. MICHALEK: -- it is a document, that it's part
19 of his file. It is listed in his report.

20 THE COURT: I think -- do you have a specific
21 question for him regarding that book?

22 MR. MICHALEK: The book -- a couple, but the book
23 specifically states that the 15 to 30 percent is something
24 that a psychologist should determine.

25 MR. EGLET: Okay.

1 MR. MICHALEK: And I'm simply going to use that
2 report right now, that [inaudible].

3 MR. EGLET: First of all, as the Court knows, he did
4 not say it was a learned treatise.

5 THE COURT: No, he didn't.

6 MR. EGLET: He also said he did not rely on it for
7 his opinions today. He did not indicate that it's part of his
8 file. So all three of those representations are false by Mr.
9 Michalek. All of them false. So there's no foundation.

10 Second of all, they never identified this book as
11 something that they would use for impeachment purposes, which
12 you have to do, just like we identified all the depositions in
13 our -- of their experts that we would use for impeachment. We
14 identified them. We produced them. They have done nothing
15 with respect to this book, so they haven't done that.

16 And second of all, they still don't get to publish
17 the book. Even though it's a learned treatise, you can
18 cross-examine a witness with it --

19 THE COURT: Right.

20 MR. EGLET: -- but you don't get to publish it to
21 the jury. So it's improper use. But it's not a learned
22 treatise. There's no testimony he relied upon it. And
23 there's no testimony he used it in his opinion. It's not part
24 of his file. So there's no basis to even impeach him with it.

25 MR. MICHALEK: Your Honor, it is a part of his file.

1 In fact, his website states that a copy of the book is given
2 to every counsel who oppose him. It is a part of his file.
3 He cited in his report the lines [inaudible]. It is something
4 that he used.

5 I agree, it's not going back to the jury. But I can
6 certainly examine -- use it to examine him. But now, if
7 counsel says, well, I don't want to see the slide up there,
8 that's fine. I'll ask him the question and then I'll read
9 from the book.

10 MR. WALL: They don't --

11 THE COURT: Sustain the objection. Let's move on.

12 (Bench conference ended at 5:01 p.m.)

13 * * * * *

14 (Bench conference began at 5:11 p.m.)

15 MR. WALL: If he wants to make an objection, make an
16 objection. But categorizing this very sensible testimony is
17 ridiculous. It is absolutely inappropriate and I would ask
18 that --

19 THE COURT: I agree.

20 MR. WALL: -- that that be stricken.

21 THE COURT: We're getting a little far afield here.
22 I haven't heard a lot of objections with respect to relevance.
23 I've heard a couple of them. But very far afield here. I
24 wonder if you can bring it back to the issue at hand and to
25 his testimony.

1 MR. MICHALEK: I am, Your Honor. But it was --

2 MR. WALL: How much more do you have?

3 MR. MICHALEK: -- a simple question [inaudible].

4 THE COURT: It was not a simple question, Mr.

5 Michalek. And you pretty much, in the Court's view, you sort

6 of asked for it. The answer you got, you sort of asked for

7 it. So, I ask you to refocus and let's move on.

8 MR. WALL: Can we strike that --

9 THE COURT: I will.

10 (Bench conference ended at 5:12 p.m.)

11 * * * * *

12 (Bench conference began at 5:22 p.m.)

13 MR. WALL: I don't know how much more there is to
14 this, but.

15 THE COURT: I wonder why you're asking this witness
16 questions that have nothing to do with his scope of his
17 expertise, nor anything to do with direct examination.

18 MR. MICHALEK: It does, Your Honor. His report was
19 written April 16th, 2009. He's saying, and that report says,
20 that this plaintiff has lost the enjoyment of his life, to the
21 tune of, you know, millions of dollars. And the fact is, he
22 hadn't even recovered from surgery yet.

23 So to be able to give an opinion three weeks
24 post-surgery that this guy has lost the enjoyment of life, is
25 certainly relevant to cross-examine him on.

1 THE COURT: Your response, Mr. Wall?

2 MR. WALL: I don't know why you asked him what his
3 medical condition is. It's all based on his interviews with
4 him, not only three weeks after the surgery, but also in
5 October or December of 2010, I think it was December of 2010.

6 So, based upon those assumptions that he makes, he
7 talks to them. [Inaudible] a percentage and he does the math.
8 He just does the math, for God's sake. That's all.

9 Are we going to walk through his medical treatment
10 with him? I don't know where we're going with this. I just
11 don't know.

12 MR. MICHALEK: How -- how come you say [inaudible]
13 lost their enjoyment of life and they haven't -- and they
14 haven't even recovered from surgery yet.

15 THE COURT: Well, that sounds like something for
16 closing argument [inaudible].

17 MR. MICHALEK: That's fine, Your Honor.
18 [Inaudible].

19 THE COURT: Well, you can argue that. But this
20 witness -- it's not within this witness's scope of expertise.
21 Hold on a second. The direct examination was really fairly
22 concise, and this witness has made clear to this jury what his
23 area of expertise is, numerous times, in responding to your
24 questions. So, let's stay within the scope of expertise. And
25 let's stick with what was covered in direct examination.

1 MR. WALL: How much more do you have?

2 MR. MICHALEK: Well, there's a lot of questions I'd
3 like to ask this witness.

4 THE COURT: Let's continue.

5 MR. EGLET: I just want to apologize to the Court.
6 I have got a meeting that I cannot miss, so I'm going to step
7 out.

8 THE COURT: Okay.

9 MR. EGLET: Okay. Thank you.

10 THE COURT: All right.

11 MR. MICHALEK: Your Honor, [inaudible] because I
12 have -- I have documents, affidavits, a listing of items that,
13 yes, were listed in [inaudible] that I want to cross-examine
14 this witness. If the Court's not going to allow me to do that
15 based upon, I guess, [inaudible] then I'll make an offer of
16 proof [inaudible] short circuit this.

17 But there's a lots of studies and documents that are
18 listed in the report I haven't cross-examined on. [Inaudible]
19 plaintiff's counsel [inaudible]. If you're going to
20 [inaudible] then I'll make an offer of proof outside the jury.

21 THE COURT: I have no idea what he's talking about.

22 MR. WALL: I don't know either. I think he's saying
23 that there's -- that his expert cites some articles which use
24 a different theory than he's used. Is that what you're -- is
25 that what you're talking about?

1 MR. MICHALEK: There are articles cited by my expert
2 that use different theories. They have not been produced to
3 plaintiff's counsel. They were cited in the expert report.

4 THE COURT: Well, that's a problem.

5 MR. MICHALEK: There's also [inaudible] I'll simply
6 make a record on [inaudible] because [inaudible].

7 MR. WALL: All right. Make it.

8 MR. MICHALEK: [Inaudible] we should be able cross-
9 examine on it [inaudible] make an offer of proof.

10 THE COURT: Not at this moment. You'll have to do
11 it tomorrow.

12 MR. MICHALEK: Okay.

13 THE COURT: Let's finish with this witness.

14 MR. MICHALEK: Thank you.

15 (Bench conference ended at 5:25 p.m.)

16 * * * * *

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25

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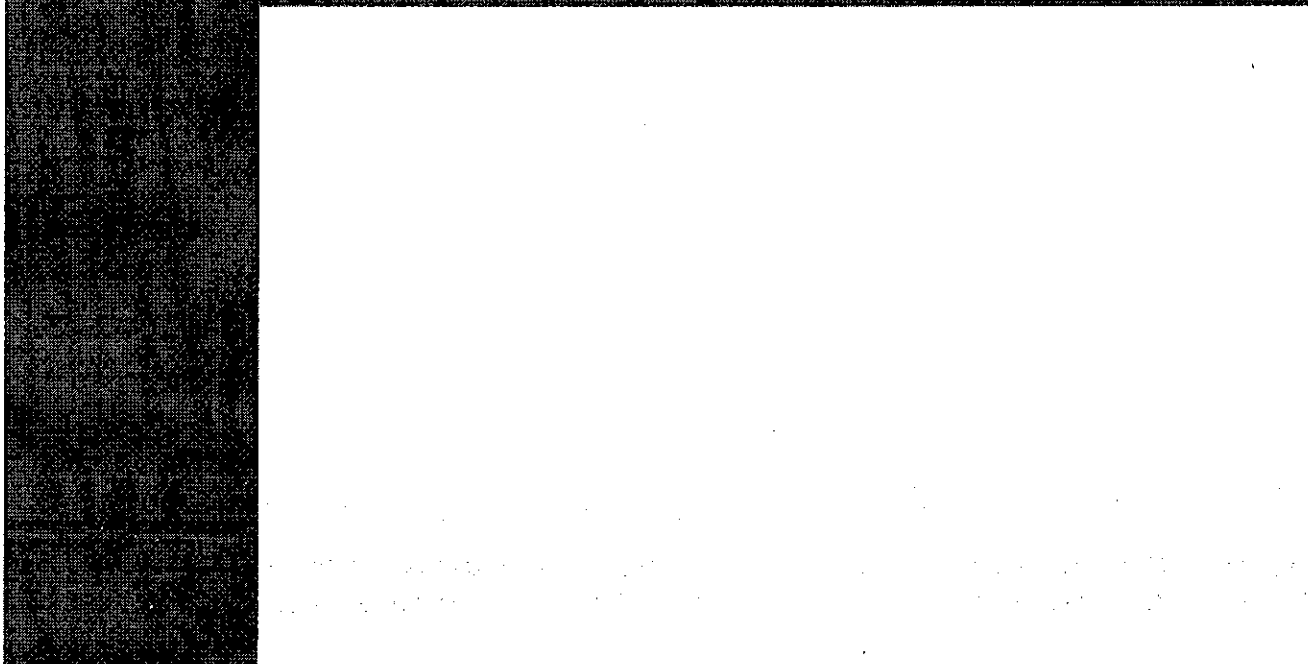
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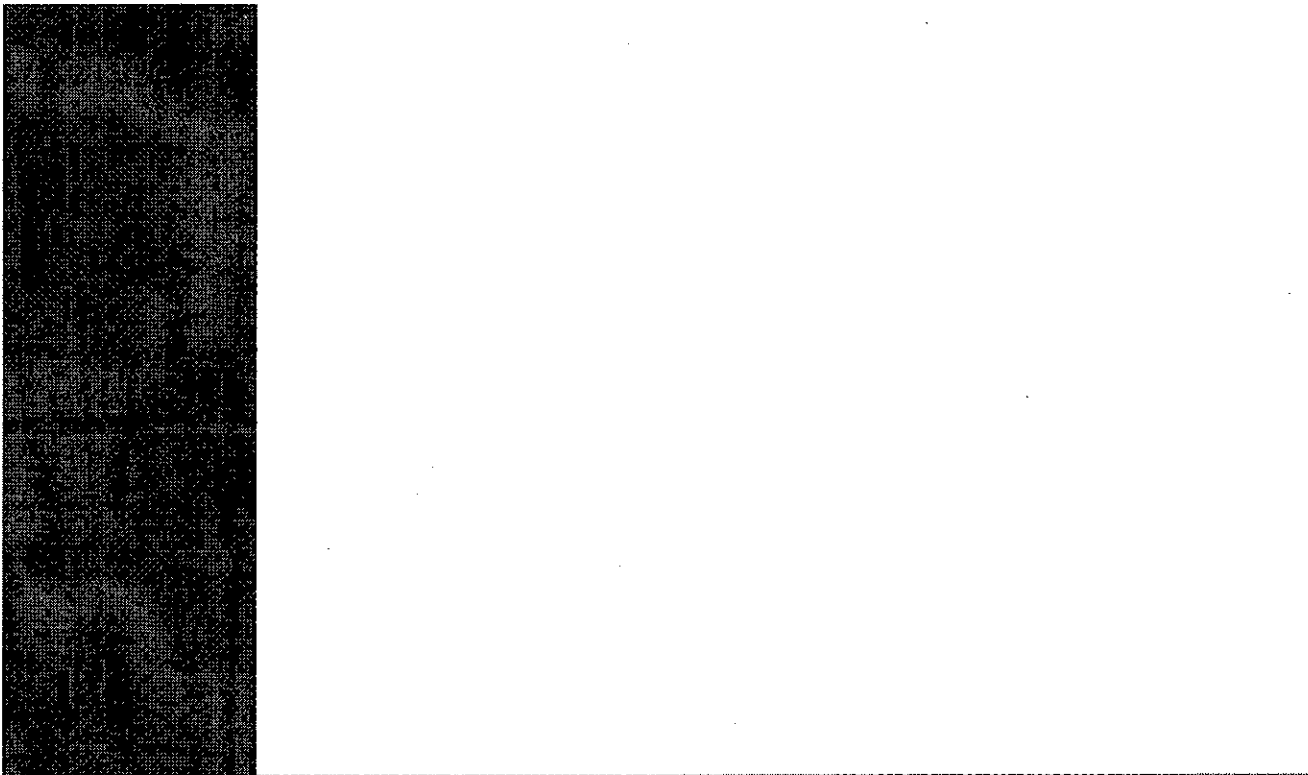
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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *WILLIAM SIMAO and
CHERYL SIMAO,

Plaintiffs,

vs.

JENNY RISH,

Defendant.

CASE NO. A-539455

DEPT. NO. X

TRANSCRIPT OF
PROCEEDINGS

Partial Transcript

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

PORTION OF JURY TRIAL - DAY 14
(BENCH CONFERENCES)

THURSDAY, MARCH 31, 2011

APPEARANCES:

FOR THE PLAINTIFFS:

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TRACY A. EGLET, ESQ.
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FOR THE DEFENDANT:

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CHARLES A. MICHALEK, ESQ.COURT RECORDER:VICTORIA BOYD
District CourtTRANSCRIPTION BY:VERBATIM DIGITAL REPORTING, LLC
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1 LAS VEGAS, NEVADA, THURSDAY, MARCH 31, 2011, 2:02 P.M.

2 (This transcript contains bench conferences only)

3 * * * * *

4 (Bench conference began at 2:02 p.m.)

5 MR. EGLET: Mr. Rogers went into this one other time
6 and we objected and he just did it again. And we pointed out
7 that the only reason he's doing this is to lead this jury and
8 make the impression that this -- that this was a worker's
9 compensation claim, because -- let me finish, please.

10 MR. ROGERS: [Inaudible].

11 MR. EGLET: That's exactly what you're doing.

12 MR. ROGERS: No, it isn't.

13 MR. EGLET: That this is a worker's compensation
14 claim, leading this jury with the impression that maybe he
15 received worker's compensation benefits from this accident,
16 because he was an employee at the time of the accident. It
17 was on the job.

18 The only way to solve this is a curative instruction
19 to this jury right now, notifying them that this was -- that
20 there was no worker's compensation claim made by this, and Mr.
21 Simao did not receive any worker's compensation benefits as a
22 result of this accident.

23 Otherwise, they are left with the impression --

24 MR. WALL: Yeah, there was that testimony of --

25 MR. EGLET: There --

1 MR. WALL: -- was it Rosler, or somebody, about --

2 MR. EGLET: Yeah.

3 MR. WALL: -- surveys and worker's comp patients.

4 MR. EGLET: Right. Yeah, he asked the same thing.

5 MR. ROGERS: I didn't hear that. What?

6 MR. WALL: There was that testimony, I forget it who
7 it was your cross of Rosler, or somebody --

8 MR. EGLET: Rosler.

9 MR. WALL: -- about -- about surveys involving
10 worker's comp claimants.

11 MR. EGLET: Right. He's now left the impression
12 twice with this jury that our client may have received
13 worker's compensation benefits from this accident. That is
14 highly prejudicial to the plaintiff, because if this was a
15 worker's compensation case, the jury would be instructed on
16 that, specifically, that they are not to -- that the amount,
17 and that they are not to make any reduction for that amount
18 that he received, worker's compensation benefits.

19 This is calculated. It's been done on purpose.
20 There's no reason for it. It's not relevant to any issue in
21 this case.

22 THE COURT: I wondered about the relevancy.

23 MR. ROGERS: Well, there's a perfect relevant
24 reason.

25 UNKNOWN MALE SPEAKER : It's [inaudible] after --

1 after it came up before, we were told that worker's comp was
2 not relevant to this case. We've already talked about it. So
3 there's no prejudice to saying to them now, you know,
4 [inaudible] based on the question that was asked, we don't
5 want to give the jury the impression that this case has
6 anything to do with worker's compensation, then whatever.

7 MR. ROGERS: There is an instruction on this
8 already. The relevance of it is not at all sinister, as
9 plaintiff's counsel has interpreted it. The main point of
10 this is, as I went through with his wife, is that he was an
11 employee of the company, and that he became the owner after
12 accident time when he claims when he claims that he was having
13 difficulty working.

14 The difference on this is that, well, plaintiff is
15 evidently progressing at work, to the point where he bought
16 it. It's -- there's no intention to mislead this jury.
17 That's not at all the point. It's that he's not doing as bad
18 after the accident as he's making out. That's the -- that's
19 the theory of the case, of this issue.

20 So there really isn't a bad intention at all.

21 MR. EGLET: Then there's no -- then there's no
22 prejudice of giving the curative instruction we've asked for.

23 THE COURT: No, there wouldn't be.

24 MR. EGLET: And excuse me, Your Honor, just for the
25 record. If I don't think that just about everything when he

1 brings up the irrelevant information that it's -- that there's
2 a sinister purpose for it, because he's done that throughout
3 this trial. He's tried to violate every single court order he
4 can.

5 MR. WALL: Well, and the suggestion, I'm not sure
6 the relevance of. He bought the business to try to establish,
7 look, he's got plenty of money.

8 MR. EGLET: Yeah.

9 MR. WALL: He doesn't need your help. The financial
10 condition of the parties.

11 THE COURT: That's not relevant. I agree.

12 MR. WALL: Of both parties.

13 MR. EGLET: Right. Exactly. That's not relevant
14 either.

15 MR. ROGERS: No. And whether he has money is not
16 relevant. The point isn't that he's flush with cash, it's
17 that he's progressing in his work at a time when he claims
18 that he is injured.

19 THE COURT: Well, then that's also something --

20 MR. EGLET: We have a -- we have a --

21 THE COURT: -- we should save for closing argument.

22 MR. EGLET: -- here's why that's --

23 MR. WALL: [Inaudible].

24 THE COURT: If that's your theory.

25 MR. EGLET: -- here's why that's not relevant

1 though, because we have not made either a future, or a past
2 wage loss claim. We have not claimed that his earning
3 capacity has been diminished. So that argument is not
4 relevant to this case in any way, shape, way or form. And we
5 have shown to this Court everything he's going to say is not
6 relevant, and it clearly -- this is for one purpose, is to
7 throw this work comp in there and to leave this jury with this
8 impression.

9 MR. ROGERS: And it's absolutely not at all, not
10 even close to the intention. Look, it -- as hobbies or
11 activities that he's able to continue, and here's the -- he
12 will testify that he was, albeit with the limitations to the
13 pain, that's fair game. If he's able to continue working and
14 progressing in the work, in a job that requires manual labor,
15 it's the same principle. There's been [inaudible].

16 THE COURT: You know, the thing is, the Court views
17 -- the Court views it totally differently, because the flip
18 side of that is, maybe he's physically not able to continue
19 working in the kind of work that he's doing. Maybe as a
20 management, as an owner, he would be better suited, because
21 there would be less physical demands on his body. So, that's
22 the flip side of that. And I'm not persuaded by that
23 argument, but that's neither here nor there. I think we've
24 made our record now, and I'll instruct the jury.

25 MR. EGLET: We would -- we'd ask that the curative

1 instruction be that -- that -- that this case has nothing to
2 do with worker's compensation, and Mr. Simao has not received
3 any worker's compensation benefits as a result of this
4 accident.

5 THE COURT: [Inaudible] claim made, right?

6 MR. WALL: Yes, he hasn't claimed any.

7 MR. ROGERS: And that's the way to --

8 THE COURT: Right.

9 MR. ROGERS: -- put it then, because, I mean, that's
10 going to far now, when you're talking about money that's
11 received, or not received.

12 MR. EGLET: No.

13 THE COURT: I think it's entirely appropriate, given
14 that --

15 MR. EGLET: It's absolutely appropriate.

16 THE COURT: -- the level of source issues. But the
17 door's now been opened. The Court has to address this again.

18 MR. ROGERS: Okay.

19 (Bench conference ended at 2:08 p.m.)

20 * * * * *

21 (Bench conference began at 2:10 p.m.)

22 MR. WALL: Please help me understand. The potential
23 relevance in there is, to whether it was stop and go traffic,
24 whether he was stopped, other than to infer or argue that the
25 cars were going too slowly to have a significant impact to

1 cause the injury.

2 MR. EGLET: This is exactly why Linda Rush
3 [phonetic] was just excluded, because we're not to get into --

4 MR. WALL: [Inaudible] opened the door to it. That
5 was very succinct --

6 THE COURT: Um-hum.

7 MR. WALL: -- and very pointed. But the questions I
8 asked him about the accident [inaudible] opened the door.
9 He's going to -- he's going to impeach him with his deposition
10 on whether it was stop and go traffic, whether traffic was
11 stopped. I don't know what other purpose there would be.

12 I don't know what purpose there would be other than
13 to suggest that their cars were moving too slowly, so as to
14 not having an impact significant enough to cause the injury.
15 I don't know what the relevance is that makes the likelihood
16 of any fact in consequence most or less probable, other than
17 that. What fact is made more or less probable than this line
18 of questioning.

19 THE COURT: Mr. Rogers?

20 MR. ROGERS: We had this very argument this morning
21 on the record. And the defense's point is that the facts
22 surrounding this accident are relevant. We understand the
23 prohibition that we cannot call this a minor impact. But --

24 MR. WALL: That's not the prohibition.

25 MR. ROGERS: -- you now have an irrebuttable

1 presumption, because you argue that any fact that I discuss
2 that even gets close to the accident itself, somehow violates
3 an Order, which holds only one --

4 MR. EGLET: Can you whisper, please?

5 MR. WALL: The [inaudible] irrebuttable presumption
6 doesn't allow for the other side to present evidence to rebut
7 it.

8 MR. ROGERS: Here's -- here's the point though.

9 MR. WALL: It doesn't. So what -- what -- what
10 fact, what purpose is there in stop and go traffic, other
11 than, cars were going too slow, she wasn't going very fast,
12 she didn't hit him very hard. What other --

13 MR. ROGERS: Has this Court Ordered, just because
14 the problem that we're having here has been running throughout
15 the trial. Has this Court Ordered that the defense can
16 present no evidence about the facts surrounding this accident?

17 MR. WALL: No.

18 THE COURT: What I'd like you to do is to answer Mr.
19 Wall's question which he's proposed twice, and you've
20 responded, but you've not answered it. And I think that's
21 what's germane to this particular objection. So, that's what
22 I'd like you to respond to.

23 MR. ROGERS: Is what -- ask the question again.

24 MR. WALL: Other than an inference or a suggestion
25 the cars were going slowly and therefore she didn't hit him

10

1 that hard, what potential relevance is there to -- whether it
2 was stop and go traffic.

3 MR. ROGERS: The relevance is to establish that the
4 plaintiff's characterization of this accident is not accurate.

5 MR. WALL: How?

6 MR. ROGERS: That the medical providers'
7 characterization of the substantial hyperflexion extension --

8 MR. WALL: How is that not trying to rebut the
9 irrebuttable presumption that this accident was significant or
10 substantial [inaudible] enough to cause the type of injury
11 complained of?

12 MR. ROGERS: How -- it does go to rebut that --

13 MR. WALL: [Inaudible] --

14 MR. ROGERS: -- just as it goes to rebut --

15 MR. WALL: -- it can't --

16 MR. ROGERS: No, it -- just as it goes --

17 MR. EGLET: It's an irrebuttable presumption.

18 MR. ROGERS: No, because if --

19 MR. EGLET: You can't rebut it.

20 MR. ROGERS: -- you saw the instruction that
21 plaintiff's counsel wrote, it says that the accident -- it is
22 irrebuttably presumed that the accident can cause --

23 MR. WALL: Right.

24 MR. ROGERS: -- the injury alleged, but it is up to
25 the jury to determine whether it did.

1 MR. EGLET: Based on medical causation testimony,
2 not on this.

3 MR. WALL: Not based on --

4 MR. ROGERS: The defense --

5 MR. EGLET: Not based on this.

6 MR. WALL: Not based on the [inaudible].

7 MR. ROGERS: The --

8 MR. EGLET: Not based on --

9 MR. WALL: We need an expert for --

10 MR. EGLET: This is for -- you don't have an expert
11 for this.

12 MR. ROGERS: But when you put an expert on the stand
13 and he says that his causation opinion is based on a history
14 that there was a substantial hyperflexion extension mechanism,
15 then we need to explore whether there was.

16 MR. EGLET: You have no evidence --

17 THE COURT: Sustain the objection.

18 MR. EGLET: -- there wasn't.

19 THE COURT: Let's move on.

20 (Bench conference ended at 2:15 p.m.)

21 * * * * *

22 (Bench conference began at 2:19 p.m.)

23 MR. EGLET: Your Honor, let me --

24 MR. WALL: Look, how many times do we go through
25 this? What in the world is the relevance?

1 MR. EGLET: I'm going to move to --

2 MR. WALL: How many times have we done this? How
3 many frickin' times have we done this with every single
4 witness? You asked if she was injured. What in the world
5 could have possibly be the relevance here?

6 MR. ROGERS: You know exactly what. Do you want to
7 get loud?

8 MR. WALL: Absolutely.

9 MR. ROGERS: Let's do. Let's excuse this jury and
10 do exactly that.

11 MR. WALL: You got it. You got it. You have no
12 idea what you're in for.

13 MR. ROGERS: Good.

14 MR. WALL: I'm going to ask that he be sanctioned in
15 front of the jury, that he be fined in front of the jury, and
16 that the jury be told that he had violated the Court Order
17 again.

18 MR. ROGERS: That is absolutely not true. This --

19 MR. WALL: Let's excuse them and make a record.

20 MR. ROGERS: Let's do.

21 THE COURT: Do we really need to do that?

22 MR. WALL: That's my --

23 THE COURT: Do we really --

24 MR. WALL: -- my request is that he be sanctioned in
25 front of this jury.

1 THE COURT: Do we really need to do that? We were
2 making such progress with your examination of these other
3 witnesses.

4 MR. EGLET: I'm sorry?

5 MR. WALL: How many times?

6 THE COURT: We've been making --

7 MR. WALL: How many times?

8 THE COURT: -- such progress in terms of this trial
9 moving along since we began with Mr. Wall's examination
10 [inaudible] first witness, and all [inaudible] can we just
11 keep this thing moving?

12 MR. EGLET: Your Honor, here's the problem. Well,
13 first of all, this is the last witness for the day, so we're
14 going to have -- we're going to finish. It's not going to be
15 a problem, because we expected there to be -- Dr. Wang would
16 be here, but he's not. So we don't have any other witnesses
17 available. But I want to -- I want to have a conference,
18 because I think we may be moving to strike the answer at this
19 point. These continuous violations.

20 THE COURT: Can't we have -- can we bring that
21 radiologist in this afternoon?

22 MR. EGLET: He's not available until Monday.

23 MR. ROGERS: We can ask. I don't know. I'm told
24 it's Monday, but if he could come, that's possible. I don't
25 know.

1 THE COURT: All right.

2 (Bench conference ended at 2:20 p.m.)

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