Exhibit 28

Total Care & Wellness

801 S. Rancho Dr.
Las Vegas, NV 89106
(702)534-4711

9/22/2015

Patient: **Mike Strother**
9066 Salvatore St.
Las Vegas, NV 89145
Chart #: STRMI000
Case #: 22

Attorney: Damon Schuetze, ESQ.
601 S. Rancho Dr. #C20
Las Vegas, NV 89106

Date	Description	Procedure	Modifier	Dx 1	Dx 2	Dx 3	Dx 4	Units	Charge
5/13/2015	E/M Level 3, Detailed: 30 mins	99203		847.0	847.1	847.2	844.9	1	155.00
5/13/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
5/13/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00
5/13/2015	Mechanical Traction	97012		847.0	847.1	847.2	844.9	1	40.00
5/13/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	1	60.00
5/13/2015	XR Cervical: 4-5 views	72050		847.0	847.1	847.2	844.9	1	375.00
5/13/2015	XR Lumbosacral: 2-3 views	72100		847.0	847.1	847.2	844.9	1	225.00
5/13/2015	XR Knee: 1-2 views	73560		847.0	847.1	847.2	844.9	1	150.00
5/14/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
5/14/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00
5/14/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	2	60.00
5/18/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	2	120.00
5/18/2015	Therapeutic Activities: 15 minutes	97530		847.0	847.1	847.2	844.9	1	60.00
5/20/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
5/20/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	3	180.00
5/27/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
5/27/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00
5/27/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	3	180.00
5/28/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
5/28/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00
5/28/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	1	60.00
6/2/2015	CMT; Spinal: 3-4 regions	98941		847.0	847.1	847.2	844.9	1	69.00
6/2/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00
6/2/2015	Mechanical Traction	97012		847.0	847.1	847.2	844.9	1	40.00
6/2/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	1	60.00
6/3/2015	CMT; Spinal: 3-4 regions	98941		847.0	847.1	847.2	844.9	1	69.00
6/3/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00

Total Charges:	$ 2373.00
Total Payments:	$ 0.00
Total Adjustments:	$ 0.00
Total Account Balance:	$ 3,683.00

Payment Information: Please make checks payable to:
Total Care & Wellness

Federal Tax ID #: **465288494**

Total Care & Wellness

801 S. Rancho Dr.
Las Vegas, NV 89106
(702)534-4711

9/22/2015

Patient: **Mike Strother**
9066 Salvatore St.
Las Vegas, NV 89145
Chart #: STRM1000
Case #: 22

Attorney: Damon Schuetze, ESQ.
601 S. Rancho Dr. #C20
Las Vegas, NV 89106

Date	Description	Procedure	Modifier	Dx 1	Dx 2	Dx 3	Dx 4	Units	Charge
6/3/2015	Mechanical Traction	97012		847.0	847.1	847.2	844.9	1	40.00
6/3/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	1	60.00
6/9/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
6/9/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	3	180.00
6/15/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
6/15/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00
6/15/2015	Mechanical Traction	97012		847.0	847.1	847.2	844.9	1	40.00
6/15/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	1	60.00
7/6/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
7/6/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	4	240.00
7/13/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
7/13/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	4	240.00
7/16/2015	CMT; Spinal: 1-2 regions	98940		847.0	847.1	847.2	844.9	1	58.00
7/16/2015	Hot/Cold Pack Application	97010		847.0	847.1	847.2	844.9	1	30.00
7/16/2015	Mechanical Traction	97012		847.0	847.1	847.2	844.9	1	40.00
7/16/2015	Massage Therapy	97124		847.0	847.1	847.2	844.9	1	60.00

Total Charges:	$ 1310.00
Total Payments:	$ 0.00
Total Adjustments:	$ 0.00
Total Account Balance:	$ 3,683.00

Payment Information: Please make checks payable to:
Total Care & Wellness

Federal Tax ID #: **465288494**

TREATMENT SHEET

PATIENT NAME: Mike Strother

DATE	I / E (TYPE)	CMT (1-5)	ICE 97010	MH 97010	EMS 97014	US 97035	PB 97018	IST 97012	SDC S9090	TE 97110	TA 97530	NMR 97112	MT 97124	MAN 97140	INITIAL
5.13.15	99203	98940	X					X					X		
5/14/15		98940		X									X2		
5/18/15											X		X2		
5/20/15		98940											X3		
5/27/15		98940		X									X3		
5.28.15		98940		X									X		
6-2-15		98941		X				X					X		
6-3-15		98941		X				X					X		
6/9/15		98940											X3		
6/15/15		98940		X				X					X		
7/10/15		98940											X4		
7/13/15		98940											X4		
7/16/15		98940		X				X					X		

X-RAYS	SUPPLIES	ELECTRODES
5.13.15 5 series cervical 2 series lumbar 2 series knee		

PATIENT INFORMATION FORM

Today's Date: 5-13-15 Date of Injury: 5-8-15

Last Name: Strother First Name: Mike

Address: 9066 Salvatore St. City: Las Vegas

State: NV Zip Code: 89145 Home Phone: _____ Cell Phone: (702) 340 1159

Email Address: Mic.Strother@gmail DOB: 3-15-78 Age: 37 Sex: M

Marital Status (S,(M),D,W): M SSN: 554-53-2768 Driver's License #: _____

Occupation: Security officer Work Phone: (702) 770-7000

Employer: Wynn/Encore Employer Address: _____

Spouse: Last Name: Strother First Name: Claudina MI ___

Spouse SSN: _____ Spouse DOB: 1-22-79

ATTORNEY INFORMATION

Attorney's Name: Damon Shuetze Contact: (702) 324-5034

Address: 601 S. Rancho #C20 Las Vegas NV 89106
Street City State Zip

Phone: 702-369-3225 Fax: 702-369-2110

AUTO INSURANCE INFORMATION

Have you filed a claim with your insurance company? YES / NO Claim #: _____

Insurance Co. Geico Phone: 800 841-3000 Fax: _____

Address: _____
Street City State Zip

Adjuster: _____ Name of Insured: Myself

HEALTH INSURANCE INFORMATION

Insurance Co. N/A Policy No. _____

Group No. _____ Phone: _____

Address: _____
Street City State Zip

Name of Insured: _____ DOB: _____

CIRCLE PRESENT COMPLAINTS

Headache	Back Pain	Leg Numbness	Shoulder Pain L	Ears Ringing
Neck Pain	Back Stiffness	Arm Pain	Knee Pain L	Sleeplessness
Neck Stiffness	Leg Pain	Arm Weakness	Knee Stiffness L	Memory Loss
Dizziness	Leg Weakness	Arm Numbness	Chest Pain	Pain with day-to-day activities

Other: _____

At the time of impact, was your car moving? Y / N Stopped? Y / N Head turned? Y / N - R / L

Were you the DRIVER / PASSENGER — FRONT / BACK — RIGHT / LEFT Total Occupants: 1

Your car was struck: Front / Back Right / Left

Did you hit any other objects? Y / N _____

Were you able to get out and walk? Y / N Police report at the scene? Y / N

Where did you go from the scene? Hospital Ambulance? Y / N Same Car? Y / N Other _____

Have you ever had a similar condition? YES / NO When? April 2012

Please Describe: Hit by a drunk driver while riding motorcycle

WOMEN: Are you pregnant? YES / NO LMP: _____

MEDICAL HISTORY:

1) Are you currently taking any medications? YES / NO If yes, please list each, including dosage:
800 ibuprofen, 350 mg carisoprodol, 4 mg Hydromorphone

2) Do you have any allergies? YES / NO If yes, please list each:

Accidents / Injuries	Date	Doctor / Hospital	Outcome
reconstruct left hand	2012		
2 fractured metatarsals	2012		
Bruised Ribs / left tibia fracture	2012		
Surgeries	**Date**	**Doctor / Hospital**	**Outcome**
Spinal fusion	2007	Thomas Dunn	
Hospitalizations	**Date**	**Doctor / Hospital**	**Outcome**
UMC	2012		

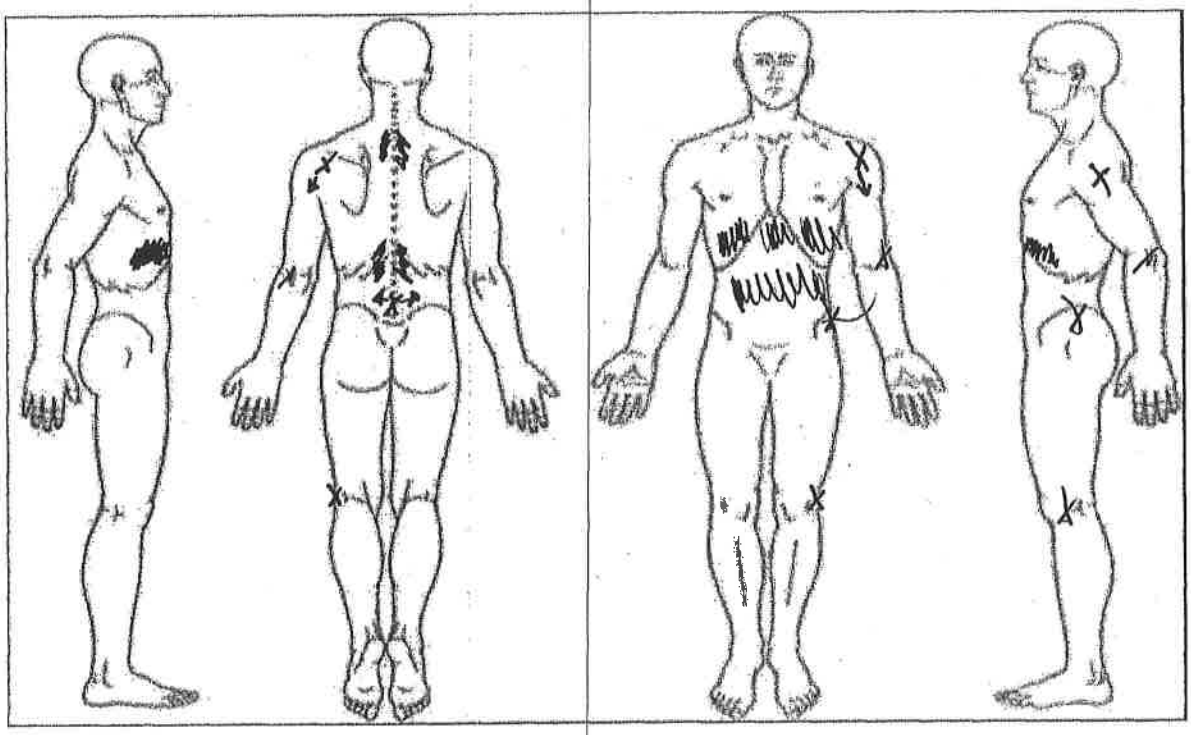
left heel fracture Broke + walked

Patient Name: Mike Brother Date: 5-13-15

Patient Signature: _____ Date: _____

PAIN DRAWING

On the figures below, please color in your areas of pain/discomfort you are feeling. Please include all areas where pain radiates or spreads with a ↑, ↓, or ←, → arrow to indicate the direction of radiating pain. Include all affected areas



Please indicate how you would rate your pain: (LOW) 0 1 2 3 4 5 6 7 8 9 10 (HIGH)

NAME: (please print) Mike Strother

SIGNATURE: _____ DATE: 5-13-15

(7)

NAME: Strather Mike

DATE		NOTES
7.16.15 (S)	Patient reports of	persistent cervical pain
	on today's visit.	Patient reports of
	improvement of Lumbar	ROM on today's visit.
(O)	CROM: Flex, LR, LLF, RLF, RR restrictions with	
	pain.	
	Hypertonicity: Traps (B); Levator (B L>R), Cervical	
	paraspinals (TRP);	Rhomboids (B); OI (B).
	TRP: Traps (B);	Levator (L>R); occipital (B)
	Rhomboids.	
(A)	PTTw - CMT 2.0 of	T_7/T_8, L3/4. IASTM
	of Muscles of Traps, Levator. IST/Heat.	
(P)	Continue to	a week. Patient
	is recommended	to see specialist for
	surgical consult history pain.	

000343

Provider Name T. Wakefield

SOAP CHART

Patient Name Strother Mike

Date 7/13/15

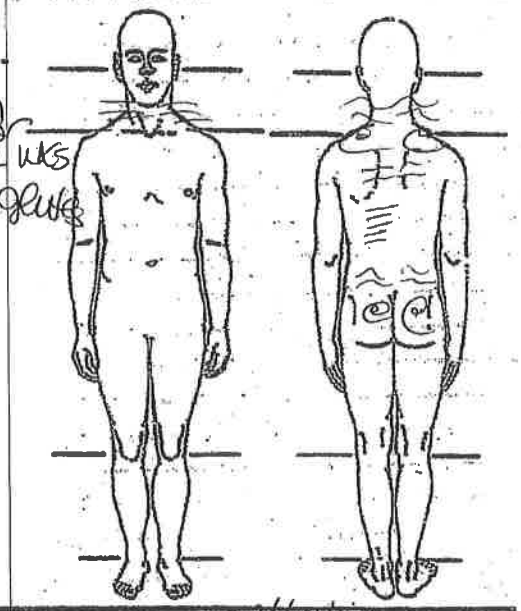
Current Meds See Img form

S: light in traps & top of neck, trunk is very stiff has been off work for 2 wks

O: TT in scalenes, SP's in traps, rhomb, QL, IDS in glutes, TT in Piriformis group, IDS in levator scap

A: Soft tissue Medical (T) C/T/P + therapeutic stretching

P: Hydrate & follow up D.D.C per SP



Provider Signature

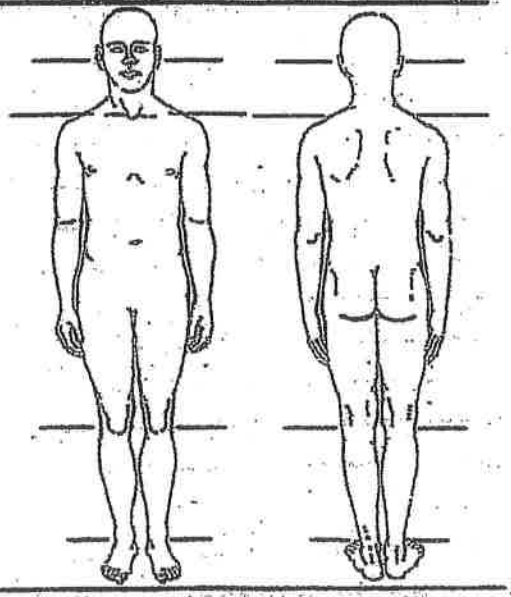
Date 7/13/15

S:

O:

A:

P:



Provider Signature

Date

Legends: TrP, Adh, Numb, rot, Trtl, elev, TTP, Short, SP, Long

(6)

NAME: Mike Strother.

DATE	NOTES
7.6.15 (S)	Patient reports of persistent cervical pain on today's visit. Patient states she has returned to work full time and mid/low back flares up with prolong standing and activities.
(O)	Please refer to massage notes for additional information.
(A)	PTTW - CMT-D @ T8/T9, L2/L3. a
(P)	Patient will be seen 2x a week. Will be co-treated with massage therapist. No cervical adjustments will be performed due to medical history. IASTM will be performed on muscles around the cervical spine next visit.
7.13.15 (S)	Patient reports of persistent cervical pain. Patient states mild improvement of mid/low back pain on today's visit compared to last week appts.
(O)	CAM: Pain upon all motions. LROM: Pain upon extension, LR, RLF. Please refer to massage notes for additional info.
(A)	PTTW - CMT-D @ Thoracic and Lumbar Spine with Drop. Massage therapy prior to appt.
(P)	Continue 2x a week. Will treat with IASTM next visit. (did not perform due to massage appt today.).

Provider Name I Wakefield

SOAP CHART

Patient Name Strother, Mike

Date 10/9/15

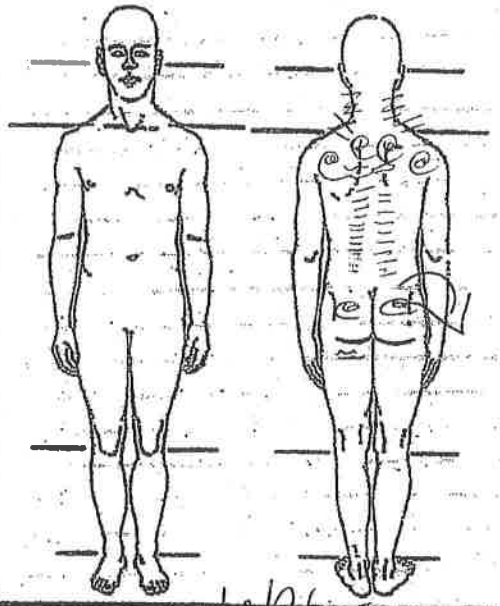
Current Meds Sa long form

S: feels really tight. Not sleeping well. Working at a seated post.

O: TrPs in erector group, scalenes, traps, SPs in rhomb + (L) hams, TrPs in glutes, subscap, levator scap

A: 2x per medical MT, MFR + therapeutic stretching

P: Hydrate + follow up PRN per DR



Provider Signature

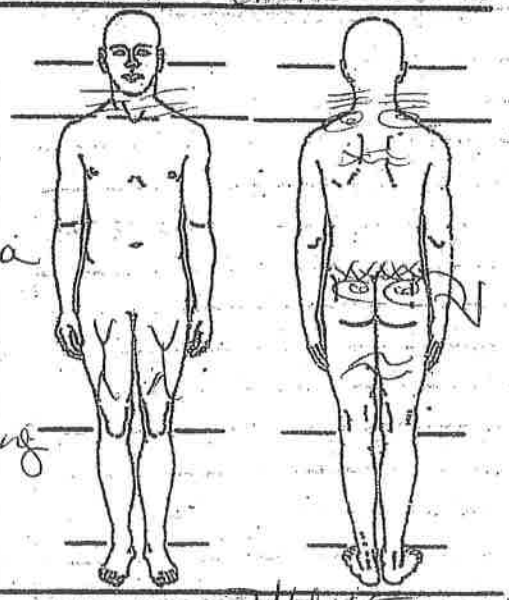
Date 10/9/15

S: Back to full duty at work. Spent 5 days in hospital + they dont know why he cant sleep. He slept 6 hrs last night. Pain + stiffness in lower back.

O: ADHs in thoracolumbar fascia, TrPs in glutes, traps, TTP in scalenes, SPs in rhomb + hams. Short groups.

A: 00 mm medical MT, MFR + therapeutic stretching

P: Hydrate + follow up in 1 wk per DR



Provider Signature

Date 11/6/15

Legends: TrP, TeP, Inf, HT, SP, Adh, Numb, rot, elev, Short, Long

(5)

NAME: Strother, Mike

DATE		NOTES
6.9.15	(S).	Patient presents for care after massage therapy treatment prior to today's appt. (Please refer to massage notes). Patient reports ↑ feeling less "tight" following massage therapy and states he is still having Cervical pain, Mid/Low back pain with ROM Restriction.
	(O)	CROM: LR, RR, RLF restriction with pain. Pain also with Extension of Cervical Spine.
		LROM: LR, RR and extension restriction with pain.
		Hypertonicity: Traps (B); Rhomboids (B); QL (B).
		TRP: Occipitals (B), Traps (B); Levator (B) {L>R on TRP}
	(A)	PTTW: Thoracic and Lumbar CMT-D. No Cervical adjustment.
	(P)	Patient will be seeing a Specialist regarding "Loose Screws" of Cervical Spine. Will see patient after the consult next week. Continue 3x a week of IST/Heat/MTT/CMT. ///
6.15.15	(S)	Patient reports of Persistent pain and "tightness" of mid/low back. Patient states after therapy patient is able to move mildly better. Patient reports of Still having Cervical pain and reports of difficulty of ROM and difficulty of work due to pain.
	(O)	CROM: restriction with pain in all direction
		LROM: extension and LR restriction with pain.
		Hypertonicity: Traps (B); Rhomboids (B); QL (B).
		TRP: occipitals (B); Paraspinals (C); Traps (B); Levator (B).
	(A)	PTTW - Thoracic; Lumbar CMT-D. (No Cervical adjustment) MH; IST.
	(P)	3x a week with massage therapy. Will start IASTM treatment for muscles around Th

(4)

NAME: Mike Strotler

DATE		NOTES
6.2.15 (S)	Patient reports of increase in Left upper trap pain, in which he never experienced to "this extinct" prior to the Motorcycle accident. Patient also reports of continue pain of low back on today's visit with no radiating pain	
(O)	Hypertonicity: Trap (B); Rhomboids (B); Q.L (B); TRP: occipitalis (Left); Left Traps; Rhomboids (Left). CROM: restricted RLF; LR; RR. LROM: LR; RR and extension.	
(A)	PTTW: MRT focus on QL; Left Trap; Left Levator and Left occipitalis. CMT-D: T/L ~~Activator~~ = Cervical.	
(P)	Continue 3x a week and IASTT use if necessary for muscles needed. No CMT-D of cervical Spine	
6.3.15 (S)	Patient reports of persistent pain as last visit. Patient states he was not sore following last treatment and feels the same as last visit.	
(O)	Objective findings same as previous visit of 6/2/15.	
(A)	PTTW: CMT-D of thoracic & lumbar. CMT w/ activator of cervical spine. MRT work same as last visit.	
(P)	Continue 3x a week. massage therapy next visit.	

NAME: Mike Strother

DATE	NOTES
5.27.15	The patient states he is feeling stiff in his neck + LB. His job requires long hours on his feet & this aggravates his pain. He also works the graveyard shift + he has trouble sleeping because of his (P)
S)	Tender + hypertonic upper traps, levator scaps, rhomboids (all greater on L) T + L paraspinals (~T5-T12, L1-L5 - slightly more hypertonic on L.). QLs hypertonic bilaterally w/ mild tenderness @ the iliac crest attachment. ceom - Flex + LRoom - Ext + (P) - See Lit SOAP
O)	
A)	PTTW - states he feels a lot better post TX. See Lit SOAP for massage details. Cmt-D: T3/T4, T7/T8, L2/L3, L4/L5
P)	Continue therapies 3x/week. Add upper trap stretch.
5.28.15	The patient states he is feeling pretty good. He yesterday relieved most of his pain + stiffness. He states he slept well yesterday.
S)	
O)	Tender + hypertonic upper traps, levator scaps + rhomboids - more tender on (L) side. T + L paraspinals hypertonic + tender throughout (L>R). QLs hypertonic bilaterally w/ no significant tenderness.
A)	PTTW - States he feels much looser post-tx MFR to above muscles. Pin + stretch to T + L paraspinals. IC to identified TPs. Tenderness to T + L spine - 8 mins. Cmt-D: T2/T3, T4/T5, T7/T8, L3/L4, L4/L5
(P)	Continue therapies 3x/week. Stretch daily. Use heat before stretches

Provider Name J. Wakefield

Patient Name Strother, Mike

SOAP CHART

Date 5/20/15

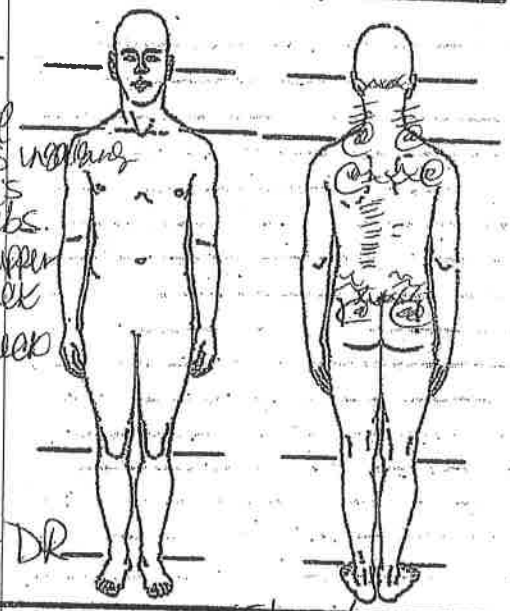
Current Meds See long form

S: feels like he needs more pressure during massage. feels like his back is so tight. he is working his abs + upper back + neck

O: tp's in glutes, subscap, traps, SCM, UT, rhomboids, HT in erector group, scalenes, Adh's in thoraco-lumbar fascia

A: 45 min Medical (L) c. MFR + therapeutic stretching + MET + deep blue essential oils

P: Hydrate, rest, contrast therapy 20 mins each day + follow up PRN per DR



Provider Signature [signature]

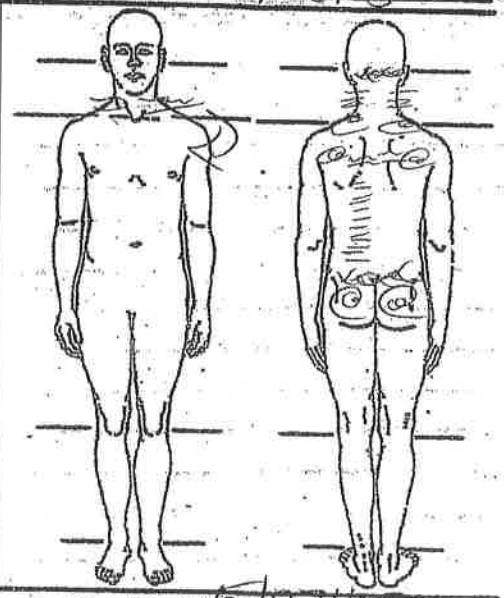
Date 5/20/15

S: Stiffness in neck and tension in low back

O: tp's in SCM, Rhomboids, UT, in scalenes (L) erector group, tp's in traps, subscap, glutes, Adh's in thoracolumbar fascia

A: 45 min Medical (L) c MFR + MET

P: Hydrate + follow up PRN per DR



Provider Signature [signature]

Date 5/21/15

Legends: @ TP, ⊛ TeP, O P, * Infl, = HT, ≈ SP, X Adh, ≫ Numb, O rot, / elev, ⟩⟨ Short, ⟷ Long

(2)

NAME: Mike Strother

DATE		NOTES
5.18.15	The patient states he is sore in his back + has some neck stiffness. He feels a little better since beginning therapy	
O)	Tender + hypertonic upper traps, levator scaps, suboccipitals (L>R) rhomboids, T paraspinals (L>R- knots ~ T7-T10 on (L)), L paraspinals (L1-L5 (>R, knots L3-L5). Glutes / piriformis tender + hypertonic bilaterally CROM- Ext/LF, LROM- Ext + (P)	
A)	PTTW - See CMT's SOAP for massage details. Stretched in-office: upper traps, levator scaps, PSOAS, glutes, piriformis bilaterally	
P)	Continue therapies 3-4 / week	
5.20.15	The patient states he feels stiff today - especially in his mid + LB. He states massage + adjustments have been palliative	
O)	Tender + hypertonic upper traps, levator scaps (>R), T paraspinals (L>R - T8s ~ T6-T8 on (L)) L paraspinals (L1-L5 (>R) QLs bilaterally - more tender on (L). CROM- Ext + (P), CROM- Rot + (P) in upper trap area	
A)	PTTW- States he feels a lot better post-TE. See CMT's SOAP for massage details - ant D: T7/T8, T9/T10 L2/L3, L4/L5	
P)	Continue therapies 3-4x/week Stretch daily - Pt to scheduled w/ spine surgeon	

000351

Provider Name T. Wakefield

SOAP CHART

Patient Name Strother, Mike

Date 5/14/15

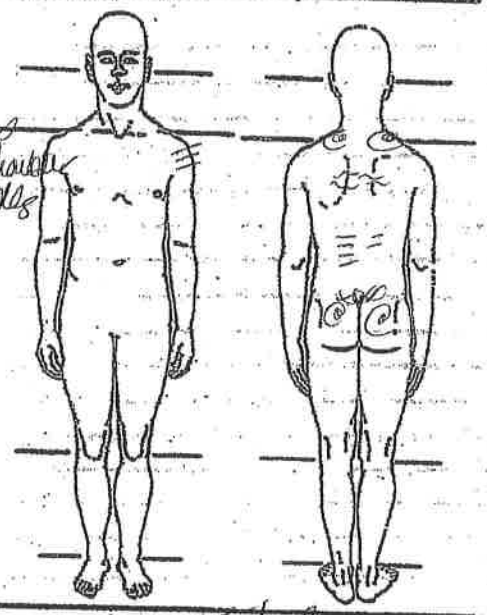
Current Meds See long form

S: HIT on motorcycle yesterday 45 mph. (L) side hit a SUV knocked off bike. (L) shoulder, arm & shoulder blades

O: HT in erector group, (L) Ant & Post TPs in glutes, traps, Adh's in thoracolumbar fascia;

A: 30 min medical (M) & MER & therapeutic stretching

P: Hydrate & follow up PRN per DR



Provider Signature

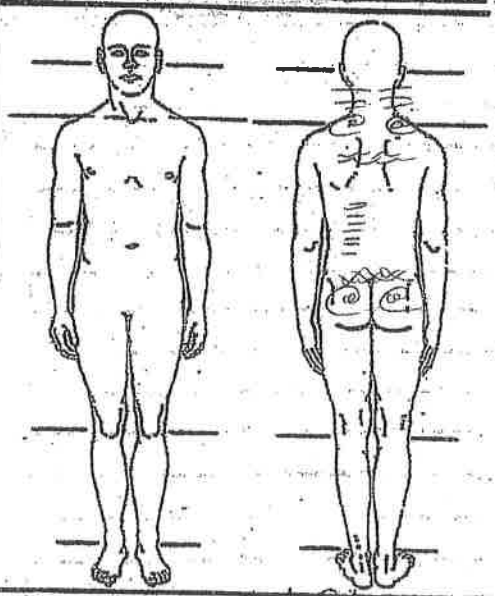
Date 5/14/15

S: Tenderness in neck & back

O: TP's in ↑ traps, glutes, SP's in rhomb, HT in scalenes & (L) erector group, Adh in thoracolumbar fascia

A: 30 min medical (M) & MER & therapeutic stretching

P: Hydrate, rest & follow up PRN per DR



Provider Signature

Date 5/18/15

Legends: TrP, TeP, Trfl, HT, SP, Adh, Numb, rot, elev, Short, Long

(1)

NAME: Mike Strotha

DATE	NOTES
5.13.15	The patient presents for care following a motorcycle accident. He has neck pain, back pain, (L) shoulder pain, + left knee pain. See initial exam form for detailed subjective information.
S)	
O)	See ~~DOR~~ initial exam form for objective information.
A)	PTTW - States he feels looser post-Tx. MFR to upper traps, levator scaps, T + L paraspinals. Manual lumbar traction. CMT-D. T4/T5, T7/T8, T9/T10
P)	Refer for CT scan of C-Spine - X-Ray seems to show broken screw from spinal fusion. Refer to Dr. Kaplan - Spine surgeon.
5.14.15	The patient is sore today but does feel a little better since Tx yesterday.
S)	
O)	Tender + hypertonic suboccipitals, upper traps, levator scaps, T + L paraspinals (both severely hypertonic + tender w mild/moderate pressure), QLs bilaterally w tenderness @ iliac crest attachment, Chon-Rad/LE + Chon-Extens
A)	PTTW - States he feels better post-Tx. See MD's notes for massage details. CMT-D T3/T4, T6/T7, T9/T10
P)	Continue therapies 3-4x/week. Avoid bending, lifting + going to hard @ the gym. Has CT scan today.

PATIENT ACCIDENT / INJURY CONSULTATION

Patient Name: Mike Stratter Date: 5.13.15

CHIEF COMPLAINTS:

#	REGION	AREA	TYPE	0-10	DURATION	RADIATING	WORSE AT	PROVOCATIVE FACTORS	PALLIATIVE FACTORS
	Neck	L R (B)	(Dull) Sharp Burn Throb Ache tight	8	Occ Int Freq (Cons)	Pn Nb Tng Local	Morn Day Eve (Night)	movement	Medication Rest
	upper back	L R (B)	Dull Sharp Burn Throb Ache	8	Occ Int Freq (Cons)	Pn Nb Tng Local	Morn Day Eve (Night)		
	mid back	L R (B)	Dull Sharp Burn Throb Ache	8	Occ Int Freq (Cons)	Pn Nb Tng Local	Morn Day Eve (Night)		
	low back	L R (B)	Dull Sharp Burn Throb Ache	8	Occ Int Freq (Cons)	Pn Nb Tng Local	Morn Day Eve (Night)	Sitting/Standing too long	
	(L) shoulder	(L) R B	(Dull) Sharp Burn Throb	8	Occ Int Freq (Cons)	Pn Nb Tng Local	Morn Day Eve (Night)	movements in ER + flex + Abd	
	(L) Knee	(L) R B	Dull Sharp Burn Throb	8	Occ Int Freq (Cons)	Pn Nb Tng Local	Morn Day Eve (Night)	Walking - Req weight bearing	
		L R B	Dull Sharp Burn Throb		Occ Int Freq Const	Pn Nb Tng	Morn Day Eve Night		
		L R B	Dull Sharp Burn Throb		Occ Int Freq Const	Pn Nb Tng	Morn Day Eve Night		
		L R B	Dull Sharp Burn Throb		Occ Int Freq Const	Pn Nb Tng	Morn Day Eve Night		

PRESENT HISTORY:

Date of Accident: 5.8.15 MVA / Other: Motorcycle

Accident Description:

Driving NB on Orange - Truck made Left turn in front of pt - Pt realized he couldn't get out of the way in time bc truck had trailor attached - he swerved way left into oncoming traffic + side-swiped cars on his (L)

NAME: Mike Strother DATE: 5.13.15

Hit your head? Y / N -- FT / BK RT / LT / TOP Lump? Y / N Cut? Y / N--SCALP / FACE Bleeding Y / N LOC ___

Pain on impact? (Y) / N Where neck, back shoulder, knee Worsened: SAME DAY / NEXT DAY / LATER

Have you seen any other doctor? (Y) / N -- Name: Physicians @ St Rose Dominican

Imaging? (Y) / N -- Which ones? X-Ray

Medications? (Y) / N -- Name / Dose: Ibuprofen, hydrocodone, carisoprodol

Other medical services: _____

PAST HISTORY:

Former accidents/injuries	Date of Injury	Treatment Length	Outcome
1) Spinal Fusion - C6/C7	2007	No residual (P) - Resolved & managed with meds	
2) Motorcycle Accident 2012 - fractured heel, tibia, metacapals			
3)			

OTHER MEDICAL HISTORY:

~~Pregnancy Y / N~~ Diabetes Y / (N) Heart Disease Y / (N) Hypertension Y / (N)

Previous history of cancer Y / (N) Type: _____

Other: _____

Other Physician's Care (Y) / N For: Pain one

Currently working? (Y) / N Employer / Occupation: Security @ Wynn

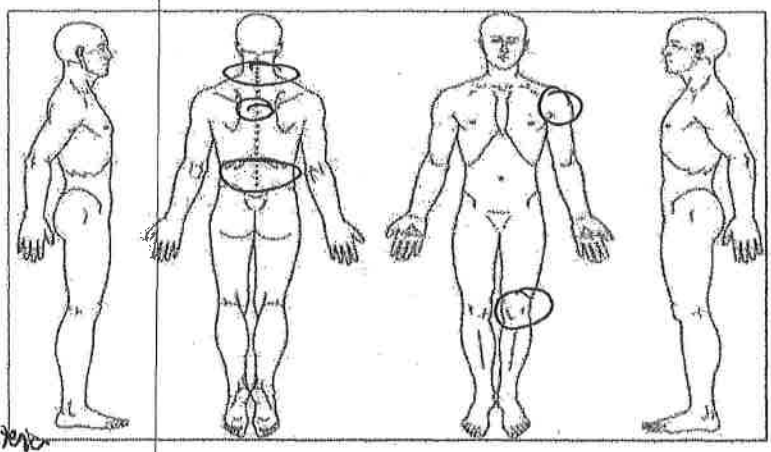
Missed time from work? Y / N How long? _____

NAME: Michael Stratton DATE: 5·13·15

HT: _____ WT: _____ BP: 130/78 SEX: ☒M ☐F HAND: ☐R ☐L AGE: 37

VISUAL INSPECTION

Forward flexed antalgic gait



CERVICAL PALPATION:

Tenderness: Tender + hypertonic suboccipitals + posterior cervical muscles. Tenderness most in lower + upper segments

Spasm:

Guarding:

THORACIC PALPATION:

Tenderness: Tender + hypertonic upper traps, levator scaps (L7R), rhomboids, T paraspinals (superch hypertonic from ~T5–T12 (L7R).

Spasm:

Guarding:

LUMBAR PALPATION:

Tenderness: Tender + hypertonic L paraspinals (L4–L5 L7R) QLs bilaterally w tenderness @ lower rib + iliac crest attachment. Mild discomfort in glutei piriformes bilaterally

Spasm:

Guarding:

EXTREMITY: Shoulder R/L

Tenderness: Tender in anterior + posterior JT compartments

Spasm: Tenderness in GH JT. Line

Guarding:

EXTREMITY: Knee R/L

Tenderness: Tender in lateral compartment of knee. (P) w/ flex, ext, + bearing weight bearing

Spasm:

Guarding:

EXTREMITY: _____ R/L

Tenderness:

Spasm:

Guarding:

Notes: _____

Patient Name: Mike Strother Date: 5.13.15

Range of Motion	CERVICAL		THORACIC		LUMBAR	
	PAIN	ROM	PAIN	ROM	PAIN	ROM
Flexion:	✓	WNL	✓	WNL	✓	WNL
Extension:	✓	WNL	✓	↓	✓	↓
Right Lateral Bending:	✓	↓	✓	↓	✓	↓
Left Lateral Bending:	✓	↓	✓	↓	✓	↓
Right Rotation:	✓	↓	✓	↓	✓	↓
Left Rotation:	✓	↓	✓	↓	✓	↓

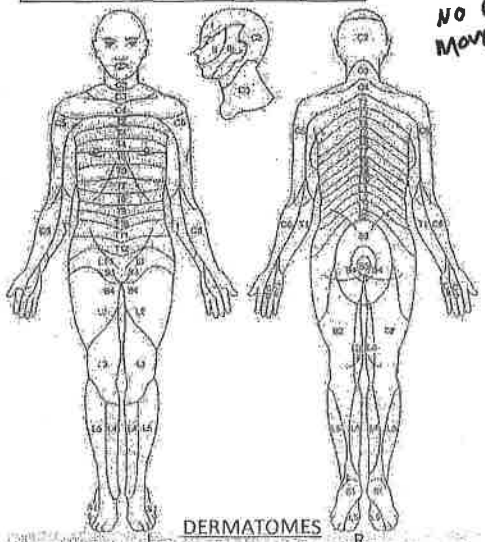
Cervical Orthopedics	R	L
George's Maneuver	–	–
Cervical Compression	+	+
Cervical Distraction	+	+
Shoulder Depression	+	+
Valsalva Maneuver	–	–

Lumbar Orthopedics	R	L
Kemps	+	+
Bechterew (SLR)	–	–
Braggard's	+	+
Heel Walk	WNL	WNL
Toe Walk	↓	↓
Valsalva Maneuver	+	+ local
Patrick Fabere	–	–

Shoulder Orthopedics	R	L
Supraspinatus P. Test	–	+
Obrien's Maneuver	–	+
Knee Orthopedics		
Varus / Valgus	– / –	+ / +
A-P / P-A Drawer	– / –	– / –

GH joint pain

Wrist Orthopedics	R	L
Varus / Valgus	/	/
Prayer / Phalen's	/	/
Ankle Orthopedics		
Varus / Valgus	/	/
A-P / P-A Drawer	/	/



All bilaterally symmetrical

No excessive movement

SHOULDER	R	L	HIP	R	L
Flexion	S	S	Flexion	S	S
Extension			Extension		
Abduction	S	S	Abduction		
Adduction			**KNEE**		
Internal Rotation	S	S	Flexion	S	✓
External Rotation	S	S	Extension	S	S
ELBOW			**ANKLE**		
Flexion			Dorsiflexion	S	S
Extension			Plantar Flexion	S	S
WRIST			Inversion	S	S
Flexion	S	S	Eversion	S	S
Extension	S	S	**GREAT TOE**		
Radial Deviation			Flexion		
Ulnar Deviation			Extension		
FINGERS			**REFLEXES**		
Flexion			Biceps		
Extension			Brachioradialis		
Abduction	S	S	Patellar		
Adduction	S	S	Achilles		

TOTAL CARE & WELLNESS
801 S. Rancho Dr. #A3
Las Vegas, NV, 89106

Patient: Mike Strother **Date:** 5.13.15 **Attorney:** Damon Schuetze

General:
__ Anxiety 293.84
__ Blurred vision 368.8
__ Cognitive deficits 310.1
__ Dizziness 780.4
__ Facet Syndrome 724.8
__ Insomnia 780.52
__ Myofasciitis 729.1
__ Motor Vehicle Collision E812.0 E812.1
__ Paresthesias 782.0
__ Post traumatic stress disorder 308.3
__ Pregnancy V22.2
__ Post concussive syndrome 310.2
__ TMJ dysfunction 524.60
__ Walking difficulty 719.7
__ Effusion of a joint 719.0

Cervical:
X Cervicalgia / Pain 723.1
__ Degenerative Disc Disease 722.4
__ Displacement of a disc 722.0
__ Intervertebral Disc Ds. w/ myelo 722.71
X Muscle Spasm 728.85
__ Radiculitis 723.4
__ Spinal Stenosis 723.0
__ Spondylosis, no myelopathy 721.0
__ Spondylosis w/ myelopathy 721.1
X Cervical Strain / Sprain 847.0
__ Cervical Spine ISD 739.1

Thoracic:
__ Contusion of the back 922.31
__ Degenerative Disc Disease 722.5
__ Degenerative Disc Ds. w/ myelop 721.4
X Muscle Spasm 728.85
X Pain in Thoracic Spine 724.1
__ Radiculitis 724.4
__ Spinal Stenosis 724.01
__ Spondylosis, no myelopathy 721.2
__ Spondylosis w/ myelopathy 721.4
X Thoracic Sprain / Strain 847.1
__ Vertebral Dislocation, closed 839.2
__ Thoracic Spine ISD 739.2

Lumbar:
__ Coccyx Dislocation, Closed 839.41
__ Degenerative Disc Disease 722.5
__ Disc Displacement 722.1
__ Disc Displacement w/ myelopathy 722.73
__ Disorders of the Sacrum 724.6
__ Displaced Vertebral Disc 722.1
X Lumbago 724.2
X Muscle Spasms 728.85
__ Sacroiliac Dislocation 839.42
__ Sacroiliitis 720.2
__ Sciatica 724.3
__ Spinal Enthesopathy 720.1
__ Spinal Stenosis 724.02
__ Spondylosis 721.3
__ Spondylosis w/ myelopathy 721.91
X Lumbar Sprain / Strain 847.2
__ Unspecified Backache 724.5
__ Lumbar Spine ISD 739.3
__ Sacral Spine ISD 739.4

Head / Scalp / Face:
__ Abrasion face, neck, scalp 910.0
__ Cephalgia 784.0
__ Concussion, no LOC 850.0
__ Concussion, Brief LOC 850.1
__ Concussion, Moderate LOC 850.2
__ Concussion, Unspecified time 850.5
__ Contusion face, scalp, neck 920
__ Laceration of the scalp 873.0
__ Laceration of the scalp, complicated 873.1

Chest:
__ Abrasion, trunk 911.0
__ Chest Pain, 786.5
__ Contusion, breast 922.0
__ Contusion, chest wall 922.1
__ Contusion of the trunk 922.8
__ Fracture, ribs 307.0
__ Painful Respiration 786.52
__ Sprain / Strain, Costochondral 848.3
__ Sternal Injury 848.4

Hip / Pelvis / Abdomen
__ Abrasion, hip / thigh / leg 916.0
__ Contusion, abdominal wall 922.2
__ Contusion of the buttock, 922.32
__ Contusion of the hip / thigh 924.0
__ Sprain / Strain of the hip 843.9
__ Sprain / Strain of the pelvis/abdomen 848.4
__ Unspecified Injury, abdominal organs 868.0

Lower Extremity:
__ Abrasion, hip / thigh / leg 916.0
__ Contusion, ankle / foot 924.2
__ Contusion, knee / leg 924.1
__ Contusion, lower limb 924.4
__ Contusion, toe 924.3
__ Dislocation of the patella, closed 836.3
__ Enthesopathy of the knee, 726.6
__ Femoral Patellar Syndrome 717.7
__ Internal Derangement, knee 717.9
__ Int. Derangement, lateral meniscus 717.4
__ Loose Body in knee joint 717.6
__ Int. Derangement, medial meniscus 717.3
__ Pain in limb 729.5
__ Sprain, Cruciate Ligament 844.2
__ Sprain, Medial Collateral Ligament 844.1
X Sprain / Strain of the knee 844.9
__ Unspecified injury to knee, leg, foot 959.7

Upper Extremity:
__ Abrasion, elbow / forearm / wrist 913.0
__ Abrasion, hand 914.0
__ Abrasion, finger 915.0
__ Bicipital tenosynovitis 726.12
__ Bursal tendon disorder 726.01
__ Contusion of the elbow / forearm 923.1
__ Contusion of the finger 923.3
__ Contusion of the scapula 923.01
__ Contusion of the shoulder 923.00
__ Contusion of the upper arm 923.03
__ Contusion of the wrist / hand 923.2
__ Enthesopathy of the elbow 726.3
__ Enthesopathy of the wrist 726.4
__ Lateral Epicondylitis 726.32
__ Rotator Cuff Syndrome 726.1
__ Sprain / Strain AC Joint 840
__ Sprain / Strain Elbow / Forearm 841
X Sprain / Strain Rotator Cuff 840.0
__ Sprain / Strain Supraspinatus 840.6
__ Sprain / Strain Wrist / Hand 842
__ Tenosynovitis 727.00

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Total Care & Wellness
801 S. Rancho Dr. #A3
Las Vegas, Nevada 89106
(702)534-4711 (Office)
(702)534-3430 (Fax)

RADIOLOGY REPORT

Patient:	STROTHER, MIKE	Date:	05/13/2015
Physician:	BREAGAN	DOB:	03/15/1978
Facility:	TOTAL CARE & WELLNESS	ID #:	STROTHERM78

CERVICAL SPINE

There is anterior fusion at C6-7 with orthopedic plate and side screws. The inferior screws are fractured within the C7 vertebral body. Calcification is present in the anterior longitudinal ligament bridging between C5 and C6. All the vertebral bodies are normal in height. No significant spondylosis is present. The spinous and transverse processes appear normal.

Impression: Anterior fusion at C6-7 with fracture of the inferior screws.

Electronically Signed
DEAN YARBRO, M.D.
DY/DD: May 14, 2015
DY/DT: May 14, 2015

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801 S. Rancho Dr. #A3
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RADIOLOGY REPORT

Patient:	STROTHER, MIKE	Date:	05/13/2015
Physician:	BREAGAN	DOB:	03/15/1978
Facility:	TOTAL CARE & WELLNESS	ID #:	STROTHERM78

LEFT KNEE

No fracture is noted. Joint alignment and soft tissues are unremarkable. Bone density and morphology are within normal limits. There is no evidence of radiopaque foreign body noted.

Impression: No significant abnormality of the knee.

Electronically Signed
DEAN YARBRO, M.D.
DY/DD: May 14, 2015
DY/DT: May 14, 2015

Interpreted by **LAKE MEAD RADIOLOGISTS**
2559 Wigwam Parkway Henderson, Nevada 89074
Phone (702) 982-3659 | Fax (702) 823-5434 | https://pacs.lmrlv.com

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801 S. Rancho Dr. #A3
Las Vegas, Nevada 89106
(702)534-4711 (Office)
(702)534-3430 (Fax)

RADIOLOGY REPORT

Patient:	STROTHER, MIKE	Date:	05/13/2015
Physician:	BREAGAN	DOB:	03/15/1978
Facility:	TOTAL CARE & WELLNESS	ID #:	STROTHERM78

LUMBAR SPINE

The alignment of the lumbosacral spine is within normal limits. There is no evidence of fracture or subluxation. The intervertebral disc spaces are well preserved. No significant degenerative disease is identified. There is no spondylolysis or spondylolisthesis.

Impression: No significant abnormality of the lumbar spine.

Electronically Signed
DEAN YARBRO, M.D.
DY/DD: May 14, 2015
DY/DT: May 14, 2015

Exhibit 29

A' RNEY SCHUETZE & MCGHA
601 S RANCHO STE C20

LAS VEGAS NV 89106

HEALTH INSURANCE CLAIM FORM

APPROVED BY NATIONAL UNIFORM CLAIM COMMITTEE (NUCC) 02/12

PICA | PICA

1. MEDICARE [ ] (Medicare #) MEDICAID [ ] (Medicaid #) TRICARE [ ] (ID#/DoD#) CHAMPVA [ ] (Member ID#) GROUP HEALTH PLAN [ ] (ID#) FECA BLK LUNG [ ] (ID#) OTHER [X] (ID#)			1a. INSURED'S I.D. NUMBER (For Program in Item 1): 554532768
2. PATIENT'S NAME (Last Name, First Name, Middle Initial): STROTHER MIKE	3. PATIENT'S BIRTH DATE: 03 15 1978 SEX: M [X] F [ ]		4. INSURED'S NAME (Last Name, First Name, Middle Initial): SAME
5. PATIENT'S ADDRESS (No., Street): 9066 SALVATORE ST	6. PATIENT RELATIONSHIP TO INSURED: Self [X] Spouse [ ] Child [ ] Other [ ]		7. INSURED'S ADDRESS (No., Street): SAME
CITY: LAS VEGAS STATE: NV	8. RESERVED FOR NUCC USE		CITY: STATE:
ZIP CODE: 89148 TELEPHONE (Include Area Code): (702)3401159			ZIP CODE: TELEPHONE (Include Area Code): ( )
9. OTHER INSURED'S NAME (Last Name, First Name, Middle Initial)	10. IS PATIENT'S CONDITION RELATED TO:		11. INSURED'S POLICY GROUP OR FECA NUMBER
a. OTHER INSURED'S POLICY OR GROUP NUMBER	a. EMPLOYMENT? (Current or Previous) [ ] YES [X] NO		a. INSURED'S DATE OF BIRTH: 03 15 1978 SEX: M [X] F [ ]
b. RESERVED FOR NUCC USE	b. AUTO ACCIDENT? [X] YES [ ] NO PLACE (State): NV		b. OTHER CLAIM ID (Designated by NUCC):
c. RESERVED FOR NUCC USE	c. OTHER ACCIDENT? [ ] YES [X] NO		c. INSURANCE PLAN NAME OR PROGRAM NAME
d. INSURANCE PLAN NAME OR PROGRAM NAME	10d. CLAIM CODES (Designated by NUCC)		d. IS THERE ANOTHER HEALTH BENEFIT PLAN? [ ] YES [X] NO If yes, complete items 9, 9a and 9d.

READ BACK OF FORM BEFORE COMPLETING & SIGNING THIS FORM.

12. PATIENT'S OR AUTHORIZED PERSON'S SIGNATURE I authorize the release of any medical or other information necessary to process this claim. I also request payment of government benefits either to myself or to the party who accepts assignment below.
SIGNED SIGNATURE ON FILE DATE

13. INSURED'S OR AUTHORIZED PERSON'S SIGNATURE I authorize payment of medical benefits to the undersigned physician or supplier for services described below.
SIGNED SIGNATURE ON FILE

14. DATE OF CURRENT ILLNESS, INJURY, or PREGNANCY (LMP) MM DD YY QUAL.	15. OTHER DATE QUAL. 439 MM DD YY 05 08 2015	16. DATES PATIENT UNABLE TO WORK IN CURRENT OCCUPATION MM DD YY FROM TO
17. NAME OF REFERRING PROVIDER OR OTHER SOURCE: DN STUART KAPLAN MD	17a. 17b. NPI 1508823824	18. HOSPITALIZATION DATES RELATED TO CURRENT SERVICES MM DD YY FROM TO
19. ADDITIONAL CLAIM INFORMATION (Designated by NUCC)		20. OUTSIDE LAB? [ ] YES [X] NO $ CHARGES
21. DIAGNOSIS OR NATURE OF ILLNESS OR INJURY. Relate A-L to service line below (24E) ICD Ind. 9 A. 723.1 B. C. D. E. F. G. H. I. J. K. L.		22. RESUBMISSION CODE ORIGINAL REF. NO. 23. PRIOR AUTHORIZATION NUMBER

24. A. DATE(S) OF SERVICE From MM DD YY	To MM DD YY	B. PLACE OF SERVICE	C. EMG	D. PROCEDURES, SERVICES, OR SUPPLIES (Explain Unusual Circumstances) CPT/HCPCS	MODIFIER	E. DIAGNOSIS POINTER	F. $ CHARGES	G. DAYS OR UNITS	H. EPSDT Family Plan	I. ID. QUAL.	J. RENDERING PROVIDER ID. #
1 06122015	06122015	11		99244		A	950.00	1		NPI	1508823824
2										NPI	
3										NPI	
4										NPI	
5										NPI	
6										NPI	

25. FEDERAL TAX I.D. NUMBER SSN EIN	26. PATIENT'S ACCOUNT NO.	27. ACCEPT ASSIGNMENT? (For govt. claims, see back)	28. TOTAL CHARGE	29. AMOUNT PAID	30. Rsvd for NUCC use
880274371 [ ] [X]	1246740	[X] YES [ ] NO	$ 950.00	$ 0.00	

31. SIGNATURE OF PHYSICIAN OR SUPPLIER INCLUDING DEGREES OR CREDENTIALS (I certify that the statements on the reverse apply to this bill and are made a part thereof.)	32. SERVICE FACILITY LOCATION INFORMATION	33. BILLING PROVIDER INFO & PH. # (7027371948
STUART KAPLAN MD MD SIGNED 06/16/2015 DATE	WESTERN REGIONAL CENTER FO 2471 PROFESSIONAL COURT LAS VEGAS NV 891280825 a. 1093772204 b.	WESTERN REGIONAL CTR FOR BRAI 3061 S MARYLAND PKWY #200 LAS VEGAS NV 89109-6227 a. 1093772204 b.

NUCC Instruction Manual available at: www.nucc.org — PLEASE PRINT OR TYPE — APPROVED OMB 0938-1197 FORM 1500 (02-12)

WCMS-1500CS-12

000363

William D. Smith, MD
Jason E. Garber, MD, FACS
Stuart S. Kaplan, MD, FACS
Gregory L. Douds, MD

Western Regional Center for Brain & Spine Surgery
Comprehensive Neurosurgical Care

2471 Professional Court
Las Vegas, NV 89128
Phone: (702) 835-0088
Fax: (702) 835-0085

Patient: Mike Strother **Patient #:** 263420 **DOB:** 03/15/1978 (37 years)

Date of Encounter: 06/12/2015

History of Present Illness

The patient is a 37 year old male who presents with neck pain. Note for "Neck pain": Mr. Strother presents today for evaluation. He was under the care of Dr. Gallagher. He was involved in a motorcycle accident. He states a car cut him off when he was driving his motorcycle and hit him. He was hit directly on. He was taken to St. Rose Hospital. He has been noticing pain in the region of his ribs. His neck has been hurting him, and his left shoulder and his low back has been hurting him. He has not noticed any pain down the arms or the legs themselves. He underwent a previous cervical fusion C6-7. Surgery was done by Dr. Thomas Dunn. He believes his surgery was done back in 2007. The symptoms he had prior to surgery he had left-sided arm pain. He got benefit from the operation. He notices his neck pain is made worse with flexion over extension. He has been under the care of Dr. Gallagher. He has been getting pain medication. He underwent a CT scan of the cervical spine.

Additional reasons for visit:

Chronic pain

Arm pain

Weakness in limbs

Transition into care is described as the following:
The patient is transitioning into care and a summary of care was reviewed .

Allergies

No Known Allergies 06/24/2015
No Known Drug Allergies 06/24/2015

Past Medical History

Depression

Family History

Mother: Deceased; Spinal meningitis
Father: In good health
Brother 1: In good health
Brother 2: In good health
Brother 3: In good health
Brother 4: In good health

Social History

Occupation/Work Status: Working Full Time; Security; The patient's condition has impacted work status and/or the amount of physical work that can be performed; Last worked 06/12/2015.
Marital Status: Married
Children: 1
Living situation: Lives with spouse, Lives with relatives
Tobacco use: Never smoker
Non Drinker/No Alcohol Use
Illicit drug use: Never
HIV risk factors: None
Highest recreation level prior to spine condition: Contact Sports; Recreational level is affected by condition.

Medication History

Percocet (10-325MG Tablet, Oral) Active.
Morphine Sulfate ER (60MG Tablet ER, Oral) Active.
Carisoprodol (350MG Tablet, Oral) Active.
Ibuprofen (800MG Tablet, Oral) Active.
Medications Reconciled.

Past Surgical

Neck Surgery (2007); Fusion C6-7
Ankle surgery (1994)
Cystectomy: Total (1992); Cyst removed from throat
Hand surgery (04/2012); Left

Diagnostic Studies

Bed rest
Bracing/Immobilization
Chiropractor
Exercise Therapy
Physical Therapy
TENS
MRI, Cervical Spine

Review of Systems

General: Not Present- Fever, Weight Loss, Weight Gain, Night Sweats and Excessive Fatigue.
HEENT: Present- Sinus Problems and Sinus Headaches. Not Present- Wears glasses/contact lenses, Eye Infection, Eye Injury, Glaucoma, Cataracts, Hearing Loss, Wears hearing aids, Ear Pain, Ear Infection, Ringing in the Ears, Balance Disturbance, Vertigo, Spinning Sensation, Nose Bleed, Nasal Congestion, Nasal Drainage and Inability to Smell.
Respiratory: Not Present- Chronic Cough, Shortness of Breath and Bloody sputum.
Breast: Not Present- Breast Pain, Breast Tenderness, Breast Swelling and Nipple Discharge.
Cardiovascular: Present- High Blood Pressure. Not Present- Irregular Pulse, Heart Murmur, High Cholesterol, Swelling of Extremities and Leg Pain and/or Swelling.
Gastrointestinal: Not Present- Indigestion, Nausea, Vomiting, Vomiting Blood, Jaundice, Abdominal Pain and Change in Bowel Habits.
Male Genitourinary: Not Present- Blood in Urine, Urinary Frequency, Painful Urination, Urinary Urgency and Incontinence.
Musculoskeletal: Present- Neck Pain, Arm Pain, Arm Weakness and Back Pain. Not Present- Leg Pain, Leg Weakness, Joint Pain, Joint Swelling and Decreased Range of Motion.
Neurological: Not Present- Fainting Spells, Blacking Out, Seizures, Problem with Memory, Disorientation, Difficulty with Speech, Inability to concentrate, Double Vision, Blurred Vision, Face Weakness, Incoordination and Headaches.
Psychiatric: Present- Anxiety, Depression and Insomnia.
Endocrine: Present- Cold Intolerance. Not Present- Appetite Changes, Thyroid Problems, Excessive Thirst, Excessive Urination, Excessive Sweating, Decreased Sweating, Heat Intolerance and Hair Changes.

Vitals

06/24/2015 03:02 PM
Weight: 170 lb **Height:** 71 in
Body Surface Area: 1.97 m² **Body Mass Index:** 23.71 kg/m²

Physical Exam

The physical exam findings are as follows:

General
Mental Status - Alert. **General Appearance** - Well groomed. Not Sickly. **Orientation** - Oriented X3. **Build & Nutrition** - Well nourished and Well developed. **Posture** - Normal posture.

Eye
Pupil - **Bilateral** - Equal and Direct reaction to light normal.

Peripheral Vascular
Lower Extremity: Inspection - **Bilateral** - No Varicose veins.
Palpation: Temperature - **Bilateral** - Normal. **Tenderness** - **Bilateral** - Non Tender. **Edema** - **Bilateral** - No edema.

Neurologic
Mental Status: Speech - No impairment of naming or impairment of word repetition. **Cognitive function** - No impairment of attention, Impairment of concentration, Impairment of long term memory or impairment of short term memory.
Cranial Nerves:
II Optic: Visual acuity - Bilateral - Normal. **Visual fields** - Normal.
III Oculomotor: Pupillary constriction - Bilateral - Normal.
IV Trochlear - Bilateral - Normal.
V Trigeminal: - Normal Bilaterally.
VI Abducens - Bilateral - Normal.
VII Facial: - Normal Bilaterally.
VIII Acoustic - Bilateral - Hearing normal, (Hearing tested by finger rub), (Hearing tested by whispered voice) and (Hearing tested by tuning fork). **IX Glossopharyngeal / X Vagus** - Normal.
XI Accessory: - Normal Bilaterally.
XII Hypoglossal - Bilateral - Normal.
Eye Movements: Gaze - Bilateral - Normal. **Nystagmus - Bilateral** - None.
Sensory:
Light Touch: Intact - Globally.
Pain: Intact - Globally.
Vibration: Intact - Globally.
Proprioception - Bilateral - Normal.
Overall Assessment of Muscle Strength and Tone reveals:
Upper Extremities: Right Deltoid - 5/5. **Left Deltoid** - 5/5. **Right Bicep** - 5/5. **Left Bicep** - 5/5. **Right Tricep** - 5/5. **Left Tricep** - 5/5. **Right Wrist Extensors** - 5/5. **Left Wrist Extensors** - 5/5. **Right Wrist Flexors** - 5/5. **Left Wrist Flexors** - 5/5. **Right Intrinsics** - 5/5. **Left Intrinsics** - 5/5.
Lower Extremities: Right Iliopsoas - 5/5. **Left Iliopsoas** - 5/5. **Right Quadriceps** - 5/5. **Left Quadriceps** - 5/5. **Right Hamstrings** - 5/5. **Left Hamstrings** - 5/5. **Right Tibialis Anterior** - 5/5. **Left Tibialis Anterior** - 5/5. **Right Gastroc-Soleus** - 5/5. **Left Gastroc-Soleus** - 5/5. **Right EHL** - 5/5. **Left EHL** - 5/5.
Plantar Reflexes (L4-S2) - Bilateral - Flexion. **Coordination** - No Impairment of heel-to-shin, Impairment of finger-to-nose or Impairment of rapid alternating movements.

Neuropsychiatric
Associations - intact. **Thought Processes/Cognitive Function** - appropriate fund of knowledge.

Musculoskeletal
Global Assessment
Gait and Station - normal gait and station.
Spine/Ribs/Pelvis
Cervical Spine:
Inspection and Palpation: Muscle tone - spasticity.
Assessment of pain reveals the following findings:: The pain is characterized as - severe, constant, deep and spasmodic.
Location - cervical area, upper trapezius area, (R) and upper trapezius area, (L).
Lumbosacral Spine:
Assessment of pain reveals the following findings: **Location** - pain refers bilaterally to buttocks and pain refers to lower back bilaterally.
Upper Extremity
Shoulder:
Assessment of pain reveals the following findings:: **Location** - about the left shoulder.

Assessment & Plan

Acute neck pain 723.1 | M54.2

- EXPLORATION OF CERVICAL SPINAL FUSION ; Routine ()
- REMOVAL OF ANTERIOR CERVICAL SPINAL INSTRUMENTATION; Routine ()
- ANTERIOR CERVICAL DISCECTOMY & FUSION ; Routine ()
- Patient Education: Neck Strain *: neck pain
- **Review of Diagnostic Test**
  Comments: On CT scan, both of his screws are broken into C7. I do not appreciate incorporation of the graft. He does have spondylosis at the level above the fusion at C5-6.
- How to access health information online

Encounter for pre-operative laboratory testing V72.84 | Z01.812

- PT (PROTHROMBIN TIME) (85610); Routine ()
- PTT (ACTIVATED PARTIAL THROMBOPLASTIN TIME) (85730); Routine ()
- RH (D) BLOOD TYPING (86901); Routine ()
- ABO BLOOD TYPING (86900); Routine ()
- RBC ANTBDY SCRN-EA TECH (86850); Routine ()
- METABOLIC PANEL, BASIC (80048); Routine ()
- CBC, PLATELETS & AUT DIFF (85025); Routine ()
- URINALYSIS, AUTOMATED W/ MICRO (81001); Routine ()
- 12 LEAD EKG: ELECTROCARDIOGRAM COMPLETE (93000) ; Routine ()
- X-RAY OF CHEST, AP AND LATERAL VIEWS (71020); Routine ()
- **Surgical Risks**
  The risks and benefits of surgery were discusssed in detail. The risks include the risk of infection, bleeding, CSF leak, neurologic injury, anesthetic complications, pneumonia, heart attack and stroke. The patient wishes to proceed.
- Call the office to schedule follow up

I am going to recommend an ACDF at C5-6, C6-7, removal of hardware. If I am able to fuse him well from the front that will be it. Otherwise, he needs a posterior fusion as well. He will likely need a STALIF from the front as well. We will set this up for him.

Stuart Kaplan, MD

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL STROTHER,

Plaintiff,

v.

MANUEL GUTIERREZ; an Individual, and DOES I through X, inclusive and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-15-723794
Dept. No.: XXXI

DEFENDANT'S OPPOSITION TO APPLICATION FOR DEFAULT JUDGMENT AND COUNTERMOTION TO SET ASIDE DEFAULT

COMES NOW, Defendant MANUEL GUTIERREZ, by and through his counsel of record of the law firm of McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH, LLP, hereby submits his Opposition to Plaintiff's Application for Default Judgment and Countermotion to Set Aside Default.

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This Opposition and Countermotion is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, and any oral argument to be presented at the time of hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

This matter arises out of a motor vehicle accident that occurred on or about May 8, 2015 at the intersection of Charleston and Robindale in Las Vegas, Nevada. Plaintiff alleges that Defendant MANUEL GUTIERREZ failed to yield the right of way while making a left turn on a permissive yellow light. Plaintiff further alleges that he attempted to avoid Defendant's trailer by swerving into oncoming traffic and colliding with a third vehicle. As a result of this accident, Plaintiff claims a 2007 cervical fusion was disrupted thereby requiring a revision on May 26, 2016. Plaintiff now seeks damages in the amount of $413,201.13 for medical expenses plus an award of general damages.

On July 26, 2016, the undersigned was retained by Defendant's insurer to represent Defendant in this matter thereby affording Defendant the opportunity to defend himself in this action. Upon learning of the application for default judgment undersigned counsel sought to immediately correct this Default by filing this Opposition and Countermotion to Set Aside so that this matter may be decided on its merits. Defendant respectfully requests the opportunity to defend himself against Plaintiff's allegations and investigate the reasonableness, necessity, and relatedness of Plaintiff's claimed damages.

II.
LAW AND ARGUMENT

A. Opposition to Application for Default Judgment

In opposition to Plaintiff's Application for Default Judgment, Defendant notes that receipt of Plaintiff's Application was the first notice to Defendant and any of his representatives of Plaintiff's medical records and bills. At no point prior to the filing of the Application did Plaintiff ever make a monetary demand for settlement or inform Defendant, Defendant's insurer, or Defendant's prior

counsel of his claimed injuries, treatment, and the amount of his alleged medical specials. Defendant is now placed in a position where he is faced with the possibility that he could be held responsible for medical treatment in excess of $400,000 and an award of general damages without having had any opportunity to review and evaluate Plaintiff's damages and defend himself with respect to those claims. As the Court can see from Plaintiff's Application, Plaintiff alleges that he required a revision of his prior cervical fusion following this accident, and thereafter, engaged in significant pain management treatment as well as a subsequent psychiatric hospitalization for hallucinations. Further, Plaintiff informed the investigating police officer at the scene that part of the reason for him swerving and hitting another vehicle was that he did not anticipate the trailer behind the Defendant's truck, and clearly did not slow as he approached the intersection to avoid the vehicle and trailer. As such, there are significant questions regarding liability and damages involved in this case.

Due to the lack of any notice of the extent of Plaintiff's claimed injuries and subsequent medical treatment, Defendant is now denied the opportunity to meaningfully oppose Plaintiff's Application for Default Judgment and the amount claimed therein. According to Plaintiff's Application, Plaintiff underwent a pre-accident cervical fusion in 2007. It is certainly possible that some, or all, of Plaintiff's post-accident treatment was related to his pre-existing conditions thereby requiring an apportionment determination. In addition to his prior neck injury, there is no indication as to how Plaintiff's hospitalization at Spring Valley Hospital wherein he was placed on a legal 2000 hold for an altered mental status, visual auditory hallucinations, hyperammonemia, and history of chronic insomnia is related to the subject accident. The cost for Plaintiff's three-day psychiatric hospitalization alone totals $55,718.00, an amount which he now seeks to be paid by Defendant.

Additional discovery regarding Plaintiff's prior injuries and post-accident treatment is clearly needed in order to make an informed and sufficient determination with respect to Plaintiff's damages related to the subject accident, if any. Defendant asks this Court to deny Plaintiff's Application for Default Judgment for these reasons as well as the reasons discussed below.

Defendant promptly notified his insurer when he was served with the summons and complaint. Defendant's insurer promptly referred the matter to be defended. A calendaring mistake occurred thereafter with prior counsel that has caused current situation to occur and given the intent of the

Defendant and his insurer to defend the matter, this calendaring mistake should be considered excusable neglect allowing the Defendant to answer and defend himself in this case.

B. Countermotion to Set Aside Default

Under NRCP 55(c), a court may set aside an entry of default for good cause shown. *Long v. A-1 24 Hour Towing, Inc.*, 101 Nev. 682, 707 P.2d 1151 (1985). The decision to set aside an entry of default is with the court's discretion. *Sealed Unit Parts. Co. v. Alpha Gamma Chapter of Gamma Phi Beta Sorority, Inc. of Reno*, 99 Nev. 641, 642, 668 P.2d 288, 289 (1983). "Good cause shown" is defined broadly and includes the mistake, inadvertence, surprise, and excusable neglect referred to in NRCP 60(b)(1). *Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.*, 83 Nev. 126, 129, 424 P.2d 884, 886 (1967). Setting aside a procedurally defective default is **mandatory**. *See Jacobs v. Sheriff, Washoe County*, 108 Nev. 726, 729 (1992) (emphasis added); *Garcia v. Ideal Supply Co., Inc.*, 110 Nev. 493, 494-495; *overruled on other grounds*, as stated in *Teriano v. Nev. State Bank*, 112 P.3d 1058 (2005).

In determining whether "good cause" has been met, Courts are allowed broad discretion in considering a request to set aside a default and a decision to set aside will not be overturned absent an abuse of discretion. *Cicerchia v. Cicerchia*, 77 Nev. 158, 161, 360 P.2d 839, 841 (1961) citing *Bryan v. Gibbs*, 69 Nev. 167, 243 P2d 1050; *see Lukey v. Thomas*, 5 Nev. 20, 33 P.2d 979; *see also Schultz v. King*, 68 Nev. 207, 228 P.2d 401 *and Gazin v. Hoy*, 102 Nev. 621, 703 P.2d 436 (1986). In reviewing a Court's decision to set aside a default, the Nevada Supreme Court has articulated that public policy favors the adjudication of cases on their merits and *not* by default. *Hotel Las Frontier v. Frontier Prop.*, 79 Nev. 150, 155-56, 380 P.2d 292, 295 (1963).

To assist the Court in determining when to set aside a default, the Nevada Supreme Court set forth the following guidelines:

> 1. The moving party must show some excuse of its failure to answer or otherwise respond to the Complaint; and
>
> 2. The Court should give due consideration to the underlying policy that each case should be decided on its own merits.

Epstein v. Epstein, 113 Nev. 1401, 950 P.2d 771 (1997) (overruling that a party must show a meritorious defense in order to have the Court set aside a default judgment); *Lesley v. Lesley*, 113

Nev. 727, 941 P.2d 451; *Bauwens v. Evans*, 109 Nev. 537, 853 P.2d 121; *Sealed Unit Parts v. Alpha Gamma Ch.*, 99 Nev. 641, 668 P.2d 288.

With respect to the first consideration, Defendant recognizes that prior counsel should have sought stipulation to set the default aide and/or filed a motion to set aside the default. Although a calendaring error with prior counsel prevented this, Defendant is clearly interested in pursuing a defense of this case and his insurer showing the same intent by referring the matter to defense counsel after being notified of service of the complaint. Defendant respectfully requests that he not be punished for prior counsel's neglect in failing to timely seek to set aside the default and asks this Court's to allow him to now file an answer and proceed with a defense.

In addition to the above, Defendant notes that the Three Day Notice of Intent to Take Default was never served upon Defendant himself. Defendant was never informed by mail or otherwise of Plaintiff's intent in pursuing a default against him despite Plaintiff's knowledge of Defendant's whereabouts. As evidenced by Plaintiff's Certificate of Service of the Three Day Notice of Intent to Take Default, Defendant was never served with Plaintiff's Notice. Considering Defendant immediately notified his insurer of service of the Complaint, and his insurer immediately referred the matter to counsel, one could expect that Defendant would have also immediately acted upon the pursuit of a default against him had he properly been informed of such intent.

Secondly, the default should be set aside so that this case, which involves a significant amount of damages and serious questions regarding liability and medical causation, to be heard on its merits. The Nevada Supreme Court has articulated that long time Nevada public policy favors the adjudication of cases on their merits and not by default. See *Hotel Las Frontier v. Frontier Prop.*, 79 Nev. 150, 155-56, 380 P.2d 292, 295 (1963). To further this goal, it is essential that the default be set aside otherwise this Court would hold Defendant responsible for paying the entirety of Plaintiff's requested damages without the opportunity to conduct discovery, retain experts, review medical records, and challenge Plaintiff's liability allegations. Defendant respectfully requests that this Court grant him the opportunity to defend himself against Plaintiff's allegations and claimed damages in the amount of $413,201.13 plus general damages.

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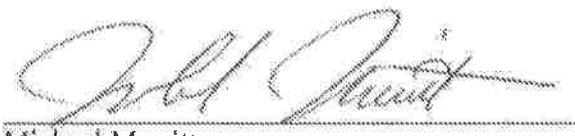
It is undisputed that Plaintiff claims a significant amount of past medical specials and is also seeking additional recovery for pain and suffering, which far and away exceeds any amount Defendant can contribute to the satisfaction of a default judgment. Defendant would be significantly prejudiced by the granting of the default judgment. Whereas Plaintiff would suffer no prejudice if Defendant is permitted to file an answer to the complaint and proceed with litigation; Plaintiff would simply be required to prove his claim as was required by our system of justice when he filed his complaint. As such, Defendant asks this Court to allow him to correct the mistake of failing to seek to set aside the default by denying the Application for Default Judgment, and ordering the default to be set aside.

III.
CONCLUSION

Based on the foregoing, Defendant MANUEL GUTIERREZ respectfully requests that this Court denies Plaintiff's Application for Default Judgment and grant his request to set aside the Default entered against him.

DATED this 1st day of August, 2016

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

By 

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Attorneys for Defendant Manuel Gutierrez

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of August, 2016, a true and correct copy of **DEFENDANT'S OPPOSITION TO APPLICATION FOR DEFAULT JUDGMENT AND COUNTERMOTION TO SET ASIDE DEFAULT** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

By _____
Kristin Thomas, an Employee of
MCCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL STROTHER,

Plaintiffs,

vs.

MANUEL GUTIERREZ; an Individual, and DOES I through X, inclusive and ROE CORPORATIONS I through X, inclusive,

Defendants.

CASE NO: A-15-723794
DEPT NO: XXXI

PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR DEFAULT JUDGMENT AND OPPOSITION TO COUNTER-MOTION TO SET ASIDE DEFAULT

COMES NOW, Plaintiff MICHAEL STROTHER, by and through his counsel of record, WILLIAM W. McGAHA, ESQ. of the law firm **SCHUETZE & McGAHA, P.C.**, and hereby submits the following Reply to Opposition to Motion for Default Judgment and Opposition to Counter-Motion to Set Aside Default:

SUMMARY OF ARGUMENT

The Plaintiff is asking this Court to deny the Motion to Set Aside as untimely, and without merit and then to consider and rule on the Motion for Default Judgment. The imposition of default judgment is appropriate and just and is the correct course of action based upon the Nevada Rules of Civil Procedure and under case law.

There are several observations about the Opposition and Counter-Motion which frame up the case. **First**, and foremost, while the insurer for the Defendant claims that there was a "calendaring error" no proof of a calendaring error exists and the error is never explained.

This Court will note that there is no affidavit from anyone, from American Access and the adjuster from the insurer, or in-house defense counsel who had the file, which documents and or substantiates any of the claim of excusable neglect being made on behalf of the Defendant. While the undersigned certainly appreciates Mr. Merritt's arguments and acknowledges and respects his skills as a lawyer, Mr. Merritt cannot be a witness in this matter since he was not involved and has no personal knowledge about what took place. As a result, there is literally no accounting for what took place by American Access and then in-house defense counsel, and as a result, it is impossible to conclude that there was excusable neglect since there is not a single statement from either American Access or in-house counsel about what took place.

Literally, the only portion of the brief which addresses this central issue on the Motion to Set Aside is on page 3-4 lines 27-2 of the Opposition where the American Access writes: "A calendaring mistake occurred thereafter with prior counsel that has caused [the] current situation to occur and given the intent of the Defendant and his insurer to defend the matter, this calendaring mistake should be considered excusable neglect allowing the Defendant to answer and defend himself in this case."

That assertion is pure speculation as there is no affidavit from prior counsel or staff or anyone else for that matter, no letters, no documents, not a stitch of evidence from the insurer and in-house counsel as to what took place. Just assertions that are supposed to be taken at face value. It has to be pointed out, that a "calendaring error" does not account for the actions of American Access and then in-house counsel as both failed to respond in different ways. There was no singular "calendaring error" as is asserted. Therefore, there is no evidence about why this took place and no evidence of excusable neglect. Not just excusable neglect about why no answer was ever filed, but why when given the default BOTH the insurer and in-house counsel ignored the matter, literally, until the instant motion was filed.

Second, Plaintiff has complied with the Nevada Rules of Civil Procedure, case law, and the directions of American Access on this case. In writing, American Access had requested that any default be sent to them. It was. Repeated notices were given to American Access,

/ / /

as there was no rush to impose a default. Only after American Access obviously failed to act was the default entered.

Third, the right to file a Motion to Set Aside has been waived. No motion to set aside was ever filed by the Defendant and without a doubt, the undersigned served through electronic service the Complaint, Summons and Default upon Denise McCurry who opened the documents on December 15, 2015 at 3:24 pm. (**Exhibit 12** to the Motion.) Ruth Sarmiento, in the same office opened the documents at 11:16 am that same day, December 15, 2015. And yet, there was never a motion to set aside the default. **Over seven (7) months transpired, December 2015 into January 2016 and into July 2016 there was no motion to set aside**. Then this Motion for Default Judgment was filed. And yet, no affidavit is submitted as to why and therefore no evidence of excusable neglect and certainly none can be inferred.

REPLY ISSUES

VALUE OF THE CLAIM AS AN EXCUSE

The first argument in the Opposition is that the insurer, American Access, had no idea what the level of damages were in this case. Of course, that is true because they denied the claim and forced the case into litigation. Filing litigation is exactly what was expected and the result of denying the claim. Moreover, that argument is completely irrelevant given that American Access denied the claim. As was set out in the original motion, on June 2, 2105, American Access sent a letter of denial of liability on behalf of Defendant Gutierrez. **Exhibit 4**. This was not just a form letter, but was carefully crafted to deny liability and so it cannot be argued that there was some sort of surprise here when the Complaint was filed and served. The adjuster, Claudia Carmona, tailored her denial letter to the case and explained her version of why she believed that there was no liability. (Despite the incident being directly witnessed by LVMPD, who cited the Defendant driver as set out in the Motion.)

So, American Access chose to deny liability and forced this case into litigation. American Access chose to deny liability on a claim where there was no valid defense to the claim, but that was the choice of the insurance company. The denial letter did not say "please

send us your medicals and maybe we will change our mind." American Access cannot now be heard to complain that maybe it would have acted differently. As the adjuster wrote: "Therefore, your claim has been denied." **Exhibit 4.**

Filing the Complaint was the result of American Access actions in denying the claim, and the follow up to all of that is the refusal of American Access to act on the communications from the undersigned, and then in-house counsel's refusal to act despite being put on notice at every single step in the process.

AMERICAN ACCESS GIVEN FULL NOTICE

Second, the undersigned did exactly as American Access directed and requested in it's correspondence. What is meant is this: In it's May 21, 2015 correspondence to the undersigned, American Access wrote: **"If you choose to litigate this case instead of forwarding all the medical bills and records on behalf of you (sic) client, please forward us a copy of the summons and complaint. You should also send any and all DEFAULT notice to American Access Casualty Company at the address listed below." Exhibit 3.** (Bolding and underlining added.) The undersigned did exactly as requested.

American Access was notified of the service of process of the Complaint upon Defendant in correspondence, with all pertinent enclosures, on September 29, 2015. **Exhibit 7.** The notification is confirmed and American Access does not dispute receipt of the materials. So, there is a concession of actual notice of the Summons and Complaint being served. (There is literally no evidence as to why there was a failure, or refusal, by American Access to respond.) There was no response from American Access and so again on November 16, 2015, correspondence was sent again to American Access, with all pertinent enclosures, which is confirmed by electronic confirmation of the facsimile communication. **Exhibit 8.** (Again, there is no argument that the material was not received, again, and there is therefore this secondary follow up notice to which American Access failed to respond.) In addition to the Summons and Complaint, the letter to American Access clearly states that there is an intent to take default after three days, and a Three Day Notice of Intent to seek Default was also sent. There was no response from American Access. **The undersigned**

waited another full 20 days, which is a full service period, before submitting the default to the Clerk of the Court. Very clearly, there was ample opportunity for American Access and it's in-house counsel to act by either filing an answer, or filing a motion to set aside, neither of which took place, and never took place until the filing of this Motion.

WHAT DID AMERICAN ACCESS DO?

American Access never acted even though it was served by the undersigned with the appropriate documents, all of which is confirmed by electronic means. There was no calendaring error at American Access. When American Access was notified on September 29, 2015 by the undersigned that there was valid service, for which there is electronic confirmation, what did American Access do to defend the claim? We know that American Access DID NOT reply to the undersigned. We know that American Access did not evince an intent to defend the claim. We know that because American Access refused to communicate with the undersigned. If American Access sent the materials to in-house counsel to defend back on September 29, 2015 we don't know that is the case as there is no affidavit from anyone. In other words, the evidence is that American Access chose to do nothing and then repeated this over again after notice was served again in November 2015. This is important since if there was an intent to defend the claim, that is what would have been communicated.

Again, on November 16, 2015 the undersigned again wrote to American Access, with electronic confirmation, about service of the summons and complaint and informed American Access that the undersigned intended to take a default. There is nothing vague or ambiguous about this correspondence. Nevertheless, the response from American Access: literally nothing. American Access refused to communicate either through a letter or a phone call or email. Was the file sent to defense counsel to defend? We don't know that either since there is no affidavit from anyone. What we do know is that there was no calendaring error, and no reason not to act.

Then, on December 10, 2015, 24 days latter, the undersigned secured the default. That was done over three months after service was effectuated. On December 14, 2015 Denise McCurry e-served a letter of representation to the undersigned. The very next day the

summons, complaint, proof of service and the default were all served on opposing counsel and staff and they opened the material that day, December 15, 2015. This is important since not just one person, but two staff members in the in-house office opened the letter and knew that there was a default because they opened the file. After that, there was literally no activity from the defense. What was the calendaring error there. What was calendared, and how was it in error, and why did the file just sit around the office of in-house counsel for over seven months? There is literally no evidence on any of this and no evidence of an error which could be construed as excusable neglect.

CALENDARING ERROR

American Access seeks to have all this set aside because of a "calendaring error" which is otherwise not explained. Really? Was there a calendaring error at American Access and what kind of error would that be? The brief in Opposition clearly implies that the alleged error was with in-house counsel, but what about American Access, what did it do? What kind of calendaring error? Is American Access trying to claim that there were calendaring erros in that office and then in the office of in-house counsel? What about this error led counsel who saw the default on December 15, 2015, along with staff who also opened the documents, from otherwise not moving promptly to set aside? That is not a calendaring error. The problem here with that explanation is that there is no explanation just vague assertions made in the hopes that the lack of diligence gets interpreted as excusable neglect. Moreover, there is no affidavit to back up this "calendaring error" and whatever that may mean. This Court can not be expected to rule that there was excusable neglect when American Access never puts before this Court evidence to consider in the first instance. The record fails on this point since there is a literal factual void on what took place.

Under EDCR 2.20(e) a party is required to submit "supporting affidavits, if any..." when making an opposition. Here, the factual opposition is premised upon the assertion that there was some mistake made which works as excusable neglect. In this case we are told that the mistake is a calendaring mistake. However, there is as noted no affidavit to that point, and as also noted, counsel can't be a witness since he was not involved in that matter. So, in the end

there is no evidence of anything to rule upon and conclude that there was excusable neglect.

Counsel cites numerous cases all of which go over the general proposition that there has to be excusable neglect. There is no argument about the case law. The cases show that the Court has the discretion to either grant or deny a motion to set aside depending on the circumstances. A predicate to each of the cases is that there has to be a valid reason to do so. Like the Opposition brief noted in the case of Epstein v. Epstein, 113 Nev. 1401, 950 P. 2d 771 (1977): **"The moving party must show some excuse of its failure to answer or otherwise respond to the Complaint...."**

CHRISTY V. CARLISLE

Christy v. Carlisle, 94 Nev. 651, 584 P. 2d 687 (1978) is an important case in this circumstance in that the Plaintiff and the undersigned complied with Christy and the requirements of the three day notice. Under Christy, Plaintiff's counsel is obligated to inform the insurer of the service and of the three day notice of intent to seek default. All of which was done in this case. In Chirsty, Plaintiff's counsel was engaged in a course of negotiations with the insurer for the defendant in a tort case, much like this case. In that matter, the insurer, had evidenced it's intent to defend, but was not noticed with the fact of service and a default judgment was entered. The insurance company was not given notice that the insured was served and the Court rightly held that the insurer was entitled to get and receive notice that the insured was served. By extension, the Court also ruled that because the insurance company had indicated that it was defending and that by negotiating with counsel had appeared in the case, the insurer was entitled to the three day notice.

In this case, as opposed to Christy, the insurer American Access received repeated notice and was fully informed. American Access chose never to respond to the undersigned, remained silent and refused to communicate even after the repeated communications which were confirmed received through electronic service. Then after the default, when counsel was served with the documents, there was never an application to set aside, ever.

WAIVER

No Motion to Set Aside was ever filed. It took the Motion for Default Judgment before

there was any action by the defendant. This case has been pending for a year now. There is a waiver of the right to ask this Court to set aside the default. The summons, complaint, and the default were all served on defendant back in September 2015 and then provided to the insurer, twice and then to in-house counsel on December 15, 2015 who then opened and read the material and never acted. Ever. Support staff also opened the material on that day. There was no motion to set aside default ever filed after that. Well over seven months later, and still no motion to set aside, the Motion for Default Judgment was filed and then out-side counsel was hired. There is set of circumstances which offer excusable neglect for the failure to file the motion to set aside. Over six months transpired and that is the time to move to set aside a judgment under NRCP 60. Given the length of time and actual notice of the default to counsel being served and opened on that very day, there is an obvious waiver of the right to move to set aside. The standard is that the defendant has to promptly move to set aside. That standard is not met here, and there is no set of circumstances or case law which supports a seven month delay.

PREJUDICE TO THE PLAINTIFF

Absolutely, there is prejudice to the Plaintiff if this Court grants the set aside. This matter is now post-accident over a year. It has been over a year since liability was denied and the claim denied. Plaintiff filed the Complaint a year ago and has done exactly what the law requires. Service was effectuated, and the insurer put on notice repeatedly. Then the insurer was put on notice again and notified of the intent to take a default. Then Plaintiff waited again until December 10, 2015. Then defense counsel was given all the documents and nothing took place. No motion to set aside was ever filed. Now, after all this time and making the application for default judgment, which was done appropriately, and with supporting documentation, Plaintiff is entitled to judgment against the defendant.

NO CALENDARING ERROR

There are two phases in this matter to consider. American Access received the materials twice. There is no claim that American Access did not get the materials as we have the electronic confirmation that the material was received. The concept that there was a

calendaring error was only forwarded with regard to in-house defense counsel. What did American Access do? We do not know since there was no argument or evidence on that point. We do know however that the insurer was properly appraised of the service and intent to take a default. The undersigned waited 24 days before submitting the application for default. It is not like there was a rush to judgment. In-house counsel failed to file a Motion to Set Aside. There is no excusable neglect in that sequence of events. Certainly, there is neglect, but not excusable neglect. Plaintiff is the one who will suffer from the Court setting aside the default.

NO EXCUSABLE NEGLECT

There is no showing of excusable neglect. First there has to be evidence of what took place. That is not provided. There are no dates given, what was supposedly calendared in mistake, why it was a mistake, why the mistake was not discovered and that does not even cover the issues with why American Access failed to act. American Access had full disclosure, received notices as requested, and just did nothing. Under these circumstances, there is no case for excusable neglect .

CONCLUSION

Based upon the evidence submitted, and the testimony which is anticipated at the hearing on the Motion for Default Judgment, Plaintiff is asking this Court for an award of the medical expenses incurred along with damages for pain and suffering consistent with the evidence in the medical records and the testimony of Plaintiff.

DATED this 11th day of August, 2016.

SCHUETZE & McGAHA, P.C.

By */s/William W. McGaha*
WILLIAM W. McGAHA, ESQ.
Nevada Bar #3234
601 S. Rancho Drive, Suite C-20
Las Vegas, Nevada 89106
Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of SCHUETZE & McGAHA, P.C. and that on this 11th day of August, 2016, I caused the foregoing ***PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR DEFAULT JUDGMENT AND OPPOSITION TO COUNTER-MOTION TO SET ASIDE DEFAULT*** to be served electronically via the Court's ECF system to the following parties listed on the service list:

Michael Merritt, Esq.
McCormick, Barstow, Sheppard,
Wayte & Carruth, LLP
8337 W. Sunset Road, Suite 350
Las Vegas, Nevada 89113
Attorneys for Defendant

/s/Donna K. Brand
Employee of SCHUETZE & MCGAHA, P.C.

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CLERK OF THE COURT

McCormick, Barstow, Sheppard,
Wayte & Carruth LLP
Michael Merritt
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Facsimile: (702) 949-1101

Attorneys for MANUEL GUTIERREZ

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL STROTHER,

Plaintiff,

v.

MANUEL GUTIERREZ, an individual, and DOES I Through X, inclusive and ROE CORPORATIONS I Through X, inclusive,

Defendants.

Case No. A-15-723794-C
Dept. No.: XXXI

SUPPLEMENT TO MOTION TO SET ASIDE DEFAULT

Defendant MANUEL GUTIERREZ, by and through his counsel of record of the law firm of McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH, LLP, hereby submits his Supplement to Motion to Set Aside Default.

SUPPLEMENTAL POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

According to Plaintiff's Application for Default, American Access Casualty Company ("American Access") was notified that Manuel Gutierrez was served with the summons and complaint on September 29, 2016. **See Plaintiff's Application p. 4:9-11; see also Exhibit 7 to Plaintiff's Application**. Thereafter, Plaintiff sent a three day notice of intent to file a default to American Access on November 16, 2016. **See Plaintiff's Application p. 4:12-14; see also Exhibit 8 to Plaintiff's Application**. The file was then referred to American Access' staff counsel office for the defense of

Manuel Gutierrez. **See Affidavit of Denise McCurry attached hereto as Exhibit A.** When a referred matter arrives, it is received by the legal assistant of the assigned attorney and the file is opened in the office by the legal assistant. **See Exhibit A.** After the file is opened, the legal assistant's first task is to calendar all pertinent case deadlines. **See Exhibit A.** If any case deadlines require that the assigned attorney provide immediate attention to the case, such as the deadline for the filing of an answer to the complaint, the legal assistant will alert the assigned attorney to the deadline and the task necessary to be performed. **See Exhibit A.** If the task needing immediate attention involves a response to a pleading or other paper, the legal assistant will provide the paper or pleading to the attorney with a reference to the task required and the deadline for the task. **See Exhibit A.**

The current case was assigned to Denise McCurry, Esq, at the American Access' staff counsel office. **See Exhibit A.** In November and December 2015, Ms. McCurry's legal assistant was Aracely Garcia; Ms. Garcia is currently no longer employed with Ms. McCurry's office. **See Exhibit A.** As the files are not directly referred to the assigned attorney from American Access, Ms. McCurry does not have personal knowledge of the exact date the case referral was received by their office from American Access. **See Exhibit A.** After the file was received from American Access, Ms. Garcia sent a letter to Plaintiff's counsel on 12/14/15 with Ms. McCurrey's electronic signature seeking a copy of the summons and complaint and service information from Plaintiff. **See Exhibit attached to Affidavit of Denise McCurry, Esq. attached hereto as Exhibit A.** Ms. McCurry did not draft the 12/14/15 letter, it is a form letter generated by her staff when an assignment is referred to the office from American Access. **See Exhibit A.** At that time, Ms. McCurry had not seen the file and did not know she was assigned the file.

Plaintiff e-served the summons and complaint and default, among other documents, to Ms. McCurry's office on 12/15/15. **See Plaintiff's Application p. 4:24-28; 5:1-4; see also Exhibits 11 & 12 to Plaintiff's Application.** Ms. McCurry has no memory of being served with this information. In reviewing this matter later after the Plaintiff's application was served, Ms. McCurry discovered that on 12/15/15, she and her staff received the e-service emails, and although they may have been opened by her and her staff, Ms. McCurry did not read or review the email or the documents served through the link contained in the email. **See Exhibit A.** When Ms. McCurry office receives an e-serve email,

the addressees for the e-service always include Ms. McCurry's staff members. **See Exhibit A.** Ms. McCurry does not do the clerical task of reviewing the email or downloading the documents by the link provided in the email; Ms. McCurry's staff is tasked with downloading the documents through the link, and saving the documents to their electronic files. **See Exhibit A.** At the time of service of the document, Ms. McCurry's staff is supposed to bring anything to her attention that she needs to address with any urgency, and calendar any relevant dates related to the document served. **See Exhibit A.**

When Ms. Garcia received the referred file from American Access she erroneously calendared all upcoming case deadlines for the same date, 12/14/15. **See Exhibit A.** As such, after 12/14/15, no calendar entries for the case alerted Ms. McCurry to the fact that anything needed to be done in this case. **See Exhibit A.** Additionally, when the e-served complaint and default were received on 12/15/15, Ms. Garcia did not change any calendar entries for the case, she did not calendar a date for an answer or motion to set aside the default, and did not bring the filed default to Ms. McCurry's attention for any immediate action by Ms. McCurry. **See Exhibit A.**

Accordingly, no date was on the calendar beyond 12/14/15 to alert Ms. McCurry that she was required to do anything on the case, and she was never told by her staff of any upcoming or urgent deadlines that required her attention. **See Exhibit A.** For these reasons, Ms. McCurry never acted to set aside the default and file an answer. **See Exhibit A.**

Ms. McCurry has a very active case load at the firm and her practice is calendar driven and calendar dependent because of the number of cases for which she is responsible. **See Exhibit A.** As such, Ms. McCurry's calendar has to be kept very accurately to allow for her to have the opportunity to satisfy all of the many case-related deadlines for her cases. **See Exhibit A.** For the above reasons, Ms. McCurry did not recognize this case as one that was assigned to her until Plaintiff's Application for Default judgment was served on her office. For the same reason, she did not file an answer on behalf of the Defendant, made no phone call to Plaintiff's counsel to seek a stipulation to set aside the default once it had been filed, and did not file a motion to set aside the default closer in time to the filing of the default. **See Exhibit A.**

II. LEGAL ARGUMENT

The decision to set aside an entry of default is with the court's discretion. *Sealed Unit Parts. Co. v. Alpha Gamma Chapter of Gamma Phi Beta Sorority, Inc. of Reno*, 99 Nev. 641, 642, 668 P.2d 288, 289 (1983). In fact, a court has wide discretion in determining what neglect is excusable and what is inexcusable for purpose of determining whether a party is entitled to be relieved from a default judgment. See *Cicerchia v. Cicerchia*, 360 P.2d 839, 77 Nev. 158 (1961). "Good cause shown" in determining whether to set aside a default is defined broadly and includes the mistake, inadvertence, surprise, and excusable neglect referred to in NRCP 60. *Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.*, 83 Nev. 126, 129, 424 P.2d 884, 886 (1967).

Moreover, in determining whether "good cause" has been met, Courts are allowed broad discretion in considering a request to set aside a default and a decision to set aside will not be overturned absent an abuse of discretion. *Cicerchia v. Cicerchia*, 77 Nev. 158, 161, 360 P.2d 839, 841 (1961) citing *Bryan v. Gibbs*, 69 Nev. 167, 243 P2d 1050; see *Lukey v. Thomas*, 5 Nev. 20, 33 P.2d 979; see also *Schultz v. King*, 68 Nev. 207, 228 P.2d 401 and *Gazin v. Hoy*, 102 Nev. 621, 703 P.2d 436 (1986). In reviewing a Court's decision to set aside a default, the Nevada Supreme Court has articulated that public policy favors the adjudication of cases on their merits and *not* by default. *Hotel Las Frontier v. Frontier Prop.*, 79 Nev. 150, 155-56, 380 P.2d 292, 295 (1963). The Nevada Supreme Court has also held that it is its underlying policy to have each case decided upon its merits and that a default judgment must normally be viewed as available only when the adversary process has been halted by an unresponsive party. *Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978). The Nevada Supreme Court in enunciating its preference for resolving cases on their merits has also stated that "an appellate court is more likely to affirm a lower court ruling *setting aside* a default judgment than it is to affirm a *refusal* to do so. In the former case a trial upon the merits is assured, whereas in the latter it is denied forever." Yocham v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1217 (1982) quoting *Hotel Las Frontier v. Frontier Prop.*, 79 Nev. at 155-56, 380 P.2d at 295 (1963) (emphasis in original).

In this case, what Ms. McCurry and her staff did or omitted to do that brought about the current circumstance easily qualifies as "mistake" or "inadvertence" as discussed in *Intermountain*

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
8337 W. SUNSET RD, SUITE 350
LAS VEGAS, NV 89113

Lumber & Builders Supply as "good cause" for setting aside a default. The law allows the Court wide discretion in determining what is or is not excusable neglect when deciding whether to set aside a default and with the strong public policy of resolving cases on their merits, this default filed by Plaintiff in this case should clearly be set aside by the Court and the Defendant permitted to file an answer to the complaint.

III. CONCLUSION

Given the foregoing, the Defendant seeks an order from this Court setting aside the Plaintiff's default and permitting Defendant to file an answer to the Complaint.

DATED this 2nd day of August, 2016

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By _____
Michael Merritt
Nevada Bar No. 5720
8337 West Sunset Road, Suite 350
Las Vegas, Nevada 89113
Tel. (702) 949-1100

Attorneys for Manuel Gutierrez

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2016, a true and correct copy of **SUPPLEMENT TO MOTION TO SET ASIDE DEFAULT** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

By _____
Kristin Thomas, an Employee of MCCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

03639-00012 4051403.1

EXHIBIT A

AFFIDAVIT OF DENISE S. McCURRY, ESQ.

State of NEVADA)
) ss.
County of CLARK)

Denise S. McCurry, Esq. being duly sworn deposes and says:

1. I am licensed to practice law in the State of Nevada and I have personal knowledge regarding the facts and information I am stating in this affidavit.

2. When files are referred to our office they are referred from the home office of American Access in Chicago.

3. When a referred matter arrives, it goes directly to the legal assistant of the assigned attorney and the file is opened in the office. At that time, all pertinent case deadlines are calendared by the legal assistant. If any deadlines on the case are pressing, such as the deadline for the filing of an answer to the complaint, the deadline and the pleading that must responded to are brought to the attention of the assigned attorney by the legal assistant immediately.

4. My legal assistant when this matter was referred to our office was Aracely Garcia; she is currently no longer employed with our office. After the file was received from American Access, Ms. Garcia sent a letter on 12/14/15 to the Plaintiff with my electronic signature seeking a copy of the summons and complaint and service information from Plaintiff. **See Exhibit A attached hereto**. I have no personal knowledge regarding when the file arrived at our office. I did not draft the 12/14/15 letter, it is a form letter generated by our staff when an assignment is referred to us. At that time, I had not even seen the file and I did not know I was assigned the file.

5. In reviewing this matter later, I discovered that on 12/15/15, I and my staff were e-served the summons and complaints and the default by Plaintiff's counsel. When the e-serve emails come to us, the addressees for the e-service always include my staff members as I do not look at the emails or download the documents by the link provided in the email. My staff is tasked with the download of the documents through the link in the email and saving the documents to our electronic files. At that time, my staff is supposed to bring anything to my attention that I need to deal with right away and calendar any relevant dates.

6. When Ms. Garcia received the referred file from American Access she erroneously calendared all upcoming deadlines for the case as 12/14/15. As such, after 12/14/15, no calendar entries for the case alerted me to the fact that anything needed to be done in this case. Further, when the e-serve documents were received from Plaintiff on 12/15/15, Ms. Garcia did not change any calendar entries for dates later than 12/14/15, she did not calendar a date for an answer or motion to set aside the default, and did not bring the filed default to my attention.

7. Accordingly, nothing was on the calendar beyond 12/14/15 to alert me to do anything and I was never told by her staff to deal with anything. The file was never on my radar as a file assigned to me that needed attention, and therefore, I never acted.

8. I have a very active file load at the firm and my practice is calendar driven and calendar dependent. Because of this, my calendar needs to be kept very accurately for to allow for me to satisfy all of the many case related deadlines for my cases. For the above reasons, I did not even recognize this case as one that was assigned to me until Plaintiff's Application for Default judgment was served on our office. For the same reason, I did not file an answer on behalf of the Defendant, I made no phone call to Plaintiff's counsel to seek a stipulation to set aside the default once it had been filed, and I did not file a motion to set aside the default closer in time to the filing of the default.

Further your affiant sayeth not.

Dated: August 19th, 2016.

Denise S. McCurry, Esq.

SUBSCRIBED AND SWORN TO
before me this 19th day of August, 2016

Ruth Sarmiento

NOTARY PUBLIC in and for said
County and State

RUTH E. SARMIENTO
Notary Public, State of Nevada
Appointment No. 14-13651-1
My Appt. Expires May 28, 2018

EXHIBIT A

LAW OFFICES OF
VAN ALFEN, McCURRY & CARDWELL
ATTORNEYS AT LAW

Managing Attorney
Scott B. Van Alfen

S. Denise McCurry
Robert L. Cardwell

STAFF COUNSEL
American Access Casualty Company Trial Division
All Attorneys are Employees of
American Access Casualty Company

This Office is not a Partnership or a Corporation

ELECTRONICALLY SERVED
12/14/2015 03:38:39 PM

December 14, 2015

Via e-service and regular mail
William W. McGaha
SCHUETZE & MCGAHA, PC
601 S. Rancho Drive, Ste. C-20
Las Vegas, NV 89106

Re: Gutierrez adv. Strother
Case Number : A-15-723794-C
Date of Loss : May 8, 2015
Our File Number : 1505091248

Dear Counsel:

Let this correspondence serve as notice that this office represents the Defendant in the above-cited matter. It is my understanding that you represent the Plaintiff.

At your earliest convenience, please forward **proof of service on my client as well as a file-stamped copy of the Complaint you have filed in this matter.** If you have any questions or concerns, do not hesitate to contact me. I can be reached at 702-893-3388.

Thank you for your time and attention. I look forward to working with you toward an amicable resolution of this matter.

Sincerely,

/s/ *Denise McCurry*
S. Denise McCurry, Esq.

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09/06/2016 03:48:14 PM

CLERK OF THE COURT

WILLIAM W. McGAHA, ESQ.
Nevada Bar #3234
SCHUETZE & McGAHA, P.C.
601 S. Rancho Drive, Suite C-20
Las Vegas, Nevada 89106
(702) 369-3225
wwm@smlvlaw.net

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL STROTHER,

Plaintiffs,

vs.

MANUEL GUTIERREZ; an Individual, and DOES I through X, inclusive and ROE CORPORATIONS I through X, inclusive,

Defendants.

CASE NO: A-15-723794
DEPT NO: XXXI

DATE OF HEARING: 9-13-2016
TIME: 9:00 AM

PLAINTIFF'S SUPPLEMENTATL REPLY TO OPPOSITION TO MOTION FOR DEFAULT JUDGMENT AND OPPOSITION TO COUNTER-MOTION TO SET ASIDE DEFAULT

COMES NOW, Plaintiff MICHAEL STROTHER, by and through his counsel of record, WILLIAM W. McGAHA, ESQ. of the law firm **SCHUETZE & McGAHA, P.C.**, and hereby submits the following Reply to Opposition to Motion for Default Judgment and Opposition to Counter-Motion to Set Aside Default:

SUMMARY OF SUPPLEMENTAL REPLY ARGUMENT

The supplemental opposition contains the affidavit of Ms. Denise McCurry as proof that there was excusable neglect as to why there was never a response from Ms. McCurry on this file. At first blush, it is quite obvious that American Access is attempting to throw Aracely Garcia, a paralegal who no longer works with American Access, under the bus and blame her for what took place. However, there is no affidavit from Ms. Garcia and significant portions of the McCurry affidavit lack personal knowledge as Ms. McCurry asserts that Ms. Garcia may have done certain things but lacks the knowledge to actually state that. The affidavit by Ms.

McCurry is highly unusual in that she very clearly eschews any responsibility for dealing with this file and utterly refuses to offer this Court any substantive reason which could be considered excusable neglect. As such, there is no record established of any excusable neglect. There clearly is no evidence for neglect as Ms. McCurry has clearly stated, incredibly, that she does not read nor review emails or serviced documents. There is no mistake involved here either. Ms. McCurry is very explicit in that she has no exposure to this file and therefore could not have any idea why it was ignored all this time. What Ms. McCurry does not dispute is that somehow this file was hers, she ignored it, and never acted on the file and never would have but for the Motion for Default Judgment.

REPLY ISSUES

1. LACK OF PERSONAL KNOWLEDGE

What is striking about the McCurry affidavit is that it lacks any personal knowledge about what took place. Ms. McCurry admits that much. Most if not all the inferences are based off of speculation about what Ms. Garcia, the paralegal, supposedly did. However, there is no statement by Ms. McCurry that she has any kind of personal knowledge about what Ms. Garcia did or did not do. All the statements are based upon inference and speculation. Ms. McCurry states she has literally no understanding of the file on a personal basis, other than to state she has no knowledge of the file. That is the sum total of the testimony in the affidavit. So, the claim by Ms. McCurry that she believes she can infer what Ms. Garcia did or did not do is pure speculation and not a valid basis from which the Court or any other person could conclude that there is excusable neglect.

There are some sleight of hand statements which need to be addressed. First, on page 2, line 24, the Supplement makes the following contention: **"Ms. McCurry has no memory of being served with this information."** Maybe that is true in a technical sense but it is false to say she was not served. The statement is in reference to being electronically served with the summons, complaint, and default. That statement is shocking given that we have the proof that she was electronically served, and more than that, **Ms. McCurry opened the email with those documents at 3:24 pm on December 15, 2016**. So, the assertion that Ms.

McCurry has no "memory" of the file certainly means nothing. She was served and opened the service document and had actual personal access to the documents. Ms. McCurry is therefore charged with ACTUAL notice as she did have actual notice. Seven months later claiming "no memory" is outrageous and can't serve as a legitimate basis for establishing excusable neglect.

Next, in this sequential argument by American Access, it is argued that "although they [the email and attachments] may have been opened by her [Ms. McCurry} and her staff..." Ms. McCurry did not read nor review the email contents. Really??????? Seriously??????? The Court and counsel are asked to consider the implication of that sort of statement and the standard which American Access seeks to set out with that argument.

American Access and McCurry are arguing that even though the valid and proper means of electronic service were used, and there is literal proof that the electronically emailed documents were opened, and there is no disagreement that the emails were opened, especially by Ms. McCurry since we have that evidence down to the exact second the email was opened: Ms. McCurry somehow is relieved of the duty to act. Based upon that, and that alone, Ms. McCurry argues that since she never addressed the file, she never read what was delivered to her, that sort of behavior is excusable. It is the essence of Ms. McCurry's job to know what is served on her and to track her cases. This was valid service as set up here in the Eighth Judicial District Court. Ms. McCurry is telling this court that merely ignoring material being sent to counsel through official electronic service is excusable neglect.

If this Court accepts that excuse that willfully ignoring electronically served material, which is opened and then never read, is excusable neglect. There is no case law which supports that conclusion and it wrecks the entire process for electronic service. That logic kills the system as it makes electronic service a superfluous and not effective. Ms. McCurry was charged with knowledge of the material when it was served. If she refused to read the material when she opened it then that is her choice. However, the Court is free to reject that testimony. How implausible does it seem to this Court and anyone who reads this material that when opening up her email Ms. McCurry does not read nor review the material? That is

so far out of the realm of reality that it can't be true, or accepted as true, and this Court is asked to reject that statement and find that whether failure to read and review or not, the set of circumstances here does not equal excusable neglect.

The Supplement and the Affidavit of Ms. McCurry argue that she did not read nor review the material. That is not neglect: Ignoring the default which was served is purposeful, it is not excusable neglect. So, in order to try and have the Court reach the conclusion that there is excusable neglect, the argument now is that Ms. McCurry did open her email with the documents, but never looked that the contents. Yet, even in that there is no proof that is what took place. Counsel argues that point for Ms. McCurry, but the Court has to be placed on notice that is never stated in the Affidavit. Ms. McCurry never once states that she opened the email been served with the documents never reviewed or looked at them. (Which is of course contrary to the electronic evidence which shows that she did open the email on December 14, 2015 at 3:24 pm.) Which puts everyone in the awkward place of having contradictory statements between the supplemental brief and the affidavit supporting the brief.

At best, in paragraph 5, Ms. McCurry stated under oath that **"I do not look at the emails or down load the documents...."** So, while the brief argues that Ms. McCurry certainly opened the emails and never read nor looked at the contents, her affidavit is otherwise. Which one is it going to be? Either the email was opened by Ms. McCurry or it was not. Ms. McCurry is the one who chose to never look at the e-serve material on her own cases. That is not and could not be excusable neglect. It is not excusable neglect. What could possibly be excusable about that? The only out argued by American Access after that is to blame the paralegal who never submitted an affidavit and about whom Ms. McCurry has no personal knowledge.

2. CAN'T BLAME MS. GARCIA

So, without providing an affidavit from Ms. Garcia, Ms. McCurry blames Ms. Garcia for not "calendaring" the case appropriately. Several things are wrong with this approach. The obvious foundational issue is that there is no personal knowledge of what Ms. Garcia did since if Ms. McCurry had personal knowledge, she would have known about the calendaring issue

all along. So, in reality, this Court has to strike from the record all the assertions by Ms. McCurry about what Ms. Garcia might have done, because Ms. McCurry has no knowledge about this file, at all.

Ms. McCurry states that the letter sent in the name of Ms. McCurry to the undersigned was send by Ms. Garcia as a form letter. Presumably, calling the letter a "form" letter is intended to separate Ms. McCurry from the file and absolve American Access of responsibility. But there is no proof that Ms. Garcia sent the letter and the traditional initials in the bottom left hand corner of who actually sent the letter are not present on this letter from Ms. McCurry. So, there actually is no evidence it was sent by Ms. Garcia and the only person who has their name and initials on the letter is Ms. McCurry herself. Ms. McCurry claims she never drafted the letter, but she does not state how she concludes that point, and again there is no evidence someone else drafted the letter, anyway.

The entirety of paragraph six (6) has to be stricken and is wholly without personal knowledge by Ms. McCurry. The biggest assertion and one with no basis in truth and made without personal knowledge, is that Ms. Garcia "erroneously calendared all upcoming deadlines for the case as 12/14/15." That can't be true. All that assertion does is beg the question as to how does Ms. McCurry know this? If that assertion comes from habit and office procedure, then that is one thing, but what took place is different from office procedure. ***What exactly was calendared on December 14, 2015?*** There were no dates to calendar since there was a default. There was no answer to file since there was a default in place. There were no discovery deadlines, so there was nothing to calendar. The assertion that something was calendared is merely an assertion and there is no reason to believe that it is true, given what has been pointed out. There is no evidence of anything being calendared and if so, where is the proof?

Moreover, it is the attorney's responsibility to make sure that the dates, whatever those are, get calendared. Ms. McCurry approaches the affidavit with such indifference it is shocking. There was a default, Ms. McCurry opened up the email and saw the default. We know Ms. McCurry had personal knowledge of the default because she opened the email, and

then the file was shoved aside. There is literally nothing to substantiate that the paralegal on the file should be thrown under the bus here.

Furthermore, how do files come into the American Access legal office in Las Vegas? Why would Ms. McCurry not know that a case was assigned to her? Who assigns the cases and where is their affidavit? Was this case on her case list for seven months? Ms. McCurry claims she is extremely busy, but if that is so, where are the details of here case load and why she had no time to deal with this case? All of these questions remain unanswered because the affidavit does not address what took place, and therefore fails to establish good cause.

NO EXCUSABLE NEGLECT

There is no showing of excusable neglect. The affidavit of Ms. McCurry completely fails to address the issues and raises more issues than it ever could have answered. Given the lack of personal knowledge, the whole affidavit should be stricken. There is no affidavit from Ms. Garcia. There is no evidence of excusable neglect, just indifference and no information provided on what actually took place.

CONCLUSION

Based upon the record in this case, the Court is asked to deny the Motion to Set Aside the Default..

DATED this 6TH day of September, 2016.

SCHUETZE & McGAHA, P.C.

By */s/William W. McGaha*
WILLIAM W. McGAHA, ESQ.
Nevada Bar #3234
601 S. Rancho Drive, Suite C-20
Las Vegas, Nevada 89106
Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of SCHUETZE & McGAHA, P.C. and that on this 6TH day of August, 2016, I caused the foregoing ***PLAINTIFF'S REPLY TO SUPPLEMENTAL OPPOSITION TO MOTION FOR DEFAULT JUDGMENT AND OPPOSITION TO COUNTER-MOTION TO SET ASIDE DEFAULT*** to be served electronically via the Court's ECF system to the following parties listed on the service list:

Michael Merritt, Esq.
McCormick, Barstow, Sheppard,
Wayte & Carruth, LLP
8337 W. Sunset Road, Suite 350
Las Vegas, Nevada 89113
Attorneys for Defendant

/s/ Nancy Arrington
Employee of SCHUETZE & MCGAHA, P.C.

AFFIDAVIT OF DENISE S. McCURRY, ESQ.

State of NEVADA)
) ss.
County of CLARK)

Denise S. McCurry, Esq. being duly sworn deposes and says:

1. I am licensed to practice law in the State of Nevada and I have personal knowledge regarding the facts and information I am stating in this affidavit.

2. When files are referred to our office they are referred from the home office of American Access in Chicago.

3. When a referred matter arrives, it goes directly to the legal assistant of the assigned attorney and the file is opened in the office. At that time, all pertinent case deadlines are calendared by the legal assistant. If any deadlines on the case are pressing, such as the deadline for the filing of an answer to the complaint, the deadline and the pleading that must responded to are brought to the attention of the assigned attorney by the legal assistant immediately.

4. My legal assistant when this matter was referred to our office was Aracely Garcia; she is currently no longer employed with our office. After the file was received from American Access, ~~Ms. Garcia sent a letter on 12/14/15 to the Plaintiff with my electronic signature seeking a copy of the summons and complaint and service information from Plaintiff~~. See **Exhibit A attached hereto**. I have no personal knowledge regarding when the file arrived at our office. I did not draft the 12/14/15 letter, it is a form letter generated by our staff when an assignment is referred to us. At that time, I had not even seen the file and I did not know I was assigned the file.

5. In reviewing this matter later, I discovered that on 12/15/15, I and my staff were e-served the summons and complaints and the default by Plaintiff's counsel. When the e-serve emails come to us, the addressees for the e-service always include my staff members as I do not look at the emails or download the documents by the link provided in the email. My staff is tasked with the download of the documents through the link in the email and saving the documents to our electronic files. At that time, my staff is supposed to bring anything to my attention that I need to deal with right away and calendar any relevant dates.

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6. When Ms. Garcia received the referred file from American Access she erroneously calendared all upcoming deadlines for the case as 12/14/15. As such, after 12/14/15, no calendar entries for the case alerted me to the fact that anything needed to be done in this case. Further, when the e-serve documents were received from Plaintiff on 12/15/15, Ms. Garcia did not change any calendar entries for dates later than 12/14/15, she did not calendar a date for an answer or motion to set aside the default, and did not bring the filed default to my attention.

7. Accordingly, nothing was on the calendar beyond 12/14/15 to alert me to do anything and I was never told by her staff to deal with anything. The file was never on my radar as a file assigned to me that needed attention, and therefore, I never acted.

8. I have a very active file load at the firm and my practice is calendar driven and calendar dependent. Because of this, my calendar needs to be kept very accurately for to allow for me to satisfy all of the many case related deadlines for my cases. For the above reasons, I did not even recognize this case as one that was assigned to me until Plaintiff's Application for Default judgment was served on our office. For the same reason, I did not file an answer on behalf of the Defendant, I made no phone call to Plaintiff's counsel to seek a stipulation to set aside the default once it had been filed, and I did not file a motion to set aside the default closer in time to the filing of the default.

Further your affiant sayeth not.

Dated: August 19th 2016.

Denise S. McCurry, Esq.

SUBSCRIBED AND SWORN TO
before me this 19th day of August, 2016

Ruth Sarmiento

NOTARY PUBLIC in and for said
County and State

RUTH E. SARMIENTO
Notary Public, State of Nevada
Appointment No. 14-13651-1
My Appt. Expires May 28, 2018

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL STROTHER,

Plaintiffs,

vs.

MANUEL GUTIERREZ; an Individual, and DOES I through X, inclusive and ROE CORPORATIONS I through X, inclusive,

Defendants.

CASE NO: A-15-723794
DEPT NO: XXXI
PLEASE FILE WITH MASTER CALENDAR

DEPARTMENT XXXI
NOTICE OF HEARING
DATE 11/28/17 TIME 10:00 am
APPROVED BY JC

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT GUTIERREZ'S MOTION TO SET ASIDE DEFAULT

On September 5, 2017 the Motion To Set Aside Default filed by Defendant Gutierrez was heard, with Plaintiff being represented by William W. McGaha, Esquire and Defendant being represented by Michael Merritt, Esquire.

The parties motion, opposition and reply briefs were all considered by the Court along with the arguments of counsel.

Based upon the briefs, the arguments of counsel, the colloquy of the Court with counsel, and all arguments for and against the Motion to Set Aside Default having been considered by the Court, the Motion to Set Aside Default is denied based upon the following findings of fact and conclusions of law:

FACTS REGARDING ENTRY OF DEFAULT

1. A default against Defendant Manuel Gutierrez was entered by the Clerk of the Court on December 10, 2015.

2. The insurer for Defendant Gutierrez is American Access Casualty Company. American Access was placed on notice of the claim by way of letter of representation from the undersigned on May 13, 2015. **Exhibit 1**, correspondence to American Access along with electronic confirmation of communication.

3. American Access acknowledged the letter of representation in it's letter of May 21, 2105. American Access acknowledged that it's insured Defendant Gutierrez was involved in the accident of May 8, 2015. **Exhibit 2**.

4. On June 2, 2105 American Access sent a letter of denial of liability on behalf of Defendant Gutierrez. **Exhibit 3**.

5. The Complaint for personal injury damages was filed with the Clerk of the Eighth Judicial District Court on August 28, 2015. **Exhibit 4**.

6. The Summons and Complaint were personally served on Defendant Gutierrez on September 4, 2015. **Exhibit 5**.

7. American Access was notified of the service of process of the Complaint upon Defendant in correspondence, with all pertinent enclosures, dated September 29, 2015. **Exhibit 6**.

8. There was no response from American Access to the September 29, 2015 correspondence. Therefore, on November 16, 2015, correspondence was sent again, by Plaintiff's counsel, to American Access, with all pertinent enclosures, and was confirmed by electronic confirmation of the facsimile communication. **Exhibit 7**. In addition to the Summons and Complaint, the letter to American Access stated that there was an intent to take default after three days, and a Three Day Notice of Intent to seek Default was also sent. There was no response from American Access.

9. On December 10, 2015, a default was entered. **Exhibit 8**.

10. On December 14, 2015, the staff counsel for American Access wrote to and E-Served the undersigned, acknowledging that the undersigned represented Plaintiff, and asked for proof of service, and a copy of the Complaint. **Exhibit 9**.

11. On December 15, Plaintiff's counsel responded to the request of counsel for American Access by sending through E-Service a copy of the Summons and Complaint, the Default, and copies of the September 29, 2015 and November 16, 2015 letters to American Access indicating that their insured had been served. **Exhibit 10.**

12. **Exhibit 11** is the E-Service confirmation which establishes the service of the letter to Denise McCurry, Esq., and Ruth Sarmiento on December 15, 2015. Denise McCurry, Esq., is an in house attorney for American Access which is the company which provided bodily injury liability insurance on the defendant. Ms. McCurry was retained as counsel to defend the interests of the defendant. Ruth Sarmiento was a paralegal for Ms. Denise McCurry at that time. Electronic confirmation shows that Ms. McCurry and Ms. Sarmiento each received and opened the letter and attachments on December 15, 2015 at 15:24:47 and 11:16:01, respectively, confirming that both received and affirmatively opened the letter and attachments, which included the Complaint, Summons, and the Default.

13. No Motion to Set Aside the default was ever filed by Ms. McCurry.

14. On July 15, 2016, seven months after the Complaint, Summons and Default were served on Ms. McCurry, the Plaintiff filed a Motion for Default Judgment.

15. On August 1, 2016, an Opposition To Application For Default Judgment and Countermotion To Set Aside Default was filed by Michael Merritt, Esquire, of McCormick, Barstow, Sheppard, Wayte and Carruth LLP. Additionally, a Supplement To Motion To Set Aside Default was filed on August 24, 2016. The countermotion to set aside the default was filed seven months and two weeks after the Default was presented to defendant's counsel, Denise McCurry, Esquire.

16. In the Motion to Set Aside, there was no affidavit provided to support the claim made in the motion that there was good cause for the failure to file an Answer. In the Countermotion to Set Aside, the defendant admitted in the brief, page 5 lines 3-5, that counsel should have sought to move to set aside the default, but attributed that to a calendaring error.

17. On August 11, 2016, counsel for the Plaintiff submitted an Opposition to the Motion to Set Aside. Among the opposition arguments made was that there was no affidavit in support of the Countermotion to Set Aside and that there was no proof of any calendaring error.

18. On August 24, 2016 in a Supplement to the original Countermotion to Set Aside, the affidavit of Denise McCurry, Esq., was submitted in support of the Countermotion to Set Aside. The affidavit of Ms. McCurry consists of 8 paragraphs and is incorporated as though set forth fully herein. Ms. McCurry refers to her legal assistant, Aracely Carcia, for whom no affidavit was ever presented.

19. Ms. McCurry testified in paragraph 3 of her affidavit:

> "When a referred matter arrives, it goes directly to the legal assistant of the assigned attorney and the file is opened in the office. At that time, all pertinent case deadlines are calendared by the legal assistant. If any deadlines on the case are pressing, such as the deadline for the filing of an answer to the complaint, the deadline and the pleading that must responded to are brought to the attention of the assigned attorney by the legal assistant immediately."

20. Ms. McCurry further stated in paragraph 4 of her affidavit:

> "My legal assistant when this matter was referred to our office was Aracely Garcia: she is currently no longer employed with our office. After the file was received from American Access, Ms. Garcia sent a letter on 12/14/15 to the Plaintiff with my electronic signature seeking a copy of the summons and complaint and service information from Plaintiff. See Exhibit A attached hereto. I have no personal knowledge regarding when the file arrived at our office. I did not draft the 12/14/15 letter, it is a form letter generated by our staff when an assignment is referred to us. At that time, I had not even seen the file and I did not know I was assigned the file."

21. In paragraph 5 of the McCurry affidavit, she admits that her office received through e-service the summons, complaint and the default all on 12,/15/15/ Ms. McCurry stated in her sworn affidavit:

> "In reviewing this matter later, I discovered that **on 12/15/15, I and my staff were e-served the summons and complaints and the**

> **default by Plaintiff's counsel.** When the e-serve emails come to us, the addresses for the e-service always include my staff members **as I do not look at emails or download the documents by the link provided in the email.** My staff is tasked with the download of the documents through the link in the email and saving the documents to our electronic files. At that time, m staff is supposed to bring anything to my attention that I need to deal with right away and calendar any relevant dates." Bolding added to the quote.

22. That the record in this case establishes that Ms. McCurry had actual notice of the filing of the Default, Complaint and Summons on December 15, 2015 at 15:24:47 and by Ruth Sarmiento of Ms. McCurry's office at 11:16:01 on December 15, 2015 as well.

23. That Denise McCurry did not call Plaintiff's counsel to request that the default be set aside. That Ms. McCurry did not seek a stipulation to set aside the default and did not file a motion to set aside the default.

24. That Defendant conceded in his eventual Motion to Set Aside Default at page 5 lines 3-5: With respect to the first consideration, Defendant recognizes that prior counsel should have sought stipulation to set the default aide and/or filed a motion to set aside the default."

25. That Ms. McCurry in her affidavit showed that she had pattern and practice of having non-attorney assistants sign letters for her under her name, such as the December 14, 2015 letter which was sent to Plaintiff's counsel. That Ms. McCurry in her affidavit testified that her legal assistants were charged with signing letters on behalf of Ms. McCurry with no evidence that the assistants ever consulted with Ms. McCurry about the contents of the letters.

26. That the sworn statement of Ms. McCurry that she does not look at her emails, as stated in her affidavit, is inconsistent with the electronic e-service evidence that Ms. McCurry in fact opened, on December 15, 2015 at 15:24:47, the email which transmitted to her the default to her. That while Ms. McCurry stated in her affidavit that she never opens her emails, she never established who was the person who opened her emails and there were no other affidavits submitted to the Court.

27. That there was no actual proof of a calendaring error as this matter came to Ms. McCurry with a default and that before an answer could be filed the default had to be set aside by stipulation or by motion to the Court. No affidavit was submitted by any person with knowledge of such an error and Ms. McCurry did not offer any testimony in her affidavit as to what was calendared, when it was calendared and why it would have been done in error.

28. That while Ms. McCurry attempted in her affidavit to divert responsibility to her staff for responding to the default, specifically Aracely Garcia, there was no affidavit from Ms. Garcia to provide a record of what Ms. Garcia did on this matter. Moreover there was no personal knowledge by given by Ms. McCurry to establish that she actually knew what, if anything, was done by her staff on this file in response to the default.

CONCLUSIONS OF LAW

29. NRCP 55 (c) states: "For good cause shown the court may set aside an entry of default, and if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60."

30. That "good cause" includes mistake, inadvertence, surprise and excusable neglect as referred to in NRCP 60. Intermountain Lumber & Builders Supply v. Glens Falls Ins. Co., 83 Nev. 126, 424 P. 2d 884 (1967). That the defendant failed to show that there a mistake, inadvertence, surprise or excusable neglect as set out in the Finds of Fact above.

31. The Court finds that as a matter of law, based on the affidavit of Ms. McCurry she knew or should have known of the default which was sent to her and opened by her in her email. That as a matter of law, the failure to respond to the default, was in this case inexcusable neglect. That Ms. McCurry has a professional responsibility to read and understand the contents of materials sent to her through e-service.

32. That as a matter of law, American Access which is the insurer for the defendant and in-house counsel for the defendant Denise McCurry, Esq., both had actual notice of the action and the failure to respond is culpable conduct. Direct Mail Specialists, Inc., v. Eclat Computerized Techs., Inc., 840 F. 2d 685, 690 (9th Cir. 1988).

33. That pursuant to Christy v. Carlisle, 94 Nev. 651, 584 P. 2d 687 (1978) thee Plaintiff is required to provide a Three Day Notice of intent to seek default. That the Plaintiff did in fact provide such notice, as a matter of law, in that the Notice was provided to the insurer for the defendant on November 16, 2015, that there was no response from American Access, and the default was not taken until December 10, 2015.

34. That based upon the above, and with all arguments having been heard and all briefs for and against the Motion to Set Aside having been considered, the Court finds, based upon the Findings of Fact and the Conclusions of Law that there is inexcusable neglect in the failure to seek a set aside of the default in this matter. That this Court therefore denies the Motion to Set Aside Default. That this Court sets the hearing on the Motion for Default Judgment on the 28th day of November, 2017 at 10:00 am.

DATED this 3 day of November, 2017.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

TS

Approved as to form and content:

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH, LLP

By: _____
MICHAEL MERRITT, ESQ.
8337 W. Sunset Road, Suite 350
Las Vegas, Nevada 89113
Attorneys for Defendant

Submitted by:

SCHUETZE & McGAHA, P.C.

By _____
WILLIAM W. McGAHA, ESQ.
Nevada Bar #3234
601 S. Rancho Drive, Suite C-20
Las Vegas, Nevada 89106
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2017, a true and correct copy of this completed **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE (VOLUME II OF II)** upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

I hereby also certify that on this 8th day of December, 2017, a true and correct copy of **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE (VOLUME II OF II)** will be served by messenger service by providing it to Junes Legal Service, a professional messenger service, for service upon:

William W. McGAHA, Esq.
SCHEUTZE & McGAHA, P.C.
Attorneys at Law
601 S. Rancho Drive, Suite C-20
Las Vegas, NV 89106

Eighth Judicial District Court Clerk
200 Lewis Avenue
Las Vegas, NV 89155

By _____
Kristin Thomas, an Employee of
MCCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP