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Materials By:
Andrew J. Smiley, Esq.

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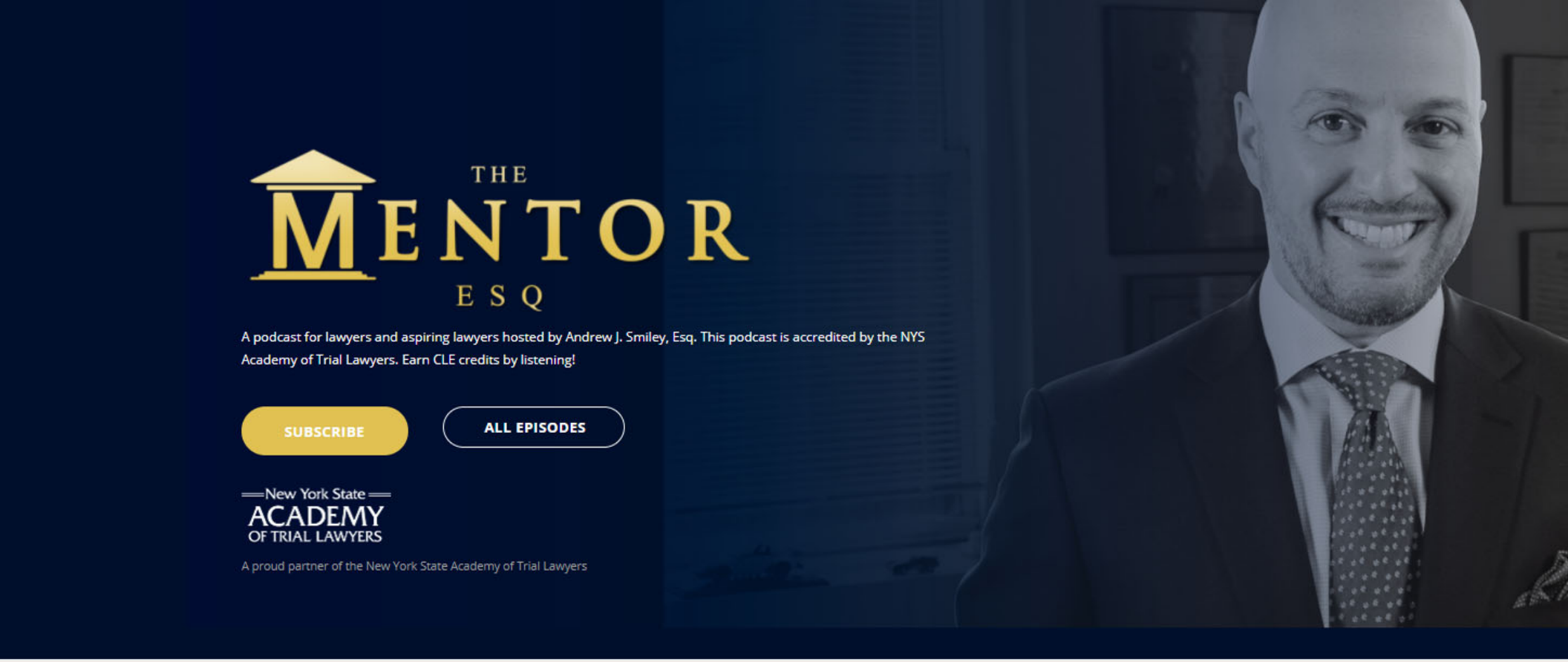

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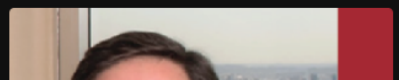

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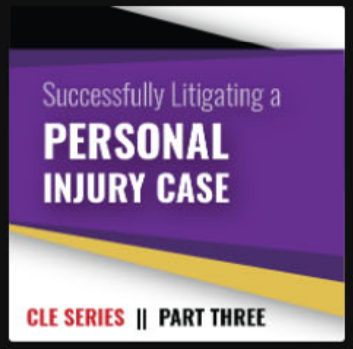

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Hosted By
Andrew J. Smiley, Esq.

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CLE: Taking the "Umm..." out of SUM/UM Coverage

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In Andrew's current CLE series, "How to Litigate a Personal Injury Case", the topic of SUM and UM coverage has come up several times. In fact, it came up so many times during the Q&A sessions that the Mentor, Esq. worked with the Academy to do an entire CLE on the topic!

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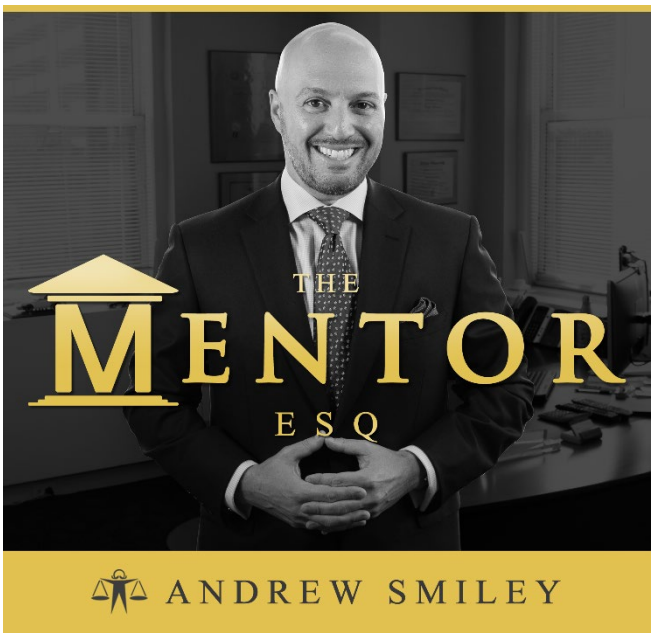

Andrew J. Smiley, Esq.
Smiley & Smiley, LLP
122 East 42nd Street, NYC 10168
212.986.2022
asmiley@smileylaw.com
www.smileylaw.com
www.thementoresq.com

CURRICULUM VITAE

Education:

·Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

·Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present
Associate, June 1996 - December 2000
Law Clerk, September 1993 - June 1996
Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation.

· *Adjunct Clinical Instructor of Law* - *Brooklyn Law School*, Trial Advocacy Program (1998-2004)

· *New York "Super Lawyer"*
2010, 2011,2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021

·Bar Admissions:
- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont.

Organizations/Affiliations:

·New York State Academy of Trial Lawyers
-Immediate Past President (May 2018- May 2019)
-President (May 2017 – May 2018)
-President-Elect – (April 2016- May 2017)
-Vice President – 1st Dept. (July 2013-May 2016)
-Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)

·New York City Trial Lawyers Alliance
-Chairman of Board of Governors (July 2017 – July 2019)
-President (July 2015 – July 2017)
-Vice President (June 2013 – July 2015)
-Treasurer (June 2011 – June 2013)
-Secretary (June 2009- June 2011)
-Board of Directors (2000-present)

· Judicial Screening Committee, Kings County Democratic Party (2013)
·New York State Bar Association
· Brooklyn Bar Association
-Medical Malpractice Committee
-Supreme Courts Committee
·The American Association for Justice
·American Bar Association
·Brooklyn Law School Alumni Association
·National Order of Barristers
· Friars Club - member

Continuing Legal Education (CLE) Presentations:

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How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File, New York State Academy of Trial Lawyers, January 6, 2021

Brick by Brick: Building a Personal Injury Practice, New York State Academy of Trial Lawyers, December 10, 2020

Working with Experts to Build Your Case, New York State Academy of Trial Lawyers, October 8, 2020

Fitness Industry Liability: Gyms, Trainers and Waivers, The Mentor Esq. Podcast, September 8, 2020

Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court, New York State Academy of Trial Lawyers, June 9, 2020

Crisis Management - The Corona Virus Pandemic, The Mentor Esq. Podcast, April 9, 2020

Do You Have a Federal Tort Claims Act Case in Your Office, New York State Academy of Trial Lawyers, December 10, 2019

Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts, New York State Bar Association, September 9, 2019

Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective, The Defense Association of New York, March 12, 2019

Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions, The Defense Association of New York, January 31, 2019

Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives, The Defense Association of New York, September 17, 2018

Punitive Damages – What to Plead, What to Prove: Medical Malpractice, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

Continuing Legal Education (CLE) Presentations Continued:

Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA, New York State Bar Association, October 11, 2015

Effectively Using Experts in Personal Injury Cases, Lawline, October 8, 2015

Killer Cross Examination Strategies, Clear Law Institute, April 21, 2015

Powerful Opening Statements, Clear Law Institute, January 13, 2015

The Dram Shop Law: New York Liquor Liability, Lawline.com, November 20, 2014

Killer Cross Examination Strategies, Lawline.com, November 20, 2014

Trial Techniques: Tricks of the Trade Update, Lawline.com, October 14, 2014

Personal Trainer Negligence Update, Lawline.com, October 14, 2014

Trial Techniques – Part 2: Cross- Examination & Closing Arguments, Brooklyn Bar Association, May 15, 2014

Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination, Brooklyn Bar Association, May 7, 2014

Health, Fitness & Adventure Sports Liability, New York State Bar Association, August 1, 2013

Direct Exams: How To Make Your Witnesses Shine, New York State Academy of Trial Lawyers, May 6, 2013

Opening Statements: A Recipe for Success, Lawline.com, August 7, 2012

"You Had Me at Hello": Delivering an Effective and Powerful Opening Statement, New York State Academy of Trial Lawyers, April 1, 2012

Preparing the Construction Accident Case, New York County Lawyers Association, March 26, 2012

The Nults and Bolts of a Trial, New York State Academy of Trial Lawyers, October 24, 2011

Personal Trainer Negligence, Lawline.com, March 22, 2011

Effectively Using Experts in Personal Injury Cases, Lawline.com, May 4, 2011

Continuing Legal Education (CLE) Presentations Continued:

Trial Techniques: The Tricks of the Trade, Lawline.com, February 16, 2011

Practice Makes Perfect: Learn to Practice Like a Pro, Lawline.com, January 18, 2011

Jury Selection 101, New York State Academy of Trial Lawyers, December 14, 2010

Practical Guidelines for Getting Items into Evidence, Lawline.com, March, 2010

Winning Your Case: Trial Skills that Count, Lawline.com, August 21, 2009

Television Appearances – Legal Commentary:

Fox News Channel
-The O'Reilly Factor
-What's Happening Now with Martha McCallum
- America's News Room
- Fox & Friends
-Fox Business Channel
-Neil Cavuto
-Money with Melissa Francis
CNN -Anderson Cooper 360
ET – Entertainment Tonight
Bloomberg TV
Headline News
Tru TV
Court TV
The Morning Show with Mike and Juliet

Interests, Hobbies:

Tennis, Porsche Club, Sim Racing, Yoga, Cooking

SMILEY & SMILEY, LLP

ATTORNEYS AT LAW

(212) 986-2022

122 EAST 42ND STREET
39TH FLOOR
NEW YORK, NEW YORK 10168

WWW.SMILEYLAW.COM
FAX: (212) 697-4689

September 21, 2021

Via email: adicaprio@dicaprioadr.com

Anthony DiCaprio, Esq.
DiCAPRIO ADR
64 Purchase Street
Rye, NY 10580

Re: [redacted] **v.** [redacted]
[redacted]**-KHP (SDNY)**
Mediation Date: September 30, 2021

PLAINTIFFS' CONFIDENTIAL SUBMISSION

Dear Mr. DiCaprio,

We represent the plaintiffs, [redacted]. Mr. [redacted] was seriously injured on May 26, 2017, as a result of a motor vehicle accident when, during the course of his employment, his car was violently slammed into from behind by a tractor-trailer which was owned and operated by the defendants herein. Photographs from the accident scene depicting the severity of the impact are annexed as Exhibit "A". The defendants have conceded liability and a stipulation of judgment on liability has been "so-ordered" and entered on March 5th, 2021 (see, Exhibit "B" annexed) and interest is running. Accordingly, the only issues remaining in this litigation are causation and damages.

CAUSATION – AGGRAVATION OF A PRE-EXISTING INJURY

[redacted], now 55 years-old, had suffered from chronic low back pain which began in 2005. He underwent treatment from 2005-2014 to manage the pain. Treatment for pain management included steroid injections and prescription medication. From 2014 until May 26, 2017 ("the accident"), treatment consisted solely of prescription medication (oxycodone) for the

pain. He was seen by his family care practice monthly for the renewal of the prescription for his chronic lower back pain.

Prior to the accident [redacted] was able to manage and tolerate his lower back pain with the assistance of the oxycodone, massage and stretching. He did not require any invasive treatment or surgical intervention. Additionally, and importantly for the discussion of damages to be addressed *infra*, Mr. [redacted], continued to work full time successfully and actively from 2005 up until the accident as a heating & cooling consultant/salesman and as an inventor/entrepreneur.

Unfortunately, because of the severe blow Mr. [redacted] sustained to his back in the accident, his physical condition and employability both took a dramatic turn for the worse. He immediately sought medical treatment from the scene of the accident, where he was transported to the hospital via ambulance. He was diagnosed as having sustained trauma to his back and an aggravation of his pre-existing back condition. Unlike prior to the accident, he could no longer manage the pain and, as a result, he had to reduce his work hours to no more than four (4) hours per day. Mr. [redacted] underwent a course of conservative treatment, which included medication and physical therapy, but his condition did not improve. Accordingly, he required surgical intervention.

On May 31, 2018, Mr. [redacted] underwent a **micro lumbar discectomy** surgical procedure at the L5-S1 levels of his spine. The surgery was performed by Seth Neubardt, MD. Dr. Neubardt causally connected the need for the micro-discectomy to the accident herein as has Mr. [redacted] primary care provider Ralph Gargiulo, PA (See Exhibit "C"). Unfortunately, the micro-discectomy procedure did not prove helpful resulting in the need for Mr. [redacted] to have his **lumbar spine fused with hardwar**e in a surgical procedure performed by Dr. Neubardt on September 11, 2020. Annexed hereto as Exhibit "D" is a report from Dr. Jeffrey Perry, who provides a comprehensive review of the treatment Mr. [redacted] required as a result of the accident, the findings of his examination of Mr. [redacted] and his opinion that the treatment required was causally related to the accident herein.

All of Mr. [redacted] medical providers have causally connected the need for his surgeries and inability to work to the accident herein. Additionally, three (3) different independent Worker's Compensation doctors have evaluated Mr. [redacted] on numerous occasions, reviewed related medical records and each have rendered the opinion that Mr. [redacted] back injuries, the treatment he has received since the date of the accident, including the need for two surgeries, are causally related to the accident. The worker's compensation doctors confirm that the injuries in this accident aggravated Mr. [redacted]s chronic back pain (See, Worker's Compensation Medical Examination Reports, annexed hereto as Exhibit "E.")

THE DEFENDANTS ARE LIABLE AS A MATTER OF LAW FOR AGGRAVATING MR. [redacted]'S PRIOR BACK CONDITION

The law is well-settled that Mr. [redacted] can recover damages as a result of the (stipulated) negligence of the defendants herein for an aggravation of a pre-existing condition. The pattern jury instruction for aggravation of a preexisting injury provides that "the plaintiff is entitled to recover for any (increased) disability or pain resulting from" the aggravation of a preexisting injury or condition where the aggravation was caused by the accident (PJI 2:282). This charge is somewhat

similar to the increased susceptibility charge, which instructs the jury that "[t]he fact that the plaintiff may have a physical or mental condition that makes [him or her] more susceptible to injury than a normal healthy person does not relieve the defendant[s] of liability for all injuries sustained as a result of [their] negligence" (PJI 2:283).

PLAINTIFFS' DAMAGES

Economic Damages

The plaintiffs have sustained substantial economic damages because of the negligence of the defendants herein. Mr. [redacted] has been unable to return to work as a result of this accident and will never return to work in a full-time capacity. Annexed hereto as Exhibit "F" is the vocational report prepared by plaintiffs' expert Dan Wolstein, Ph.D. which has been provided to the defense. Dr. Wolstein conducted a comprehensive review of Mr. [redacted]'s prior employment, earnings and future earning potential. Dr. Wolstein opines that, at best, Mr. [redacted] could return to an entry level job working part-time, resulting in a substantial loss of future income. Dr. Wolstein's opinions are not disputed by the defense**.** In fact**, the defense's own vocational expert, Gary Young, testified that Mr. [redacted] has sustained a fifty (50%) percent loss in earning potential as a result of the accident.** Defense expert, Mr. Young, testified as follows:

> *Q And from everything you've reviewed currently, at least at the time of your analysis, he was limited to sedentary work, correct?*
>
> *A Basically yes.*
>
> *Q So you looked into jobs that you felt he could do involving sedentary work, correct?*
>
> *A Yes.*
>
> *Q And you agree that before this accident he was not limited to sedentary work, correct?*
>
> *A Before the accident, yeah. Correct.*
>
> *********
>
> *Q So can we agree as of the time of your evaluation he can't do the work that he did at the time of his accident, can we agree on that?*
>
> *A Yes.*

Q Can we agree that at the time of his accident his work was not considered sedentary, can we agree on that?

A Correct.

Q And can we also agree that at the time of his accident he was able to work full time?

A Yes, yes, at the time of his accident.

Q And can we also agree that at the time of his accident he was able to earn an income upwards of $100,000?

A For the one year, yes.

Q Close to $90,000 on an annual basis for two other years, correct?

A Correct.

Q And can we agree as of now he cannot earn anywhere near 90 to $100,000 in the workplace?

A Correct

******

Q He has suffered economic loss as a result of this accident from the date of accident until now, correct?

A Yes.

Q And you would agree that moving forward now he will continue to sustain economic loss as a result of the happening of this accident, correct?

A Yes, and approximately half of what he was making prior -- half of what he was making prior to the accident.

Q So if he was making on average about a $90,000 annual full-time salary at the time of the accident, then moving forward, based on your answer just now, he would be sustaining about $45,000 a year economic loss moving forward?

A Yes.

The plaintiffs have also served Dr. Wolstein's Life Care Plan on the defense. The Life Care Plan, annexed as Exhibit "G" shows the future medical needs and associated costs for Mr. [redacted]. Again, the defense does not dispute Dr. Wolstein's Life Care Plan.

An economic analysis of Mr. [redacted]'s income loss and life care needs was conducted by plaintiffs' expert economist, James Lambrinos, Ph.D. Dr. Lambrinos's report was served upon the defense and is annexed hereto as Exhibit "H." Dr. Lambrinos's calculations contained within his report reveal a **total economic loss sustained by Mr. [redacted] from the accident in the amount of $2,513,210**.

There is also a worker's compensation lien being asserted against any recovery from this case. Annexed hereto as Exhibit "I" is a **worker's compensation lien notice advising of a total lien asserted against this case in the amount of $93,873.04**.

Accordingly, we will submit evidence at the time of trial that **Mr. [redacted]s total economic loss as a result of this accident is $2,607,083.04.**

Pain and Suffering Damages

The significant economic damages do not take into account an additional award of damages for the significant past and future pain and suffering sustained by Mr. [redacted] because of this accident.

Mr. [redacted] testified that he can no longer enjoy the daily activities and hobbies that he enjoyed prior to the accident. He is restricted in how much he can lift or carry. He is in pain if he tries to exercise or walk for extended periods. He can no longer play golf, a sport he regularly enjoyed. He is unable to be social or have relations with his wife in the manner he did prior to the accident. Mr. [redacted]'s wife and co-plaintiff, Anna, therefore, has a claim for her loss of services.

Mr. [redacted] is in constant and unrelenting pain. He has hardware in his spine that will be there permanently. An intra-operative x-ray of the hardware in his lumbar spine is annexed as Exhibit "I." Jury verdicts and settlements in New York over the last ten (10) years show that plaintiffs in Mr. [redacted]'s age group, who have sustained a lumbar injury requiring a fusion surgery, routinely receive pain and suffering awards in excess of one-million dollars. Annexed hereto as Exhibit "J" are over 80 pages of awards in excess of one-million dollars to compensate a plaintiff for pain and suffering as a result of undergoing lumbar fusion surgery.

The sustainable value for Mr. [redacted]'s case, based on the above cited economic and non-economic damages is well in excess of $3,000,000.

ANTICIPATED DEFENSES AND CASE POSTURE

We anticipate that the defense will argue that Mr. [redacted]'s damages are not related to the accident and/or that he would have needed the post-accident treatment and surgeries even if the accident did not occur due to his prior condition. This argument is simply not supported by any credible weight of the evidence in this case. The defense's own expert orthopedic surgeon, Dr. Jeffrey Spivak, would not even concede that Mr. [redacted] even had a prior condition:

> *Q. Any reason to dispute that he was there for a follow up from the accident that we're talking about and that he's having low back pain that's been exacerbated from this accident?*

A. Again, the word exacerbation isn't appropriate, but the low back pain is still associated with that accident.

Q. Why do you disagree with the word exacerbation?

A. Because there's no evidence to suggest that at any time immediately beforehand, as you mentioned, that he had low back pain.

Q. But does this note –

A. He had back pain, but I don't know --exacerbation would imply that it's sort of a chronic condition that comes and goes and that the accident brought it about, and there's no evidence to support that.

We also anticipate the defense to argue that Mr. [redacted] was unable to continue working due to a heart condition and not as a result of his back injury. This argument is equally without support in the evidence. While true that Mr. [redacted] had heart surgery between his two back surgeries, Mr. [redacted] explained at his deposition that the back pain and restricted mobility is what made it difficult to continue working, not anything related to his heart. There is no testimony from any physician, nor does the defense have a cardiology expert, to support a claim that Mr. [redacted] inability to work full time is related to anything other than his back injury.

Lasty, as discussed briefly during the pre-mediation conference call, the defense intends to ask the Court to re-open discovery if the case does not settle at the mediation. The requested relief is premised upon the discovery of neurology treatment records from 2005-2014 that the defense obtained after the close of discovery earlier this year. We intend to vigorously oppose the requested relief as there is no basis for further discovery. The records obtained simply re-confirm that Mr. [redacted] had been suffering from a prior back condition and receiving treatment for it. The records do not however, in any way, diminish the plaintiffs' claim of aggravation of a pre-existing condition. If the case does not settle at mediation, we intend to oppose any request to re-open discovery and, instead, ask the Court to set this matter down for an immediate trial.

SETTLEMENT POSTURE

The defendants maintain a One Million ($1,000,000) Dollar insurance policy and surprisingly do not carry any excess insurance coverage. We have been provided with tax records which show that the defendant, Eagle Transport, Inc., is a multi-million-dollar national trucking and leasing company with sufficient assets to satisfy any judgment in excess of their policy limits.

In an effort to reach a settlement, the plaintiff has offered to accept $950,000 to settle the case. This figure would protect the defendant from exposure beyond its policy limits while allowing

for the insurance company to save something off its entire policy. It would give the plaintiff prompt resolution of the case without the added time delay, expense and uncertainty of a trial.

The latest offer from the defense is $325,000. An offer that has been soundly rejected.

We look forward to mediating this case with you on September 30th and are hopeful that you will assist the parties in resolving the case. Please let us know if there is any additional information you would like to receive prior to the mediation and it will be provided promptly.

Respectfully submitted,

ANDREW J. SMILEY

SMILEY & SMILEY, LLP

ATTORNEYS AT LAW

(212) 986-2022

122 EAST 42ND STREET
39TH FLOOR
NEW YORK, NEW YORK 10168

WWW.SMILEYLAW.COM
FAX: (212) 697-4689

CONFIDENTIAL MEDIATION MEMO

February 21, 2022

VIA email: submissions@namadr.com
Richard P. Byrne, Esq.
NAM
122 E. 42nd Street, Suite 803
New York, NY 10168

Re: [redacted]
NAM Case No.: 1000252914
Mediation Date: February 25, 2022 at 3:00 P.M.

Dear Mr. Byrne:

We represent the plaintiff in this motor vehicle case that caused the death of [redacted].

FACTS

On September 18, 2019 at approximately 10:35am, [redacted] was driving a white Jeep eastbound on Snake Hill Road in the town of Phillipstown, located in Putnam County, New York. Mr. [redacted] stopped at a stop sign at the intersection of Snake Hill Road and Route 9. Mr. [redacted] then turned left onto the northbound lane of Route 9, which is a two-way road that runs north and south, with one lane of travel in each direction. As Mr. [redacted] was making his left turn, Massimo Velardo was travelling in the southbound lane of Route 9 in a fully loaded Kenworth dump truck. Just as Mr. [redacted] was completing his left turn, he was struck by the dump truck in the northbound lane of Route 9. In other words, [redacted] had crossed over from the southbound lane of Route 9 into the northbound lane of Route 9 thus causing the collision. Mr. [redacted] died about two hours after the accident following conscious pain and suffering. He left surviving a wife, [redacted], and a young daughter, [redacted].

SMILEY LAW

POSTURE OF THE CASE

An action was commenced in Supreme Court, Westchester County, based upon the residence of defendant [redacted] Discovery was completed and a Note of Issue was filed on July 21, 2021. Thereafter, both sides moved for summary judgment on liability. The motions have been fully submitted and have been adjourned to February 28, 2022 after the parties made the court aware of this mediation.

PARTIES

The plaintiff is [redacted], individually and as Administrator of the Estate of [redacted]. [redacted] is now 51 years old. [redacted] was 72 years old. [redacted] and [redacted] had one daughter named [redacted] who is now 12 years old. The defendants are the driver of the dump truck, [redacted] who is now 25 years-old, and [redacted]. who owned the dump truck.

LIABILITY

The liability in this case falls squarely on [redacted]. Simply put, Mr. [redacted] crossed over a double yellow line into the opposite lane of travel and struck Mr. [redacted]'s vehicle which was almost entirely in the northbound lane of Route 9. Had Mr. [redacted] simply maintained his lane of travel in the southbound lane of Route 9, rather than crossing into the northbound lane, the accident never would have occurred. It is undisputed that Mr. [redacted] crossed over the double yellow line, that Mr. [redacted] Jeep was almost completely within the northbound lane and that the collision occurred entirely within the northbound lane. Attached hereto as Exhibit A is a copy of the MV-104 police accident report. Page 3 of the report has a diagram of the location of the vehicles at the time of the collision. Mr. [redacted] was shown the diagram at his deposition and he confirmed that the diagram was accurate. Specifically, Mr. [redacted] testified as follows:

Q: Does the diagram show your truck at the moment of the impact all the way in the northbound lane?

A: Yes.

Q: Do you have any reason to believe that this diagram is incorrect in terms of what it shows about the location of the vehicles at the time of impact?

A: No.

Mr. [redacted] went on to testify as follows:

Q: Why did you swerve to the left?

A: To avoid contact.

Q: Other than swerving to the left, and I know it was quick, but did you consider doing something else?

A: There was nothing else that could be done

Q: Did you consider not swerving and just continuing to go straight and continuing to apply the brake?

A: No.

Q: Did you consider swerving to the right side instead of the left side?

A: No.

Q: How much time went by from the time that you started to swerve until that moment of impact?

A: I don't know.

It is undisputed that Mr. [redacted] intentionally crossed over the double yellow line and into the opposite lane of travel which is where the impact occurred. Mr. [redacted] admitted that he did not consider any other course of action except the negligent actions he took. As will be discussed in further detail below, the scientific data reveals that had Mr. [redacted] simply maintained his lane of travel, the accident would not have occurred. In other words, Mr. [redacted]'s Jeep was clear of the southbound lane and thus presented no danger to Mr. [redacted]. In addition to the scientific data that will be discussed below, Mr. [redacted] also deviated from good and accepted truck driving practice in his actions. The plaintiff has retained Michael DiGiorgio who is an expert in truck driving practice. The plaintiff has exchanged a 3101(d) expert disclosure for this expert. Mr. DiGiorgio's opinions within the expert disclosure are summarized as follows:

A. The collision between the truck and the [redacted] Jeep occurred in the northbound lane of travel on Route 9 and if Mr. [redacted] had simply remained in his lane of travel, the southbound lane, the collision never would have occurred. Mr. [redacted] was negligent and deviated from the standard of care for truck drivers by crossing into the northbound lane of travel while only having one hand on the steering wheel and while continuing to brake hard thus causing the collision. Had Mr. [redacted] not engaged in such negligent actions, the collision would not have occurred.

B. [redacted] deviated from the standard of care for commercial truck drivers by failing to utilize proper braking technique by engaging in sudden and continued hard braking when he first observed the [redacted] Jeep entering the roadway of Route 9 which was not necessary in light of Mr. [redacted]s testimony that the "Jake Brake" immediately engaged which slows action to the truck's drive wheels by altering the operation of the engine's exhaust valves so that the engine works as a power-absorbing air compressor. Therefore, the engagement of the Jake Brake enables the driver to have improved vehicle control without using the service brakes. Yet, Mr. [redacted] continued to implement hard and continued braking which caused him to not be able to control the truck as he should have.

In addition to the above acts of negligence, Mr. [redacted] was speeding while operating a fully loaded dump truck. Even the defendant's own expert concedes that Mr. Velardo was speeding. In fact, Mr. [redacted] did not even know the correct speed limit for the area on Route 9 where the accident occurred. Mr. [redacted] erroneously thought that the speed limit on Route 9 at the location of the accident was 55 mph when in fact it is 50 mph. Mr. [redacted] testified at his deposition as follows:

Q: And how do you know that? What is the basis of saying it is 55?

A: The speed limit sign.

Yet, the speed limit was actually 50mph. See page 13 of the Putnam County Crash Investigation Report, annexed hereto as Exhibit B, which states "speed limit is posted at 50 mph through this area". The fact that [redacted] was speeding is even confirmed by the defendants' own expert accident reconstructionist, John Desch. Specifically, paragraph 8 of Mr. Desch's affidavit that was submitted with the defendants' motion for summary judgement and annexed hereto as Exhibit C, states that "we determined that the loaded dump truck was traveling at approximately 50-55 mph as Mr. [redacted] approached the location of contact prior to braking." The defendants' own expert confirms that [redacted] was speeding while at the same time refutes what [redacted] testified to about his speed prior to the accident. With regard to speed, Mr. [redacted] testified at his deposition as follows:

Q: Now at the time you first saw it approximately 100 to 150 feet away, how fast were you traveling?

A: I don't remember. Approximately 45 mile per hour. I keep a steady 50, keep a steady pace as I go.

The plaintiff also hired a fully accredited and court qualified accident reconstruction expert, Michael DiCicco. Mr. DiCicco submitted an affidavit in support of the plaintiff's motion for summary judgment. Mr. DiCicco's affidavit details all of the material he used in his analysis

including, but not limited to, examination of the event data recorder (EDR) recovered from the [redacted] vehicle by the police, the engine control module (ECM) from the [redacted] vehicle, Faro Zone 3D software and inspection of the site of the accident including use of a drone to fly overhead. Among other conclusions reached by Mr. DiCicco detailed in his affidavit, he found that:

A. Mr. [redacted]'s approach speed can be determined by analyzing the tire marks on the roadway created by his Kenworth dump truck. The Police utilized a laser mapping system to document the crash scene on the same day of the collision. These tire marks can be verified with photographs taken of the crash scene. The downward grade along Mr. [redacted]'s heavy brake travel path along Route 9 was measured to be approximately 0.4% to 1.3%.

When considering:

- An average downward grade of 0.9%
- Drag factor of 0.59g for commercial dump trucks on dry asphalt[2,3,4]
- Heavy braking distance of 220.91 feet (as documented by the Police)

Mr. [redacted]'s speed at the onset of heavy braking was at least 62 mph. This speed is conservative as it does not take into account the speed loss associated with the impact with the [redacted] Jeep or the impact with the utility pole and ditch. This speed is also above the 50-mph speed limit and shows Mr. [redacted] was speeding when Mr. [redacted] began his left turn onto Route 9.

B. By utilizing the Faro Zone 3D results and the scaled Police Accident Investigation Diagram, Mr. [redacted] began heavy braking approximately 131 feet before impacting the [redacted] Jeep. Mr. [redacted] testified his speed prior to heavy braking was 45 mph. Had Mr. [redacted] been traveling his testified speed of 45 mph when he began heavy braking, his Kenworth would have stopped in 92 to 117 feet and the collision would have been avoided.

In fact, the Faro Zone 3D analysis showed that had Mr. [redacted] been driving the posted 50-mph speed limit and stayed in his lane of travel, the collision would have been avoided (<u>with or without</u> Mr. [redacted] braking). Also, if Mr. [redacted] simply maintained his lane of travel and reacted as he did by braking hard at his 62+ mph approach speed, the collision would have been avoided. Mr. [redacted]'s speeding above the posted 50-mph speed limit and failure to maintain his lane of travel caused the subject collision.

C. The [redacted] Kenworth was at least 320 feet away when Mr. [redacted] began his left turn onto northbound Route 9. The EDR pre-crash data from the [redacted] Jeep shows that Mr. [redacted] properly stopped at the intersection prior to turning. Also, the EDR data shows that [redacted] Jeep was turning left for approximately 3.7 seconds when his Jeep (despite braking the last ½ second) was almost entirely in the northbound lane of

Route 9 at impact and no longer a hazard to southbound traffic.

> Mr. [redacted]'s decision to begin his left turn when the [redacted] Kenworth was over 320 feet away (nearly the length of a football field) was not unreasonable. Had Mr. [redacted] been driving at the 50- mph speed limit and/or maintained his lane of travel, the collision would not have occurred. Mr. [redacted]'s left turn was not improper in a manner to have caused the subject collision.

Mr. DiCicco recreated the accident the way it actually happened using Faro Zone 3D software. Mr. DiCicco also recreated what would have happened if Mr. [redacted], traveling at the 62 mph rate of speed he was going, simply maintained his lane of travel in the southbound lane of Route 9 and did not cross over into the northbound lane. Next, Mr. DiCicco recreated what would have happened if Mr. [redacted] was travelling at 50 mph, the posted speed limit at the location, and did not brake hard. In each of the three scenarios, it is clear that the accident would have never occurred if Mr. [redacted] maintained his lane of travel even while speeding at 62 mph. Lastly, Mr. DiCicco recreated what would have happened if Mr. [redacted] was going the posted speed limit of 50 mph and used his brakes. Yet again, the accident would have never occurred. The video recreations are collectively annexed hereto, in order, as Exhibit D. In sum, it is Mr. DiCicco's opinion that [redacted]s left turn was not improper in a manner to have caused the subject collision and it was Mr. [redacted]'s actions of speeding above the posted 50-mph speed limit and failure to maintain his lane of travel that caused the subject collision.

Interestingly, Mr. Desch, the expert hired by the defendants, also recreated the accident using what appears to be the same Faro Zone 3D software. The overview of the reconstructed accident as prepared by Mr. Desch is annexed hereto as Exhibit E. This recreation clearly shows that had Mr. [redacted] simply maintained his lane of travel in the southbound lane, the accident would never have occurred. This fact is clear to any lay person viewing the accident even without the added factor that Mr. [redacted] was speeding at the time of the accident and that had he not been speeding, he would have had even more time to stop his dump truck.

Following the impact between the dump truck and the Jeep, the dump truck continued to veer off to the left and came into contact with a utility pole. The dump truck then turned over onto its side and came to rest. The Jeep came to rest in the middle of the roadway. Due to the contact with the utility pole, electrical wires came to rest on both the dump truck and the Jeep. A photograph depicting the final resting spot of both vehicles is annexed hereto as Exhibit F.

The defendant will likely claim that Mr. [redacted] was not negligent and that the reason the accident occurred was because Mr. [redacted] made a left turn onto Route 9 when it was not safe to do so. That argument is misplaced because the objective scientific evidence demonstrates that there was enough time and distance for Mr. [redacted] to have successfully completed his turn. In fact, he did complete his left turn and it is only because of the negligent actions of Mr. [redacted] that the accident occurred causing Mr. [redacted] to lose his life. Similarly, the defendant will likely argue that Mr. [redacted] violated VTL section 1142(a) which deals with the failure to yield the right of way at an intersection. In fact, Mr. [redacted] was issued a ticket for an alleged violation of this

statute. However, Mr. [redacted] did stop at the stop sign as even Mr. [redacted] acknowledged. The ticket was not adjudicated, and the issuance of the ticket alone is meaningless to the analysis of fault in a civil case in the same way that an arrest without a conviction is meaningless and not admissible in a civil case.

DAMAGES

First responders were on the scene promptly. Mr. [redacted] was conscious and alert following the accident. It is noted in the Putnam County Crash Investigation Report (Exhibit B) that Mr. [redacted] was responsive and moving around inside of his vehicle and, more specifically, gave a "thumbs up sign" and nodded his head in response to a police officer's instructions to stay inside of the vehicle. The occupants of both vehicles had to remain inside their respective vehicles due to the fact that the power lines were in contact with both vehicles. The Crash Report states that Central Hudson Gas and Electric was notified of the incident at 10:42am and arrived on the scene at 11:00am. Power to the downed lines was "cut" at 11:10am and Mr. [redacted] was extracted about 20 minutes later according to the medical records, a portion of which are annexed hereto as Exhibit G. The Crash Report states that Mr. [redacted] was then placed in an ambulance and interviewed by a police officer. The Crash Report also states that Mr. [redacted] reported pain to his side, but was also conscious, alert and able to articulate that they should call his wife. Nonetheless, the EMT in the ambulance called for Mr. [redacted] to be transported by helicopter to Westchester Medical Center due to his age and the severity of the crash.

The medical records state that Mr. [redacted] was awake, alert and oriented when EMS arrived but then started to complain about left-sided chest pain. Mr. [redacted] was noted to have a "flail chest and obvious rib fractures". (From WebMD: Flail chest is defined as two or more contiguous rib fractures with two or more breaks per rib and is one of the most serious of these injuries and is often associated with considerable morbidity and mortality. It occurs when a portion of the chest wall is destabilized, usually from severe blunt force trauma.).

As Mr. [redacted] was in the helicopter on route to Westchester Medical Center, he started to "crash" and was intubated and also received a needle decompression due to a left hemothorax. The medical records state that approximately 1 ½ minutes prior to arrival at the hospital, Mr. [redacted]'s heartrate dropped and he became pulseless. Chest compressions were started and continued after arrival to the hospital. The trauma team at Westchester Medical Center reintubated Mr. [redacted] and a chest tube was placed. Unfortunately, Mr. [redacted] could not be resuscitated and was pronounced deceased at 12:18pm.

The total amount of time that elapsed from the time of the accident until the time Mr. [redacted] passed away was 1 hour and 43 minutes and Mr. [redacted] was conscious for virtually that entire period of time. It is documented in the medical records and police report that Mr. [redacted] was complaining of pain. Mr. [redacted] had fractured ribs, among other injuries, and it is common knowledge that rib fractures are extremely painful.

An autopsy was conducted by the Westchester County Medical Examiner and a copy of the autopsy report is annexed hereto as Exhibit H. The findings within the autopsy report are significant and reveal that Mr. [redacted] was undoubtedly in significant pain prior to his death. The "anatomical findings" section of the autopsy report is on page 10 of the report. The numerous findings include the fractured and dislocated ribs, spleen laceration, subarachnoid hemorrhage, left wrist fracture and other significant internal injuries. The cause of death is listed as "hemothorax, lung contusions and lacerations, rib fractures due to blunt force trauma". By any objective measure, Mr. [redacted] suffered significant conscious pain and suffering prior to his death.

Mr. [redacted] was retired at the time of his death and there is no claim for future lost earnings. However, [redacted] was and is working full time and Mr. [redacted] was a primary care-taker and day-to-day provider for their young daughter. For example, Mr. [redacted] took his daughter to school every morning and frequently picked her up from school as well. Mr. [redacted] would get [redacted] ready for school each morning, he would sit with her while she did her homework, and he would prepare many of her meals. Simply put, Mr. [redacted] and his daughter enjoyed a close relationship and [redacted] has now been deprived of the guidance and care that she received from a wonderful father. A photograph of Mr. [redacted] with [redacted] and [redacted] is annexed hereto as Exhibit I.

MISCELLANEOUS

Please take note of the following additional information:

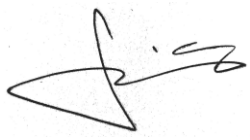
1. No fault paid for virtually all the medicals bills and no bills remain outstanding. There was a small lien being asserted by Optum, on behalf of a United Health Care Medicare Advantage Plan, but that was paid by the no-fault carrier and we received a satisfaction of lien letter from Optum.
2. There is no lien being asserted by CMS or any other entity.
3. Mr. [redacted]'s funeral cost $22,550. A portion of that expense was paid for by a death benefit that was in place at the time, however, [redacted] directly paid $9,080 of the total funeral cost.
4. Any settlement that the parties agree to will be subject to approval from Surrogate's Court pursuant to the terms of the Decree issuing the Letters of Administration.
5. The defendants have asserted counterclaims against the Estate for alleged personal injuries sustained by Mr. [redacted] and for claimed property damage to the dump truck sustained by [redacted]. The Estate is represented by a law firm hired by Mr. [redacted]s insurance carrier, but that law firm is not participating in this mediation. It is our understanding that there have been settlement discussions to resolve the counterclaims, we believe the matter has not yet resolved.

CONCLUSION

A demand of $2,750,000 has been made. The defendants have made no offer.

I, along with [redacted], and my partner Andrew Smiley, look forward to working with you on February 25, 2022 with the hope that we may bring this matter to a successful resolution.

Respectfully yours,



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Attachments

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