

Plaintiffs

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Defendant

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PLAINTIFFS' DEMAND BROCHURE

Personal

_____ and _____ were a happily married couple living in Vermont at the time when _____'s vehicle was struck by a news delivery van driven by _____ and owned by Company in _____, New York on the morning of January 17, 2007. _____ was a 43 year old automobile mechanic, born _____, while _____ was a 39 year old teacher's assistant born on _____. _____ had been previously married, with _____ living with her and _____ at home.

_____ dropped out of high school his junior year in New Jersey, but worked steadily as an auto mechanic or running a vending machine business with his brother. _____ moved to Arizona in 1981, where he started an auto repair business in the Phoenix area which he operated for 15 years. He became an A.S.E. certified mechanic during this time. His mechanical talents resulted in him building and racing Nascar stock cars and drag racers, beginning with the Dodge Series in 1986.

_____ raced cars every summer and earned an average of \$5,000.00 to \$10,000.00 in annual winnings. He still holds a NASCAR Sportsman Auto Class license. _____ has won over 230 racing trophies during this time. He last raced during the summer of 2006, and was planning to return to the racetrack the next summer to compete.

_____ and _____ met at an Arizona race track (where _____ was racing) on May 10, 1994. After a year's courtship they married one year to the day after they met. The couple even raced together from time to time. In 1999 they moved to New Jersey, and finally settled in Vermont in October 2006. Unfortunately, economic realities demanded that _____ continue working as a mechanic in New Jersey during the week, while _____ found a job as a part time teacher's aide in nearby _____, Vermont.

In spite of the difficulties of the past few years, the _____ maintain the same close relationship they had before the collision, see Photograph at Tab 1. There is no pre-collision history of separation or marital counseling, and the couple enjoyed an extremely active sex life, sharing physical intimacy 4 times per week before _____ got hurt.

At the time _____ was injured, he was working as a mechanic for _____, an auto repair business located in New Jersey. He would either remain in New Jersey during the week or commute to New Jersey from Vermont on a daily basis, a 9 to 10 hour round trip.

From 2000 to 2005, _____ earned an average of \$38,440.00 annually, with a high salary of \$56,160.00 in 2000 and low salary of \$26,928.00 in 2006, which resulted from _____ moving to Vermont in October 2006. See Form W-2 Statements, 1999 - 2006 at Tab 2.

_____ had reached an agreement with _____, owner of _____ in _____, to begin work as a mechanic at a weekly salary of \$750.00, beginning January 22, 2007. See No Fault Employer's Wage Verification Report attached at Tab 3. Mr. _____ will testify that after a trial period working with _____ as a mechanic, he wanted _____ to open a transmission shop in _____, with _____ in charge. Eventually Mr. _____ expected that he and _____ would become partners in that venture.

_____ thrived on the hard work necessary to be a successful mechanic. He enjoyed his work, and was able to lift transmissions or auto engines by hand, work in and under cars without any physical restrictions.

The _____ live in rural Vermont, close to the New York border. _____ was responsible for all of the household chores and repairs, ranging from splitting and stacking wood, home repair and remodeling, to all types of home and grounds maintenance. _____ would do yard work, raking and lawn mowing, while in the winter he would shovel snow and rake snow from the roof. He did all of the maintenance and repair work on all of the family vehicles on weekends. He even built two race or “hobby” cars, for his sons to drive competitively.

Before _____ was hurt, he also enjoyed playing basketball, football, and baseball with his sons during the warmer weather months at a local recreation park. In fall and spring the family would hike up the mountain located behind their home. In the wintertime _____ would go sledding with his sons. Obviously he was blessed with a great deal of energy and stamina.

Liability

On January 17, 2007, _____ arose at 3:30 a.m. to begin the 5 hour commute to New Jersey to work as a mechanic at _____. He was driving a 1991 Ford Bronco which was in excellent working condition. _____ had an adequate night’s rest and was in fine health. The weather conditions were clear and bitter cold.

At 4:15 a.m. that morning, 24 year old _____ left the _____ in _____, New York, driving a 1999 Ford van registered to _____. _____ had recently hired _____ as a delivery man driving a company vehicle even though as his enclosed driving record abstract shows, see Tab 7, his driver’s license had been suspended between October 29, 2004 and March 9, 2005. On September 11, 2006, _____ was convicted of speeding for a violation taking place on July 28, 2006, and earned a four point violation. Several weeks after that offense, on August 13, 2006, Mr. _____ was ticketed for disobeying a traffic device, for which he was convicted on November 21, 2006 and earned a two point violation. Moreover, a driver for your insured later told an eyewitness that _____ had previously been warned by _____ about his driving practices.

The collision took place at the intersection of New York Route 40 and Irish Road. The area is generally residential, as seen in the photographs attached at Tab 4, with Route 40 sloping downhill toward the south. However, the intersection of Irish Road and Route 40 is level. The posted speed limit was 45 miles per hour.

_____ was stopped at this intersection, in the northbound lane, signaling her intention to make a left hand turn. It was still dark at that hour. As she awaited southbound traffic to pass, _____ zoomed from behind at 50 to 55 miles per hour, by his own admission, and saw the stopped _____ vehicle ahead of him with its left turn signal visible. Since _____ was going too fast to stop, he swerved to the right, onto the shoulder, and sideswiped the _____ vehicle. He then lost control, his _____ van swerving counterclockwise, and “t-boned” the driver’s side of _____ Ford Bronco, which was driving southbound, just before the Irish Road / Route 40 intersection. The force of the impact was so great as to cause the _____ Bronco to flip upside down, landing on its roof and trapping _____ inside. See Crash Scene Photos at Tab 5.

_____ was driving southbound on Route 40 at the time, and saw the _____ vehicle with its left turn signal activated, waiting to turn onto Irish Road. She saw your insured’s red van coming up behind Ms. _____ “at a high rate of speed”, and not slowing down at all as the van swerved around the _____ car onto the shoulder. As can be seen from the enclosed photographs at Tab 5, the point of impact was between the left front of your insured’s van and the wheel well by the driver’s side door of the _____ Bronco. _____ has told us that it did not appear to her that your driver _____ even saw the _____ vehicle ahead of him because he did not slow down at all. She estimated that he went off of the pavement on the shoulder of the road at a minimum speed of 50 miles per hour. The _____ Bronco was the third car behind her.

Immediately after the crash, which _____ heard but did not see, she parked 35 feet south of the crash scene and saw the vehicles at rest, including the upside down _____ Bronco. She

spoke to Ms. _____, who herself appeared to be in shock, and said “he hit me”. She then heard _____ screaming and moaning in pain, from inside his vehicle. See _____ and _____ Statements at Tab 10.

_____ later admitted in his Statement, at 2, see Tab 9, that the force of the impact caused him to be thrown entirely over to the front passenger section. After he got out of his vehicle, he saw _____ trapped in his car. “*There was blood and I could see the bone from his leg.*” (emphasis added)

_____ was arrested by Sheriff’s Deputies at the scene and charged with Reckless Driving, Passing on the Right and Unreasonable Speed. See Arrest Report attached at Tab 11. Ultimately, he was convicted of imprudent speed.

Given the facts of this collision, there is abundant evidence that the crash resulted entirely from your insured’s delivery driver operating in a grossly negligent manner. _____ drove at an excessive rate of speed and illegally attempted to pass the _____ vehicle on the right as he could not stop when he belatedly noticed that she had stopped and was signaling a left hand turn. Therefore, as a matter of law, full responsibility for the collision rests with your insured. If suit is filed, a prompt Motion For Summary Judgment on liability will be filed, and likely granted.

Injuries And Treatment At Albany Medical Center

As the enclosed photographs show, the roof of the _____ Bronco was completely crushed when the vehicle flipped over. _____ lay trapped inside, hanging upside down with jagged bone sticking out of his left thigh. He had been knocked unconscious.

An ambulance arrived at the scene 10 minutes after the crash, at 6:36 a.m. The local fire department had to cut open the doors of _____’s vehicle in order to reach him. In the bitter cold. See news article from The Albany Record dated January 18, 2007, attached at Tab 6. According to the local fire chief, “it took us maybe 45 minutes to an hour just to get him

out...(w)e had to cut the door off to gain entry and to start to treat him while we were trying to make a way out for him”.

_____ awakened to the screaming of paramedics. His head was bent over between his legs and he felt enormous pressure on the base of his neck. He began to choke and spit up blood as he heard power tools cutting open the driver’s side door. He was gripped with fear that he might be crushed. Paramedics injected him with a sedative to calm him down. He remembered the steering column being cut away in order to allow medical personnel to reach him. The ambulance record noted that _____ was awake for the 75 minutes it took to free him. He lost consciousness as he was pulled from the wreck.

Empire Ambulance Service rushed _____ to Albany Medical Center, arriving at 8:38 a.m. A breathing tube was stuck down _____’s throat in the ambulance because of decreasing oxygenation and transfusion of packed red blood cells consistent with supportive therapy for trauma.

Radiological studies taken upon _____’s admission, see Tab 13, reveal the following injuries, which are graphically illustrated at Tab 12.

- 1. Significantly comminuted intra articular distal left femoral fracture with numerous bony shards/supra condylar/inter condylar fracture grade 3B, with possible arterial injury;**
- 2. Comminuted supra condylar T-type femoral fracture of the left knee joint;**
- 3. Multiple comminuted nasal fractures with considerable soft tissue swelling about the nose and the upper mid line forehead area;**
- 4. Left primary incisor (tooth) fracture and partial avulsion;**
- 5. Fractured distal phalanx of the left big toe;**
- 6. Comminuted angulated displaced fracture of the proximal phalanx bone of the fifth finger in the left hand;**

7. **Disruption of the distal radial ulnar joint with dorsal displacement of the distal ulna in the left wrist, i.e. dislocated left wrist;**
8. **Cut to the top of left hand 1 and ¾ inches long resulting in permanent scarring, see attached photograph at Tab 26.**

Moreover, _____ developed a cardiac arrhythmia or rapid atrial fibrillation, which was a traumatically induced heart condition. This serious heart rhythm disturbance was treated upon hospitalization with electrical stimulation and medication.

The severity of _____'s left femoral injuries required immediate surgery. Dr. Paul Hospodar performed an *open reduction with internal fixation of _____'s distal femoral inter condylar, supra condylar open 3B tibial fracture*. The surgery took roughly 2 and ½ hours. See Narrative Operative Report and Medical Illustration, of Left Knee Surgery, 1/17/07, attached at Tab 14; See also X-rays of Operative Repair at Tab 13. _____'s left leg and knee had to be cut open to expose the femoral fracture and remove fracture fragments. Remaining bony fragments, wound degree and devitalized tissue were debrided or removed, followed by reduction of the fracture by k wires and surgical screws. A surgical plate was then attached to _____'s leg, and additional surgical screws secured the plate to bone and stabilized the femoral fracture. _____'s hospitalization was filled with fear and uncertainty over whether he might ever walk again, or lose his left leg. He was barely conscious for much of his 6 days at Albany Medical Center. He had a breathing tube stuck down his throat from his admission until January 18th. _____ spent the entire week at the hospital by his side, sleeping in his room or in the patient lounge couch.

The nurse's note from January 20th recorded that _____ was "allowed to verbalize anxiety", while the following day, January 21st, the nurse recorded that _____ was "anxious re: transfer". The January 20th Patient Progress Sheet noted that _____'s appetite was "poor".

Physical and occupational therapy assessments were performed during the remainder of _____'s hospitalization.

_____ was discharged on January 23rd, as per the Transfer Discharge Summary by Dr. David Kuehler, attached at Tab 15. His left leg was wrapped and placed in an immobilizer. He was to continue with Lovenox injections to prevent blood clots as well as Percocet for pain control.

Treatment 1/24/07 Through 12/31/07

_____’s first four days at home were spent in bed. He had no strength to hold himself upright, and had to use a walker once he was finally able to get out of bed. Placing pressure on _____’s broken left pinkie, dislocated left wrist and cut left hand generated level 7 to 8 pain whenever he pulled himself about using the walker. Any movement involving the left leg, such as hoisting himself up from a sitting position, caused level 10 pain. Even when taking Percocet, he could only sleep one hour at a time, as his left leg brace and pain would awaken him.

_____ found that walking even the short distance from his bedroom to the living room would wear him out, and generate level 7 to 8 pain. “It felt as though my leg was simply hanging from my hip”. See photos from February 2007 at Tab 16. He relied on his wife and children for all of his needs. His mother-in-law flew in from Arizona to provide support for the family. As winter moved into spring he had vivid dreams about walking. _____ felt frustrated, helpless and without any control over his own situation.

Family members found that, understandably, _____’s patience and temperament had changed dramatically. As he was not working, bills began piling up immediately. He was exhausted by 5:00 p.m. from being uncomfortable all day long. He worried incessantly about his family and paying their bills. _____ could not even sleep in the same bed with _____ for the next one and one half years afterward, because of his leg pain.

On January 24, 2007 Manchester Vermont Health Services nurse Rebecca Andrews noted in her assessment that _____ already wanted to return to work as a mechanic. _____'s surgical staples and stitches were removed by Dr. Kuehler on February 7th. However, on February 16th, _____ experienced excruciating pain and swelling in his left calf. He was rushed to the emergency room at Southwestern Vermont Medical Center (SVMC) in Bennington, Vermont.

The Emergency Room and ultrasound reports from that facility, attached at Tab 17, noted “pain and swelling to his foot and ankle with purple discoloration...he has been very faithful with this physical therapy regimen” and “complains of chronic pain at the site of his surgical end...”. It was determined that _____ had suffered *a deep venous thrombosis lower left extremity*, a major complication which sometimes results from orthopaedic surgery. DVT can be a chronic disease. Patients who survive an initial episode of DVT are prone to chronic swelling of the leg because the valves in the veins can be damaged which leads to venous hypertension. A common but devastating consequence of DVT is when the blood clot travels to the lungs and results in a Pulmonary Emboli, which can be life threatening.

Most importantly, patients with DVT are prone to recurrent episodes. According to current medical studies, excerpts of which are attached at Tab 18, _____ **is subject to a 19.6% risk of DVT reoccurrence through three years post injury, or January 2010, 29.1% after 5 years, and 39.9% after 10 years.** Significantly, there can be a recurrence of this condition without any provocation. Accordingly, _____ had to pursue a course of frequent blood work and anti-coagulation therapy, with dosage adjustments based upon PT/INR Results. This therapy began with Dr. Drinnon Hand at Shaftsbury Vermont Medical Associates on February 19th, 2007. _____ was in a wheelchair for this appointment. Subsequently, _____ had to endure regular home blood draws (billed through Southwestern Vermont

Medical Center) through June 20, 2007, daily injections of Lovenox, and Coumadin pills by mouth.

_____ was also receiving home physical therapy with Manchester Vermont Health Services through the end of February. On February 22nd, _____ saw Dr. Robert Block of Taconic Orthopaedics in Bennington, who was to become his treating surgeon. See Block Reports 2007 – 2009 at Tab 19. Dr. Block opined in his February 22, 2007 report:

Patient was very comminuted (sic) and difficult fracture which may require prolonged healing. Patient is at high risk of non-union. He is also high risk of loss of fixation with over vigorous activity before there is some bony support.

Dr. Block ordered _____ to continue with range of motion exercises but no leg raises or resistance work.

On February 26th, Dr. Hand noted in his report that _____ was discouraged. He was still forbidden from weight bearing. His Lovenox injections were discontinued but he continued on Coumadin. On March 8th, the physical therapist noted “patient anxious to ambulate”. On March 20th, the physical therapy note documented that _____ was concerned over his insurance running out and his inability to work. Dr. Block allowed _____ to increase to 20% weight bearing on March 22nd.

The March 27th physical therapy note recorded “stiff and achy in all joints” and that his left knee popped getting out of bed that morning. One month later, Dr. Block allowed _____ to increase weight bearing to 50%. However, on April 25th, the physical therapist recorded that _____ said he was having “*pain that shoots down outside left leg*” when he rolls over and “*feels like it pinches a bracket on my left leg. It hurts so much that I have to stop and roll back onto my back*”. Dr. Hand’s May 4th medical record noted left knee pain, and more importantly, _____’s concern over “*functionality and inability to perform work, loss of livelihood*”.

As winter progressed into spring, _____’s left hip became painful from constant sitting. The _____s were constantly \$700.00 to \$800.00 per month behind on their bills.

_____ was still totally dependent on others for his care, relying upon _____ to help him bathe and with personal hygiene. He was still unable to enjoy a decent night's sleep, because of knee pain and swelling. _____ could only sleep two to three hours before his left leg pain awakened him and often he could not get back to sleep. He would take Oxycodone at bedtime to dull the pain but this would only help him sleep for three hours before the pain would awaken him. In June, the upper two femoral screws broke off and the surgical plate pulled away from the left leg. Thus he was ordered not to weight bear for three weeks. Performing leg lifts as part of his physical therapy routine was responsible for this problem.

The return of warmer weather went unnoticed in the _____ household. _____ was totally housebound until July, except for medical appointments. _____'s in-laws came from Arizona to stay and help with his care. The _____s barely were able to remain afloat financially with loans from _____'s parents. _____'s mother borrowed \$2,700.00 against her life insurance policy in order to help the family with their bills. _____ borrowed funds from his brother as well. The _____ teenagers contributed their summer job income toward household expenses. Nevertheless, the family fell further behind in their bills, including defaulting on their credit cards. During this time, _____ began having short term memory problems, which triggered arguments between him and other family members. He was also frustrated over his inability to work and to enjoy his normal daily activities, which he took out on his family.

On July 24th, Dr. Block saw _____ because of persistent left knee pain which had become noticeable since _____ had begun exercising that knee. On manipulating the knee, Dr. Block noted "moderate patellafemoral crepitus (or grinding) on range of motion" with posterior knee laxity. Based on these findings, he modified his diagnosis to **sprained posterior left knee cruciate ligament with secondary chondromalacia patella and secondary posterior**

cruciate ligament laxity. See Medical Illustrations of Posterior and Anterior Cruciate Ligaments at Tab 21.

_____ made incremental and painful progress in his healing into November 2007. He continued taking Lovenox, and Vicodin for pain until early October. On August 21st, Dr. Block prescribed a double upright hinged knee brace because of left knee instability. He found that he was having fluid build-up in his left knee. On October 4th, his office note indicated that he did not believe _____ would be able to return to heavy mechanical work. Dr. Block found significant post traumatic chondromalacia or abnormal softening of cartilage in the left patella. He also noted weakness in the left hip which required strengthening, while x-_____s revealed that the surgical plate had partially pulled away from the bone. On October 7th, _____'s physical therapist approved the use of a cane, but was eventually overruled by Dr. Block who ordered _____ to use crutches beginning in July. Over time, he wore out 2 pair of crutches.

In October, _____ noticed that the onset of cold damp weather increased left knee pain to level 7 to 8. On the evening of October 11th, _____'s left leg pain was level 9. He needed two crutches just to get about the home. He was still sleeping only a few hours per night, because he would awaken when he would roll over onto his left leg. On November 8th, Dr. Block prescribed Hydrocodone-Acetaminophen 500 mg. tablets four times daily for pain relief. _____ was still receiving injections of Lovenox.

After being discharged from physical therapy on May 17th, _____ resumed these treatments on October 9th. Dr. Block's November 13th report noted "recurring pain" from "intensive physical therapy on the left leg", together with a recurrence of left thigh pain and tibial pain. Left knee pain caused swelling in that region as well. On examination, Dr. Block found tenderness over the fracture site and persisting PCL laxity. X-_____s showed lack of union of the femoral fracture site. Dr. Block ordered _____ to stop all weight bearing and

obtain a CT scan, with electrical stimulation to be added if the scan showed lack of union. “It is possible the patient may need re-operation”. He also ordered physical therapy to stop.

CT scans of _____’s left femur taken on November 16th showed several broken surgical screws, some of which remained in the surgical plate, which had itself fractured and separated from bone. See Report at Tab 20. Meanwhile at least one screw remained in bone but did not traverse the surgical plate. Radiologist James Keenan, noted “considerable callous formation with non-union of previously fractured bone and displacement of the surgical plate from two areas of the fracture. This is also depicted on x-_____s taken March 18, 2008, which show bony non-union, surgical plate pulling away from bone and the broken surgical screws, see Tab 20.

Obviously the 2007 Christmas season brought little cheer to the _____ household. _____’s continued left leg pain and disability, his inability to work and provide for his family, and the _____s falling further behind on their bills created enormous pressure and uncertainty as 2007 drew to a close. _____ was still borrowing from family members to keep from getting even deeper in debt. He had applied for Social Security Disability Benefits, but had been denied eligibility on October 19th. With the help of counsel, he filed an appeal, but there was very little hope this would be successful. These problems forced the _____s to consider leaving Vermont and moving in with _____’s brother in Arizona.

Injuries And Treatment 2008

_____’s diligent use of the electro stimulator (noted by Dr. Block in his January 30, 2008 report as three hours per day) helped the re-growth of bone at the left femoral fracture site. _____ continued taking Hydrocodon-Acetaminophen 500 mg. four times daily as well as continuing with injections of Lovenox.

Early in 2008, _____ was working 35 hours per week as a teacher’s aide at the _____, Vermont Elementary School. To make ends meet for the family, she also worked

weekends at a country store in _____, Vermont beginning the previous summer, of 2007, but had to quit in the wintertime because she was simply too exhausted.

On March 13th _____ presented to Dr. Block with left knee instability and a feeling of “giving way”, with particular difficulty walking over uneven surfaces and stairs. Extended sitting and rising from a sitting position caused posterior left knee pain, with “occasional painful catching of the left lateral thigh muscles in the upper edge of this (surgical) plate as he rotates and as he gets up in the morning”. On examination, the upper lateral surgical plate was prominent in the lateral right thigh. Dr. Block found a Grade 3 posterior drawer sign in the left knee, which confirmed that the posterior cruciate ligament was ruptured, as there was abnormal “giving” of the left leg during this test. Based on these findings Dr. Block opined that _____ would (a) need reconstruction surgery for the PCL because of “symptomatic laxity in the knee despite bracing”. He also determined that surgery would be necessary to remove surgical hardware which was irritating soft tissues in the femoral area.

On March 6th, _____ reported that he was using a single crutch to get about although he needed both crutches to pull himself up from a sitting position. He noted that his left femoral muscles and tendons would “snap” and catch on the surgical bracket which Dr. Block found to be “prominent”, and which was causing level 3 to 4 pain. _____ reported that the greatest amount of pain was below the left knee, which would generate level 10 pain when _____ would get up and walk after sitting. He needed Vicodin in order to sleep. If he would roll over in bed, a sharp stabbing level 5 to 6 pain would shoot up from below the left kneecap into the hip. _____ would suffer this pain four to five times per night if he did not take Vicodin. He was still taking Coumadin, which was making him nauseous.

On March 25th, Dr. Block’s partner Matthew Nofziger saw _____ on Dr. Block’s referral “for discussion of possible PCL reconstruction”, see Report at Tab 19. On examination Dr. Nofziger found anterior knee pain, “occasional giving way of the knee...significant crepitus,

crunching and popping under the patella with active motion”. The patella grind test was positive with “marked patellofemoral crepitus”, tenderness to palpation in that region with PCL laxity on Drawer Testing. Dr. Noziger’s diagnosis was *patellofemoral syndrome of the left knee and PCL laxity left knee*. Patellofemoral syndrome is an abnormality concerning how the kneecap or patella slides over the lower end of the thigh bone or femur. With this condition, _____’s kneecap “tracked” toward the lateral or outer side of the femur, which permitted the underside of the patella to grate along the femur causing chronic inflammation and pain.

By the end of March, _____ was nevertheless able to do limited walking using only a cane. He reported a constant feeling of left knee weakness and instability. He remained essentially housebound, and therefore unable to work. The “persisting pain” Dr. Block noted due to the surgical hardware was level 6, which increased to level 9 to 10 pain if _____ moved about in bed. He stopped taking pain medications at night because of the hangover effect that he would experience upon arising the next morning.

A CT scan performed on April 22, 2008 revealed that all six surgical screws were displaced from the main femoral shaft, with the lateral end of the surgical plate being further away from the femur than in previous x-____s. The radiologist saw no evidence of “bony bridging or union”. Moreover, *“I strongly suspect the presence of developing pseudo arthrosis”*, or joint disease. See Report at Tab 23.

On May 4th, after ten days of anal rectal pain, _____ was brought to the emergency room of Southwestern Vermont Medical Center. He was diagnosed as suffering a peri-rectal abscess involving the anal sphincter. He was admitted to the hospital and surgery was performed by Dr. Eugene Grabowski. He surgically removed the abscess after drainage, and _____ was released that same day. Mr. _____ is not making a claim for damages arising from this condition and the expenses of treatment for it, as there is no relationship to the injuries stemming from the collision.

Based upon _____'s injury and treatment history, the Social Security Administration (S.S.A.) on May 4, 2008 reversed the previous denial of Social Security Benefits. The S.S.A. reviewing official deemed _____ to be disabled retroactive to the date of the collision, January 17, 2007 because he was unable to sit, stand or walk for more than six hours per day, so that he was "unable" to perform *any work*, including sedentary work, on a single 'regular and continuing' basis for eight hours a day, for five days a week..". See "Decision Of Federal Reviewing Official" granting disability benefits attached at Tab 22. Nevertheless, _____ was still borrowing from his in-laws to put food on the table, and the _____s remained behind on their monthly bills.

On July 22nd _____ was examined by Dr. Robert Block. Reviewing the April 22nd CT scans of the left femur, Dr. Block confirmed separation of the surgical plate from bone, non-union of a large posterior "butterfly" bone fragment and a posterior gap in the femur. There was also a five degree shift of the femoral alignment at the fracture site. Lastly, Dr. Block confirmed that _____ had suffered a sprain or partial rupture of the posterior cruciate ligament. He decided to schedule surgery which included a bone graft and re-fixation of the surgical hardware "to secure union of the distal femoral fracture". The surgical plan was open reduction and internal fixation of the fracture non-union, with bone grafting and attachment of a new lateral femoral plate. _____ would not be allowed to put weight on his left leg for 16 to 24 weeks after the surgery, which was scheduled for August 1st at Southwestern Vermont Medical Center.

_____ was again hospitalized from August 1st to August 2nd. The surgery itself took two hours and nineteen minutes, although _____ was in the operating room for three hours. Dr. Block's Narrative Operative Report and a medical illustration of this surgery may be found at Tab 24.

First, _____'s left thigh was cut open at the original surgical site to expose muscle, the femur and the surgical plate and screws. The upper part of the plate had completely pulled away

from the femur with several screws remaining in bone. A mallet was then used to chop away hypertrophic bony overgrowth which was interfering with snug placement of the surgical plate and screws. Surgical screws were next removed from the upper portion of the surgical plate, and the area of non-union further down the femoral shaft, was drilled out to allow for packing of the bone graft material. The bone graft material was taken from a cadaver and mixed with _____'s blood to create a "paste" which was then packed into the non-union area to create a solid bond.

Lastly, the upper portion of the surgical plate was placed flush against the flat surface of the distal femur which had just been cleared of irregular bony overgrowth. This allowed for proper attachment of the surgical plate to the bone with the insertion of several new surgical screws along the length of the plate. A cyst was also removed from the left anterior thigh.

Post surgical x-____s and narrative report and a photo of the 14 inch long surgical scar and surgical staples in _____'s left leg, are at Tab 25.

The surgery and later recuperation further delayed _____'s overall recovery and his hoped for return to work. Dr. Block's partner, Dr. Debra Henley, issued a note on August 14th that _____ was completely disabled. See Report at Tab 19. _____ and _____ still could not sleep in the same bed for fear of injuring _____'s leg, which forced _____ to sleep on the couch. The continual family stress caused by lack of money, _____'s pain and prolonged convalescence caused 16 year old Anthony to leave home to join the Navy. _____ was also angry over losing a second summer's worth of activities, and instead being confined inside. He was most upset by being reduced to watching car racing on television instead of being able to race his own cars, as he would have done had he been healthy. _____'s sleep was poor as he could not get comfortable in bed, and constantly worried about the family's finances. Into the autumn of 2008, _____ still relied on crutches to get around, and he was able to bathe only by

hanging onto the bathroom fixtures. _____ had to do 80% of all of the household chores. As _____ put it on September 18th, “I feel like I’m stuck in a closet” but “I refuse to be a cripple”.

On November 13th, _____ saw Dr. Block for the first time after his surgery. While _____’s femoral pain had improved greatly, there was mild left thigh atrophy and continued instability and weakness in the left knee, which had not yet been repaired. Dr. Block recommended increased weight bearing and to continue using the left knee brace, as well as home exercises. Dr. Block wrote to Mr. _____’s attorney on November 17th summarizing _____’s status and residual disability, see letter attached at Tab 27. While noting that _____ had no thigh pain and had regained range of motion in the left knee, Dr. Block emphasized the following deficits:

- **Atrophy and mild to moderate weakness of the left thigh and knee;**
- **Posterior laxity of the left knee;**
- **Continued use of left knee brace because of PCL laxity;**
- **“He is at high risk for later arthritis of the knee due to the severity of the knee injury”.**

Based on these injuries, Dr. Block opined that _____ would be unable to return to work as an auto mechanic because he could not squat, kneel, lift or carry anything over ten pounds. However, Dr. Block deferred an opinion of permanency until his partner, Dr. Nofziger, would determine the need for reconstruction of the left PCL.

Permanent Impairment And 2009 Status

During the 2008-2009 Holiday Season _____ was able to begin walking around the house unaided, for the first time in 2 years. He continued wearing his knee brace, as without it he would still feel the knee giving way. Repetitive stair climbing resulted in left leg weakness.

_____ returned to Dr. Block on January 9, 2009. See Report at Tab 27. On examination, Dr. Block found left quadriceps atrophy with three + posterior drawer on testing of

the left knee, which meant that there was still abnormal give in the knee confirming the torn PCL ligament. Dr. Block also noted a two mm. displacement of the intercondylar notch joint surface, or joint space irregularity between the femoral condyles. Dr. Block lastly noted loss of five degrees of left knee flexion, and joint space narrowing/loss of articular cartilage height of three mm. in the lateral compartment of the left knee.

These combined deficits resulted in Dr. Block assessing **23% left lower extremity disability equating to 9% whole person impairment**, according to the A.M.A. Guides, 6th Edition. Dr. Block discharged _____ from his care at this time. However, as Dr. Nofziger noted in his March 8, 2009 letter attached at Tab 19, given the amount of arthritic change in his knee, _____ would get a better result from left knee reconstructive surgery instead of repair of the left posterior cruciate ligament. Nevertheless, according to Dr. Block, the question for _____ is not whether such surgery would be needed, but when.

As 2009 progressed, _____ slowly gained strength and confidence in his left leg. He still suffers knee pain when it is damp or cold or after prolonged use of the left leg. He was gradually able to resume working on cars. However, he would limp after walking for 45 minutes and noticed persistent crepitus in the left knee.

By any measure, _____ has made an astounding but incomplete recovery from his gruesome left thigh and knee injuries.

Beginning in late July _____ resumed auto mechanical work, doing moonlighting 10 to 15 hours per week in New Jersey, and returning home on weekends. He has developed bi-lateral shoulder pain from having to haul himself about on crutches for nearly two years. He cannot push vehicles but is able to lie on his back underneath them to work. _____ notices nightly left leg twitching and he still awakens two nights per week, with severe leg cramps. His left leg strength and mobility is only 80% of what it was before the collision. He is unable to climb ladders at home, which means that his sons must do household chores which _____ had

previously done himself. Gradually, _____ has been able to take over more of the small household chores, although _____s the lawn mowing, furniture moving, snow shoveling and raking snow from the roof.

Nevertheless, _____ simply _____s not have the physical stamina and energy that he did before the collision, even though he lost 30 pounds in 2009. This past summer he tried playing basketball with his sons, but his left leg and knee simply wouldn't allow him to do this. He cannot run because of a lack of left knee stability. The _____ family no longer hikes in the hills by their home due to _____'s injuries, and he still cannot race cars due to both a lack of left leg strength and fear of further injury. He hopes to be able to open an auto repair shop in the _____, Vermont area, closer to his home. However, his prolonged absence from work and substantial loss of income over the past two and one half years, mean that he will be unable to pursue this opportunity until he regains financial stability.

The _____s' mortgage holder, Countrywide, has notified them of its intent to begin foreclosure proceedings. See Notice of Intent to Accelerate at Tab 29. The loss of income due to _____'s injuries has also resulted in **\$36,648.40** in pending debt collection claims brought by various credit card issuers, see "Pending Debt Collection Cases" itemization at Tab 28. A number of these claims have already been reduced to judgment.

_____ and _____ no longer enjoy the same level of physical intimacy that they shared before the collision. This is due to: worries over the lack of income and past due bills, and remaining pain and functional limitations in his left leg.

PAST AND FUTURE MEDICAL EXPENSES

As itemized at Tab 30, _____'s total treatment expenses from this collision are **\$101,682.37**. Dr. Nofziger has stated that _____ will need left knee replacement surgery in the near future. Taking into account the surgeon's fee, same day hospital surgery costs and

follow up physical therapy, a reasonable cost for these medical services is **\$7,500.00 to \$10,000.00**.

Lost Earnings And Household Services

The _____s have retained Richard Heaps of Northern Economic Consulting, Inc., Westford, Vermont as an economist to determine _____'s lost wages and lost household services. Mr. Heaps' report and statement of qualifications are attached at Tab 31. Mr. Heaps has taught economics at Middlebury College, St. Michaels College and at the University of Vermont.

Mr. Heaps has reviewed _____ and _____'s tax returns from 2002, as well as the no fault employer's wage verification report from _____, owner of _____ in Bennington, Vermont, who was to hire _____ at a gross salary of \$750.00 per week, see Tab 3. Mr. Heaps also calculated the present value of _____'s lost household services from the date of the collision until July 21, 2009, when _____ was able to return to work. Mr. Heaps' lost earnings calculation covered this same period.

Based upon this information, and relying on bureau of labor statistics, Mr. Heaps will testify that the present value of _____'s lost earnings total **\$92,537.00**. He will further testify that the present value of _____'s lost household services is **\$36,559.00**, for total economic losses of **\$129,096.00**.

Since _____ has returned to work, he is not claiming loss of future income.

Damages For Future Knee Replacement Surgery And

For Increased Likelihood Of Developing DVT

_____ is entitled to not only future medical expenses for knee replacement surgery, but also damages for pain and suffering and lost enjoyment of life attendant to the fear and worry which goes with any surgery. Furthermore he is entitled to damages for the physical pain and emotional suffering resulting from the surgery and the physical therapy which will follow it.

Lastly he is entitled to lost enjoyment of life damages for the period he will be unable to walk, run, work, and otherwise pursue his normal daily activities.

Moreover, the medical literature attached at Tab 18 establishes that _____ having suffered a deep venous thrombosis of his lower left leg on February 16, 2007, renders him subject to a **19.6% risk of DVT re-occurrence three years after the injury, or until February 2010, 29.1% risk after five years, and 39.9% risk after ten years.** This entitles _____ to separate damages not only for future treatment of this condition, but also for this demonstrated susceptibility, within reasonable medical probability, of developing a deep venous thrombosis in the future.

_____ will be easily able to establish at trial, with testimony from a pulmonologist, that he stands a significantly greater chance of suffering DVT in the future, because of having suffered it in the past. This entitles him to damages for the possibility of a future deep vein thrombosis. Schwegel v. Goldberg 209 Pa. Super. 280, 228 A.2d 405 (1967) (Plaintiff's medical expert allowed to testify that child who had suffered skull fracture and brain bruising had a 5% probability of developing future epilepsy); Boosee v. Digate 107 Ill. App. 2d 418, 246 N.E. 2d 50 (1969) (affirming Plaintiff's verdict where Doctor testified that that based upon reasonable degree of medical and surgical certainty, Plaintiff's eye had a 50% chance of being removed within the next ten years because a secondary glaucoma could result); Feist v. Sears Roebuck and Company 267 Ore. 402, 517 P.2d 675 (1973) (allowing medical testimony relating to injured child's susceptibility to meningitis, even though future meningitis was only a possibility, and affirming a jury instruction that it could consider susceptibility to meningitis, as a future condition, in its award of damages).

_____ 's Claims For Loss Of Consortium

_____ _____ has her own claims under New York law against the Defendant for interference with her physical and emotional relationship with her husband. Millington v.

Southeastern Elevator Company 22 N.Y. 2d 498, 293 N.Y.S. 2d, 305, 239 N.E. 2d 897 (1968).

The part of _____'s loss of consortium claim dealing with the loss of _____'s household services during the time he was injured, has already been estimated by Economist Richard Heaps to be valued at **\$36,559.00**, covering the period January 17, 2007 to July 21, 2009, when _____ was able to resume working as a mechanic. This figure would compensate _____ for the tasks she had to take on while _____ was recuperating from his injuries and unable to perform the following tasks:

- Driving the youngest _____ son, to and from appointments, school events and other social activities;
- Performing home maintenance work and repairs which _____ was unable to perform;
- Having sole responsibility for cooking, food shopping and house cleaning;
- Outdoor maintenance including lawn mowing, leaf raking, and shoveling snow from the walk and off of the roof.

However, this sum is not the limit but the floor of the value of _____'s overall claims for loss of consortium, which has been defined in Black's Law Dictionary as:

Conjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection and aid of the other in every conjugal relationship.

Beyond the simple loss of _____'s household services for two and one half years, _____ was deprived of the love, support, comfort and companionship of her husband during this time, and to a lesser degree, into the future.

As mentioned earlier, the _____s had no sexual relations for 6 to 7 months after the collision. They then shared intimate relations only twice per month until the fall of 2008, when they were able to have sex on a more regular basis. _____ and _____ could not sleep in the same bed for one and one half years because of _____'s leg pain. However, their intimacy has

been damaged not only by _____'s physical limitations, but also from stress caused by financial worries resulting from _____'s loss of income. In the fall of 2007, _____ worked full time as a teacher's aide and then would work at a local country store from 3:30 to 9:30 p.m. simply to help pay the bills.

The twin stressors of lack of family income and _____'s injuries forced _____ to take medication in order to simply get to sleep. Obviously she suffered enormously for the first year and a half after the collision, with _____'s repeated surgeries, hospital stays and physical therapy. When the couple could not sleep together, _____ was forced to sleep on the couch. For months, _____ had severe recurring nightmares which revolved around the fateful telephone call she received on the morning of January 17, 2007 that her husband had been seriously injured. During _____'s convalescence, and until he was finally able to walk, he was totally dependent upon _____ for his care, including bathing.

_____ became ill tempered and forgetful after coming home from Albany Medical Center. While his memory problems gradually improved, _____ will testify that his temperament and patience was not what it was before the crash. _____ would fight _____ constantly over his treatment and medical expenses, over finances, and issues with their children.

_____ still has to do the lawn work and remove snow from the walk and from the roof. She put on 40 pounds in 2007, because of worry over her husband and the family's loss of income. She found herself unable to sleep or concentrate, and she cried constantly. She will testify that _____ still is not as patient, tolerant or compassionate as he was before getting hurt. "Part of _____ is missing, and it's taken its toll on how we look at life".

In summary, this is a classic case of loss of consortium under New York law, entitling _____ to significant damages. See Millington v. Southeastern Elevator Company, *supra*; Kalafonos v. State 115 Misc. 2d 692, 454 N.Y.S. 2d 645, (Ct. Cl.) (1992) (affirming jury verdict for past, present and future loss of consortium to the spouse of a permanently injured husband

who, became short tempered, would strike his wife and daughters without reason, and became socially withdrawn).

SUMMARY AND DEMAND

_____ suffered permanent and disabling damage to the soft and hard tissue in his left thigh and knee on January 17, 2007. These injuries required multiple surgeries and extensive physical therapy and rehabilitation. _____ was unable to walk without a crutch or a cane until 2 years after the collision. He has and will suffer 36.3 years, or 2 years 9 months since the crash, and 33.4 years life expectancy, of pain and permanent left leg disability. See Mortality Table at Tab 32.

In addition, _____ suffered an atrial fibrillation, and deep vein thrombosis one month after the collision, as a result of his injuries. The attached medical literature establishes that he will have up to a 40% chance that he will have another deep vein thrombosis within ten years, which could potentially be fatal. In addition, _____ suffered fractures to his nose, teeth, left big toe and left fifth finger.

The collision in this case was caused entirely by the reckless driving of your insured's delivery man, _____, who provided a full confession to police. The force of the crash was so great that _____'s SUV flipped upside down, trapping him inside and requiring rescue personnel to spend nearly an hour cutting the vehicle open in bitter cold temperatures to free him.

Although _____ has miraculously returned to work as an auto mechanic, the two and one half years away from his job has devastated the _____ family, ruined their credit, subjected them to multiple law suits for credit card charges which they were unable to pay, and nearly resulted in foreclosure of their home.

These events have also taken a tremendous toll upon _____ and _____'s marriage. The couple could not enjoy the same level of physical intimacy that they did before

the collision for years. _____ became irritable and impatient over his injuries and the lack of income, even though _____ was working two jobs simply to make ends meet. She was forced to be nurse and caretaker for over two years, and continues to perform household chores which _____ would have done had he been healthy. Nevertheless, the couple persevered through this incredibly arduous period, which is a testament to their strength and their devotion to each other.

The aggravated liability facts, the presence of a target Defendant, _____'s gruesome and debilitating injuries, the hardships _____ endured as a result of _____'s disability and the loss of his income, will surely motivate an Albany County state or federal Jury (there is Federal diversity jurisdiction as the _____s are Vermont residents) to award substantial damages, likely in excess of the one million dollar policy limits. Plaintiff's counsel has obtained an independent case analysis by a national jury verdict research service confirming that the value of this case, *based upon Albany County verdict history*, is nearly \$1,500,000.00. The jury will find _____ and _____ to be sympathetic and deserving Plaintiffs, while likely showing little identification with your insured based on Mr. _____'s dangerous and reckless driving which caused this collision. Therefore, the full value of _____ and _____'s claims are as follows:

- 1) Medical Expenses.....\$ 101,682.37**
- 2) Future Medical Expenses/Left Knee Reconstruction**
 - Surgery and Rehabilitation Costs..... \$ 10,000.00**
- 3) Lost Earnings.....\$ 92,537.00**
- 4) Lost Household Services..... \$ 36,559.00**
- Sub Total of ¶ 1 – 4 (\$ 240,778.37)**
- 5) Pain, Suffering, Permanent Disability and
Lost Enjoyment of Life:**
 - a) Left Femoral Comminuted Distal Fracture
Grade 3B, Surgical Insertion of Hardware and**

Subsequent Surgical Hardware Removal and Bone Grafting, 9% Permanent Impairment	\$ 300,000.00
6) Pain, Suffering, and Lost Enjoyment of Life	
a) Comminuted T-Type Femoral Fracture of Left Knee Joint With Avulsion Tear of Left PCL Ligament Requiring Eventual Knee Replacement	\$ 175,000.00
b) Left Calf Deep Vein Thrombosis Requiring Hospitalization and Including 20 to 40% Risk Of Re-Occurrence Over the Next 1 to 10 Years	\$ 150,000.00
c) Multiple Comminuted Nasal Fractures With Considerable Soft Tissue Swelling	\$ 60,000.00
d) Fractured Left Big Toe	\$ 15,000.00
e) Comminuted Angulated Displaced Fracture of Left Fifth Finger	\$ 10,000.00
f) Fracture and Partial Avulsion of Left Primary Incisor Tooth	\$ 7,500.00
g) Dislocated Left Wrist	\$ 5,000.00
7) Permanent Scarring:	
a) 1 ¾ Inch Scar on Left Hand	\$ 10,000.00
b) Left Thigh and Knee: 14 Inch Surgical Scar	\$ 7,500.00
8) _____'s Loss of Consortium	\$ 75,000.00
<hr/> <hr/>	
TOTAL CASE VALUE.....	\$ 1,055,778.37
TOTAL DEMAND.....	\$ 1,000,000.00

The _____s are not interested in a structured settlement. If this case is not settled by January 1, 2010, New York co-counsel will be retained and the case will be placed in suit in order to meet the January 17, 2010 statute of limitations.

Dated at Manchester Center, County of Bennington, State of Vermont, this _____ day of November, 2009.

By _____
Bradley D. Myerson, Esquire
Attorney for Plaintiff

AND

V.

APPENDIX

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