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RE: Marcia Rhodes, Harold Rhodes, et al. v. Carlo Zalewski, et al.
Norfolk Superior Court, Civil Action No.: 02-01159

Dear Counsel:

This office represents Marcia Rhodes and her family, her husband Harold Rhodes and her fifteen-year-old daughter, Rebecca Rhodes, in their claims against Carlo Zalewski ("Zalewski"), Driver Logistics Service, Inc. ("Driver Logistics"), Penske Truck Leasing Corporation ("Penske") and Building Materials Corporation of America d/b/a GAF Building Materials Corporation ("GAF") (collectively, "the Defendants"). As you know, these claims arise from the Defendants' negligence and violations of Massachusetts state law, which caused Marcia Rhodes to suffer catastrophic physical and emotional injuries as a result of Zalewski crashing into Marcia's stopped Toyota Corolla with the 81,000 pound loaded tractor-trailer on January 9, 2002. Defendants' negligence has rendered Marcia a permanent paraplegic with: no use of her legs, no feeling below her waist, chronic back pain, complete loss of bowel and bladder control, depression and loss of personal independence for the rest of her life. As a result of the injuries, Marcia has suffered numerous medical complications that have required many hospitalizations, trips to the emergency room and extended bed rest. Defendants' actions also have caused Harold and Rebecca to suffer significant loss, including stress and loss of consortium, from their beloved wife and mother.

The purpose of this letter is to demand compensation for the injuries suffered by the Rhodes family.¹ This demand letter is intended to assist in your assessment of the claims of the Rhodes family by: (1) providing you with profiles of Marcia, Harold and Rebecca Rhodes; (2) providing you with the basis for the liability of each individual Defendant; (3) describing the

¹ As such, it is intended as a communication to pursue a settlement opportunity and therefore is inadmissible for any purpose.

catastrophic injuries suffered by Marcia, Harold and Rebecca Rhodes; (4) enumerating the damages to which each Plaintiff is entitled; (5) introducing you to a day in the life of Marcia Rhodes; and (6) making a demand for settlement.

I. Profiles of Marcia, Harold and Rebecca Rhodes.

A. Marcia Rhodes.

Marcia is the 48-year-old mother of 15-year-old Rebecca and the wife of Harold. Marcia and Harold recently celebrated their 20-year wedding anniversary on April 16, 2003.

Marcia was born in Newark, New Jersey. Marcia graduated from Dean Junior College with an Associate's degree and Babson College with a Bachelor's degree in accounting and marketing. After college, Marcia worked for various companies as an accountant, spending approximately one-and-a-half years with a Certified Public Accounting firm, one-and-a-half years with Stride Rite Corporation and one-and-a-half years as an internal auditor with Zayre Corporation. Marcia then began her own accounting/consulting firm shortly after she and Harold were married in April 1983, where she assisted companies with employee training and accounting. Marcia also taught a number of business courses at Chamberlain Junior College and Mount Ida College from 1983 through 1992.

In May 1988, shortly after Rebecca was born, Marcia made the decision to remain home and devote herself to her family full time, with the exception of teaching five or six business courses each year. As the family homemaker, Marcia handled the daily household duties including the cooking, cleaning, shopping and running of errands. She also was Rebecca's transportation, driving Rebecca to and from school as well as various after-school activities.

Marcia's life prior to the crash was the time that she spent with her family. Marcia and her daughter Rebecca were virtually inseparable as Rebecca was growing up. Although Marcia and Rebecca were "mother and daughter," they were also best friends. Marcia took her daughter on trips to arcades, malls and flea markets. It was not often that Marcia and Rebecca were apart.

In 1992, Marcia started her own antiques and collectibles business. Until the crash, Marcia was very actively engaged in this business, buying and selling unique collectibles in various antique shops all over eastern Massachusetts as well as on-line, via the Internet. Additionally, Marcia frequented many antique shows and flea markets to buy and sell collectibles, sometimes bringing her family with her and other times going alone. Marcia's extensive antiques are now stored in boxes in the garage as well as in an off-site storage facility.

Marcia and her family also enjoyed vacationing together. Each year, Marcia vacationed on Cape Cod for a few weeks with her family. There, the family enjoyed spending time at the beach. Marcia also took her daughter Rebecca to Wellfleet for a few days each summer to enjoy the Wellfleet flea market. Due to Marcia's complications and inadequate lodging facilities for the disabled, the family has not vacationed since the crash.

Marcia and Harold also enjoyed participating in religious activities at the local synagogue. Marcia particularly enjoyed assisting with its fundraising activities. They also enjoyed going out to dinner as a family and with friends.

B. Harold Rhodes.

Harold was born on February 24, 1954 in Philadelphia, Pennsylvania. Harold attended Indiana University and obtained a degree in Economics. Shortly thereafter, Harold graduated from Harvard Business School with a Master's degree in Business Administration in 1980.

Harold worked for a number of high technology companies from 1980 until approximately 1992. In 1992, Harold began consulting for various emerging high technology companies, with an emphasis on marketing. Harold had a successful career prior to the crash.

When not working during the evenings and on weekends, Harold enjoyed spending time with his wife Marcia and his daughter Rebecca going out to dinner, frequenting flea markets, antiquing and spending time with friends. He also looked forward to their summer vacations on Cape Cod.

Since the crash, Harold has been home taking care of his wife Marcia and his daughter Rebecca literally full time. Harold has attempted to work for a few companies on a per diem basis since the crash in an effort to bring some income into the household, but due to Marcia's various complications and medical appointments, he has been unable to commit to any type of schedule. Harold has not worked at all since approximately March 2003.

C. Rebecca Rhodes.

Rebecca was born on April 8, 1988 and has lived in Milford since she was born. Rebecca has a number of interests including creative writing and computers. She also participates in the theater program at Milford High School. Rebecca is a good student and is well-liked by her teachers. She currently volunteers at Milford-Whitinsville as a Candy Striper (a nurses' aide).

Prior to the crash, Rebecca spent much of her free time with her mother Marcia. They enjoyed going to flea markets, the mall and the movies. Now, because of the crash, Rebecca must either forego these activities or do them alone because Marcia is bedridden.

II. Basis for Liability.

There is no dispute that Zalewski crashed into the rear of Marcia's stopped 1997 Toyota Corolla on January 9, 2002 while driving a fully loaded 81,000 pound tractor-trailer. (Ex. 1). Photographs of Marcia's Toyota Corolla from which she was extracted using the Jaws of Life are attached as Exhibit 2. Zalewski admitted during his deposition that he crashed into Marcia's vehicle, which caused it to careen into the woods and hit a tree, because he was paying attention to another car pulling out of Trotter Drive rather than Marcia's stopped vehicle directly in front of him. (Deposition of Carlo Zalewski ("Zalewski Dep."), p. 92-105, attached hereto as Exhibit

3). Zalewski even admitted that the Commonwealth had sufficient facts to sustain a finding of guilty for the crime of operating negligently under G.L. c. 90, §24. (Zalewski Dep., p. 117).

Moreover, there is ample evidence that Zalewski failed to lock his brakes prior to impact. (Zalewski Dep., p. 121-122). Massachusetts State Police Trooper O'Hara so concluded in his Accident Reconstruction Report. (Ex. 4). Trooper O'Hara also testified as such in his deposition. (Deposition of Edward O'Hara ("O'Hara Dep."), p. 122, attached hereto as Exhibit 5). There also is ample evidence that there were no impediments to Zalewski's visibility on Route 109 on the date of the crash. The police report prepared by the Medway Police Department states that there was 800 feet of clear view traveling downhill on Route 109. (Ex. 6). Moreover, there was nothing blocking Zalewski's view when he careened into Marcia. (Zalewski Dep., p. 89, 91).

Zalewski was perched in a high position because of the size of his truck, the road was straight with a downhill slope for approximately 800 feet and there were no vehicles between Zalewski and the point of impact on the Eastbound side of Route 109. (Zalewski Dep., p. 87-91). Thus, it is clear that Zalewski breached his duty of care in driving the tractor-trailer when he crashed into Marcia's stopped Toyota Corolla. Zalewski's negligence caused Marcia to suffer catastrophic and permanent physical and emotional injuries that she must endure for the remainder of her life.

The three remaining Defendants, Driver Logistics, GAF and Penske are equally as liable as Zalewski because each Defendant maintained a sufficient amount of control over Zalewski to sustain a finding of negligence. The liability of each Defendant will be addressed in turn.

A. Driver Logistics.

Driver Logistics hired Zalewski in April 2001 to drive tractor-trailer units exclusively for GAF—tractor-trailer units that were owned by Penske. Prior to his employment with Driver Logistics, Zalewski worked for Vanguard Transportation Services ("Vanguard"). While at Vanguard from 1997 through 2001, Zalewski also drove exclusively for GAF (with the exception of approximately six months) and operated tractor-trailer units that were owned by Rollins Leasing Corporation ("Rollins"), the company that Penske later acquired. (Zalewski Dep., p. 9-10, 29-31).

There is no dispute that Driver Logistics at all relevant times was Zalewski's employer. (Driver Logistics' Ans., ¶¶ 4, 27, attached hereto as Exhibit 7; Zalewski Dep., p. 50-51, 156-157). Driver Logistics paid Zalewski; provided medical and disability benefits; took care of Zalewski's workers' compensation insurance; and approved his vacation and sick time. (GAF Ans. to Ints., ¶9, attached hereto as Exhibit 8; Zalewski Dep., p. 129-132, 175-176, 178); Quinn-Weinstein v. Kelly, 92-3016, 1994 Mass. Super. LEXIS 657, at *5-6 (July 1, 1994) (city was employer of medical residents due to providing vacation, sick time, assigned hours and salaries); Sabel v. Armstrong, 00-2591, 2001 Mass. Super. LEXIS 457, at *7-8 (Oct. 18, 2001) (evidence regarding employment included receiving a W-2 form, health and dental benefits). Thus, Driver Logistics is imputed with liability for Zalewski's negligence.

Driver Logistics also had the right to control Zalewski's driving activities. E.g., Hohenleitner v. Quorum Health Res., Inc., 435 Mass. 424, 431, 436 (2001) (the right to control the conduct of an employee is the ultimate test of a master-servant relationship); Smith v. Law, 93-0514, 1994 Mass. Super. LEXIS 137, at *10-13 (Aug. 1, 1994) (summary judgment denied on right to control issue where it was unclear if property owner or contractors for snow removal had the right to control the driver who was negligent). Indeed, there is a rebuttable presumption that Driver Logistics retained the right to control Zalewski. Kelley v. Rossi, 395 Mass. 659, 663 n.5 (1985); Sawtelle v. Mystic Valley Gas Co., 1 Mass. App. Ct. 672, 676 (1974). Evidence exists that Michael Kelley ("Kelley"), a driver for Driver Logistics, was the dispatcher of the Driver Logistics drivers assigned to GAF. (Zalewski Dep., p. 53-54). Zalewski testified that he was in constant communication on essentially a daily basis with Kelley regarding his driving routes. (Zalewski Dep., p. 124-125, 178-179). Kelley was Zalewski's contact if there was a scheduling problem and was his supervisor. (Zalewski Dep., p. 124-125, 180).

There also is evidence that Kelley maintained the logbooks for the Driver Logistics drivers and that the logbooks, although turned over to GAF, were given out by Driver Logistics. (Zalewski Dep., p. 146-147; Ex. 9). Moreover, Driver Logistics was required to conduct safety meetings for its drivers pursuant to its contract with GAF. (Ex. 10). Zalewski testified that Vanguard held similar meetings for its drivers assigned to GAF and that these meetings often took place at GAF. (Zalewski Dep., p. 152-153). Documents produced reveal that Driver Logistics employees were instructors at these meetings and Zalewski testified that representatives from each of the Defendants presented at these meetings. (Ex. 11; Zalewski Dep., p. 153-155).

B. GAF.

1. GAF's Right To Control.

GAF also is liable for Marcia's injuries. GAF leased driving services from Driver Logistics. Thus, under the borrowed servant doctrine and other agency principles, a court will find GAF liable as it maintained a sufficient amount of control over Zalewski. GAF admitted in its lease agreement with Rollins dated May 18, 1992 that it would permit the tractor-trailer to be operated only by a "safe, careful driver" and admitted that that driver was subject to GAF's "exclusive direction and control." (Ex. 12, ¶5B).

GAF also directed the manner and means to be followed by Zalewski as well as his final destination. E.g., Dias v. Brigham Medical Assocs., Inc., 438 Mass 317, 320-321 (2002); Konick v. Berke, Moore Co., 355 Mass. 463, 467-469 (1969) (control over the final task is sufficient even if the means, such as speed and route of travel, cannot be controlled). The evidence showed that each day, Zalewski would pick up the tractor-trailer from Penske's lot in Linden, New Jersey and travel to GAF's facility in Millis, Massachusetts. After leaving Penske's lot, Zalewski would pick up his load of liquid asphalt and receive a bill of lading from that entity. When Zalewski arrived at GAF's facility in Millis, he would report to GAF personnel at the gate to be weighed in. Here, Zalewski turned over the bill of lading to GAF and proceeded to the area of GAF where the asphalt was emptied. GAF weighed Zalewski's tractor-

trailer on the way out of Millis, and Zalewski then returned to New Jersey. (Zalewski Dep., p. 35-45). It is clear that Zalewski's routes were dictated by and/or for the benefit of GAF.

The evidence also shows that Zalewski submitted driving logs to GAF. (Ex. 13; Ex. 9; Zalewski Dep., p. 147-149). This also supports a finding of control. Bright v. Cargill, Inc., 837 P.2d 348, 361 (Kan. 1992) (timesheets verified by both temporary employer and employment agency is evidence of shared control); Morgan v. ABC Mfr., 710 So.2d 1077, 1078-79 (La. 1998) (same). Indeed, the Driver Logistics Company Policy and Information Booklet states that log sheets should be "turned into the company the driver is assigned to" and also that the logbooks are available at DLS "free of charge." (Ex. 9). Another document produced by GAF states that GAF and Driver Logistics were required to review the last seven days worked by a prospective applicant to ensure that fatigued drivers were not placed on the road. (Ex. 14). These dual review procedures granted each a right and a duty to control driver scheduling to avoid putting dangerous drivers on the road.

The evidence also shows that Zalewski was in contact with not only Kelley of Driver Logistics but also Carlo Melia ("Melia") of GAF during his GAF route. (Zalewski Dep., p. 180-181, 205-206). Zalewski testified that Melia contacted him almost too much, at which point Kelley began communicating with Zalewski more frequently than Melia. (Zalewski Dep., 180-181). It was not as if Melia (or Kelley for that matter) was divorced from Zalewski's daily driving activities. Zalewski himself testified that although he was employed by Driver Logistics, GAF called the shots. Indeed, Zalewski testified that the "pecking order" was such that Melia would give an order, Kelley would implement it and Zalewski would carry it out. (Zalewski Dep., p. 133).

Although Driver Logistics ultimately terminated Zalewski from his employment, it appears that GAF had the ability to remove Zalewski from GAF service which demonstrates a considerable right to control. E.g., Bright, 837 P.2d at 361 (temporary employer could dismiss employee from its service, and general employer could reassign employees at will); Morgan, 710 So.2d at 1078-79 (temporary employer could terminate employee from particular service, but only employment agency had the right to hire and fire). GAF contracted the right to approve in writing each and every Driver Logistics employee assigned to drive its routes. (Ex. 15, ¶3).

GAF claims that Zalewski was an independent contractor, but even if this were true, GAF would still be liable for its own negligence in allowing Zalewski to unsafely drive the tractor-trailer. See, e.g., Corsetti v. Stone, 396 Mass. 1, 10 (1985) (when a party entrusts work to an independent contractor, but retains control over any part of the work, failure to exercise that control with due care constitutes negligence); Ku v. Framingham, 53 Mass. App. Ct. 727, 730 (2000) (same); Smith, 1994 Mass. Super. LEXIS 137, at *10-11 (same). As set forth above, GAF explicitly retained a degree of control over Zalewski and other Driver Logistics drivers assigned to GAF.

2. Dual Agency/Joint Liability of GAF and Driver Logistics.

GAF and Driver Logistics are also liable under the theory of dual agency, which the Supreme Judicial Court has cited with approval in Hohenleitner. 435 Mass. at 434 n.8. The

doctrine, as set forth in the Restatement (Second) of Agency §226, states that “A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.” The evidence shows that Zalewski was serving both Driver Logistics and GAF while driving the tractor-trailer owned by Penske and was not required to abandon his service to either entity.

GAF and Driver Logistics both benefited from Zalewski’s driving. GAF leased an experienced driver from Driver Logistics, a company that has been in business for over twenty-five years, and did not have the hassle of employment-related paperwork, background screening, etc. Indeed, Driver Logistics promotes itself as a full service company that constantly trains and tests its drivers using a mobile safety classroom. (Ex. 16). Driver Logistics, on the other hand, also benefited from leasing its drivers to GAF pursuant to the lease between the two companies that was executed in November 1997. (Ex. 17). Thus, Zalewski was serving both GAF and Driver Logistics while accomplishing the single act of driving his tractor-trailer. Neither company required Zalewski to abandon his service to the other; therefore liability should be imposed upon both. For an in-depth discussion of the dual agency doctrine as set forth in Hohenleitner, see Morgan, 710 So.2d at 1078-83 and Bright, 837 P.2d at 363-64.

GAF and Driver Logistics acknowledge that they are vulnerable to joint employer and dual agency laws. As such, Driver Logistics prepared for its customer, GAF, a “Checklist on Avoiding ‘Co-Employment’ Vulnerability.” (Ex. 18). (emphasis added). The facts of this case support many of subjects that Driver Logistics warned GAF about in this checklist.

For example, Zalewski drove GAF routes for over three years while employed by Vanguard before being hired by Driver Logistics in 2001. (Id., ¶1). Indeed, Zalewski was referred to Driver Logistics by Melia, a GAF employee that he had known while employed by Vanguard. Zalewski learned from Melia that he would need to become employed by Driver Logistics to continue driving for GAF. (Zalewski Dep., p. 51-54). Driver Logistics also was involved with Zalewski’s day-to-day driving activities and schedules through its former employee, Kelley. Zalewski contacted Kelley while on the road, and Kelley was responsible for dispatching drivers. (Ex. 18, ¶2; Zalewski Dep., p. 53, 124-125, 178-179). The tractor that Zalewski drove, which was leased to GAF by Penske, had GAF’s corporate name listed on it: “Building Materials Corp.” (Ex. 18, ¶9; Zalewski Dep., p. 61). Finally, although Driver Logistics conducts safety meetings for its drivers, it conducts those meetings for drivers assigned to GAF jointly with GAF and Penske. (Ex. 18, ¶11; Ex. 19; Zalewski Dep., p. 153-154). Indeed, these meetings have been held at GAF’s corporate headquarters in New Jersey. (Zalewski Dep., p. 153).

Simply stated, it would be disingenuous to argue that GAF and Driver Logistics did not maintain the right to control Zalewski.

C. Penske.

Penske is liable to the Rhodes on several fronts. First, as owner of the tractor-trailer that Zalewski was driving (Penske Ans., ¶10, attached hereto as Exhibit 20; Ex. 21), Penske is liable under G.L. c. 231, §85A, which establishes prima facie evidence that Zalewski was acting as



Penske's agent when he negligently crashed into Marcia's vehicle. St. Pierre v. Penske Truck Leasing Corp., CA 00-4805-G, 2001 Mass. Super. LEXIS 521, at *15 (Dec. 14, 2001) (because ownership, standing alone, is sufficient for a finding of agency, motions for summary judgment and directed verdict should be denied).

Penske also was negligent in failing to maintain the brakes adequately on the tractor-trailer. (Zalewski Dep., p. 120-121). Because Penske retained the duty to maintain the truck, Penske was required to keep the brakes in proper working order. G.L. c. 90, §7; Ex. 8, ¶1. Indeed, Zalewski specifically testified that if he encountered a mechanical defect or failure of some kind, he would report this to Penske. (Zalewski Dep., p. 183). The evidence is clear that the Number Five brake was inoperative; this failure constitutes negligence. See Bolton v. Massachusetts Bay Transp. Auth., 32 Mass. App. Ct. 654, 659 (1992) (defendant found to be negligent for failing to properly maintain brakes on a bus). Although the Massachusetts State Police concluded that this defective brake was not a major factor in this crash, Zalewski continues to maintain that he applied the brakes prior to impact and that those brakes failed to lock prior to the crash. (Zalewski Dep., p. 94, 121-122).

Finally, Penske maintained sufficient control over Zalewski and the tractor-trailer to sustain a finding of negligence. In its lease agreement with GAF, Penske agreed to assist in teaching safe driving habits to the drivers of its tractor-trailers. (Ex. 22, ¶4J). The evidence shows that Penske was involved in safety meetings for Driver Logistics drivers assigned to GAF. (Zalewski Dep., p. 152-155; Ex. 18). Penske also required from GAF that it be permitted to receive all vehicles for at least eight hours per week and that GAF would provide vehicle condition reports to Penske. (Ex. 23, ¶4A).

Further, Penske provided Zalewski with the equipment that he needed in order to drive GAF's routes. E.g., Sabel, 2001 Mass. Super. LEXIS 457, at *7-8 (providing supplies is evidence of control); see also Mannon v. Howmet Transport Serv., Inc., 641 N.E.2d 70, 73 (Ind. App. 1994). Zalewski picked up the tractor-trailer each working day from Penske's lot in Linden, New Jersey. (Zalewski Dep., p. 29-31). While at Penske's yard, Zalewski picked up a form that Penske required him to complete daily regarding several mechanical aspects of the tractor-trailer, including its lights, hoses, brakes, etc. (Zalewski Dep., p. 35-37, 134-140; Ex. 24). This maintenance paperwork was turned into both Penske and GAF. (Zalewski Dep., p. 35-37, 60, 139). If for some reason Zalewski could not drive his assigned tractor-trailer, Penske would assign him another one. (Zalewski Dep., p. 58-59). Penske also provided the fuel for the tractor-trailer, which Zalewski signed for. (Zalewski Dep., p. 136; Ex. 25).

III. Injuries Sustained by Marcia, Harold and Rebecca Rhodes.

This Demand does not detail each and every injury sustained by the Rhodes family as a result of the crash on January 9, 2002 or the loss of functional ability to perform activities attendant with this type of spinal cord injury, and which Marcia once enjoyed. Rather, the Demand, with the accompanying medical records, amply summarizes what the Rhodes have had to endure every day since the crash. Additional information by way of testimony and documentary evidence will be presented at the trial of this action.

A. Marcia Rhodes.

1. Milford-Whitinsville Regional Hospital.

Immediately after the crash, Marcia was transported to the Emergency Department at Milford-Whitinsville Regional Hospital ("Milford-Whitinsville"). (Ex. 26). At Milford-Whitinsville, Marcia was diagnosed with "multiple trauma with spinal cord injury and paralysis" and "left rib fractures." (Ex. 27). It was ultimately determined that Marcia also suffered a T12 burst fracture of her spinal cord, numerous bilateral rib fractures and a left pneumothorax. (Ex. 28). Marcia also suffered bruises and contusions.

2. UMASS Medical Center.

Marcia was immediately transferred to UMASS Medical Center ("UMASS") from Milford-Whitinsville on the date of the crash. It was there that Marcia learned that she would suffer from permanent paraplegia for the remainder of her life. (Ex. 29). Marcia then underwent spinal fusion to stabilize her burst vertebra on January 16, 2002, just one week after the devastating crash. (Ex. 30). Marcia had to wear a thoracolumbar spinal orthosis (TLSO) brace for an extended period of time to stabilize her while the spinal fusion was healing. A picture of the TLSO brace similar to what Marcia had to wear is attached as Exhibit 31. This, of course, aggravated Marcia's discomfort due to her multiple rib fractures and general pain. Photographs of Marcia while at UMASS are attached as Exhibit 32.

Shortly after Marcia was admitted to UMASS, she was transferred to the Surgical Intensive Care Unit ("SICU") at UMASS. A head CT scan revealed that Marcia had a subarachnoid hemorrhage. (Ex. 29). X-rays during Marcia's stay in the SICU revealed that Marcia suffered from a left pneumothorax, which was likely caused by the multiple flail segments from her rib fractures, and a chest tube was placed in her chest. (Id.).

While at UMASS, Marcia was diagnosed with Methicillin Resistant Staphylococcus Aureus (MRSA) pneumonia, a urinary tract infection, the beginning of a sacral decubitus ulcer, diabetes insipidus and pancreatitis. (Id.). Marcia also was suffering from a cerebral hematoma and deep vein thrombosis (blood clot) in her left leg. Marcia underwent a procedure to insert a Greenfield Filter for the thrombosis as she was not a candidate for anticoagulation. (Ex. 33). Marcia was ultimately released to Fairlawn Rehabilitation Hospital ("Fairlawn") on February 5, 2002, where she remained for over two months until April 16, 2002.

3. Fairlawn Rehabilitation Hospital.

Marcia continued to be treated for her MRSA pneumonia while at Fairlawn. In addition, Marcia was required to wear the TLSO brace each and every time she got out of bed. (Ex. 34). This, of course, hampered Marcia's physical and occupational therapy regimens as did the MRSA pneumonia. For example, because of the brace and other issues, Marcia required the assistance of two persons for transfers. (Ex. 35). All physical and occupational therapy was extremely painful and depressing for Marcia. Moreover, Marcia was confined to her room for essentially all but two weeks of her time at Fairlawn due to the MRSA pneumonia.



Marcia also suffered from clostridium difficile colitis (a bacterial infection) during her first few weeks at Fairlawn. (Ex. 36). This infection caused severe stress in Marcia's bowels, ranging from constipation to diarrhea. Marcia was treated with Flagyl for this condition.

Marcia then developed significant edema in her left leg. (Ex. 37). Marcia was required to undergo painful blood draws to obtain readings of her Prothrombin Time/International Normalized Ratios levels. Marcia's left leg remained severely swollen for an extended period of time throughout her stay at Fairlawn, which made therapy virtually impossible.

Marcia was discharged from Fairlawn on April 16, 2002 – her 19th wedding anniversary.

4. Milford-Whitinsville Regional Hospital/Whittier Rehabilitation Hospital.

Just over one month after being discharged from Fairlawn, on or about May 24, 2002, Marcia was taken to the Emergency Department at Milford-Whitinsville for abdominal pain that had gotten increasingly worse over the course of two days. (Ex. 38). She presented with a fever and nausea. Marcia was formally diagnosed with cholecystitis (inflammation of the gallbladder) and quickly underwent surgery to remove her gangrenous gall bladder while at Milford-Whitinsville. (Ex. 39). After one week of recovery there, Marcia was transferred for two weeks of rehabilitation at Whittier Rehabilitation Hospital ("Whittier"). (Ex. 40). Marcia also was treated for an infection in her left great toe while at Whittier. (Ex. 41).

Marcia was treated at Milford-Whitinsville for frequent urinary tract infections over the course of the latter part of 2002. (Ex. 42). Because Marcia has no control over her elimination functions, urine removal is accomplished via full-time Foley catheter, which has caused Marcia to suffer urine, bladder and fungus infections. There also has been blood and other foreign materials in her urine. Marcia was referred to a urologist to explore self-catheterization in April 2003. (Ex. 43). However, self-catheterization is not yet possible because of the numerous complications that Marcia has suffered since the crash. (See Section III.A.5., infra).

In addition, Marcia performs a multiple hour bowel program each morning that can last up to four hours. Because she has no control over her elimination functions, Marcia must stimulate her bowels digitally each and every morning and use suppositories to accomplish a bowel movement. Marcia begins this process as soon as she awakes each morning at approximately 7:30 a.m. and finishes just before lunch.

5. Attempts at Therapy and Marcia's Setbacks.

Shortly after coming home from Whittier in June 2002, Marcia began undergoing intensive physical therapy and began practicing maneuvering her wheel chair. From this, she developed tendonitis and bursitis on or around July 2002 and had to stop all physical therapy until her arms and shoulders could heal. (Ex. 44). Marcia began undergoing ultrasound treatments to relieve her bursitis and tendonitis. Although these ailments have since subsided, they will likely flare up once Marcia recommences her therapy regimens again in earnest.

In the Fall of last year, Marcia began to suffer stomach pain, which was ultimately attributed to the rods inserted into her spine (described as "Juncture Pain") (Ex. 45), and she was advised that this would be pain that she would have to live with. She attempted physical therapy again during the Fall and was able to maneuver her wheel chair around her house. However, Marcia still had difficulty in making transfers and required the assistance of one person to transfer.

In early December, 2002, Marcia developed Level 1, Level 2 and Level 3 pressure sores and had to remain in bed, on her sides, for almost three months to relieve pressure on the sores. (Ex. 46). Photographs of Marcia's sores are attached as Exhibit 47. Marcia learned just recently that she had a localized staph infection in the pressure sores that has slowed their healing. Although she is now receiving specialized antibiotic treatment, Marcia is still plagued with such sores and is being treated at Sturdy Memorial Hospital in Attleboro, Massachusetts.

In February, 2003, Marcia fell off the commode during a transfer back to her wheelchair and landed on the hard tile floor. Shortly thereafter, in early March, 2003, she developed an infection in her right leg and was treated with antibiotics. The infection was very resistant to treatment. Marcia had to go to Milford-Whitinsville to be treated, on three separate occasions, with intravenous antibiotics every twenty-four hours for three days in a row. (Ex. 48). In the course of treatment for her leg infection, it was ultimately determined that Marcia had broken bones in her right leg and had fractures near her left knee. (Ex. 49). Marcia was fitted with a full leg cast on her right leg in March 2002. (Id.) Photographs of Marcia in this type of cast are attached as Exhibit 50. Because Marcia has no feeling below her waist, she was unaware that these bones were broken. In addition to the broken bones, Marcia was diagnosed as suffering from osteoporosis.

On April 5, 2003, Marcia again fell from the toilet during a transfer and had to be taken to the emergency room for x-rays. Marcia did not suffer additional fractures, but additional pressure sores were discovered which required that she resume bed rest (with her leg in the cast) for another month to allow the sores to heal, further aggravating the bursitis and tendonitis. Just recently, on July 15, 2003, Marcia was fitted with a pneumatic walker air cast, which continues to provide support for Marcia's injury, after over three months of wearing the other type of cast. Marcia also recently contracted three different types of bladder and urinary tract infections for which she has been receiving antibiotics.

Marcia suffers from Attention Deficit Hyperactivity Disorder (ADHD) and Bipolar Disorder. These conditions have worsened since the crash. Marcia sees a therapist weekly and is under the care of a psychiatrist for medication. In addition to assistance from Harold, Marcia receives daily care from a Certified Nurse's Aide and is seen by the Visiting Nurse's Association of Greater Milford ("VNA") generally one time per week.

Marcia lives with the depression and anxiety that she will be bound to either her bed or a wheelchair for the rest of her life due to the Defendants' actions. She is frustrated that she can no longer do those things that she could previously. She also lives with the constant worry about unplanned visits to the emergency room, doctor and therapist visits and her general loss of

personal independence and personal embarrassment. She knows that she is likely to encounter several of the complications (such as the pressure sores) into the future given her weakened condition.

Attached as Exhibit 51 is a summary of what Marcia has had to endure and her prognosis prepared by her psychiatrist, Dr. Elizabeth Roaf.

B. Harold Rhodes.

Since the crash, Harold's life has changed dramatically. Because certain transfers cannot be accomplished with only one person, Harold has gone from a successful marketing consultant to a full-time care provider for his wife Marcia. In addition to attending to Marcia's needs, Harold has assumed the role of both mother, father and family homemaker to his 15-year-old daughter Rebecca. Harold can no longer pursue any of the professional and personal goals that he set for himself as he is now confined to the home as Marcia's caregiver.

Harold has been under stress and anxiety since the crash, worrying each and every day about matters ranging from Marcia's chronic pressure sores to her falling in the shower. Harold has extensive trouble sleeping and suffers from depression. Harold visits his therapist weekly and is under medical care. Harold is no longer as cheerful as he was before the crash, and as a result of the crash, he no longer socializes with his friends. Harold is in constant pain and turmoil as a result of the crash.

Harold also has suffered significant loss of consortium and services as a result of the crash. Harold and Marcia remain close, yet their relationship has changed. On weekdays, Harold must assist Marcia's Certified Nurse's Aide with all of Marcia's transfers (into her medical bed, onto the toilet, into her wheelchair). On weekends and evenings, Harold provides full-time care and attends to all of Marcia's living needs – preparing meals, transportation, transfers, cleaning, personal care, etc. Their relationship has now mostly changed from a married couple looking forward to each new day as their child grew up, to daily-care to just get through each day. Additionally, Harold spends extensive amounts of his remaining personal time dealing with insurance companies and the many medical providers that Marcia has seen, as well as making sure that Marcia is stocked with the required in-home medical supplies and medicines.

C. Rebecca Rhodes.

Rebecca's life also has changed significantly since the crash. Rebecca has lost the companionship of her mother and her best friend. She must now accomplish many things on her own that she previously looked to her mother for. For example, Rebecca gets back and forth to school on her own and prepares her own meals. She also no longer gets the enjoyment of spending time with her mother Marcia outside of the home. Gone are the days of strolling around flea markets or the mall.

Rebecca has become very withdrawn since the crash. When Rebecca comes home from school, she retreats to her bedroom upstairs (where she often eats dinner alone) and her

computer. Although she and Marcia communicate daily about school, their relationship has changed. All interaction now takes place in the former living room of the Rhodes' home, which now serves as Marcia's bedroom.

Rebecca also has been under stress and anxiety since the crash, worrying about her mother and realizing that this is the way the remainder of her life will be. That is, with her mother in a wheelchair and her father as her mother's provider. Rebecca sees a therapist weekly. There is no doubt that Rebecca will be scarred for life as a result of the crash.

IV. Damages.

A. Marcia's Medical Bills To Date.

Marcia's medical bills to date are extremely high. This is unsurprising given the amount of care that she has received from the numerous medical providers that she has seen since the crash. Marcia has spent 120 out of the approximately 580 days since the crash in a hospital, or 21% of her life since January 9, 2002.

The following depicts what Marcia has had to endure since the date of the crash through July 31, 2003:

	<u>Hospital Days</u>	<u>Physical Therapy Sessions</u>	<u>Occupational Therapy Sessions</u>	<u>Nurse Visits</u>	<u>Home Health Aide Hours</u>	<u>Trips to Emergency Room</u>	<u>Doctor Visits</u>	<u>Blood Tests</u>
Total	120	61	42	58	2,607	14	133	41
January 2002	23	0	0	0	0	0	0	0
February	28	0	0	0	0	0	0	0
March	31	0	0	0	0	0	0	0
April	16	3	2	0	80	0	4	1
May	8	6	3	1	128	1	8	0
June	14	3	3	4	82	0	3	5
July	0	5	4	2	122	1	3	5
August	0	11	1	3	113	1	7	2
September	0	5	14	2	146	1	17	2
October	0	0	12	2	208	0	12	2
November	0	0	3	2	208	0	11	2
December	0	0	0	7	215	0	15	2
January 2003	0	0	0	4	213	0	5	5
February	0	3	0	6	155	1	4	3
March	0	6	0	5	194	8	6	1
April	0	9	0	5	211	1	8	3
May	0	0	0	6	180	0	9	2

	<u>Hospital Days</u>	<u>Physical Therapy Sessions</u>	<u>Occupational Therapy Sessions</u>	<u>Nurse Visits</u>	<u>Home Health Aide Hours</u>	<u>Trips to Emergency Room</u>	<u>Doctor Visits</u>	<u>Blood Tests</u>
June	0	5	0	5	168	0	10	3
July	0	5	0	4	184	0	11	3

The medical bills compiled to date total **\$413,977.68**. Copies of medical bills from UMASS, Fairlawn, Milford-Whitinsville, Whittier and the VNA, as well as a summary of all of the medical bills obtained and compiled to date, are attached as Exhibits 52-57.²

B. Future Annual Costs.

It should be no surprise that Marcia will have several medical needs for the rest of her life. Attached as Exhibit 58 are cost projections prepared by Adele Pollard, R.N. of Case Management Associates, Inc., which set forth the future annual costs associated with those needs. Ms. Pollard's curriculum vitae is attached as Exhibit 59.

Ms. Pollard calculated these cost projections using two life expectancies, one based on the CDC Vital Statistics Life Table for a white female with approximately 34.7 years remaining and one based on SCI (Spinal Cord Injury) Models Systems, which projects 24.4 years remaining (reducing Marcia's life expectancy by ten years because of her injuries). Marcia's total annual costs excluding episodic and other risks total \$66,110.51. The average total cost for the remainder of Marcia's life is \$1,953,565.50, which is calculated as follows:

Total Annual	\$66,110.51
With 34.7 years remaining	\$2,294,034.60
With 24.4 years remaining	\$1,613,096.40
Average Future Costs	\$1,953,565.50

C. Future Episodic Costs.

Marcia also is expected to incur several episodic costs for items such as x-rays, durable medical equipment expenses and medical supplies. Attached as Exhibit 60 are those future episodic costs, also prepared by Ms. Pollard, that Marcia will likely incur over the course of the remainder of her life. The average total episodic costs is \$486,196.15, which is calculated as follows:

<u>Time Frame</u>	<u>Range</u>	<u>Average</u>
With 34.7 years remaining	\$493,070.68 to \$591,070.68	\$542,070.65

² Counsel is still in the process of obtaining medical bills from Marcia's medical providers. Copies of medical bills from providers other than those listed above will be furnished upon request.

value of household services would be \$11,680. As set forth in Exhibit 63, the present value of Marcia's household services through age 75 is **\$292,379**.

G. Out-Of-Pocket Expenses.

Marcia also has incurred out-of-pocket expenses as a result of the crash totaling **\$83,984.74**.⁴ A breakdown of these expenses through July 31, 2003 is as follows:

Home Care	\$48,784.75
Dental	\$1,025.00
Doctor	\$7,073.50 ⁵
Equipment	\$7,320.64
Hospital	\$3,028.80
Medicine	\$10,004.73 ⁶
Other	\$4,058.25
Supplies	\$2,048.07
Transportation	\$641.00
TOTAL	\$83,984.74

H. Loss of Consortium: Harold and Rebecca.

As stated above, Harold and Rebecca have sustained significant loss of consortium, support and services as a result of Defendants' negligence for which they should be compensated. See Section III.B.-C., supra for a discussion of the injuries sustained by Harold and Rebecca.

I. Other.

The Rhodes are not claiming lost wages or lost earning capacity for either Marcia or Harold.

V. Day In the Life Video.

Enclosed herewith is a copy of a videotape depicting a Day in the Life of Marcia Rhodes. This video, which has not been edited for trial, portrays what Marcia's life has become as result of the Defendants' negligence. This video is approximately 30 minutes in length.

VI. Demand For Settlement.

Plaintiffs' special damages set forth above total **\$2,817,419.42**. The pain and suffering that Marcia has had to endure since the crash will add significant value to her claim as will the

⁴ Supporting documentation will be furnished upon request.

⁵ Note that Doctor includes amounts for Harold and Rebecca.

⁶ Note that Medicine includes amounts for Harold and Rebecca, which amounts could not be separated out easily.



loss of consortium suffered by Harold and Rebecca. Plaintiffs therefore demand **\$16,500,000.00** in full settlement of all claims against all Defendants, which is less than **six (6)** times Marcia's special damages, even if no value is assigned to the loss of consortium claims.

In light of what the Rhodes family has had to endure since January 9, 2002 and their strong likelihood of success on the merits against each of the Defendants, Plaintiffs believe that this demand is fair. This demand will remain open for 30 days.

I look forward to hearing from you soon.

Very truly yours,

BROWN RUDNICK BERLACK ISRAELS LLP

By: M. Frederick Pritzker 
M. Frederick Pritzker

MFP/rsg

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