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PERSONAL INJURY ▪ FAMILY LAW ▪ CRIMINAL DEFENSE ▪ BUSINESS MATTERS

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September 28, 2010

Via Certified Mail Return Receipt
No.: 7009 2250 0001 1079 4988

Courtney D. Scott
First Acceptance Insurance
P.O. Box 150769
Nashville, Tennessee 37215

Re:	**Our Client**	**:**	**John Doe**
	Date of Injury	**:**	**May 17, 2009**
	Your Insured	**:**	**Christopher Williams**
	Claim Number	**:**	**420902520**

Dear Mr. Scott:

In an attempt to resolve the above-referenced claim amicably, our firm hereby submits the following demand on behalf of our client:

BACKGROUND FACTS

On May 17, 2009, shortly before 6:00 p.m. on a late Sunday afternoon, our client, Mr. John Doe, was the properly restrained driver of a 2003 Ford F350 full-size crew cab work pick-up truck, in Round Rock, Texas. Mr. Doe was heading to a band rehearsal at the time (he was the lead singer and acoustical/electric guitarist for the band Atomic Strawberry), and had some musical equipment in the back of his pick-up cab, including and especially his hard-shelled guitar case. He was traveling northbound on F.M. 1460, approaching the intersection with University Boulevard, and preparing to turn left (westbound) onto University.

Mr. Doe turned his left blinker on and came to a stop in the left-hand / turning Smith, waiting for southbound traffic on F.M. 1460 to clear so that he could turn left onto University. At that instant, your insured, Mr. Christopher Williams, also traveling northbound on F.M. 1460 and approaching the same intersection in a Pontiac Bonneville four-door sedan, carelessly, negligently, and violently slammed into the rear of our client's truck. The impact bent the towing hitch of our client's pick-up truck downward, and caused the rear of the truck to violently bounce upward and downward as the truck was propelled forward by the collision. Inside our client's cab, his hard-shelled guitar case flew forward and struck him painfully in the back of the head (at the right side base of the skull, just above the right posterior neck region), jerking his neck and shoulder forward and back again.

As a result of this collision, our client has suffered serious and substantial damages, all of which are set forth in complete detail below.

LIABILITY AND CAUSATION

Our investigation has established beyond dispute that your insured's negligence was the proximate cause of this collision. We have obtained three (3) separate statements from motorists who eye-witnessed the entire event, start to finish.

Liability:

(1) Your insured failed to control his speed, failed to timely apply his brakes, and failed to maintain assured clear distance between himself and our client's vehicle. This is self-evident from the rear-end collision, and there is no witness that states that our client was reversing at the time of the collision, or that he came to an extremely sudden and abrupt stop at an inappropriate place.

The witness statement of Mr. John Brown (enclosed), Paragraph 7, indicates that our client was stopped and waiting to turn for at least a good 10 seconds when your insured rammed into the back of our client's truck.

(2) Your insured completely failed to keep a lookout for traffic conditions ahead, as a reasonable driver of ordinary prudence would have done in the same or similar circumstances. The witness statement of Mr. Tom Smith (enclosed) clearly states, in Paragraph 3: "The driver of the Pontiac was looking down [not ahead] as his vehicle struck the pickup; after which he jerked his head up sharply, with a startled expression, and his mouth open."

(3) This would also explain why Mrs. Mary Smith recalls, in her witness statement (enclosed), Paragraph 8, "[W]e saw a dark green Pontiac going at what appeared to be full traffic speed, come right up behind the red pickup truck and hit it hard in the rear. I do not recall hearing the screeching of brakes or seeing the green Pontiac do anything that would indicate it was trying to slow down or come to a stop to avoid the impact."

Clearly, your insured was simply not paying attention, since he would have made some effort to slow or stop to avoid the collision if he were looking up while driving, and had seen our client.

Causation:

(4) The eyewitness testimonies also corroborate our client's account of the force of impact and the propelling forward of his vehicle. The witness statement of Mr. John Smith, Paragraph 4, clearly states that our client's truck "…was shoved rapidly onto west bound University at an angle, slightly past our vehicle. I remember the driver looking across at me with a stunned, dazed look on his face."

(5) Despite all of this eyewitness evidence, we have had to deal with three (3) adjusters (yourself included) from your company, putting forth the absurd and nonsensical theory (based on a purported accident reconstruction expert) that this collision could have been no more than a "rolling impact, at 10 m.p.h. or less" (exact words of Mr. Mark Groves, the very first adjuster with whom we spoke on this case; similar sentiments were expressed by a Ms. Jennifer Wethington, the second adjuster that spoke with us about it).

We have asked each of the three eyewitnesses in detail about this particular issue:

The statement of Mr. John Smith (Paragraph 4), portion cited above, details how the impact shoved our client's vehicle rapidly onto westbound University, past his own vehicle, which was sitting and waiting at the intersection.

The statement of Mrs. Mary Lynn Smith (Paragraph 8), portion cited above, details that your insured appeared to be going at full traffic speed and did not hit his brakes or do anything to slow down before he (in her own words) "…hit it [i.e., our client's truck] hard in the rear."

The statement of Mr. John Brown (Paragraph 7) describes it as "…a loud metal-to-metal crash," and adds that the green Pontiac rear-ended the red pickup truck "pretty hard." Furthermore, in direct answer to the '10 m.p.h. / rolling impact' claim, Mr. Le states (Paragraph 20): "I've been made aware of the assertion by the green Pontiac driver (or his agent) that this was a slow-rolling impact, maybe 5-10 m.p.h. or less. I can say this is just not believable. The crash was very loud, and the damage I saw to the front of the Pontiac was much more than if it was a rolling 5-10 m.p.h. impact" (emphasis added).

(6) The eyewitnesses also corroborate our client's account of being hit in the head by the hard equipment in his truck during the impact. Their testimony is admissible in this regard, since they are recounting an excited utterance, as well as a contemporaneous description of physical feeling, made by our client at the scene:

The statement of Mrs. Mary Lynn Smith (Paragraph 11) describes her observation of our client immediately after the impact: "To me, the driver of the red pickup truck looked visibly dazed or stunned. It seemed to me like he had hit his head on something." Furthermore, in recounting her subsequent conversation with our client (Paragraph 17): "He responded with words to the effect of, 'I don't know what just happened, but I was supposed to be going to a rehearsal and I had all this equipment in the back, I'm just really dazed right now.'"

The statement of Mr. John Smith (Paragraph 7) contains the following: "He mentioned he had been on his way to a rehearsal, for a play, I believe. He explained that his guitar had slammed into the back of his head during the impact, forcing his head into the windshield."

(7) Based on the above, we have established clear and consistent evidence and testimony regarding the impact and mechanism of injury. Your accident reconstruction expert, who is not an eyewitness, who was hired after the fact, and who was likely paid handsomely, either hourly or flat fee (all of which we will be entitled to probe into and elicit in front of a jury, if necessary), to come up with opposing conclusions, cannot possibly hold up next to this testimony. Furthermore, even in the unlikeliest of all scenarios, that your accident reconstruction expert convinces anyone that this was a 10 m.p.h. rolling impact, he will not be able to testify as to causation of injury. This will require an expert in the field of biomechanics and/or physical forces. And, even if such an expert testifies, he will have no firsthand basis to deny our client's corroborated account of the hard guitar case flying forward and striking him in the head.

Negligence Per Se, Gross Negligence, and Recklessness:

(8) The above discussion does not even take into account an entirely independent set of factors, centered on your insured's outrageous conduct. Fully knowing that he had just rammed into another car, your insured sped off, fleeing the scene. All three eyewitnesses confirm this:

Statement of Mrs. Mary Lynn Smith (Paragraphs 9-12): "Even more surprising, the green Pontiac did not stop after the impact. Its engine gunned, and it continued on north through the intersection on A.W. Grimes, fleeing the scene of the collision. … I recall my husband saying out loud, 'Oh my God, that guy didn't even stop.' … My husband quickly made a left turn and we sped after the green Pontiac."

Statement of Mr. John Smith (Paragraphs 3-5): "The green Pontiac, containing three persons, then accelerated very rapidly North on Grimes. … The intersection was clear at that time so I turned left onto Grimes and followed the Pontiac, which continued North at high speed."

Statement of Mr. John Brown (Paragraph 8): "The next thing I saw was the green Pontiac reverse, and then drive around the passenger side of the red pickup truck, and drive northbound on 1460. In other words, it was fleeing the scene."

(9) Mr. and Mrs. Smith had to engage in a high-speed chase in order to track down the license plate number of your insured's vehicle:

Statement of Mrs. Mary Lynn Smith (Paragraphs 13-15): "We had to chase after the car for a number of minutes, at a high speed, although I can't be exactly sure how long the chase took. … I recall seeing the green Pontiac pull off and turn to the right. It came to a stop on the dirt road and just sat there. … We also turned onto the dirt road and pulled up behind the Pontiac, just close enough to see the license plate, but not too close, in case the driver tried to do something. … I took

down the license plate number on a little piece of paper I could find in our car."

Statement of Mr. John Smith (Paragraph 5): "The intersection was clear at that time so I turned left onto Grimes and followed the Pontiac, which continued North at high speed. After a few miles, the Pontiac slowed and turned onto an unpaved side road with houses and empty lots on both sides. … My wife quickly wrote down the license number of the Pontiac; I then backed up, turned around and we returned to the scene of the accident."

(10) It is very easy for any reasonable juror to infer that your insured was trying to escape responsibility for this collision, and that it was only because he realized he had been followed and his car had been identified, that he eventually returned to the scene to explain himself. It is very easy to infer that he realized at this point that if he did not return to the scene (now that his car had been identified), he risked much more serious consequences, e.g., arrest and charges for failing to stop and render aid, failing to provide proof of insurance, etc.

(11) Furthermore, when he did come back to the scene, he gave what the eyewitnesses could only describe as "stupid" and "nonsense" excuses for fleeing, excuses that he obviously had to come up with on short notice, given that he now realized his car had been identified:

Statement of Mrs. Mary Lynn Smith (Paragraphs 18-20): "During the time period that we were there, I saw the green Pontiac drive back to the scene of the accident, and pull up and park behind our car. The driver of the green Pontiac got out. … He headed toward the officer and Steve. One of the only things that I can recall overhearing from him was some words to the effect of, 'Hey man, I'm sorry, I didn't even realize I hit you.' I thought to myself how stupid that sounded, considering what a hit it was, and that he sped up and drove off right afterwards."

Statement of Mr. John Smith (Paragraphs 8-10): "At that time the green Pontiac stopped on the shoulder of South bound Grimes, a car length or so north of my vehicle. The driver walked, stumbling slightly, over to the victim. Pulling his license out, he mumbled, 'I'm sorry man, I wasn't trying to run away, I just needed to pull over and check the damage to my car.' … His excuse for running away was complete nonsense. There was obviously adequate space for the driver of the Pontiac to pull over. The green Pontiac traveled miles before pulling off the road."

(12) We also have good reason to believe that your insured was driving in an impaired and compromised (if not actually intoxicated) state, based on the eyewitness testimony, corroborated also by a conversation that our client had with your insured's mother some time after the collision.

Not only does the fleeing from the scene tend to show impaired judgment, coupled also with the absurd and incoherent excuses given once he returned to the

scene, but also the eyewitnesses had this to say:

Statement of Mr. John Smith (Paragraphs 8-10): "The driver walked, stumbling slightly, over to the victim. Pulling his license out, he mumbled, 'I'm sorry man, I wasn't trying to run away, I just needed to pull over and check the damage to my car.' … I have little patience with drunks or liars. … It was my firm impression that the driver of the Pontiac was D.U.I. … His excuse for running away was complete nonsense. There was obviously adequate space for the driver of the Pontiac to pull over. The green Pontiac traveled miles before pulling off the road." (emphasis added)

Thus, we have eyewitness testimony as to your insured appearing physically and mentally impaired (stumbling while walking, and mumbling nonsense). Even if there can be no proof of intoxication, insofar as no toxicology was conducted by the officer, the very mention of this by an eyewitness will most certainly inflame the anger of an average Williamson County jury against your insured.

Furthermore, this eyewitness statement corroborates our client's account of events, specifically, that he contacted your insured's mother (Ms. Elizabeth Martin Williams) some time after the collision, and that she explicitly admitted to him that her son was on some type of medication. Based on these factors, we have more than good-faith basis to conduct full discovery as to your insured's medical and prescription drug history, which will most certainly be relevant and admissible at trial, in light of the foregoing testimony.

Any evidence of your insured driving while in a compromised mental state due to drugs (whether prescription or otherwise) will lay basis to our claim for gross negligence, pursuant to Texas Civil Practice & Remedies Code § 41.003, should this matter have to proceed to trial. Any reasonable Williamson County jury would unanimously find, by clear and convincing evidence, that your insured's conduct, in operating a motor vehicle in such a state, was gross negligence under the standards set forth in the Texas Civil Practice & Remedies Code. He would therefore be subject to punitive damages for such behavior.

Furthermore, many carriers are under the mistaken impression that exemplary damages in these cases are capped by the provisions of Texas Civil Practice & Remedies Code § 41.008(b). However, please see Texas Civil Practice & Remedies Code § 41.008(c)(14) as confirmation that exemplary damages will not be subject to any cap in this case, should this matter proceed to trial. This particular subsection states that "intoxication assault" is one of the exceptions to the limitation on exemplary damages set forth in the preceding subsection. As that term has been defined by Texas law, striking another individual with one's vehicle while intoxicated, so as to cause injury, qualifies as intoxication assault.

(13) There is already separate basis for a claim of negligence *per se*, in that your insured received Citation #TX093T0CIA001 from Texas Highway Patrol Trooper

Sandra Adams (I.D. #08880), for failing to control his speed. This is by far the least of all the offenses for which your insured could have been charged, given all of the foregoing evidence and circumstances. He is profoundly lucky. Given what our client has had to go through for almost the past year and a half since this incident, he has been nowhere near as fortunate.

INJURIES AND DAMAGES

In light of all of your insured's foregoing actions, omissions, and grossly negligent and reckless behaviors, our client has incurred the following damages:

Property Damage

(a) Cost of Repairs:

Our client obtained two (2) separate, detailed damage repair estimates for his 2003 Ford F350 pick-up work truck:

Assured Auto Appraisers: Mr. Jeff Reed, with Assured Auto Appraisers, on May 20, 2009, determined that there was $6,004.68 worth of repairs (parts and labor) that had to be done to the rear bumper, towing hitch, tailgate assembly, bed rail and molding, etc.

Texas 46 Collision Center: Mr. Greg Pool, with Texas 46 Collision Center, on June 9, 2009, determined that there was actually $7,903.51 worth of repairs (parts and labor) that had to be done to the above items, as well as to the rear suspension, rear differential, transmission, etc. This second estimate was obtained precisely because our client noticed problems occurring with the vehicle since the collision which had never previously occurred, i.e. leaking fluids and other issues making the vehicle non-drivable.

Despite the above, your company has persisted in asserting that this was a "rolling impact at 10 m.p.h.," which could only have resulted in some paltry amount of vehicle damage. Mark Groves, the first adjuster with whom we have dealt on this case, insulted our client by sending a $231.56 check, along with a "property damage settlement release," dated September 23, 2009. We have no intention whatsoever of settling the property damage claim for this completely ridiculous amount.

(b) Loss of Use:

You should also be aware that, over and above the cost of repairs, our client will be entitled to loss of use damages under Texas law, for the entire time that his vehicle has been sitting, non-drivable and unrepaired.

Please read the following Texas case law (enclosed), from both the Supreme Court of Texas and from the 3rd Court of Appeals (which sits directly above the Williamson

County Court at Law, where this case would be tried if necessary, and which would have binding precedential authority):

- *Mondragon v. Austin*, 954 S.W.2d 191 (Tex. App.—Austin 1997, writ denied).
- *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115 (Tex. 1984).

In *Mondragon*, the Third Court of Appeals (in Austin) held that loss of use damages could be awarded even when such damages went far and beyond the actual market value of a claimant's vehicle, particularly when those additional damages were a result of a carrier's protracted failure and refusal to pay a meritorious damage claim. As any court will see, the facts of this claim are even more egregious than the facts presented to the *Mondragon* court.

In *Mondragon*, just as in the present claim, one of the key issues was a property damage dispute where the defense insurance carrier denied proper payment to the injured claimant. 954 S.W.2d at 192. Our client is in the identical situation as the claimant in *Mondragon*, in that he has had to continue making monthly payments on the vehicle, which has been sitting unusable and undrivable since May of 2009. *Id.* ("As a consequence of Mondragon's choices, Austin had to continue making the payments on the car, send additional money to his daughter for transportation at college, and travel six-hundred miles each way to transport her back and forth on holidays.").

Additionally, in both cases, the insurance carrier representing the defendant had clear basis to conclude that its driver was at fault. *Id.* at 195 ("Austin lost the use of his car because Mondragon, while intoxicated, negligently drove backwards down a street and collided with the car. The loss continued for more than a year because Mondragon and his insurance company chose to deny the claim."). In the present case, from the beginning, your company has been aware that there is no dispute whatsoever as to liability (rear-end collision), and you have been placed on notice (by three separate eyewitness statements) that this was not some absurd "10 m.p.h. / rolling impact." Yet, your company, just as the carrier in *Mondragon*, has gambled by refusing to pay the property damage. *Id.*

In *Mondragon*, the plaintiff was without a car for over 12 months. *Id.* In the present case, as a result of your unwillingness to satisfy the property damage claim, our client has been without the use of his work truck (and still continues to be) for over 16 months, and counting. Furthermore, in both cases, the claimants were unable to mitigate the damages suffered as a result of the defendants' negligence. In *Mondragon*, the plaintiff had to continue to make monthly loan payments on the car, and therefore had no surplus income that could be used to offset or take care of the damages himself. *Id.* at 192, 195. In the present case, our client has had to continue to make high monthly payments on the vehicle that was ultimately rendered non-drivable in this collision, and has had to continue to do so since May of 2009. Accordingly, our client has no surplus income or funds with which to repair the vehicle on his own.

The court in *Mondragon* was entirely unsympathetic with the defendant carrier's

argument that those consequential damages were not due to his own negligence, but rather due to the plaintiff's own financial situation:

> Mondragon argues the reason Austin was deprived of the car for such an extended period of time was Austin's lack of financial resources, not Mondragon's negligence. That Mondragon happened to collide with a car whose owner did not have surplus disposable income does not absolve him of responsibility for the consequences of his negligent act. The court properly considered the particular facts surrounding the incident, including Austin's financial condition, in determining the compensable time period.

Id. at 195.

Ultimately, the court in *Mondragon* held that it was completely appropriate to award loss of use damages that went far and beyond the actual market value of the car itself, especially in the face of such egregious behavior on the part of the defense: "We note at least two other Texas courts have affirmed awards derived from these rules even when the result was to award loss of use damages that exceeded the total value of chattel that had been only partially damaged." *Id.* at 196 (citing the appellate decisions in *Metro Ford Truck Sales, Inc. v. Davis,* 709 S.W.2d 785, 790 (Tex. App.—Fort Worth), *affirmed on rehearing,* 711 S.W.2d 145 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.), which awarded $74,016 for loss of use of a truck valued at $48,500), and *McCullough-Baroid Petroleum Svc. v. Sexton,* 618 S.W.2d 119, 120 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.), which awarded $30,880 for loss of use of equipment valued at $30,000).

In further support of its holding, the court reasoned that, if it were to limit loss of use damages to the plaintiff in such a case:

> …[W]e would be penalizing him for his lack of financial resources, denying him recovery of the damages he suffered because of Mondragon's negligent act, and allowing the insurance company to reap the benefit of its refusal to pay the meritorious claim. The law does not permit or require such a result.

Id. at 194.

It is indisputable that the work truck is not a total loss, and can be repaired for less than the market value. We have produced the two damage repair estimates, which are in the range of just over $6,000.00 to just under $8,000.00. The pre-accident market value of this Ford F350, with all the options and features that have been determined to be on the vehicle, and with the notated mileage of just over 88,000 miles, is over $19,000.00 in "good" condition (or even if conservatively determined to be in "fair" condition, still over $18,000.00). We have enclosed the Kelley Blue Book valuation report for this vehicle.

As such, there is no excuse for your company's appalling refusal, for almost a year and a

half now, to fully and fairly compensate our client for the damage to his vehicle, which has rendered it non-drivable most of this time. You will be held liable to pay for not only the repairs, but also the loss of use damages.

As to the issue of what the appropriate measure for loss of use damages should be, *Mondragon* and other cases provide the guidance for the courts. One way a plaintiff may prove up loss of use damages is to establish the reasonable rental value of a substitute car. *See, e.g., Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984). Using this analysis, the *Mondragon* court noted that the parties in the *Luna* case stipulated the reasonable rental value of a car to be $20.00 per day, the only dispute being over what length of time that should be computed. *Mondragon*, 954 S.W.2d at 193. The court quoted the *Luna* decision, stating that the "period of compensatory loss of use will be the amount of time the plaintiff was deprived of the loss of use of the automobile." *Id.* at 194 (adding that, "the thing to be kept in view is that the party shall be compensated for the injury done"). In fact, the *Luna* court had even held that a plaintiff may recover loss of use damages even though he or she had not actually expended money renting another car. 667 S.W.2d at 118-19 (reasoning that to condition compensation on financial ability to rent a substitute car would deny a plaintiff compensation for the damages resulting from the defendant's wrongful act). Accordingly, one valid measure of our client's loss of use damages in this case, according to both the Texas Supreme Court in *Luna* and the Third Court of Appeals in *Mondragon*, would be the reasonable rental value (e.g., $20.00 per day) of a substitute car, over the one-and-a-half year period (up to the date of this demand) that he has been without it, due to your insured's negligence and your appalling refusal to pay for it.

Keep in mind that the case law also makes clear that reasonable rental value must be based on a comparable vehicle. So, while the parties in the *Luna* case could stipulate that $20.00 per day was a reasonable rental value, given what the plaintiff's damaged vehicle was, this would not be a sufficient comparable vehicle rental value for our client, given that he was driving a full-size work truck and depended for some income on having a truck with high-load carrying and towing capabilities. We have contacted a large number of rental companies to determine what would be the reasonable rental amount for a full size work pick-up truck of this type. Most of them do not even carry this type of vehicle in their rental fleet. As for the ones that do, please see the following:

- Longhorn Rentals: $100.00 per day for a full-size pick-up truck with towing capabilities. First 100 miles included; after 100 miles, additional mileage charges.

- Avis Rental: $119.00 per day for a full-size pick-up truck, but with no towing capabilities and no towing allowed. This would not be a comparable or useful rental for our client.

- Enterprise Rental: $69.00 per day, but only a Ford F150, not a full-size Ford F350 work truck such as our client's (or an equivalent). Towing hitch capabilities.

As such, it is clear that it would cost upwards of $100.00 per day for our client to rent a reasonable and comparable vehicle (full-size work truck with towing capability).

On another note, our client has every intention of being honest and not claiming any more than what he is owed. He was able to do small repairs on his truck subsequent to the collision (what he can best describe as "band-aid fixes"). It was not until approximately two (2) weeks after the collision (i.e., beginning of June 2009) that the leaking fluid and other problems caused the truck to become inoperable. Because he was out of work for a good deal of time afterwards, and racking up large medical bills for treatment, it took him a very long time to save up some money to pay for more serious repairs on the truck. It was in December of 2009 that he was finally able to put some money towards getting the truck into drivable condition (although certainly not optimal, pre-accident condition). The truck was able to operate from December 2009 until April 2010, when it once again broke down from the stop-gap repair measures. It has been non-drivable since.

By our calculations, this totals 12 months (from beginning of June 2009 to end of September 2010, minus the approximately four months during which he was able to get the truck running) of loss of use sustained by Mr. Doe. 12 months x 30 days per month x $100.00 per day = $36,000.00 in loss of use damages. Be advised also, that even if no other damages (e.g., medical expenses, lost wages, pain-and-suffering) increase, this is one category of damages that will <u>continue to increase by law</u> for every day that the loss of use continues, and will be fully recoverable upon final trial (which, if suit were filed this year, may ultimately take place in late 2011, if not early 2012).

If you are in doubt that we have litigated and won on this issue before, please be advised that the undersigned has recently won a jury trial in Williamson County, where loss of use was one of the key contested issues, among others:

Cause No. 09-0367-CC4; *Connie LaRae Robinson v. Raunel Arroyo Avila and Christianson Air Conditioning & Plumbing, L.L.C. d/b/a Christianson Air Conditioning*; In the County Court at Law No. 4, Williamson County, Texas.

In this trial, concluded in August of this year, the undersigned successfully obtained a verdict and judgment for $9,000.00 in loss of use damages, over and above the $15,000.00 for property damages (not to mention recovery for the medical expenses, lost wages, pain and suffering, and other items, e.g., court costs, pre-judgment interest, etc.).

The judgment entered in that case has been enclosed for your records.

<u>Past Medical Expenses</u>

1.	St. David's Round Rock Medical Center	$ 1,510.00
2.	Capitol Emergency Associates	$ 651.00

3.	Austin Radiological Association	$ 80.00
4.	Lippe Chiropractic Center	$ 5,704.20
5.	Associated Neurological Specialties	$ 945.00
6.	Joseph T. Powell, M.D.	$ 310.00
7.	River Ranch Radiology	$ 8,069.50
	Total Past Medical Expenses:	**$ 17,269.70**

As stated above, the hard guitar case flew forward in the impact and struck Mr. Doe in the right side base of the skull, just above the right side posterior neck area.

He presented to the emergency room of St. David's Round Rock Hospital on the day of this automobile accident, with chief complaints of neck, back, and shoulder injuries, with specifically mentioned "numbness in the upper extremity." The triage nurses found moderate tenderness in the neck and in the right shoulder. Curtis Vard, M.D. was the attending emergency room physician. He assessed moderate tenderness in the posterior part of the neck and in the right shoulder, and ordered X-ray views of the cervical spine and right shoulder. Thankfully, the X-rays were negative for any fractures or dislocations. He was diagnosed with cervical strain and right shoulder sprain, secondary to the motor vehicle accident. He was discharged with a sling for the right arm, and told to have very limited use of the right arm and shoulder for the next seven (7) days. He was also prescribed both pain and muscle relaxant medication to control muscle spasms. He was advised to follow up as needed with a primary care clinic within a week.

Over the next two days, the symptoms persisted and worsened. He was suffering extreme neck pain and muscle spasms, tingling into the right shoulder and arm, pain, soreness, and stiffness along the back, right knee, and right hip, and symptoms of disorientation and dizziness consistent with the blow to the rear base of the skull. He obtained a referral to see Albert M. Lippe, D.C., of the Lippe Chiropractic Center, and presented for first follow-up since the emergency room visit, on May 20.

On that May 20 exam, Dr. Lippe notated and documented all of the following findings: a contusion (bruise) and swelling, 15 x 20 mm, on the right occipital area of the skull (according with the patient's complaint of being struck there in the back of the head by a hard case); headaches; neck, mid-back, and lower back pain; right knee and leg pain; sharp pain with motion of the neck / head; "severe" spasms of the cervical and thoracic para-spinal musculature (as you are aware, muscle spasms are rapid, involuntary muscle contractions, which are a clear and objective sign of muscular trauma; muscle spasms cannot be "faked"); severe tenderness to palpation; and, symptoms of post-concussion syndrome, e.g., insomnia, forgetfulness, vertigo (dizziness), headaches, photo-sensitivity, and tinnitus (ringing in the ears).

Dr. Lippe set Mr. Doe up on a reasonable and conservative treatment plan of three (3) times per week for the short term, aimed at resolving the pain with manual therapy, electrically stimulating the muscle healing processes, and teaching home exercise techniques to strengthen the affected and surrounding areas. Additionally, even on this first visit, Dr. Lippe recommended a referral to a neurological specialist in order to investigate the head injury and numbness/tingling from the neck outwards.

Mr. Doe was able to get an appointment with Robert Cain, M.D., a neurologist with the Associated Neurological Specialties clinic in Austin, on June 8. Dr. Cain conducted physical testing and then EEG testing, which was normal as to the neurological systems. He then referred him for both an MRI scan of the brain, and an MRI of the cervical spine (due to findings of pain with flexion and extension of the neck and rotation of the head, as well as right eye shooting pain upon extension of the head to the right). Thankfully, the MRI of the brain was normal. However, the MRI of the cervical spine revealed some clear, objective, and serious findings, most notably: posterior disc bulge at C4-5, with possible impingement of C5 nerve root; and, even worse, "large" disc herniation at C6-7, extending towards right neural foramen and possible impingement on right C6 nerve root.

In light of these findings, Dr. Lippe also had to alter the treatment plan to include conservative care for decompression of the spine in order to relieve as much of the inflammation and nerve irritation of the cervical spine as possible. By mid-July of 2009, after diligently attending scheduled treatment sessions with Dr. Lippe, Mr. Doe reported feeling "about 45-50%" improved in his symptoms. However, as you are of course aware, a herniated disc is a permanent, organic injury to the spine, and cannot "resolve" itself the way soft-tissue sprains and strains will do over a period of time. The best that can be done is pain management, either through a combination of medications and physical therapy (which Mr. Doe was doing with Dr. Lippe), or with steroid injections (which Mr. Doe very much wished to avoid). Other than that, a herniation can only be addressed through surgery.

By late August, Mr. Doe was getting understandably frustrated with the persistence of his neck and right shoulder issues (most of all), since the collision. There were other areas of complaint as well, in the back, legs, and knees. He decided to go for a second opinion to Joseph T. Powell, M.D., a Board Certified physical medicine and rehabilitation specialist in Austin, on September 3, 2009. Dr. Powell did full range of motion testing and palpated all areas. He specifically notated "borderline impingement sign" in testing of the right shoulder. Because of Mr. Doe's aversion to potent prescription medications, Dr. Powell dispensed him some Salonpas analgesic patches that could be directly applied to affected areas as needed. He recommended that he continue the therapeutic treatment with Dr. Lippe, and he also referred him for an MRI of the right shoulder.

The shoulder MRI was conducted on September 14, which revealed the following objective findings: edema (swelling) in the marrow of the acromion (i.e., "ball" of the shoulder joint); partial tear (25% thickness) of the bursal surface of the supraspinatus tendon; and, tear of the superior labrum. All of these findings were consistent with Mr. Doe's persistent and documented complaints of right shoulder pain and mobility symptoms since this accident.

Dr. Lippe continued to treat Mr. Doe until the last scheduled visit on October 23, 2009. By that visit, Mr. Doe had achieved what he described as 70-75% improvement in overall symptoms, and certainly not a return to 100% of pre-injury condition and function. Shortly after that visit, he moved to West Virginia, where he was offered some regular work and income by a friend. Mr. Doe stayed in West Virginia for over four (4) months, and diligently continued to perform his home exercise plan as instructed by Dr. Lippe, to try and maintain the improvement levels he had achieved thus far.

Upon returning to Texas full-time in April of 2010, Mr. Doe went back for some follow-up evaluation to Dr. Lippe, complaining of persistent and aggravated neck and right shoulder pain, never having fully resolved since the May 2009 impact. At this point, Dr. Lippe treated him on more of a maintenance basis, rather than an active three time per week basis. He made an average of two or so visits per month from mid-April 2010 to late August of 2010. The goal has been to keep Mr. Doe as independent as possible on a home exercise plan and self-care regimen, to manage his serious injuries.

Future Medical Expenses

As you can only begin to imagine, Mr. Doe has suffered a miserable year and half since the May 2009 accident caused by your insured's carelessness, negligence, and recklessness. He has suffered a permanent injury which has fundamentally changed the nature of his cervical spine for the rest of his life. This is also to say nothing of the objective tear findings in the MRI of the right shoulder. This is not a case of mere "soft tissue" injury (e.g., strain / sprain), and we will refuse to negotiate it as such.

Once the cervical disc's pressurized nucleus pulposus herniates (i.e., breaks through the torn annular barrier), it does not go back in. As such, this is not an injury which can heal itself, unlike a strain or sprain, which generally resolves within a couple of months' time. The best that Mr. Doe can do is pain management (e.g., medication) combined with exercise therapy (which he has done for many months in-clinic, and continues to do at home) to keep the musculature mobile, strong, and supple, intended to keep the injury from getting worse. It is inevitable at this point that he will have continued problems, as even his documented notes from Dr. Lippe show that basic activities of daily living cause significant aggravation and exacerbation of his neck and shoulder pain. These basic activities of daily life are taken for granted by people with healthy spines with no objective disc injury. However, it would take very little to cause a serious worsening of his injury, whereby the disc could herniate even further, to graduate from an extrusion to becoming a full-blown sequestration, causing serious impingement of nerve roots, and much more serious neurological pain complaints than the ones he has already dealt with over the past year and a half.

As such, there is no question he has future medical expenses ahead of him, even if his injury does not get worse. He will have to continue to manage the pain, perform the home exercises, and may have to return for more physical therapy to supplement the at-home exercises. He has also been discussed as a candidate for epidural steroid injections and/or potential cervical fusion surgery (please see discharge summary and narrative of Dr. Lippe).

We are experienced with these types of injury cases and take into account all of these factors when negotiating them. Just to give you a sample of the type of presentation we can make to a jury regarding these injuries, we have included a sample of some very helpful, detailed medical literature on birth and progression of disc herniations.

Dr. Lippe has conservatively estimated at least **$1,800.00** in future medical expenses geared at conservative pain management, therapeutic treatment, and exercise instruction.

Pain and Suffering, Physical Impairment, and Mental Anguish

Many things have been radically altered in Mr. Doe's life since this incident occurred. He has lost the use of a reliable, fully equipped, full-size work truck, for both work and recreational use. He has lost regular employment with an excellent facility in Lockhart as a corrections officer. He has lost the full use and mobility of his neck and right shoulder, and has permanent partial impairments there.

In addition, he has lost out on another activity which he greatly enjoyed and which meant a great deal to him, i.e., his role as singer and guitarist with his band, Atomic Strawberry. As you can see from the enclosed documentation, this was more than just a passing fancy; this was a serious hobby and passion of his and his band mates. He and the band used to play and rehearse together very seriously and frequently, and were booked for quite a number of local shows and live music venues. We have enclosed flyers pertaining to their bookings and performances in various bars, clubs, and music shows on the following dates, among others: October 11, 2008; October 17, 2008; November 22, 2008; November 29, 2008; December 5, 2008; December 13, 2008; May 22, 2009; and, June 19, 2009. Mr. Doe's last time to play with the band and do rehearsals was in June of 2009, as he was in too much pain and difficulty from holding a guitar strap around his neck, carrying and playing a guitar for long periods because of his shoulder, and concentrating and playing in loud music venues because of his head and neck injuries. He sadly had to leave the band, which is yet one more example of the way his life has been turned upside down due to your insured's actions on May 17, 2009.

Loss of Earnings

1.	The GEO Group, Inc.	$ 3,600.00
	Total Lost Wages:	**$ 3,600.00**

As misfortune would have it for Mr. Doe, he had only recently begun working as a corrections officer for a prison facility in Lockhart (owned by the GEO Group, Inc.) when this car collision happened. He applied and was put through the pre-employment physical examination and testing (which was quite rigorous, considering how stressful the physical

demands of this job were), in late April of 2009. A copy of that pre-employment physical is enclosed with this demand. As you can see from that physical, he was determined to have:

- Good body build and posture
- No chest tenderness, deformity, or masses
- Good heart with no abnormalities, and good lung function with no difficulties
- Full range of motion in all extremities upon musculo-skeletal exam
- No swelling or deformities in any of the extremities
- No signs of pain/impairment upon straight leg raise (as you are no doubt aware, straight leg raise testing is one way of determining if there are any herniated discs or nerve root impingements in the lower spine)
- No abnormal curvature, pain, or tenderness in the neck/back
- Full coordination with no weakness/numbness/paralysis upon neurological testing
- Fully appropriate behavior, speech, and orientation upon mental testing
- His previous medical history was pertinent only as to the following three (3) items:
    - Rhinoplasty in 2001
    - Right limb amputation in 1996 (our client had the top-most knuckle joint, i.e., only the joint containing the fingernail, of his right ring finger, severed)
    - Tonsillectomy in 1982
- He stated no previous accident history whatsoever
- The only other out of the ordinary finding was that he had tattoos on both shoulders
- He had no disability determined by any doctor, nor was he under any doctor's care as of the time of this pre-employment physical

Based on the above rigorous testing and examination (which had to be thorough, given the type of job being applied for), Mr. Doe was found to have full physical health and capability to serve as a prison correctional officer. Accordingly, he began working a full 40-hour per week job, as of late April, and was working up until mid-May when he had the extreme misfortune of crossing paths with your insured. He was still within his initial 90-day probationary employment period when he was badly injured by this collision.

As you can see from the enclosed pay stubs, he could not even earn more than two (2) full paychecks with his employer before being injured. His first paycheck covered the 40-hour (one week) period ending May 3, 2009, and his second paycheck covered the 76-hour (two week) period ending May 17, 2009 (the very day this fateful collision occurred). It goes without saying that after suffering serious neck injury, shoulder impairments, and minor head injury, all described in detail above, he could not work in this field any longer and had to be let go. He had not worked long enough to earn any severance pay, paid time off, sick leave, or other such benefits (stated specifically on the paychecks submitted with this demand).

Our calculation of lost wages could be much higher than the figure asserted above, since it is quite likely he would still be working at this facility if not for this collision and his injuries. However, in an attempt to be reasonable in resolution of this claim, we are calculating at the very least a 90-day guaranteed work period (which represents the initial probationary employment period). This calculates to 12 total work weeks, of which he could only work the first three (3) weeks before his injuries occurred. This leaves nine (9) weeks of work he would have had but

for being injured. At 40 hours per week, at his hired rate of $10.00 per hour, this produces a total of $3,600.00 in lost wages.

SETTLEMENT DEMAND

As to the property damage claim, we will be reasonable and take the average of the two repair estimates, which yields a mid-point figure of **$6,950.00**. As to the loss of use claim, as calculated above, the vehicle has been non-drivable for 12 months as of the date of this demand, which per the Texas Supreme Court case law, can be compensated at $100.00 per day reasonable rental value (a full-size towing work truck) for the entire time it has been unrepaired, totaling **$36,000.00** in loss of use damages. This produces a total of **$42,950.00**, which must be paid in exchange for a full and final release of all property damage claims. As you have been advised, the loss of use damages will only continue to increase for as long as this claim is unresolved.

As to the reimbursement of our client's medical expenses and lost wages, and compensation for his future medical expenses, physical impairment, physical pain and suffering, and mental anguish, as well as valuation of punitive damages for your insured's gross negligence and outrageous conduct, demand is hereby made for **$75,000.00 or the policy limits,** whichever is less, in exchange for a full and final release of all claims against your insured.

As authorized by *Allstate Ins. Co. v. Kelly*, 680 S.W. 2d 595 (Tex. Civ. App.–Tyler 1984, writ ref'd n.r.e.), this offer of settlement will remain open for fourteen (14) days after your receipt of this letter. If, after the expiration of fourteen (14) days, the terms of this letter have not been accepted by tender of funds, the offer will be considered rejected and automatically withdrawn. Because of the substantial probability a verdict would exceed $75,000.00 or the policy limits, whichever is less, based upon material furnished to you in support of this demand, should we subsequently proceed to trial and obtain a judgment in excess of the policy limits, your insured will be expected either to pay the excess or promptly take action against your company for the full amount of the judgment, including pre-judgment interest, as authorized by *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W. 2d 544 (Tex. Comm'n App. 1929, opinion adopted) and *Cavnar vs. Quality Control Parking,* 696 S.W.2d 549 (Tex. 1985).

It would appear that your insured's interests and First Acceptance's interests are in conflict, in view of this offer of settlement. Therefore, pursuant to applicable insurance law, a copy of this letter **must be forwarded directly to your insured** so that he may review it and consult with counsel of his own choice, regarding the extent of his personal exposure.

Finally, First Acceptance's duty under these circumstances is detailed in *Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656 (Tex. 1987). We hope that you will give this matter serious attention, so that it may be resolved within the time limits set forth in this letter.

Let us assure you that if your intention is to make paltry settlement offers in light of all the foregoing evidence, expecting that we will simply "go away," this will not happen. The undersigned attorney has no problem with pursuing cases all the way through jury trial, for as long as it takes to achieve full, fair, and just recovery for his clients, and has been doing so in

Travis County, Williamson County, Dallas County, Bell County, Hays County, and other jurisdictions, for many years now.

The trial of this cause will be in Williamson County Court at Law, should it be necessary to get to that point. In just August of this year, as discussed above, the undersigned obtained a very successful jury verdict in County Court at Law No. 4 (the Honorable John B. McMaster presiding), and would be more than happy to appear in that court again. In that case (Robinson vs. Christianson Air Conditioning), the traffic collision occurred in early November of 2007. After the liability carrier ruthlessly denied our client's claim, relying upon a so-called "witness" whose purported observations ran directly contrary to two (2) other eyewitnesses to the event, our client made the initial mistake of going to another attorney, who was likely afraid of trial and had no interest in pursuing a case where the carrier simply denied liability. It was not until mid-2008, when this previous attorney dropped her case like a hot potato, that the client came to our firm. The undersigned filed suit in the beginning of 2009, and vigorously pursued the case, taking all the depositions and conducting all written discovery that was necessary.

It was not until February of 2010 that the carrier finally altered its stance and even then, made only a paltry $8,000.00 offer for our client's extensive property damage, loss of use claim, and medical expense related damages. The carrier obstinately persisted in that $8,000.00 offer, all the way up to trial. Trial was ultimately held in August of 2010 (the defense successfully filed one motion for continuance, a common delay tactic with which we are well familiar and prepared to address, to reset the trial from its original April 2010 setting). The jury ultimately held the defendants 70% liable for the collision, and awarded damages which, after taking into account the 30% offset, and then adding interest and court costs, came out to $23,000.00. This is not even to mention or factor in the over $20,000.00 of defense costs that the carrier must have paid to its outside counsel to ridiculously defend the lawsuit all the way from filing, through discovery and mediation, until trial and verdict. A copy of that file-stamped judgment is enclosed.

Plainly put, the undersigned has no intention of going away for an insulting settlement amount, and still believes the title of 'attorney' means something: being willing to fight through the entire process to get the result to which his client is justly entitled. This firm does not do a "volume" practice; we do not amass hundreds of cases, and seek quick turnovers, dropping cases that seem like they will be "long" or "difficult." Your offers should be made accordingly.

ENCLOSURE / ATTACHMENTS

In order to assist you in evaluating this demand, we have produced copies of all of the following items on the enclosed CD-ROM:

(1) The police accident report;

(2) The eyewitness statements of John Smith, Mary Lynn Smith, and John Brown;

(3) The two (2) vehicle damage repair estimates, and the Kelley Blue Book value for our client's Ford F350 pick-up truck;

(4) Photographs of the vehicle damage and underbody, as well as an aerial satellite view of the accident scene;

(5) All medical records and itemized bills for our client's injury treatment;

(6) Detailed Internet medical literature regarding disc herniation;

(7) Documentation of our client's pre-employment physical exam and testing with the GEO Group, Inc.'s prison facility, as well as pre-accident earnings records;

(8) Documentation of our client's busy performance schedule with the band (Atomic Strawberry) prior to this incident;

(9) Texas case law pertaining to loss of use damages for an unrepaired vehicle; and,

(10) Documentation of previous trial judgment obtained by the undersigned in the Williamson County court.

We look forward to speaking with you in an effort to resolve this matter fairly and promptly. Thank you.

Sincerely yours,

Ali A. Akhtar
Attorney at Law

Austin Office
AAA/ns
Enclosure