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September 29, 2006

By Federal Express
Honorable Nan R. Shuker
5220 Loughboro Rd., NW
Washington, DC 20016

Re: My client: Michael P. Doherty
Defendants: Denison Landscaping & Nursery, Inc./ Marcos Flores
Date of Incident: 4/18/2005

Dear Judge Shuker:

Please accept this submission and accompanying attachments as the Plaintiff's Mediation Statement.

I. Factual Background

A. Facts of the Collision

I represent the Estate of James Brian Doherty who was struck and killed by a pick-up truck while crossing 16th Street, NW in the District of Columbia. Just after midnight on 4/18/05, Mr. Doherty was walking within the crosswalk as he attempted to cross 16th Street, NW at the intersection with U Street. The pick-up truck was operated by Marcos Flores, an employee of Denison Landscaping & Nursery. Mr. Flores, proceeding south on 16th Street, ran a red light and struck Mr. Doherty in the crosswalk. The impact propelled Mr. Doherty across the intersection, and caused his death. Mr. Flores fled the accident scene, and proceeded the wrong way on a one-way street (Caroline Place), while being chased by witnesses. His pick-up was eventually boxed in by the witnesses and Mr. Flores was arrested by the police. Mr. Flores was operating the Denison Landscaping pickup truck while intoxicated and his BAC was recorded as .25 on an alcohol breath test. According to the Assistant United State Attorney who prosecuted the case, this is the equivalent of 12 standard drinks consumed in 1 hour. The arresting officers and witnesses will testify that Mr. Flores was too drunk to stand up and was incoherent at the scene. The police found a 12 pack of Heineken in the truck, some of which were open. Following the

arrest, Mr. Flores tested positive for cocaine in his system.

Mr. Flores was provided the pick-up truck by his employer, Defendant Denison Landscaping. There is insurance coverage for the vehicle with CNA insurance company. Defendant Denison may deny that Mr. Flores was permitted to use the truck after work hours and after he commuted to his home. From counsel's experience, this defense is very difficult absent a writing signed by Mr. Flores before the collision in which he acknowledges he is not allowed to drive the vehicle for any personal use. Even if such a writing were to exist, it is impossible to enforce such a condition on an employee, especially if he did not own his own vehicle. These facts would have to be explored in discovery.

B. Status of Litigation

The Estate has filed a Complaint in the Superior Court of the District of Columbia for both wrongful death and survival act damages. The Complaint names Mr. Flores and his employer and owner of the pick-up truck, Denison Landscaping. The Complaint alleges negligent operation of the pick-up truck by Mr. Flores and alleges claims against Denison based on respondeat superior and wrongful entrustment. The Complaint also alleges the defendants are liable for punitive damages.

The Estate has served the Defendants, who are represented by counsel. The insurer of both defendants is CNA. All parties have exchanged discovery requests. Due to a agreement among counsel and CNA that an effort should be made to settle the case before responding to the discovery requests, the parties have not responded to the outstanding discovery. Nor have any depositions been noticed. Consistent with this position, the parties have succeeded in extending the discovery deadlines as set forth in the Court's Scheduling Order.

II. Liability

Mr. Flores was conduct was willful and wanton, and was outrageous and reckless towards the safety of the Decedent. He not only ran a red light and struck a pedestrian in a cross walk, but he was traveling at recklessly high rate of speed, he fled the accident scene, and he was driving drunk, with a .25 BAC. There is evidence the police downloaded the black box from the truck which revealed Mr. Flores was traveling about 40 MPH in a 25 MPH zone. Further, Mr. Flores had previously been convicted of drunk driving in 2002 in the District of Columbia. There is also evidence of another alcohol offense from Maryland. Finally, Mr. Flores tested positive for cocaine after his arrest. Mr. Flores pleaded guilty to involuntary manslaughter and DWI on 12/7/05. He was sentenced to 7 years of incarceration by the Honorable Judith Retchin.

The Estate has alleged that Mr. Flores had permission from his employer, Denison Landscaping, to operate the Chevrolet pick-up truck after normal work hours. The Estate believes that discovery will establish that Denison Landscaping knew or should have known of the fact the Mr. Flores was unfit to operate a motor vehicle due to his abuse of alcohol and possibly cocaine. A record check would have revealed the prior DWI conviction and it is inconceivable that the representatives of Denison could not have been exposed to evidence of Mr. Flores addiction to alcohol, an addition which was acknowledged by Mr. Flores' defense counsel at the sentencing.

III. Damages

The Estate has filed a Complaint in the Superior Court of the District of Columbia alleging damages under both the Survival and Wrongful Death Statutes. The Decedent is survived by his mother and 3 adult brothers. One of the brothers, Michael Doherty has qualified as the personal representative. The Doherty family resides in Boston, Massachusetts.

A. Survival Action

The survival action is brought on behalf of the Estate and permits an award for medical expenses and for bodily injury, conscious pain and suffering , mental anguish and discomfort experienced by James Doherty prior to his death. The survival action also permits an award for the economic loss suffered by the Estate. This award is based on the amount of money the deceased would have accumulated over the course of his lifetime, which requires a deduction for personal consumption and taxes.

James Doherty (hereinafter "Decedent") was two months shy of his 46th birthday when he died. He was single and did not have any dependents.

1. Bodily Injury, Pain and Suffering & Medical Expenses

The collision occurred at approximately midnight. The records from Howard University Hospital reflect that Decedent was unconscious when he arrived at the hospital and was pronounced at 12:38 AM. The autopsy report lists the cause of death as "multiple fractures with internal hemorrhage due to blunt impact trauma." The manner of death is recorded as "ACCIDENT."

The Estate has engaged a pathologist, Dr. Jonathan L. Arden, who will testify that Decedent was most probably conscious after being struck by the drunk truck driver. These facts will not only support a claim of post collision suffering, but they will also support a claim pre-injury fright as Mr. Doherty likely realized he was about to die. The fact that the Decedent may not

have been conscious for more than a brief time should not seriously affect Defendant's exposure given the likely anger of the jurors at the conduct of the Defendants. Even a few seconds of consciousness will probably open the door to a seven figure award for agony and suffering.

The Estate's claim for post-impact pain and suffering will get to the jury despite any defense argument that there exists no direct evidence that Decedent was conscious after the impact. The lead case on this subject, Doe v Binker, 492 A.2d 857 (1985) rejected the argument that pain and suffering must be established by direct evidence. Instead, the Court held that "in survival actions, the circumstances surrounding an accident often preclude the introduction of direct evidence of consciousness or of pain an suffering....[T]he existence of conscious pain and suffering may be inferred from the nature of the decedent's injuries or the circumstances surrounding his death." Doe v Binker, 492 A2d at 861. Where circumstantial evidence is sufficient to allow the jury to draw a reasonable inference of pain and suffering, a verdict will stand. Id. The majority in Doe v Binker refused to adopt the dissent which would have rejected the claim for pain and suffering because the Plaintiff offered "no evidence of Mr. Binker's consciousness" between the impact and death. Where circumstances will allow the jury to infer conscious pain and suffering, it is not necessary that the Estate present any direct evidence, expert or otherwise.

A claim for pain and suffering followed shortly by death is a matter for the jury. "It will be up to the trier of fact to determine whether Green was conscious at all after the accident and how much did he suffer "Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d 379, 394 (D. Md. 2001) (decedent driver struck utility pole head-on).

The Estate has also made a claim for pre-impact fright. This cause of action is recognized in Maryland, and almost certainly will be recognized in DC. Benyon v Montgomery Cablevision, 718 A2d 1161 (Md. 1998). In Benyon, the decedent died instantly after his vehicle skidded 71 feet and rear-ended a tractor trailer. The Benyon Court held the skid marks established sufficient circumstantial evidence to support a reasonable inference the decedent experienced pre-impact fear or fright. Despite the absence of any direct evidence of pre-impact fright, the jury awarded $1,000,000.00 for this element of damage. In accord is Smallwood v Bradford, 720 A.2d 586 (Md.1998), allowing pre-impact fright damages where there was circumstantial evidence (defensive driving) the decedent driver was aware of the impending collision. Smallwood, 720 A2d 591-92. In accord: Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97 (D.D.C. 2000)(noting such element of damage is recoverable but finding the evidence did not support the claim). The claim for pre-impact fright was also upheld in Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d 379, 394 (D. Md. 2001) (decedent

driver struck utility pole head-on). "Defendant's argument that four to six minutes is too brief a time to recover pain and suffering is without merit. The Court in *Tri-State*, held that recovery may be had although the period between accident and death is short. *Tri-State* at 125. It will be up to the trier of fact to determine whether Green was conscious at all after the accident and how much did he suffer."

In the instant case, there is also circumstantial evidence that the Decedent experienced pre-impact fright as the pick-up truck bore down on him in the cross-walk. The oncoming headlights and the sound of the truck's engine provide more than enough circumstantial evidence of Decedent's pre-impact fright to uphold any verdict on this element of damage.

Decedents medical expenses for treatment from this collision were approximately $3,000.00.

2. Economic Loss

Employment and tax records furnished the Defendants reflect that Decedent held a very stable job at George Washington University Law School as an administrative assistant from September 2000 to January 2004. His total income for 2003, the last full year at George Washington, was $36,560.00. Decedent resigned from GW and his job at the law school in January 2004 to live in Massachusetts with his mother, who was ill. He returned to Washington later in 2004 and worked a number of different jobs as reflected by the W-2 forms. Decedent spoke of finishing his college degree and applying to law school. For that reason, he sought employment in the legal field and was hired in November 2004 by Dexter Kohn, Esq. as a legal assistant. He remained a full time employee of attorney Kohn at the time of his death. Mr. Kohn spoke very highly of Decedent, as did his supervisor at GW Law school, Renee DeVigne, Associate Dean of Student Affairs for GW Law School. Decedent also picked up two part-time jobs in 2005 shortly before his death, one with Capital Video Sales and another back at GW law school, where he scheduled to proctor a law school exam a day or two after he died.

Decedent graduated from Catholic Memorial High School in Roxbury, MA in 1977. He attended 2 years of college at the University of Massachusetts/Amherst (1978-1980) as a candidate for a degree in Special Education. He also attended Northeastern University in Boston part-time (1993-1996) earning 1 year of credits as a candidate for a Marketing degree. He was also employed full time at Northeastern during these years in the Office of Academic and Student Affairs. From 1980 to 1989 Decedent was employed at a Teacher's Assistant at Gaebler Junior

High School in Waltham, MA.

a. Vocation Rehabilitation Report

The Estate retained the services of Estelle Davis, PhD, a well respected expert in the field of vocational rehabilitation. Her report dated July 19, 2006 is attached hereto. She concludes, somewhat conservatively, the Mr. Doherty would have been earning nearly $50,000.00 within 5 years of his death. Based on anecdotal evidence, Counsel for the Estate believes the paralegals in the District of Columbia earn in excess of $60,0000.00. However, these higher salary figures are not the basis for the conclusions of the economist, who instead only relied on the salary figures provided by Ms. Davis.

b. Economist Report

The Estate also retained the services of Thomas Borzilleri, PhD, a well known and well respected economist. His report dated July 25,2006 is attached hereto. Relying on the findings of Dr. Davis, Dr. Borzilleri concludes that the Estate suffered losses of from $195,000 to $203,000. It is noted that evidence revealed that Decedent had extraordinarily low living expenses, as he shared an apartment with a friend and paid very little rent. Dr. Borzilleri ignored this evidence and calculated the losses based on average living expenses for a resident of the District of Columbia. This fact, and the low salary figures used by Dr. Davis lead to the conclusion a jury could easily find the losses to the Estate to be much greater than the figures provided by Dr. Borzilleri.

The Defendants will argue that the Decedent had not accumulated any savings at the time of his death. While this appears to be accurate, it should be noted Decedent had cashed in his retirement plan at GW when he resigned his position in January 2004 to move back to Massachusetts to take care of his mother. Decedent earned less than $10,000 in 2004, and over $5,000 of that sum was earned in November and December 2004 after Decedent was hired by Attorney Kohn. It is clear that Decedent needed his savings for living expenses when he resigned from GW in January 2004. Due to his untimely death, he had not bee re-employed long enough to rebuild his savings.

3. Punitive Damages

The Estate is entitled to an award of punitive damages against Mr. Flores if it proves with clear and convincing evidence that the defendant acted in willful disregard for the rights of the Decedent, and if the defendants conduct was reckless toward the safety of the Decedent. Direct or circumstantial evidence will suffice to establish these elements

of punitive damages. Model Jury Instruction 16-1. The Estate is entitled to a punitive damage award against Denison Landscaping it establishes that Mr. Flores is liable for punitive damages and also establishes by clear and convincing evidence that an officer, director or managing agent of Denison authorized or approved Flores operation of the company truck despite knowing he was a drunk and a danger. Crawford v. Andrew Sys., 119 F.3d 925 (11th Cir. 1997)(upholding jury verdict under Alabama law of $2,250,000 punitive damages for wrongful death based on negligent entrustment). See also, Breeding v. Massey, 378 F.2d 171 (8th Cir. 1967)(citing Arkansas law upholding jury verdict for punitive damages on negligent entrustment claim.), La Croix v. Spears Mattress Co., 2005 U.S. Dist. LEXIS 16867 (D. Ga. 2005)(citing Georgia law in permitting negligent entrustment and punitive damage claims to survive summary judgment), Came v. Micou, 2005 U.S. Dist. LEXIS 40037 (D. Pa. 2005)(citing Pennsylvania law in permitting negligent entrustment and punitive damage claims to survive summary judgment), Shook v. Rossignol Transp., Ltd., 2004 U.S. Dist. LEXIS 5622 (D. Ohio 2004)(citing Ohio law in permitting negligent entrustment and punitive damage claims to survive summary judgment), DeMatteo v. Simon, 112 N.M. 112 (N.M. Ct. App. 1991)(allowing claim of negligent entrustment to support award of punitive damages), Holben v. Midwest Emery Freight System, Inc., 525 F. Supp. 1224 (D. Pa. 1981)(claims for negligent entrustment and punitive damages survive summary judgment).

The Estate is confident that a jury will find that Mr. Flores acted in willful disregard of the rights of the Decedent when he consumed about 12 alcoholic drinks in an hour and then drove the pick-up truck through a red light at a high rate of speed. The Estate also believes discovery will reveal that managing agents of Denison Landscaping were aware of Mr. Flores' addition to alcohol and the fact he was likely to drive while drunk. These claims will likely go to the jury, which could be so incensed by the outrageous conduct of the defendants that it could return seven figure punitives verdict.

B. WRONGFUL DEATH

1. Support for Decedent's Mother

Decedent did not leave any dependents, although it is likely he would have contributed to the support of his mother, Helen Doherty. Helen Doherty is widowed and she is 75 years old (D/O/B: 11/11/30). Her life expectancy on the date of her son's death was about 13 years. Mrs. Doherty has been retired for about 10 years from her position as a bookkeeper at a mental health institution. This claim will need to be more fully explored if this claim does not settle. Decedent was Mrs. Doherty's only unmarried child and he was the most likely of her

children to provide support.

2. Funeral and Burial Expenses

Decedent’s family paid funeral and burial expenses of $12,149.76.

Very truly yours,

encls. Jeremy Flachs