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9 Attorneys for the Plaintiff

10 UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 THOMAS A. WAITE,)

13 Plaintiff,)

14 vs.)

15 THE CHURCH OF JESUS CHRIST OF)
 16 LATTER DAY SAINTS d/b/a)
 17 CORPORATION OF THE PRESIDING)
 18 BISHOP OF THE CHURCH OF JESUS)
 19 CHRIST OF LATTER DAY SAINTS, a)
 Utah corporation, d/b/a CORPORAITON)
 20 OF THE PRESIDENT OF THE CHURCH)
 21 OF JESUS CHRIST OF LATTER DAY)
 SAINTS, a Utah corporation; DONALD C.)
 22 FOSSUM; and STEVEN D. BRODHEAD,)

23 Defendants.)

) **Case No.: CV-05-399-EFS**

) **PLAINTIFF'S MEMORANDUM**
) **OF AUTHORITIES IN**
) **OPPOSITION TO**
) **DEFENDANT'S MOTION TO**
) **COMPEL**

1 Plaintiffs, by and through their attorneys, STEPHEN L. NORDSTROM and
2 RICHARD C. EYMANN, submit the following Memorandum in opposition to the
3 church defendant's motion to compel discovery responses.
4

5 I. INTRODUCTION

6 The church defendant's motion for an order compelling discovery should be
7 denied because it requests attorney work product. Moreover, although protected as
8 attorney work product, the information was previously provided to them.
9

10 II. FACTS

11
12 1. In 2005, after Mark Ryan and Dillon Hanson (missionary passengers
13 involved in the motor vehicle collision), had completed their church mission and
14 returned to their respective homes, they were contacted by J.R. Reese, a representative
15 of Mr. Nordstrom's office. (Declaration of Stephen Nordstrom, page 2, lines 10-12;
16 Ryan Deposition, p. 18, lines 1-5).
17

18 2. With the assistance of Mr. Nordstrom, Mr. Reese prepared questions,
19 which he telephonically posed separately to Mr. Ryan and Mr. Dillon. Mr. Reese
20 recorded their answers in pencil. No electronic recordings of the interviews were
21 performed. (Declaration of Stephen Nordstrom, page 2, lines 13-16).
22

23 3. On November 9, 2006, in the Salt Lake City law offices of the Defendant
24 Church, Plaintiff's co-counsel Stephen Nordstrom took the deposition of Donald
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1 Fossum, the missionary driver of the pickup involved in the motor vehicle collision at
2 issue herein. Plaintiff's co-counsel Richard Eymann was present, along with the
3 Church's defense counsel, Brian Rekofke, Church attorney Tom Walk, and Church
4 representative Richard Black. (Counsel for non-Church defendant appeared
5 telephonically). (Fossum Deposition, p. 4, lines 11-20).

7 4. During the deposition an exchange occurred as to whether Mr. Nordstrom
8 could inquire into a conversation Mr. Fossum had with Tom Walk:
9

10 Q: (By Mr. Nordstrom) Okay. Let me kind of go
11 back to the beginning again, when I talked to you about who
12 you may have spoken with regarding this accident. You had a
13 conversation sometime ago with Mr. Walk. Is that correct?

14 A: Yeah.

15 Q: Was that down in Provo?

16 A: Yeah. That was at my house.

17 Q: Do you remember the nature of that conversation?

18 A: He just asked me questions about it, and I don't
19 recall everything. I have talked about it with so many people
20 and so many times that it's kind of hard to distinguish.

21 Q: Sure. Just tell me what you do remember of that
22 conversation involving him.

23 MR. REKOFKE: Excuse me. That would be attorney-
24 client privilege.

25 MR. NORDSTROM: I didn't realize that Mr. Walk was
26 an attorney for Mr. Fossum. I thought he was – in fact, I don't –
27 did I ever get a notice of appearance from anybody but you, I
think and Andy. Am I missing something here?

MR. REKOFKE: You are missing that he is a lawyer for
various church entities. He investigated that accident. It's the
same thing under Heidebrink versus Moriwaki in the state of
the Washington.

It's privileged, so I am instructing Mr. Fossum not to
answer any questions about – other than he's already answered

1 the general tenor of the conversation and when it occurred. He's
2 not going to answer any questions about his discussions with
3 Mr. Walk.

(Fossum deposition, p. 17, lines 3-25 through p. 18, lines 1-6.)

4
5 5. During the break, Mr. Eymann challenged Mr. Rekofke on the issue of
6 whether he represented any missionaries other than Mr. Fossum, and Mr. Rekofke
7 conveyed that he viewed all missionary witnesses as being represented by himself and
8 Mr. Walk. Mr. Eymann countered that unless they were "speaking agents," there could
9 not be a valid attorney/client privilege objection. (Eymann declaration, p. 3, lines 16-
10 22.)

11
12 6. Mr. Eymann and Mr. Rekofke continued to discuss the issue during
13 subsequent breaks, outside the presence of Mr. Nordstrom. Regarding the issue of
14 direct contact between plaintiff's lawyers and former missionaries, Mr. Eymann cited
15 the case of *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), and
16 Mr. Rekofke acknowledged that he had forgotten about that case, indicating that it
17 might apply. But rather than asking Mr. Nordstrom, Mr. Rekofke asked Mr. Eymann
18 what contacts Mr. Nordstrom had made with missionaries. Mr. Eymann indicated that
19 it was his position that plaintiff's counsel had every right to contact former missionaries
20 who were witnesses unless they were speaking agents. Mr. Rekofke responded that he
21 wanted to return to his office and look at the *Wright* case, and that if he felt he was on
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1 solid ground, he wanted to get a court ruling. Mr. Eymann agreed that that would be
2 fine. (Declaration of Richard Eymann, p. 3, lines 16-26, and p. 4, lines 1-14)

3
4 7. Mr. Nordstrom was not present, nor did Mr. Eymann discuss these
5 conversations with Mr. Nordstrom (until recently). (Declaration of Richard Eymann, p.
6 4, lines 14-16; Declaration of Stephen Nordstrom, p. 2, lines 18-23).

7
8 8. The following day, (November 10, 2006), Plaintiff's co-counsel, Richard
9 Eymann, took the deposition of Mr. Ryan. The same attorneys and representatives who
10 had been present for Mr. Fossum's deposition were again present for Mr. Ryan's
11 deposition. (Deposition of Mark Ryan, p. 4, lines 14-23). During questioning, Mr.
12 Eymann made direct reference to the prior telephone interview conducted by Mr. Reese:
13

14 Q: (Mr. Eymann). I'll represent to you that one of the
15 people that called you who is not an attorney but simply an
16 investigator was JR Reese, . . . but JR Reese was just doing an
17 investigation, and it was done back in 2005, . . . he had a set of
18 questions he wanted to ask you, and he went through and he put
down your answers, and I just want to see today if those
answers are the same today as you gave to him then.

19 (Deposition of Mark Ryan, p. 18, lines 1-11).

20 9. Mr. Eymann then recited each of the questions and Mr. Ryan's answers
21 from the beginning through the end of the interview with Mr. Reese. (Deposition of
22 Mark Ryan, p. 18, lines 18-25, through page 32, lines 1-4). Mr. Eymann also offered to
23 show Mr. Rekofke the actual interview document but Mr. Rekofke declined:
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1 Mr. Rekofke: Dick, just - - before you go on to the next
2 one, you've done a great job of comparing - - of saying what
3 the answer was and then asking if he agrees, and I didn't - - is
4 that what he said in response to the Reese interview?

5 Mr. Eymann: He didn't answer that question in the
6 Reese - - that specific question in the Reese interview, because
7 what he did was he answered - - I think he tried to answer two
8 questions at once, and there's no answer here. I can show you.

9 Mr. Rekofke: No, that's fine. I trust you.

10 (Deposition of Mark Ryan, p. 27, lines 15-25, and page 26, line 1).

11 10. When Mr. Eymann returned to his office in Spokane, he reviewed the
12 Wright case and confirmed that he was correct in his assessment. Mr. Eymann assumed
13 that Mr. Rekofke had done the same, as he never saw a motion for clarification by the
14 court. (Declaration of Richard Eymann, p. 4, lines 17-21).

15 11. Approximately two weeks later, Mr. Nordstrom interviewed James T. Ross
16 by telephone. Mr. Ross was also one of the passenger missionaries involved in the
17 motor vehicle collision. He had been released from his mission in May of 2004, and
18 was now residing in Arizona. Mr. Nordstrom took notes of the telephone interview,
19 which he put into declaration form. (Declaration of Stephen Nordstrom p. 3, lines 1-6
20 and Declaration of James Ross, p. 4, lines 13-14). A copy of the declaration was
21 provided to defendants. (Declaration of Stephen Nordstrom p. 3, line 7).

22 12. On February 26, 2007, Defendants served Interrogatories and Requests for
23 Production concerning Mr. Nordstrom's contacts with missionaries. On March 27,
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1 2007, Plaintiffs responded by objecting to the request as “attorney work product.”
2 However, Plaintiff did indicate that “Mr. Nordstrom’s office has been in direct contact
3 with Mark T. Ryan, James T. Ross, and Dillon Hanson. Information, statements, or
4 declarations from each have previously been provided.”

5
6 13. On April 2, 2007, Mr. Rekofke responded by letter to Mr. Nordstrom,
7 indicating he was seeking “. . . specific information concerning the individuals you have
8 contacted ex parte.” (i.e. Ryan, Ross, and Hanson). (Declaration of Stephen
9 Nordstrom, p. 3, lines 9-13).

10
11 14. Mr. Nordstrom responded by letter dated April 5, 2007, stating:

12
13 Regarding Mark Ryan or Dillon Hanson, we do not have
14 signed declarations or statements from these individuals. We
15 have only the Ross declaration which was previously provided
16 to you. Regarding interviews of Mr. Hanson, Mr. Ryan or Mr.
17 Ross, the memoranda of these witnesses’ oral statements to
18 representatives of this office are clearly work product. They are
19 not discoverable. See *Soter v. Cowles Pub. Co.*, 131 Wn.App.
20 882, 130 P. 3d 840 (2006, Div. III).

21 Defendants responded by filing the motion to compel.

22 III. ARGUMENT

23 The information requested by defense counsel is plaintiff’s work product, and
24 defendants have made no showing of substantial need for this information. FRCP
25 26(b)(3).

1 In referring to decisions by the Washington Supreme Court as well as the United
2 States Supreme Court, the court in *Soter v. Cowles Pub. Co.*, 131 Wn.App. 882, 893-4,
3 130 P. 3d 840 (2006), stated:

4
5 Work product refers to documents prepared by counsel in
6 anticipation of litigation. *Heidebrink v. Moriwaki*, 104 Wn.2d
7 392, 396, 706 P.2d 212 (1985). There are two categories: (1)
8 Factual Information; and (2) Attorney's mental impressions,
9 research, legal theories, opinions, and conclusions. *Linstrom v.*
10 *Ladenburg*, 136 Wn.2d 595, 605-06, 963 P.2d 869 (1998).
11 Disclosure of counsel's memoranda of witnesses' oral
12 statements is 'particularly disfavored because it tends to reveal
13 the attorney's mental processes.' *Upjohn Co. v. United States*,
14 449 U.S. 383, 399, 101 Sup. Ct. 677, 66, L. Ed. 2d 584 (1981).
15 Notes of oral statements gathered during preparation for
16 litigation are included with mental impressions in the 'opinion'
17 work product category. *In Re Firestorm 1991*, 129 Wn.2d 130,
18 159, 916 P.2d 411 (1996).

19 The court may allow an adverse party to discover factual
20 information gathered by an attorney upon a showing of
21 substantial need for the information in preparing the party's
22 case and an ability to obtain the substantial equivalent without
23 undue hardship. *Heidebrink*, 104 Wn.2d at 395.

24 In the present case, the information requested by the defendant church is
25 counsel's memorandum of the witnesses' oral statements. However, unlike counsel for
26 the church, who refused to allow any inquiry into a discussion which took place
27 between an employee of the church and a missionary (Mr. Walk and Mr. Fossum),
28 plaintiffs not only provided defendants with Mr. Ross' declaration, but also a verbatim
29 recitation of the documents Mr. Reese used to interview both Mr. Ryan and Mr.
30 Hanson. (Deposition of Mark Ryan, p. 18, lines 18-25, through page 32, lines 1-4).

1 Moreover, defendant neither alleged nor made a showing of substantial need for the
2 requested information. In addition, such a showing would appear impossible since
3 Defendants have already received most of the requested information, as well as having
4 had the opportunity to interview the same witnesses.
5

6 Further, it is specifically disputed that there was an agreement between counsel
7 that there would be no contact by plaintiff's counsel *ex parte* with individuals affiliated
8 with the LDS church. (Declaration of Richard Eymann, p. 3, lines 16-26, p. 4, lines 1-
9 16). It is also interesting to note that as of this date defendants have taken no action to
10 establish that while on their missions, the missionaries were speaking agents for the
11 church, let alone following their release, as in the present case when all plaintiff's
12 interviews were conducted. The purpose behind allowing interviews of non speaking
13 agents is to advance the policy of keeping witnesses freely accessible to both parties.
14 Wright v. Group Health Hospital, 103 Wn.2d 192, 200, 691 P.2d 564 (1984). Since Mr.
15 Ross, Mr. Ryan, and Mr. Hanson were not speaking agents of the defendant church,
16 they were freely accessible to both parties and defendant's motion to compel is
17 improper.
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22 IV. CONCLUSION

23 Plaintiff's interviews were performed in anticipation of litigation and their
24 memoranda of those witnesses' oral statements is work product. Moreover, there was
25 no stipulation between the parties that plaintiffs would not conduct interviews of
26
27

1 missionary witnesses. Further, plaintiff has previously provided most information
2 concerning those interviews to the defendant church, and the church has made no
3 showing of substantial need that anything else is required.
4

5
6 DATED this 23rd day of April, 2007.

7
8 NORDSTROM & NEES, P.S.

9 By: s/Stephen L. Nordstrom
10 STEPHEN L. NORDSTROM, WSBA #11267
11 Co-Counsel for Plaintiff

12 EYMANN ALLISON HUNTER JONES, P.S.

13 By: Telephonically Approved 4/20/07
14 RICHARD C. EYMANN, WSBA #7470
15 Co-Counsel for Plaintiff
16
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1
2 CERTIFICATE OF SERVICE

3 I, Stephen L. Nordstrom, hereby certify that on the 23rd day of April, 2007, I
4 electronically filed the foregoing with the Clerk of the Court using the CM/ECF System
5 which will send notification of such filing to the following participants:

6 Brian T. Rekofke
7 Witherspoon Kelley Davenport & Toole
8 422 W. Riverside Avenue, Suite 1100
9 Spokane, WA 99201-0302

10 Andrew C. Smythe
11 Paine Hamblen Coffin Brooke & Miller
12 717 W. Sprague Avenue, Suite 1200
13 Spokane, WA 99201-3503

14 s/Stephen L. Nordstrom
15 STEPHEN L. NORDSTROM
16
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22
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24
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27

VIDEOTAPED DEPOSITION OF
DONALD C. FOSSUM

EXHIBIT 1

CONDENSED TRANSCRIPT

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

THOMAS A. WAITE,

Plaintiff,

vs.

THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS dba
CORPORATION OF THE PRESIDING
BISHOP OF THE CHURCH OF
JESUS CHRIST OF LATTER-DAY
SAINTS, a Utah corporation,
dba CORPORATION OF THE
PRESIDENT OF THE CHURCH OF
JESUS CHRIST OF LATTER-DAY
SAINTS, a Utah corporation;
DONALD C. FOSSUM; and STEVEN
D. BRODHEAD,

Defendants.

: No. CF-05-399-EFS

: Videotaped Deposition of:

: DONALD C. FOSSUM



November 9, 2006 - 1:08 p.m.

Location: Kirton & McConkie
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Reporter: Teri Hansen Cronenwett
Certified Realtime Reporter, Registered Merit Reporter
Notary Public in and for the State of Utah



GARCIA & LOVE

COURT REPORTING AND VIDEOGRAPHY

36 South State Street • Suite 1220 • Salt Lake City, UT 84111 • 801.538.2333 • Fax 801.538.2334

WAITE v. THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS

November 9, 2006

DONALD C. FOSSUM

<p style="text-align: center;">UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON</p> <p>THOMAS A. WAITE, : Plaintiff, : vs. : DONALD C. FOSSUM : THE CHURCH OF JESUS CHRIST : OF LATTER-DAY SAINTS dba : CORPORATION OF THE PRESIDING : BISHOP OF THE CHURCH OF : JESUS CHRIST OF LATTER-DAY : SAINTS, a Utah corporation, : dba CORPORATION OF THE : PRESIDENT OF THE CHURCH OF : JESUS CHRIST OF LATTER-DAY : SAINTS, a Utah corporation; : DONALD C. FOSSUM; and STEVEN : D. BRODHEAD, : Defendants. :</p> <p style="text-align: center;">November 9, 2006 - 1:08 p.m.</p> <p style="text-align: center;">Location: Kirton & McConkie 1800 Eagle Gate Tower 60 East South Temple Salt Lake City, Utah 84111</p> <p style="text-align: center;">Reporter: Teri Hansen Cronenwett Certified Realtime Reporter, Registered Merit Reporter Notary Public in and for the State of Utah</p>	<p style="text-align: center;">I N D E X</p> <p>Witness : DONALD C. FOSSUM : Examination by Mr. Nordstrom : Page : 4 :</p> <p style="text-align: center;">E X H I B I T S</p> <table border="1"> <thead> <tr> <th>Number</th> <th>Description</th> <th>Page Marked</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Driving Contract</td> <td>64</td> </tr> <tr> <td>2</td> <td>Overview of Responsibilities</td> <td>64</td> </tr> <tr> <td>3</td> <td>Safe Intersection Driving</td> <td>64</td> </tr> </tbody> </table>	Number	Description	Page Marked	1	Driving Contract	64	2	Overview of Responsibilities	64	3	Safe Intersection Driving	64
Number	Description	Page Marked											
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3	Safe Intersection Driving	64											

<p style="text-align: center;">A P P E A R A N C E S</p> <p>For the Plaintiff: Stephen L. Nordstrom NORDSTROM & NESS, P.S. 101 S. Pines Road Spokane, WA 99206 (509) 814-8900 E. Maria D. Eymann EYMAN & ALLISON KENNEDY REPORTERS INCORPORATED, P.S. 1100 W. Second Avenue Spokane, WA 99204 (509) 447-0101 (509) 444-3217 Fax</p> <p>For the Defendants: Brian T. Rekofke WITHERSPOON KELLEY DAVENPORT & TOOLE 1100 U.S. Bank Building 422 W. Riverside Avenue Spokane, WA 99201 (509) 624-5265 btr@wkd1law.com</p> <p>Thomas L. Walk KIRTON & MCCONKIE 1800 Eagle Gate Tower 60 East South Temple Salt Lake City, UT 84111 (801) 325-3200</p> <p>For the Defendant Brodhead: Andrew C. Smythe PAINE HAMBLEN COFFIN BROOKE & MILLER 717 W. Sprague Avenue, Suite 1200 Spokane, WA 99201 (509) 455-6042 andy.smythe@paineamblen.com</p> <p>Also Present: Gavin Bohne, Legal Videographer Richard Black</p>	<p>1 November 11, 2006 1:08 p.m.</p> <p>2 PROCEEDINGS</p> <p>3 VIDEOGRAPHER: This is the videotaped deposition of</p> <p>4 Donald C. Fossom being held in the law offices of Kirton and</p> <p>5 McConkie in Salt Lake City, Utah on November 9th, 2006. The</p> <p>6 time is 1:08 p.m. My name is Gavin Bohne, legal videographer</p> <p>7 for Garcia & Love Reporting. The court reporter is Teri</p> <p>8 Cronenwett, also with Garcia & Love Reporting. Will counsel</p> <p>9 please state their appearances for the record and the witness</p> <p>10 be sworn.</p> <p>11 MR. EYMANN: Richard Eymann for the plaintiff.</p> <p>12 MR. NORDSTROM: Stephen Nordstrom for the</p> <p>13 plaintiff.</p> <p>14 MR. REKOFKE: Brian Rekofke, defendants.</p> <p>15 MR. WALK: Thom Walk with church defendants.</p> <p>16 Sorry, Andy.</p> <p>17 MR. SMYTHE: Andy Smythe for defendant Steve</p> <p>18 Brodhead.</p> <p>19 MR. BLACK: Richard Black, church representative.</p> <p>20 DONALD C. FOSSUM,</p> <p>21 called as a witness at the instance of the plaintiff, having</p> <p>22 been first duly sworn, was examined and testified as follows:</p> <p>23 EXAMINATION</p> <p>24 BY MR. NORDSTROM:</p> <p>25 Q. Could you please state your name and your address,</p>
---	--

14

1 **it. I don't recall the specific month or anything that I**
2 **visited with him but --**

3 **Q. Okay. Let me kind of go back to the beginning**
4 **again, when I talked to you about who you may have spoken**
5 **with regarding this accident. You had a conversation**
6 **sometime ago with Mr. Walk. Is that correct?**

7 **A. Yeah.**

8 **Q. Was that down in Provo?**

9 **A. Yeah. That was at my house.**

10 **Q. Do you remember the nature of that conversation?**

11 **A. He just asked me questions about it, and I don't**
12 **recall everything. I have talked about it with so many**
13 **people and so many times that it's kind of hard to**
14 **distinguish.**

15 **Q. Sure. Just tell me what you do remember of that**
16 **conversation involving him.**

17 **MR. REKOFKE: Excuse me. That would be**
18 **attorney-client privilege.**

19 **MR. NORDSTROM: I didn't realize that Mr. Walk was**
20 **an attorney for Mr. Fossum. I thought he was -- in fact, I**
21 **don't -- did I ever get a notice of appearance from anybody**
22 **but you, I think and Andy. Am I missing something here?**

23 **MR. REKOFKE: You are missing that he is a lawyer**
24 **for various church entities. He investigated this accident.**
25 **It's the same thing under Heidebrink versus Moriwaki in the**

17

1 **Q. Or Walk, excuse me. Mr. Walk. I represent**
2 **Mr. Waite. Mr. Walk.**

3 **A. I have been told that he was investigating it. As**
4 **far as specifics of what they told me his position was in the**
5 **case, I don't recall.**

6 **Q. And who is they, when you say they?**

7 **A. Whoever contacted me, his assistants or secretary**
8 **or whoever it was.**

9 **Q. Okay. Let's go back to the orientation when you**
10 **got to Spokane. So you remember the vehicle safety, housing.**
11 **Did you discuss any issues regarding safety involved with**
12 **housing?**

13 **A. I believe so. It would make sense to me that we**
14 **did. I don't recall any specific examples, but --**

15 **Q. Okay. At the time of the collision in August of**
16 **2003, did you remember the specifics of that commitment**
17 **letter that you had signed?**

18 **A. Basically that we were responsible for our actions**
19 **and that we had to wear seatbelts.**

20 **Q. I understand that --**

21 **A. That's --**

22 **Q. -- but at the time of the collision did you**
23 **remember that commitment letter, how it read?**

24 **A. No.**

25 **Q. Okay. It's -- you have obviously read it since**

19

1 state of the Washington.

2 **It's privileged, so I am instructing Mr. Fossum not**
3 **to answer any questions about -- other than he's already**
4 **answered the general tenor of the conversation and when it**
5 **occurred. He's not going to answer any questions about his**
6 **discussions with Mr. Walk.**

7 **Q. (By Mr. Nordstrom) All right. So you had a -- so**
8 **you met with Mr. Walk?**

9 **A. Yes, sir.**

10 **Q. Okay. I just want to make sure. Who else, other**
11 **than when we talked about Mr. Rekofke, anyone else that you**
12 **met with specifically other than, say, ward members and**
13 **missionaries, that may concern the litigation of this case?**

14 **A. I don't recall. I -- yeah. I want to say that I**
15 **might have spoken to a lawyer from Spokane, but I don't know**
16 **if it was -- I know you're not from Spokane, but I don't**
17 **recall specifics.**

18 **Q. Okay. As we sit here today, do you know who your**
19 **attorney is in this case?**

20 **A. It's Mr. Rekofke.**

21 **Q. Okay.**

22 **A. I believe that's how you say it.**

23 **Q. Were you ever advised that you were represented in**
24 **any capacity by Mr. Waite?**

25 **A. By Mr. Waite, no.**

18

1 that time, and has that kind of refreshed your memory?

2 **A. Uh-huh.**

3 **Q. All right. Okay. And that's yes to those**
4 **questions?**

5 **A. Yes.**

6 **Q. Okay. Let's talk a little about after the**
7 **orientation, anything else besides those about, you know,**
8 **bills, housing, vehicle safety, anything else that you**
9 **recall?**

10 **A. Also talked about bike safety, I think, wearing**
11 **your helmet. The rest I don't recall.**

12 **Q. Did you receive anything in writing regarding**
13 **wearing a helmet or bicycles?**

14 **A. I am not sure. I wasn't too worried about it. As**
15 **a Spanish-speaking missionary, we didn't very often ride**
16 **bicycles.**

17 **Q. You usually had a car?**

18 **A. We usually had vehicles, yes.**

19 **Q. Okay. So from the time -- was there a time you**
20 **spent on your mission where you didn't have a car or a**
21 **pickup?**

22 **A. Yes, after the accident.**

23 **Q. Okay. And how long did you not have a car or a**
24 **pickup after the accident?**

25 **A. From the time I was -- from the -- probably a week**

20

15

VIDEO DEPOSITION OF MARK
TYLER RYAN

EXHIBIT 2

UNITED STATES JUDICIAL DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

* * *

THOMAS A. WAITE,)	
)	
Plaintiff,)	CIVIL NO. CV-05-399-EFS
)	
vs.)	VIDEO DEPOSITION OF:
)	
THE CHURCH OF JESUS CHRIST)	MARK TYLER RYAN
OF LATTER DAY SAINTS, dba)	
CORPORATION OF THE)	
PRESIDING BISHOP OF THE)	
CHURCH OF JESUS CHRIST OF)	
LATTER DAY SAINTS, a Utah)	
corporation, dba)	
CORPORATION OF THE)	
PRESIDENT OF THE CHURCH)	
OF JESUS CHRIST OF LATTER)	
DAY SAINTS, a Utah)	
corporation; DONALD C.)	
FOSSUM; and STEVEN D.)	
BRODHEAD,)	
)	
Defendants.)	

* * *

November 10, 2006
10:11 a.m.

Offices of Kirton & McConkie
60 East South Temple, Suite 1800
Salt Lake City, Utah

* * *

RENEE L. STACY
Registered Professional Reporter

APPEARANCES

Page 2

Page 4

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ALSO PRESENT: GAVIN BOHNE, Videographer

1 November 10, 2006
2 10:11 a.m.

PROCEEDINGS

3
4
5 VIDEOGRAPHER: This is the videotaped
6 deposition of Tyler Ryan, being held in the law
7 offices of Kirton McConkie in Salt Lake City, Utah,
8 on November 10th, 2006. The time is 10:11 a.m.

9 My name is Gavin Bohne, legal videographer
10 for Garcia & Love Reporting. The court reporter is
11 Renee Stacy.

12 Will counsel please state their appearances
13 for the record, and the witness will be sworn.

14 MR. EYMANN: Richard Eymann for the
15 plaintiff.

16 MR. NORDSTROM: Stephen Nordstrom for the
17 plaintiff.

18 MR. REKOFKE: Brian Rekofke for the Church
19 defendants.

20 MR. BLACK: Richard Black, Church
21 representative.

22 MR. WALK: Tom Walk with the Church
23 defendants.

24 MR. BEST: Ryan Best with the other
25 defendant.

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EXAMINATION
BY MR. EYMANN. 5

EXHIBITS

(None)

1 MARK TYLER RYAN
2 called as a witness at the instance and request of
3 the plaintiff, having been first duly sworn, was
4 examined and testified as follows:

EXAMINATION

5
6 BY MR. EYMANN:

7 Q Good morning. Could you state your name
8 for the record?

9 A Mark Tyler Ryan.

10 Q And your address?

11 A Home address, 981 North 1200 West, Pleasant
12 Grove, Utah 84062.

13 Q And would you tell us what your current
14 profession is?

15 A Real estate agent and real estate
16 developer.

17 Q How long have you been doing that?

18 A I've been a real estate agent for a little
19 over two years now, and I've been doing development
20 as of this year.

21 Q Where did you grow up?

22 A I grew up in Kennewick, Washington, until I
23 was 12 years old, and then I moved to American Fork,
24 and I've been living in the Utah County area now for
25 the past 12 years, except for my mission, the two

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1 Q I'll represent to you that one of the
2 people that called you who is not an attorney but
3 simply an investigator was JR Reese, who was the son
4 of Dale Reese, but JR Reese was just doing an
5 investigation, and it was done back in 2005, and I'd
6 like to ask you some questions and just see if you
7 agree or disagree with the answers that -- he had a
8 set of questions he wanted to ask you, and he went
9 through and he put down your answers, and I just want
10 to see today if those answers are the same today as
11 you gave to him then.

12 A Okay.

13 Q I'll represent to you --

14 And if you want a continuing objection to a
15 leading question here, or form, it's accepted.

16 MR. REKOFKE: Okay.

17 MR. EYMANN: All right?

18 Q The first question was, "Had you been
19 riding in cars during the mission?" And your answer
20 was, "Yes, throughout the mission." Is that correct?

21 A Uh-huh, yes.

22 Q The second question was, "If so, what kinds
23 of vehicles?" And you indicated, "Passenger
24 vehicles, vans and a truck." Is that correct?

25 A Yes.

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1 Q The third question was, "How were the
2 vehicles assigned?" And your answer was, "The truck
3 on this day was assigned to the Spanish elders."

4 A Which was Elder Fossum and Elder Porras.

5 Q Okay. And they're both -- they were both
6 Spanish elders?

7 A Spanish-speaking missionaries, yes.

8 Q Okay. The next one was, "How many elders
9 were generally allowed to ride in a vehicle?" And
10 your answer was, "There was no policy."

11 A At the time -- like -- as far as we know,
12 like -- like, looking back at it now, like, is -- for
13 as many as there were seat belts. Like, I remember
14 that. But -- and as far as I knew at the time, I
15 think -- I don't think, no. Like, for the actual
16 truck, I don't -- I don't really know. I don't
17 remember. I don't recall. But as of -- now, looking
18 back at it, yeah. Like, we were very well trained
19 about the seat belts in a vehicle and to stay seat
20 belted.

21 Q Okay. Well, I'll get to some questions
22 later about that. I'm trying to square your answer
23 given back then of how many elders were generally
24 allowed to ride in a vehicle. Your answer then was,
25 "No policy," and are you saying that the seat belt

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1 was a policy that was in effect at that time?

2 A It's always -- the entire mission, the seat
3 belt -- I've had so many people ask me questions
4 about all this stuff, it really, like -- I'm just --
5 it's just been -- because everybody asks me whether,
6 you know, I was on my mission, or people ask me all
7 the time, "Oh, how are you doing?" after the car --
8 it's just -- it -- it's just menial all the time. It
9 -- you know what I mean? This and -- I don't know.

10 But, like, at the time, I can see how I
11 wouldn't -- like, I don't -- I don't remember saying,
12 you know, "Only 17 people are allowed to be in a
13 car," or whatever. But I do remember now -- like
14 now -- not that I didn't remember then, but, like,
15 the whole seat belt thing, but -- at the time.

16 Q Okay. You were asked the next question,
17 "How many were riding in the pickup truck on the day
18 of the accident?" And your answer then was, "Six.
19 There were four in the cab and there were two back in
20 the bed."

21 A Uh-huh.

22 Q And is that correct?

23 A That is correct.

24 Q You were asked what type of vehicle it was,
25 and your answer was, "Dodge Dakota."

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1 A Yes.

2 Q And is that correct?

3 A Yes.

4 Q You were asked, "Why were you all riding in
5 the truck?" And in that regard -- part of that
6 question was, "Were there no other cars or other
7 passenger-oriented vehicles available?" And your
8 answer was, "There were, but they were filled with
9 the other elders." Is that correct?

10 A That is correct.

11 Q As I understand it from testimony that was
12 given by Elder Fossum yesterday, there was a sedan --
13 four-door sedan, and there was this Dodge Dakota
14 truck. Is that correct?

15 A Yes.

16 Q Okay. And that question wasn't in here. I
17 just added that just now. I just wanted to clarify.

18 You were asked, "Where were you traveling
19 to and from?" And your answer then was, "Meetings at
20 the stake center next to the temple, and at this
21 time, to lunch at a Subway restaurant."

22 A Yes.

23 Q Is that correct?

24 A That is correct. Well, when we were --
25 when we were actually in the accident, it was from

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1 Subway to Elder Ross's apartment, which I -- I can't
2 remember the name of the street that we got in the
3 car accident on, but that's -- he lives on that
street, right off that.

5 Q The next question was, "Had elders been
6 riding in the back of the pickup all day?" Your
7 answer was, "Yes."

8 A Yes.

9 Q Is that still correct?

10 A Yes.

11 Q And then the next question, "If so, how
12 many, and where were they situated?" Your answer
13 then was, "Four in the cab, two in the back." Is
14 that correct?

15 A Yes.

16 Q Okay. The next question was, "How did you
17 choose who sat where?" Your answer was, "He just sat
18 in the back because he didn't mind." And I'm
19 wondering from that answer if you know who you're
20 referring to.

21 A I would assume Elder Waite.

22 Q Did you also sit in the back because you
23 didn't mind sitting in the back?

24 A Yeah. Well, because we were the last ones
25 out of the restaurant, so...

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1 Q Okay. So is it first come, first served?

2 A Yeah.

3 Q All right. We had -- I'll come back to
4 this in a moment.

5 The next question was, "Had you ridden in
6 the back of any other pickup truck at any time before
7 this?" And your answer was, "Yes, many times."

8 A Uh-huh.

9 Q Is that correct?

10 A Yes.

11 Q Now, to clarify on that, are we speaking
12 about the pickup truck when you were a missionary, or
13 are you speaking --

14 A Ask the question again.

15 Q Had you ridden in the back of any other
16 pickup truck at any time before this?

17 A Yes. Both --

18 Q Okay.

19 A Both -- both on the mission and before the
20 mission.

21 Q The next question, "Were you aware of any
22 policy regarding riding in the back of pickup
23 trucks?" And your answer then was, "No, I never
heard of anything."

25 A That's true.

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1 Q Going to the second page, next question,
2 "Was there any other means of transportation
3 available at that time?" Your answer was, "Yes, but
4 they were not practical because everything was so far
5 away."

6 A We could have rode our bikes or walked.

7 Q Did you have your bikes with you at the
8 Subway?

9 A No.

10 Q So your alternative would have been to
11 walk?

12 A Yeah.

13 Q Are you allowed to take a taxi?

14 A Yes, but we don't have enough money to take
15 a taxi.

16 Q I take it you're precluded from hitchhiking
17 and precluded from otherwise bumming a ride from
18 someone else, correct?

19 A Well, we're allowed to. It's just finding
20 somebody that will give us a ride. That's the
21 difficulty.

22 Q All right.

23 A But, I mean, if we wanted -- if somebody
24 offered us a ride -- I've taken many rides on my
25 mission, yeah.

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1 Q Okay. You were asked questions about what
2 happened during the accident, and the first question
3 was, "Did the vehicle you were riding in stop at the
4 stop sign?" And your answer was, "Yes."

5 A Yes.

6 Q I take it you couldn't -- is it true --
7 well, let me ask this question: The next question
8 was, "Did you or could you see the other vehicle
9 before getting to the stop sign?" And part of that
10 question was, "Was there anything which might impede
11 or block you from being able to see the other vehicle
12 coming?" Your answer to both those questions was,
13 quote, "Could not have seen anything because there
14 was a big bush blocking the view. Did not see
15 anything."

16 A Yeah.

17 Q And I think that you were inside the
18 canopy, correct?

19 A Yes, I was inside.

20 Q Could you see anything out of the canopy?

21 A Yes, but I was not facing the accident. I
22 was not facing the car. I was facing the other
23 direction. But I knew the area well.

24 Q Now --

25 A Even if I could look, I couldn't have seen

1 anything. There is a -- if you've been to the
2 intersection, there's a huge tree covering the stop
3 sign, and it's just -- it looks like it goes straight
4 until you get about 50 -- I would assume 50 feet
5 before it, and then -- I mean, if you were going as
6 fast as Brodhead was going, it wouldn't -- like --
7 it's just the fact that -- if he would have been
8 going the speed limit, it would have been fine, but
9 he was going way over the speed -- there's no way of
10 telling.

11 Q We really started out here with whether you
12 could see anything or not.

13 A Oh. Sorry. No, I couldn't see anything.

14 Q So I move to strike the portion of your
15 answer, which is just a legal thing here, just so you
16 know. I just want to verify that --

17 MR. REKOFKE: So we're clear, you asked
18 him, on the day of the accident, could he --

19 MR. EYMANN: Right.

20 THE WITNESS: On the day of the accident,
21 no. Absolutely no.

22 Q (BY MR. EYMANN) Could you -- do you know,
23 on the day of the accident -- because you were asked
24 two questions here. I take it you did not see the
25 other vehicle at any time.

1 A No.

2 Q You only heard screeching of the tires?

3 A That's it.

4 MR. REKOFKE: Are we reading now? Just so
5 we're clear, can you -- was the last question, Dick,
6 one that's off script?

7 MR. EYMANN: Two questions are combined
8 here, and this one didn't have an answer.

9 MR. REKOFKE: Oh, okay.

10 Q (BY MR. EYMANN) So the first question was,
11 "Did you see the other vehicle before getting to the
12 stop sign?" And your answer to that is?

13 A My official answer is no.

14 Q Okay.

15 MR. REKOFKE: Dick, just -- before you go
16 on to the next one, you've done a great job of
17 comparing -- of saying what the answer was and then
18 asking if he agrees, and I didn't -- is that what he
19 said in response to the Reese interview?

20 MR. EYMANN: He didn't answer that question
21 in the Reese -- that specific question in the Reese
22 interview, because what he did was he answered -- I
23 think he tried to answer two questions at once, and
24 there's no answer here. I can show you.

25 MR. REKOFKE: No, that's fine. I trust

1 you.

2 Q (BY MR. EYMANN) The next question was,
3 "Was there anything that might impede or block you
4 from being able to see the other vehicle coming?"

5 And your answer to that, as I said before, was,
6 quote, "Could not have seen anything because there
7 was a big bush blocking his view." And I want to
8 clarify. His view --

9 A Brodbent --

10 Q -- would have been --

11 THE REPORTER: Just a second. We just need
12 to go one at a time, please.

13 THE WITNESS: Oh. Sorry.

14 THE REPORTER: So I'll need you to finish
15 the end of your question.

16 Q (BY MR. EYMANN) I'll start over. Quote,
17 "Could not have seen anything because there was a big
18 bush blocking his view," unquote. Now, that was part
19 of your answer. I'm just trying to know here who is
20 "his view"?

21 A It would be both Fossum and Brodhead.

22 Q Do I understand from that answer, just to
23 clarify here, that you and the rest of the elders
24 knew that there was this -- at this intersection
25 there was this tree that you just spoke of that

1 blocked views?

2 A It's not -- that I remember, like, it's not
3 like we're, "Oh, we're" -- you know, "We're at the
4 corner of Eighth. Look out for the big bush." You
5 know, like, we don't -- it's not like it consciously
6 went through our heads, but I -- I don't know how to
7 answer that question. Really, I don't.

8 Q The other part of your answer to that one,
9 "I did not see anything."

10 A Yeah.

11 Q Is that correct?

12 A Yeah.

13 Q When you say, "I did not see anything," to
14 clarify, is that referring to the other vehicle
15 coming?

16 A Yes. Yeah.

17 Q The next question was, "Did you say
18 anything before the collision?" And your answer to
19 that was, "No. All that I can recall is screeching
20 of tires and a crashing sound."

21 A Yeah.

22 Q Is that correct?

23 A Yeah. Like, I got hit, and the next thing
24 I know is -- like, I woke up on the side of the road.

25 Q Okay. You were asked, then, some questions

21

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1 about after the accident, and the first one was,
 2 "What happened immediately following the collision?"
 3 And your answer was, "I was knocked unconscious. I
 would not be able to remember."
 5 A After the accident?
 6 Q Yeah. And the question was, quote, "What
 7 happened immediately following the collision?" Your
 8 answer was, "I was knocked unconscious. I would not
 9 be able to remember." Is that correct?
 10 A That is correct.
 11 Q Okay. Next question, "Were you injured in
 12 the collision?" And the answer was -- that you gave
 13 at that time was, "I was knocked unconscious,
 14 suffered other bruises and abrasions."
 15 A Yes.
 16 Q And that's correct?
 17 A That is correct. One thing that's not on
 18 there is I did have a concussion, but --
 19 Q Sure. And I think you testified to that
 20 earlier.
 21 A Yes.
 22 Q The next question was, "What was your
 23 response?" And to that question was, "All I can
 24 remember was getting up and everything being in slow
 25 motion, and then I could recall hearing the ambulance

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1 workers working on Elder Waite."
 2 A Yes.
 3 Q Do you remember anything else at the scene
 4 of the accident, to clarify?
 5 A The slow motion part is true. I remember
 6 people holding me down. Like, I tried to get up, and
 7 they held me down because they thought -- somebody
 8 might have thought my neck was broken, that -- like,
 9 you're not supposed to move somebody. And I remember
 10 people holding me down.
 11 Q There was a last category of questioning
 12 which was called "miscellaneous," and that question
 13 was, "Who was Elder Waite's companion at the time of
 14 the collision?" And your answer to that was, "Elder
 15 Ross."
 16 A Uh-huh.
 17 Q Is that correct?
 18 A That is correct.
 19 Q The next question in that category was,
 20 "How long had you been on the mission before the
 21 accident?" And your answer was, "Thirteen months,
 22 from July 2002, and then it went through July 2004."
 23 Is that correct?
 24 A Yes.
 25 Q And the last question was, under

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1 "miscellaneous," "Where are you living now?" Your
 2 answer was, "Pleasant Grove, Utah." "And what are
 3 you doing for a living?" You were working in real
 4 estate. And I take it those are both correct.
 5 A Yes. Right now I'm actually living in
 6 Provo, but I still keep my home address.
 7 Q And I realize -- and I asked you some
 8 clarification questions, but I want to go back over a
 9 couple points here, just so that we're clear on a few
 10 things.
 11 It's my understanding that when everyone
 12 came out of the Subway, more than six got into the
 13 truck originally. Do you remember that?
 14 A Yes.
 15 Q And Elder Fossum described yesterday
 16 essentially eight getting in, four in the cab portion
 17 of the truck, pickup truck, and four in the back. Do
 18 you remember who the two other gentlemen were that
 19 got into the back with you and Elder Waite?
 20 A I think it was Elder Smith and Elder -- I
 21 don't remember what Elder Smith's companion's name
 22 was. I don't remember his name. I got his face, but
 23 I don't remember the name. I really don't remember,
 24 but I think it was Elder Smith and his companion.
 25 Q Okay. Would that have been Elder

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1 Pimmentel?
 2 A No.
 3 Q Okay.
 4 A No. Elder Pimmentel was the driver of the
 5 other vehicle.
 6 Q Okay. Who was the person that asked the
 7 two other gentlemen to go to the other vehicle?
 8 A It was me. I was the district leader at
 9 the time.
 10 Q And as district leader, why did you tell
 11 them to do that?
 12 A Because we were heading east and they
 13 needed to go west, and so it would have been more
 14 convenient for them to go in the car. And we weren't
 15 used to having the car. It was only there for a few
 16 weeks, so...
 17 Q How many elders were there in the district
 18 during this time frame, let's say the two months in
 19 the summer?
 20 A I don't remember. Maybe eight or six. Six
 21 or eight. But I -- the specific number, I don't -- I
 22 don't recall.
 23 Q At this time, there were essentially --
 24 well, at this time, Elder Fossum said there were four
 25 in the sedan when you left the Subway.