

July 8, 2010

VIA FEDERAL EXPRESS

**SETTLEMENT DEMAND**

Ms. Patty Nugent  
The Hartford  
101 Yorkshire Blvd.  
Suite E  
Lexington, KY 40509

Re:

***Our Client – Traci Kimbrel***  
***Date of Injuries: 1/17/09***  
***Your Insureds: Lee Najjar, LN Holcomb Woods, LLC,***  
***and Najco, Inc. (hereinafter collectively referred to as***  
***“Najco, Inc.”)***  
***Your Claim No: GL0009***  
***Your Policy No: 20 UENKJ***

Dear Patty:

As you know, my law firm has been retained to represent Ms. Traci Kimbrel in connection with serious injuries suffered on your insured's premises. This letter shall serve as our client's offer to resolve this matter prior to litigation.<sup>1</sup>

**LIABILITY**

Quite simply, we have little doubt that Najco, Inc. will be held entirely responsible for Traci's injuries.

On January 17, 2009, Traci went to the Twisted Taco at the Holcomb Woods shopping center in order to have dinner. She was accompanied by a friend and her friend's mother.<sup>2</sup> After dinner, she proceeded to return to her car to leave. The parking lot was dark<sup>3</sup> because the lights in

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<sup>1</sup> Accordingly, nothing herein is admissible in any forthcoming trial.

<sup>2</sup> There can be no dispute that Traci was an "invitee," as that term is used in Georgia law. Accordingly, she was owed a duty of reasonable and ordinary care by Najco, Inc. O.C.G.A. §51-3-1.

<sup>3</sup> This incident occurred during the month of January at around 8:30 p.m. Najco, Inc. certainly knew that, absent illumination, the parking lot would be extremely dark at this time of night.

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the lot were either non-functioning or without working bulbs. In addition, the end of the walkway was not appropriately painted to signal a change in elevation/drop off. As is obvious from the provided photos, the end of the walkway is the same color as the ground below the drop off and, therefore, difficult to see. This issue was compounded by the absence of parking lot lighting.

While walking on the pathway that was set up for patrons to travel between the retail shops and parking lot, Traci fell, suffering the substantial injuries detailed below.

What is clear, and what a jury will find very troubling, is that Najco, Inc. and Mr. Najjar were on notice that the parking lot lights were not functioning and that the dark lot posed a danger to patrons of Holcomb Woods.

Mr. Kendall Able and Mr. Ray Baker are part-owners of the Twisted Taco restaurant where Traci ate just prior to her fall. These gentlemen have executed Affidavits setting forth their testimony regarding this incident and the condition of the premises.<sup>4</sup> They are powerful witnesses, as they are Najco, Inc.'s tenants and in no way connected with, or partial to, Traci Kimbrel. Both men have testified to the following:

- 1) They repeatedly asked representatives of Najco, Inc. to replace the light bulbs and otherwise restore the parking lot lights because the lot was dark and dangerous at night. [Able Affidavit (Exhibit A), ¶¶ 4-5; Baker Affidavit (Exhibit B), ¶¶ 4-5];
- 2) Najco, Inc. refused those requests [Able Affidavit, ¶5; Baker Affidavit, ¶5];
- 3) Prior to Traci's fall, they were aware of many other people who had tripped or fallen in the same area [Able Affidavit, ¶10; Baker Affidavit, ¶7]; and,
- 4) The curb area where Traci fell was not appropriately painted, causing the drop-off to be difficult to see. And, there area where patrons were routed to walk was an uneven grade [Able Affidavit, ¶10; Baker Affidavit, ¶7].

Also, Mr. Able was present the night that Traci fell. He testified in his Affidavit that he "specifically recalls that the parking lot lights were not functioning on the evening Ms. Leonard fell." He took note of this fact because he "had asked LN Holcomb Wood LLC (Mr. Lee Najjar) to replace the light bulbs so many times prior to January 17, 2009." [Able Affidavit, ¶9].

It will be exceedingly difficult for Najco, Inc. to overcome this testimony at trial. In fact, it is quite likely that the testimony of Mr. Able and Mr. Baker is going to anger the jury, driving up the compensatory award and very likely resulting in a punitive damage verdict.

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<sup>4</sup> These Affidavits, as well as our client's medical records, medical bills, the Affidavit of Dr. Ron Howe, and relevant photographs are provided herewith.

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I will note, in passing, that we have had our consulting premises expert inspect the property and walkway at issue. Should this matter be filed, we will be able to prove that there were a number of issues, both practical and legal, with Najco, Inc.'s decision to use this particular area as a walkway for patrons. The area designated for patrons to walk between the parking lot and retail shops was not actually a safe pathway, but rather was a catch basin/storm drain. [Photographs provided herewith as Exhibit C]. There were multiple problems with this catch basin. First, the side where Traci fell dropped off into an uneven slope, making it difficult to keep one's footing when stepping off the walkway. Next, the area with the drop/off and uneven slope was not marked or painted in any way to make it readily apparent. This is particularly true when someone was walking in the area at night and without the benefit of lights in the parking lot.

Regardless, given the strength of the testimony of Mr. Able and Mr. Baker, we are comfortable that we will not have to rely solely upon statute and ordinance violations in order to prevail at trial.

#### **DAMAGES**

##### *TRACI KIMBREL'S PRE-INCIDENT LIFESTYLE*

Prior to this incident, Traci was an extremely active individual. She belonged to a gym, exercised frequently, and enjoyed doing activities with friends. She lived independently in a three story townhome. Traci had no trouble whatsoever with foot or leg pain and could wear any type of shoe she desired.

##### *TRACI KIMBREL'S POST-INCIDENT CONDITION*

Due to the absence of lighting in the parking lot and due to the inappropriately designed walkway, Traci fell and suffered horrendous injuries.

Mr. Able remembers that Traci "was in a lot of pain after her fall" and was "totally unable to stand or walk." [Able Affidavit, ¶8]. He carried Traci to her car so that her companions could immediately drive her to the hospital. Traci was taken to North Fulton Regional Medical Center. She was diagnosed with a displaced bimalleolar ankle fracture on her left foot and displaced fifth metatarsal (the bone that runs from mid-foot to the base of the small toe) base fracture on her right foot. Ms. Kimbrel was admitted to the Hospital and scheduled for surgery the next day.

On January 18, 2009, the day following the fall, Dr. Ronald Howe, an orthopedic surgeon, performed two surgeries on Ms. Kimbrel. Traci underwent an open reduction, internal fixation on her metatarsal base fracture on her right foot. And, Traci also had to have an open reduction, internal fixation on her bimalleolar left ankle fracture. Multiple pins and screws were necessary for the Ms. Kimbrel's surgeries. In addition, a stabilization plate was necessary for treatment of her ankle

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fracture. She was placed in a hard cast on her left leg and an air cast on her right leg. [Picture, Exhibit D]. Traci remained hospitalized until January 20, 2009.

When she left the hospital, Traci was confined to a wheelchair because she could not bear weight on either foot. Because her townhome in Georgia is multi-story and because Traci was reliant upon others for activities of daily living, she had to move in with her parents in Alabama. For approximately five weeks:

- Traci was forced to shower with her mother;
- She needed someone to place her on the toilet;
- She had to sleep with a bedpan at night;
- Traci was essentially confined to her parents' home due to mobility limitations; and,
- To the extent that Traci could move around, she was forced to do so in a wheelchair.

After more than a month, Traci was placed in boot on her left leg and a postoperative shoe on her right foot.

Traci had to attend multiple physical therapy sessions and follow-up visits with Dr. Howe. On July 28, 2009, Dr. Howe noted a "palpable click" over the deltoid ligament in her left ankle. He referred Traci to Dr. David South at Resurgens Orthopaedics for evaluation of her ankle instability. Dr. South saw Traci on August 7, 2009. He noted that her left ankle was still swollen (six months after her surgery) and also documented multiple other trauma-related ankle injuries (syndesmosis instability, posterior tibial tendonitis, and syndesmosis laxity). Dr. South informed Traci that definitive management of these issues would "likely" result in another "extensive surgery" with resulting immobilization.

Traci was, understandably, reluctant to go forth with another extensive surgery. Therefore, on September 9, 2009 she sought a second opinion from Dr. John Geathers, another Resurgens physician. Dr. Geathers noted that Traci was still having pain eight months after her surgery. He urged her to continue conservative management because the surgery to correct her residual pain and ankle instability would require an "extended recovery of six months or so." Traci remained in an ankle brace through November 2009. She returned to Dr. Geathers a number of times through January 2010 as a result of continuing ankle pain and instability.

First and most obviously, Traci has a substantial amount of hardware in her left ankle and right foot. Next, Traci's ankle continues to swell after walking, she cannot exercise due to ankle/foot pain (she has cancelled her gym membership), and cannot wear high heels. Also, she has lost balance on her left side, due to the ankle injuries, and attempts to compensate with her right side. For example, Traci has already developed, and been treated for, plantar fasciitis in her right foot as a result of her balance issues. Traci will have to live for the rest of her life with a left ankle that is larger than her right.<sup>5</sup> In addition, we have secured an Affidavit (Exhibit E) from Dr. Howe

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<sup>5</sup> See April 9, 2010 note from Dr. Howe.

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(Traci's treating surgeon), which sets forth his testimony in this matter. Particularly noteworthy is Dr. Hall's testimony that:

- 1) He has extensive training in trauma and fracture care and is certified by the American Board of Orthopedic Surgery;
- 2) Multiple pins and screws were necessary for the surgeries. In addition, a stabilization plate was necessary for treatment of Ms. Kimbrel's ankle fracture;
- 3) Traci is at increased risk for infection as a result of the presence of the hardware. She may have chronic irritation from the hardware. And, Traci may well need future surgery to remove the hardware in her ankle;
- 4) Traci is also at risk for chronic pain as a result of her injuries; and,
- 5) She is at increased risk for post-traumatic arthritis as a result of the serious injury to her ankle.

Given Dr. Howe's credentials and status as a treating physician in this matter, any forensic expert retained by The Hartford will not enjoy the credibility afforded to Dr. Howe.

The jury will be moved by what Traci has endured and by what she will endure in the future as a result of Najco, Inc.'s actions and inaction. We expect a Fulton County<sup>6</sup> jury to return very substantial special and general damage verdicts.

#### *PUNITIVE DAMAGES*

One of the standards in Georgia for an award of punitive damages is an "entire want of care which would raise the presumption of conscious indifference to the consequences." O.C.G.A. 51-12-5.1(b).

It is difficult to imagine a more fitting case than this one for an award of punitive damages in a premises liability setting.

As discussed above, we have secured the testimony of two of Najco, Inc.'s own tenants, Mr. Able and Mr. Baker. To put it bluntly, the testimony offered by these men is going to make it very difficult for Najco, Inc. to succeed in preventing a punitive damage award. Mr. Able and Mr. Baker are prepared to tell the jury that their simple, repeated requests for lighting in the parking lot went ignored. It is not a stretch to conclude that Najco, Inc. was "consciously indifferent" to the consequences that its inaction would have on the patrons of Holcomb Woods.

#### *CREDIBILITY OF THE PARTIES*

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<sup>6</sup> Fulton County, where this case will be filed, is generally considered among the top venues for Plaintiffs in the state of Georgia.

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We generally do not comment upon the credibility of the parties until after suit is filed. However, we believe this is a special circumstance.

Traci is an extremely likeable, personable, white-collar professional. She will have tremendous jury appeal. With due respect, we doubt that Najco, Inc.'s top officer will enjoy the same sort of jury appeal. Without exploring the topic in unnecessary detail at this point, suffice it to say that Mr. Najjar's television persona is well-known throughout the Atlanta area and among the pool of potential jurors. Respectfully, we believe that the publicity he has received is not going to aid his defense. Should this matter be litigated, we intend to explore, during written discovery and depositions, all aspects of his businesses.

#### **OFFER TO SETTLE**

We are authorized to accept \$675,000.00 (six hundred and seventy-five thousand dollars) to resolve this matter. Given the totality of the circumstances behind this claim, to include your insured's clear liability, the Affidavits and testimony already secured to date, the likelihood of a punitive damage award, and Traci's significant injuries, we believe this is a fair figure and far less than what a jury will likely award.<sup>7</sup> Obviously, if this case proceeds to trial, we will ask the jury for multiples of this amount. Given the insurance limits available to your insureds, The Hartford has substantial exposure in this matter.

This offer to settle without litigation will remain open until August 6, 2010 at 5:00 p.m. EST. After that date and time, our offer will be withdrawn and we will file suit.

Sincerely,

Andrew E. Goldner

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Enclosures

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<sup>7</sup> Given that Traci had two open reduction internal fixation surgeries, and in light of future complications from the surgeries and traumatic injuries, we intend to ask the jury for a figure in excess of \$1,000,000.00. When the jury considers Traci's injuries amid the testimony which will be offered against your insureds, we believe a verdict well into the seven figures will be forthcoming.

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cc: Traci Kimbrel (*w/o encl.; via E-Mail*)