

IN THE SUPREME COURT OF THE STATE OF NEVADA

\*\*\*

ANDREA AWERBACH, an individual,

Petitioner,

vs.

The EIGHTH JUDICIAL DISTRICT  
COURT of the STATE OF NEVADA,  
in and for the COUNTY OF CLARK,  
and the HONORABLE NANCY L.  
ALLF, District Judge,

Respondents.

EMILIA GARCIA, an individual;

Real Party In Interest.

Supreme Court Electronically Filed  
Aug 12 2015 11:20 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court  
Dist. Court Case No.: A-11-637772-C

Dist. Court Dept. No.: XXVII

PETITION FOR WRIT OF MANDAMUS  
OR, ALTERNATIVELY, OF PROHIBITION

Petitioner requests that action is taken with respect to this Writ Petition by  
September 4, 2015, which will allow sufficient time in advance of trial to prepare  
for trial with regard to the issues presented in this motion.

DATED this 11<sup>th</sup> day of August, 2015.

MAZZEO LAW, LLC

PETER MAZZEO, ESQ.

Nevada Bar No. 9387

631 South Tenth Street

Las Vegas, Nevada 89101

P: 702.382.3636

F: 702.382.5400

Attorneys for Petitioner Andrea Awerbach

**STATEMENT IN SUPPORT OF PETITION FOR WRIT OF MANDATE  
OR, ALTERNATIVELY, OF PROHIBITION**

Pursuant to NRS § 34.150 et seq., Petitioner ANDREA AWERBACH (hereinafter referred to as Petitioner) hereby submit this petition to this Court for the issuance of a Writ of Mandate directing Respondent to vacate its prior order imposing the sanction of finding of permissive use of Petitioner's vehicle which was taken and used by her defendant son Jared Awerbach at the time of the subject accident, or in the alternative, prohibiting Respondent from proceeding to trial until this matter is first heard by the Supreme Court.

This Petition is brought on the following grounds:

1. Trial is scheduled for September 21, 2015, and this writ petition concerns an discovery sanction imposed by the District Court that would preclude Petitioner from contesting her liability, which liability is premised on her allegedly permitting her son, co-defendant Jared Awerbach, to utilize her car.

2. In compliance with NRAP 27(e)(4), Petitioner has advanced all grounds in the district court concerning the issues raised in this Petition.

3. On December 2, 2014, Plaintiff brought a motion to strike Petitioner's Answer pursuant to NRCP Rule 37 for her alleged willful failure to disclose a claims note.

4. On February 25, 2015, Respondent denied Plaintiff's motion to strike the Answer but imposed a lesser sanction, namely a finding that Petitioner gave her son permission to use the car and a finding of permissive use" of the car. Responded based this sanction on its finding that the "claim note was concealed improperly, was relevant, and was willfully withheld by Defendant Andrea."

5. On March 13, 2015, Petitioner filed a Motion for Relief from Final Court Order, arguing that Respondent's ruling was beyond the scope of permissible sanctions permitted by Nevada Rules of Civil Procedure ("NRCP") 37 without a prior violation of a discovery Order directing Petitioner to disclose

1 the requested discovery. On April 27, 2015, Respondent denied Petitioner's  
2 motion finding that Plaintiff did not need to first move the court to compel  
3 production of the claims note and that the sanction was permissible in light of  
4 Petitioner's alleged willful concealment of the claims note.

5 6. Petitioner is prejudiced insofar as not being able to now defend  
6 against the causes of action for negligent entrustment and NRS § 41.440. In other  
7 words, Respondent's sanction did more than merely presume a fact but rather  
8 precluded Petitioner from contesting her liability.

9 7. Petitioner has no plain, speedy, or adequate remedy at law to compel  
10 the Respondent to perform her duty and Petitioner will be caused to suffer  
11 significant litigation expenses and other damages as a result of Respondent's  
12 action.

13 8. A writ of mandate is proper to compel the performance of acts by  
14 Respondent in her office, specifically to compel Respondent to vacate her prior  
15 order.

16 9. Alternatively, a writ of prohibition is proper to preclude a district  
17 court from carrying on its judicial functions when it is acting outside its  
18 jurisdiction, specifically to deny Petitioners the rights of litigants as promulgated  
19 under the Nevada Rules of Civil Procedure, including mandatory and permissible  
20 discovery.

21 10. Petitioners' request for a Writ of Mandate is necessary in order to  
22 compel Respondent to comply with the dictates of his office, to prevent further  
23 harm and injury to Petitioners and to compensate Petitioners for their damages.

24 11. This Petition is made and based upon the Exhibits attached hereto,  
25 the Affidavits appended hereto, and the Memorandum of Points and Authorities  
26 filed herewith.

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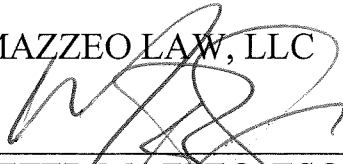
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WHEREFORE, Petitioners respectfully requests this Court:

1. Issue a Writ of Mandate compelling Respondent to vacate its prior Order issuing the sanction of effectively denying Petitioner the right to defend against the causes of action regarding liability brought by Plaintiff.
2. Alternatively, issue a Writ of Prohibition precluding Respondent from proceeding with the trial date currently set for September 21, 2015 and from proceeding to trial without first vacating its prior order pursuant to NRCP 60.
3. Award costs, interest, attorneys' fees and such other remedies as may be appropriate.

Respectfully submitted this 11<sup>th</sup> day of August, 2015.

MAZZEO LAW, LLC  
  


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 PETER MAZZEO, ESQ.  
 Nevada Bar No. 9387  
 631 South Tenth Street  
 Las Vegas, Nevada 89101  
 P: 702.382.3636  
 F: 702.382.5400  
*Attorneys for Petitioner Andrea Awerbach*

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. PREFATORY STATEMENT

This Writ Petition is brought challenging Respondent's order imposing, as a discovery sanction, a factual finding that Petitioner gave permissive use to her son, co-Defendant Jared Awerbach, to use her vehicle.

Real party in interest, Plaintiff Emilia Garcia, brought the underlying case for alleged injuries sustained in a motor vehicle accident involving Petitioner's son. In addition to suing Defendant Jared Awerbach [hereinafter "Jared"], Plaintiff also sued Petitioner, arguing that Petitioner is jointly and severally liable under NRS § 41.440 and for negligent entrustment. Liability against Petitioner is premised on Petitioner allegedly permitting Jared to drive her car on the day of the subject accident. Shortly after the accident, however, Petitioner had a discussion with the claims representative for her insurance company, Liberty Mutual Insurance Company, regarding the circumstances surrounding her son taking her car without permission. Attached as Exhibit A is the note in the claims adjuster's file that reflects this discussion. In particular, during the course of this discussion, Petitioner advised the adjuster that she (Petitioner) "did not give [driver] her vehicle and did not give him permission." It is this claims note that the Court determined to have been willfully concealed by Petitioner.

Petitioner contends Respondent exceeded its authority to impose the severe sanction of establishing a contested fact under either NRCP 37(b) or NRCP 37(c)(1). First, sanctions under NRCP 37(b) are permissible only after a party has been found to have violated a prior court order. Rule 37(c) authorizes a district court to impose sanctions "unless [the failure to disclose] is harmless." Further, the sanctions permissible under NRCP 37(c) must be appropriate to the alleged violation. Last, Petitioner argues that NRCP 37(c) authorizes a district court to issue sanctions under NRCP 37(b)(2)(A), (B), and (C) but only upon a violation of a prior court order.



1 In this case, Respondent imposed the sanction of establishing a fact that  
2 basically precludes Petitioner from contesting her liability without Plaintiff ever  
3 obtaining a court order compelling the disclosure of said claim note. Since  
4 Plaintiff never obtained a prior Order seeking to compel disclosure of the claim  
5 note, Andrea is not in violation of any Order and therefore this Court imposing  
6 the lesser included sanction of finding Jared Awerbach had permissive use of  
7 Andrea's vehicle is improper and exceeded the authority of this Court. The prior  
8 Order must be vacated and a new order entered denying Plaintiff's Motion to  
9 Strike Andrea Awerbach's Answer sans any lesser included sanction of making a  
10 finding of an established fact.

## 11 II. STATEMENT OF FACTS

12 Petitioner Andrea Awerbach is the owner of a car operated by her son and  
13 co-defendant Jared Awerbach and involved in an accident with Plaintiff's car on  
14 Rainbow Boulevard in Las Vegas, Nevada, on January 2, 2011. On that date,  
15 Jared was entering Rainbow Blvd. from a private drive, when Plaintiff, driving  
16 southbound in her 2001 Hyundai Santa Fe, sped up causing Mr. Awerbach to  
17 strike the passenger side of her vehicle. Petitioner contends that she did not give  
18 Jared permission to drive her car.

19 Although the property damage appeared to be minor, Plaintiff's vehicle  
20 was ultimately deemed to be unsalvageable likely due to the age and low market  
21 value of her vehicle. Following the subject accident, Plaintiff called 911 on her  
22 cell phone and reported the car accident. Upon the investigation by police officer  
23 Figueroa, Plaintiff denied being injured in the accident and she did not receive  
24 any medical treatment at the scene.

25 Three days after the subject accident, Plaintiff went to Mountain View  
26 Hospital where she was examined, diagnosed with low back strain and released.  
27 Plaintiff was not otherwise treated in the emergency room. Plaintiff thereafter  
28 retained counsel and proceeded with extensive medical treatment including

1 lumbar surgery. However, Petitioner contends Plaintiff had extensive preexisting  
 2 degenerative conditions to her neck and lower back which preexisted the subject  
 3 accident. Additionally, Petitioner challenges the nature and extent of the injuries  
 4 Plaintiff claims she sustained in connection with the subject car accident.

5 In her Amended Complaint, Plaintiff alleged, among other things, a cause  
 6 of action against Andrea for negligent entrustment and Joint Liability according  
 7 to NRS 41.440. *See Petitioner's Appendix, Exh. B, at 007-008.* Respondent's  
 8 Order which establishes, as conclusive, that Petitioner permitted Jared to drive  
 9 her car that day essentially precludes Petitioner from contesting liability and is  
 10 beyond the scope of Respondent's authority under NRCP 37.

### 11 **III. PROCEDURAL HISTORY**

12 Plaintiff Emilia Garcia commenced this action by filing a Complaint on  
 13 March 25, 2011. She then filed her Amended Complaint on January 14, 2013,  
 14 asserting causes of action against Petitioner for negligent entrustment and joint  
 15 liability pursuant to NRS § 41.440. *See Petitioner's Appendix, Exh. B, at 007-*  
 16 *008.*

17 On or about June 21, 2012, Petitioner responded to Plaintiff's Request for  
 18 Production of Documents. *See Petitioner's Appendix, Exh. C, at 134-141.* In  
 19 Request No. 7, Plaintiff sought "[t]he entire liability insurance or risk department  
 20 claims files relating to the accident at issue in Plaintiff's Complaint." *Id.* at 138.  
 21 Relying upon *Ballard v. Dist. Ct.*, 106 Nev. 83, 787 P.2d 406 (1990), Petitioner  
 22 objected based on attorney-work product, but also disclosed non-privileged  
 23 materials. *Id.*

24 In July 2013, Plaintiff filed a motion to compel the production of the  
 25 claims file, but subsequently withdrew that motion after Petitioner agreed to  
 26 produce it. On July 22, 2013, Petitioner served her Second Supplement to List of  
 27 Witnesses and Documents and Tangible Items Produced at Early Case  
 28 Conference, which included a redacted version of the claims file, and a "Privilege

Log Pertaining to Plaintiff's Request for Production No. 7." See *Petitioner's Appendix, Exh. C, at 108-133*. The Privilege Log references Adjuster's claims noted dated January 18, 2011, although the disclosed claims file does appear to show redactions in claims notes from other dates. The unredacted portions of the claims notes include the following information relevant to the issue of whether Petitioner permitted Jared to drive her car on the day of the accident:

• *Petitioner's Appendix, Exh. C, at 117*

AWERBACH, JARED, Policyholder 01/06/2011

Opac is insd's son. He did not ask insd to use veh b/c he was not supposed to be driving. There was an issue w/ his permit. He thought he had a permit but didn't. Opac does not have a drivers license or valid permit. Pac has used insd veh in the past with and without permission. Insd has given him permission to use veh in the past to run errands. Opac could not say how many times. Opac states insd was home at the time. Keys were on the counter. Opac took the keys and was going to visit his child. Opac does not have his own veh/insurance. . . .

• *Petitioner's Appendix, Exh. C, at 125*

. . . Opac stated he has used insd veh in the past, with and without permission. Opac stated keys were on the counter and insd was home at the time.

• *Petitioner's Appendix, Exh. C, at 126*

1/06/2011 at 5:28 pm

I called opac [Jared] . . . and was able to reach him. . . . He did not ask insd to use the veh b/c he was not supposed to be driving. There was an issue w/ his permit. He thought he had a permit but didn't. [Jared] does not have a driver's license or valid permit. [Jared] has used [insured veh in the past with and without permission. Insd has given him permission to use veh in the past to run errands. [Jared] could not say how many times. Opac states insd was home at the time. Keys were on the counter. [Jared] took the keys and was going to visit his child. [Jared] states he was cited for DUI, drug possession, no driver's license, no insurance in veh, and FTY. . . .

• *Petitioner's Appendix, Exh. C, at 127*

01/06/2011 12:10 PM

I called insd to discuss permissive use. I got vm, left message.

Per Collision notes:

Unlisted Operator Questions for Policyholder

Did the operator have permission to drive your car? NO

Is the operator a member of your household? YES

What is your relationship to the operator? SON

Does the operator have their own set of keys to your car? NO if not where did they obtain the keys to your car?

ACCESS TO KEYS BECAUSE SAME HOUSEHOLD

Has the operator driven your vehicle before? NO  
 Does the operator have a valid driver's license? NO – HE SD HE  
 HAS A PERMIT  
 How often does the operator use this vehicle? UNK  
 Does the operator have a vehicle of their own? NO  
 If yes, who is their insurance carrier? N/A  
 If operator was son or daughter, when did they obtain their license?  
 NONE

Still need to verify additional details w/ insd.

• ***Petitioner's Appendix, Exh. C, at 128***

01/03/2011 02:44 PM

Received vm from Ins. Ms. Awerbach. She stated in message son was driving her vehicle w/o permission. Ins. son got a DUI and vehicle is currently in impound. OB left message for Ms. Awerbach to c/b when available

Plaintiff never challenged the claim of privilege nor moved to compel disclosure of the documents and redacted portions that were claimed to be privileged. Instead on December 2, 2014, Plaintiff brought a motion to strike Petitioner's Answer pursuant to NRCP 37 for her alleged failure to disclose a claims note. *See Petitioner's Appendix, Exh. C, at 10-199.* Petitioner filed her Opposition to Motion to Strike her Answer. *See Petitioner's Appendix, Exh. D, at 200-214.* Plaintiff filed her Reply Brief on January 7, 2015. *See Petitioner's Appendix, Exh. E, at 215-226.*

On February 25, 2015, Respondent denied Plaintiff's motion to strike the Answer but imposed a lesser sanction that established a crucial disputed fact in the case, namely that Petitioner gave her son permission to use the car. Respondent based its decision on its finding that the claim's note was relevant and willfully withheld by Defendant Andrea. *See Petitioner's Appendix, Exh. F, at 227-232.*

On March 13, 2015, Petitioner filed a Motion for Relief from Final Court Order, challenging Respondent's ruling as beyond the scope of permissible sanctions permitted by NRCP 37 without a prior violation of a discovery order directing Petitioner to disclose the requested discovery. *See Petitioner's Appendix, Exh. G, at 234-245.* Plaintiff filed an Opposition to Motion for Relief

1 from Final Court Order. See *Petitioner's Appendix, Exh. H, at 246-257*.  
 2 Petitioner then filed a Reply Brief in support of Motion for Relief from Final  
 3 Court Order. See **Exhibit I**. On April 27, 2015, Respondent denied Petitioner's  
 4 Rule 60b motion, finding that Plaintiff did not need to first move the court to  
 5 compel production of the claims note, that Petitioner. See **Exhibit J**.

6 Trial in this matter is presently scheduled for \_\_\_\_.

#### 7 **IV. STATEMENT OF ISSUES**

- 8 1. Whether Respondent District Court prejudiced Petitioner by  
 9 exceeding her authority in imposing a sanction which  
 10 effectively denies Petitioner her right to defend against  
 11 Plaintiff's claims of liability at trial?
- 12 2. Whether Respondents Judge Alf and District Court erred in  
 13 denying Petitioner's Motion for Relief from Final Court Order  
 14 pursuant to NRCP 60 by mistakenly imposing impermissible  
 15 sanctions pursuant to NRCP Rule 37?  
 16

#### 17 **V. STANDARD OF REVIEW**

18 Application of the Nevada Rules of Civil Procedure is a question of law  
 19 and this court reviews the district court's findings de novo. *Moseley v. Eighth*  
 20 *Judicial Dist. Court ex rel. County of Clark*, \_\_ Nev. \_\_, 188 P.3d 1136,  
 21 1142 (2008) (stating that "[t]interplay and interpretation of NRCP 25 and NRCP  
 22 6 are issues of law that we review de novo") (citing *State ex rel. PSC v. Dist. Ct.*,  
 23 94 Nev. 42, 44, 574 P.2d 272, 273 (1978) (implying that the rules of statutory  
 24 construction apply to the construction of Nevada's Rules of Civil Procedure).  
 25

26 In reviewing sanctions, this Court considers whether the district court  
 27 abused its discretion in doing so. *Bahena v. Goodyear Tire & Rubber Co.*, 235  
 28 P.3d 592, 596 (2010). In *Bahena*, this Court stated that "the same standard of

review for striking all of the defendant's affirmative defenses applies when the district court strikes a defendant's answer as to liability only, but does not conclude the case as to damages." *Id.* Generally, however, sanctions will only be imposed where there has been willful noncompliance with a court order or where the adversary process has been halted by the actions of the unresponsive party. *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). This Court has also declared that "[f]undamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to the specific conduct at issue." *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 900 P.2d 323, 325 (1995) (citing *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779-80 (1990)).

## VI. STATEMENT OF WHY WRIT SHOULD ISSUE

### A. *Lack of an Adequate Remedy in the Ordinary Course and Important Judicial Policy Warrant the Issuance of a Writ of a Mandate or, Alternatively, of Prohibition.*

A party is entitled to a writ of mandate when a tribunal, such as the Eighth Judicial District Court, has failed to legally and properly discharge its legal obligations. *See Wellburn v. Eighth Judicial Dist. Ct.*, 107 Nev. 105, 806 P.2d 1045 (1991). Section 34.160 of the Nevada Revised Statutes ("NRS") provides in pertinent part as follows:

The writ may be issued by the supreme court, a district court or a judge of the district court to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; . . .

NEV.REV.STAT. § 34.160 (Westlaw 2009). A writ of prohibition, on the other hand, is proper when a court acts in excess of the court's jurisdiction. NEV.REV.STAT. § 34.320<sup>1</sup>; *see also Sonia F. Dist. Ct.*, 125 Nev. 38, \_\_ P.3d \_\_, 2009 WL 2900070 (Sept. 10, 2009).

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<sup>1</sup> Section 34.320 provides as follows:

Pursuant to this statutory mandate, this Court has recognized two bases for issuing an extraordinary writ, such as of mandamus or prohibition. Generally, such writs will not issue if petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NEV.REV.STAT. § 34.170. *See Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev. 249, 253, 21 P.3d 628, 630 (2001). This Court has also held, however, that “[w]hen circumstances reveal urgency or strong necessity or an ‘important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction,’ [it] may consider a petition for extraordinary relief, even if alternative remedies may be available.” *Id.* (citing *Jeep Corp. v. Second Judicial Dist. Court of State of Nev. In and For Washoe County*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982)).

The general rule is that a writ of mandamus should issue in the situation where sufficient facts show the petitioner “has a legal right to have something done by the inferior tribunal which it (the trial court) has refused to do.” *Philips v. Second Judicial Dist. Ct.*, 46 Nev. 25, 207 P. 80, 81 (1922); *see* NEV.REV.STAT. § 34.160. “The writ of mandate is proper to compel the performance of an act which the law especially enjoins as a duty resulting from an office, and where there exists no plain, speedy, and adequate remedy.” *Russell v. Dist. Ct.*, 96 Nev. 830, 832, 619 P.2d 537 (1980)(a writ of mandamus was the proper remedy where the trial judge exceeded his authority by appointing a special master and if it was determined on post-judgment appeal that the special master was erroneously appointed, the appeal subsequent to trial would have resulted in unnecessary expenditure of time, money and judicial energy). *Id.* at

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NRS 34.320. Writ of Prohibition defined.

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board of person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board of person.

NEV.REV.STAT. § 34.320.

833. The Supreme Court in *Matheu v. Dist. Ct.*, 88 Nev. 26, 493 P.2d 709 (1972), ruled that the extraordinary relief by certiorari was an appropriate remedy where the district court issued an order staying the deposition which the party had a right to take “without leave of Court” pursuant to NRCP 26(a).

As most recently reiterated by this Court, a reviewing court must also consider “whether judicial economy and sound judicial administration militate for or against issuing the writ.” *City of Las Vegas v. Dist. Ct.*, \_\_ Nev. \_\_, 188 P.3d 55, 58 (2008) (citing *State v. Babayan*, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990)).

This Honorable Court has expressly recognized that “a writ of prohibition or mandamus may be an appropriate remedy when addressing pretrial discovery order, which leaves a litigant with no plain, speedy, or adequate remedy at law.” *Columbia/HCA Healthcare Corp. v. Dist. Ct.*, 113 Nev. 521, 525, 936 P.2d 844, 846-47 (1997) (relying on *Schlatter v. Dist. Ct.*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977)).

In the case at bar, Petitioner is entitled to a writ of mandamus or prohibition for several reasons. First, Petitioner lacks a speedy and meaningful opportunity to defend and prevail against Plaintiff’s causes of action as to liability were she forced to proceed in the regular course of litigation. Second, Respondents discretionary sanctions exceeded the scope of permissible sanctions permitted by NRCP 37 by making a finding of an issue of material fact as to liability prior to trial will likely result in a re-trial after appeal.

***B. Petitioner Will Be Wrongfully Denied Any Opportunity to Defend Against Liability and Will Be Entitled to a Retrial Since Respondent Had No Inherent Discretionary Authority to Impose a Sanction Establishing Liability Against Petitioner.***

Rule 60 of the NRCP provides a party may seek relief from an order or judgment “upon such terms as are just” and may relieve a party from a final judgment, order or proceeding for mistake, inadvertence, surprise or excusable



neglect. Rule 2.24 of the EDCR provides a party seeking reconsideration of a ruling of the court, must file a motion for such relief within 10 days after service of written notice of order or judgment. Petitioner timely filed motions for relief pursuant to both NRCP 60 and EDCR 2.24.

**1. Sanctions Permissible Pursuant to Rule 37(a) and (b) Require the Prerequisite Filing of a Motion to Compel and a Violation of a Preexisting Order By the Non-Compliant Party.**

Rule 37(a) of the NRCP provides for motions for order to compel disclosure or discovery which first requires the moving party to confer or attempt to confer in good faith with the adverse party not making the disclosure. Where a motion for an Order compelling disclosure is granted, then NRCP(a)(4)(A) permits the court to “require the party ... whose conduct necessitated the motion ... to pay the moving party reasonable expenses including attorney’s fees... unless the court finds...” the movant did not “first mak[e] a good faith effort to obtain the disclosure...” No other sanction is available at this stage.

Rule 37(b)(2) provides that only when

... a party **fails to obey an order** to provide or permit discovery, ... or if a party fails to obey an order entered under Rules 16, 16.1, and 16.2 the court may make such orders in regard to the failure as are just” including: (A) **an [o]rder that the matters regarding which the order was made or any other designated facts shall be taken as established** for the purposes of the action in accordance with the claim of the party obtaining the order; (B) an [o]rder refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; (C) an [o]rder striking out pleadings or parts thereof, ...

NEV.R.CIV.P. 37(b)(2) (emphasis added).

*Bahena v. Goodyear Tire & Rubber Company*, 235 P.3d 592 (2010) is the leading case in Nevada analyzing the inherent equitable powers of the district court to dismiss actions and enter default judgments for abusive litigation practices. In *Bahena*, the Supreme Court analyzed whether the district court abused its discretion by imposing non-case concluding sanctions by striking the

1 defendant's answer as to liability. The district court determined the defendant  
2 had stalled, obstructed and caused unnecessary delays in failing to produce a  
3 deposition witness and disclose requested documents and for violating a  
4 discovery order which caused extreme and inappropriate prejudice to the  
5 plaintiff. The court ruled the defendant purposefully engaged in delay tactics,  
6 including its flagrant violation of the discovery order, directing them to produce a  
7 witness, rose to the level of sanctions permissible under Rule 37(b)(2).

8 The *Bahena* court analyzed the sanction of dismissal from the perspective  
9 of sanctions permissible pursuant to 37(b)(2) which requires the violation of an  
10 existing court order. In its deliberation, the district court also considered the  
11 factors articulated in *Young v. Johnny Ribeiro Bldg., Inc.* 96 Nev. 88, 787 P.2d  
12 777 (1990), prior to imposing the sanction of dismissal of the action as to  
13 liability. The *Young* factors are applied only in situations where a party has  
14 violated a court order.

15 The Nevada Supreme Court in *Young*, 96 Nev. at 92-93, 787 P.2d at 779-  
16 80, clearly articulated the standard for imposing the sanction of dismissal "must  
17 be just and must relate to the claims at issue **in the discovery order which has**  
18 **been violated.**" (Emphasis added). In other words, the District Court has no  
19 discretion to dismiss a claim unless there is an actual violation of an order. An  
20 existing order is therefore the prerequisite to the consideration of a motion to  
21 strike pleadings or "finding that designated facts shall be taken as established."  
22 NEV.R.CIV.P. 37(b)(2)(A).

23 According to *Young*, only where there has been a violation of an existing  
24 order, can the court thereafter decide whether dismissal is an appropriate sanction  
25 upon the consideration of such factors which include:

- 26 1) The degree of willfulness of the offending party;
- 27 2) The extent to which the non-offending party would be prejudiced by a  
28 lesser sanction;

- 1 3) The severity of the sanction of dismissal relative to the severity of the
- 2 discovery abuse;
- 3 4) Whether any evidence has been irreparably lost;
- 4 5) The policy favoring adjudication on the merits;
- 5 6) Whether sanctions unfairly operate to penalize a party for the
- 6 misconduct of his or her attorney; and
- 7 7) The need to deter both parties and future litigants from similar abuses.
- 8

9 *Young*, 106 Nev. at 93, 787 P.2d at 780.

10 In the case at bar, Plaintiff first sought relief for this apparent 16.1  
11 violation in her Motion to Strike Defendant Andrea Awerbach's Answer. The  
12 relief she sought was not to compel disclosure of the claim note but to strike  
13 Andrea's Answer. However, Plaintiff never brought a motion to compel  
14 disclosure of this record nor did the Court previously enter any Order directing  
15 Andrea to make the disclosure as required by NRCP 37(a). Secondly, at no time  
16 was Petitioner in violation of any prior or existing Order to disclose the subject  
17 claim note which might give rise to the sanctions permitted by NRCP 37(b).  
18 Even at the time Plaintiff brought her motion to strike Andrea's answer, Andrea  
19 was not in violation of any existing prior order which would be a prerequisite for  
20 imposing the severe sanction of designating certain facts as established.  
21 Respondent had no authority to strike a pleading or establish a disputed material  
22 fact regarding liability absent an actual violation of a court order, a violation  
23 that did not occur in this case.

24 This case is distinguished from the *Bahena* case since no prior order was  
25 ever obtained by plaintiff directing Petitioner to disclose the claims note.  
26 Petitioner should not have ever considered the *Young* factors which only pertain  
27 to sanctions permissible for violations contemplated by Rule 37(b)(A)(2).  
28 Therefore, Respondent had no discretionary authority to make a finding that

1 certain designated facts shall be taken as established (i.e., finding that Petitioner  
2 gave defendant son Jared Awerbach permissive use of her vehicle).

3                   **2.     Sanctions Pursuant to Rule 37(c) Permit the Preclusion at**  
4                   **Trial or Hearing of Information Not So Disclosed and Any**  
5                   **Other Actions Authorized by Rule 37(b)(2)(A).**

6           Rule 37(c) provides that “a party who without substantial justification fails  
7 to disclose information required by Rule 16.1, 16.2 or 26(e)(1) ... is not, unless  
8 such failure is harmless, permitted to use such as evidence at a trial, at a hearing  
9 ... any information not so disclosed.” Other sanctions permitted under Rule  
10 37(c) include “[i]n addition to requiring payment of reasonable expenses,  
11 including attorney’s fees, caused by the failure, these sanctions may include any  
12 of the actions authorized under Rule 37 (b)(2)(A)(B) or (C) and may include  
13 informing the jury of the failure to make the disclosure.”

14           The evidence in dispute was the subject claim note. *See Petitioner’s*  
15 *Appendix, Exh. A, at 2.* The claim note, which included the reference that  
16 Petitioner “did not give [driver] her vehicle and did not give him permission,”  
17 was harmless to plaintiff’s claim and indeed exonerates Petitioner from liability.  
18 *Id.* Further, the information that Petitioner’s son purportedly obtained the keys  
19 from the counter was relayed in the unredacted portions of the claims note that  
20 was produced by Petitioner. *Petitioner’s Appendix, Exh. C, at 117, 126.*

21           Notwithstanding this simple truth, the only sanction that Respondent  
22 would have had authority to issue for Petitioner’s purported failure to disclose the  
23 claim, assuming the information was not harmless to plaintiff’s claim, would be  
24 to preclude the use of the claim note at a trial, at a hearing, or on a motion. See  
25 NEV.R.CIV.P. 37(c). Nothing in NRCP 37(c) permits the court to deem any  
26 designated facts as established as permitted by NRCP 37(b)(2)(A)(B) or (C)  
27 unless the non-disclosing party is in violation of an preexisting order directing  
28 the party to make such disclosure.

///

1 This Court never had the prerequisite authority or discretion to conduct an  
2 analysis of the *Young* factors for dismissal of Petitioner's Answer nor the near  
3 equivalent of the lesser sanction of establishing as conclusive that Petitioner gave  
4 permissive use of her vehicle at the time of the subject accident. Assuming  
5 arguendo that Petitioner was in violation of a prior order, the sanction imposed  
6 would indeed be excessive based on consideration of the *Young* factors including  
7 the degree of severity of establishing liability against Andrea relative to the  
8 severity of the discovery abuse; the fact that no evidence has been irreparably  
9 lost; the policy favoring adjudication on the merits; and the fact that the sanctions  
10 unfairly operate to penalize Andrea for the misconduct of her prior attorney. Per  
11 *Young*, the sanction "must be just and must relate to the claims at issue . . ."  
12 *Young*, 96 Nev. at 92-96, 787 P.2d at 779-80; also *City of Sparks v. Dist. Ct.*, 112  
13 Nev. 952, 955, 920 P.2d 1014, 1016 (1996) ("implicit in the district judges'  
14 authority to sanction is that the district judge must design the sanction to fit the  
15 violation"). Therefore, Respondent overstepped its authority in imposing the  
16 severe sanction of "establishing [the] designated facts," which is tantamount to  
17 finding liability against Petitioner, because it never first determined that  
18 Petitioner was in violation of an existing order giving rise to consideration of the  
19 *Young* factors.

20 In the instant case, Petitioner simply failed to disclose information (i.e.,  
21 claim note) pursuant to NRCP 16.1, 16.2 or 26(e)(1) which, in and of itself, does  
22 not give rise to the severe sanction of finding an established fact of permissive  
23 use of a vehicle which essentially establishes liability against Petitioner. The only  
24 discretion Respondent had pursuant to NRCP 37(c) was to preclude the use of the  
25 claim note at trial or hearing or to impose the sanctions authorized under NRCP  
26 37 (b)(2)(A)(B) or (C) which are predicated on a violation of a prior order  
27 directing the party to make a disclosure. Such a lesser sanction is warranted given

28 ///

1 the information contained in the subject claim note was disclosed in the  
2 unredacted portions of the claims note (i.e., harmless).

3 Moreover, the sanction precluding the use of a claim note at trial must be  
4 based on finding the party failed to disclose without substantial justification and  
5 that such failure harmed the adverse party. The substance of the claim note does  
6 not assist Plaintiff concerning her claim but actually exonerates Petitioner in her  
7 defense with respect to the reference which states, "insured (Petitioner) did not  
8 give [driver] her vehicle and did not give him permission." See *Petitioner's*  
9 *Appendix, Exh. A, at 2*.

10 Therefore, this Court exceeded its authority in imposing the severe  
11 sanction of "establishing any designated facts" such as finding liability unless the  
12 Court first entered an Order on the motion for sanctions and only subsequently  
13 found the party was in violation of the Court Order.

## 14 VII. CONCLUSION

15 Because Petitioner lacks a speedy and meaningful opportunity to defend  
16 and prevail against Plaintiff's causes of action were she forced to proceed in the  
17 regular course of litigation. Second, Respondents discretionary sanctions  
18 exceeded the scope of permissible sanctions permitted by NRCP Rule 37 by  
19 making a finding of an issue of material fact prior to trial will likely result in a re-  
20 trial after appeal.

21 Respectfully submitted this 11<sup>th</sup> day of August, 2015.

22 MAZZEO LAW, LLC

23   
24 PETER MAZZEO, ESQ.

25 Nevada Bar No. 9387

26 631 South Tenth Street

27 Las Vegas, Nevada 89101

28 P: 702.382.3636

F: 702.382.5400

*Attorneys for Petitioner Andrea Awerbach*

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 12.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found, and NRAP 21, which governs extraordinary writs. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

MAZZEO LAW, LLC

*Attorneys for Petitioner Andrea Awerbach*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 17<sup>th</sup> day of August 2015, I served the foregoing **Petition for Writ of Mandate or, Alternatively, of Prohibition** as follows:

☒ US MAIL: by placing the document(s) listed above in a sealed envelope, postage prepaid, in the United States Mail at Las Vegas, Nevada, addressed to the following:

☐ BY FAX: by transmitting the document(s) listed above via facsimile transmission to the fax number(s) set forth below.

☒ BY ELECTRONIC SERVICE: by electronically filing and serving the document(s) listed above with the Nevada Supreme Court.

Corey M. Eschweiler, Esq.  
Adam Smith, Esq.  
Glen Lerner & Associates  
4795 S. Durango Dr.  
Las Vegas, Nevada 89147  
Facsimile: (702) 877-0110  
*Attorney for Plaintiff Emilia Garcia*

Roger Strassburg, Esq.  
Resnick & Louis, P.C.  
6600 W. Charleston Blvd., #117A  
Las Vegas, NV 89146  
*Attorney for Defendant Jared Awerbach*

Honorable Nancy L. Alf  
Eighth Judicial District Court  
Department XXVII  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155  
*Respondents*

  
an employee of MAZZEO LAW, LLC