

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 12 2015 12:53 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

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 Case No.

Dist. Court Case No.: A-11-637772-C

Dist. Court Dept. No.: XXVII

PETITIONER'S APPENDIX

TO PETITION FOR WRIT OF MANDATE OR, ALTERNATIVELY, FOR
PROHIBITION

* * *

VOLUME II of II

MAZZEO LAW, LLC

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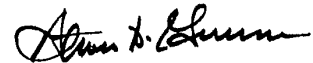
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Attorneys for Petitioner Andrea Awerbach

PETITIONER'S APPENDIX
(Alphabetical by Document Name)

Exh	Vol.	Document Name	Date Filed / Signed	Pages
B	I	Amended Complaint	1/14/2013	3-9
A	I	Claims Notes from Liberty Mutual dated 1/17/2011	NOT APPLICABLE	1-2
J	II	Decision and Order Denying Defendant Andrea Awerbach's Motion for Relief From Final Court Order	4/27/2015	265-270
F	II	Decision and Order Denying Plaintiff's Motion to Strike Andrea Awerbach's Answer; Granting Plaintiff's Motion for Order to Show Cause; and Granting in part and Denying in Part Plaintiff's Motion to Strike Supplemental Reports	2/25/2015	227-232
G	II	Motion for Relief from Final Court Order	3/13/2015	234-245
C	I	Motion to Strike Defendant Andrea Awerbach's Answer w/Exhibits	12/02/2014	10-199
H	II	Opposition to Plaintiff Andrea Awerbach's Motion for Relief from Final Court Order	3/30/2015	246-257
D	II	Opposition to Plaintiff's Motion to Strike Answer	12/18/2014	200-214
I	II	Reply in Support of Motion for Relief from Final Court Order	4/6/2015	258-264
E	II	Reply in Support of Plaintiff's Motion to Strike Defendant Andrea Awerbach's Answer	1/7/2015	215-226



CLERK OF THE COURT

1 **OPP**
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12 Attorney for Defendant Andrea Awerbach

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 EMILIA GARCIA, Individually,
16 Plaintiff,

17 vs.

18 ANDREA AWERBACH, Individually;
19 JARED AWERBACH,
20 Defendants.

Case No: A-11-637772-C

Dept No: XXVII

**DEFENDANT ANDREA AWERBACH'S
OPPOSITION TO PLAINTIFF'S
MOTION TO STRIKE ANSWER**

Date of Hearing: January 15, 2015

Time of Hearing: 9:30 a.m

21 Defendant ANDREA AWERBACH, by and through her attorney of record, PETER
22 MAZZEO, ESQ. of the law firm of MAZZEO LAW, LLC hereby submits her Opposition to Emilia
23 Garcia's ("Plaintiff") Motion to Strike Andrea Awerbach's (hereinafter "Andrea") Answer.

24 This Opposition is made and based upon the papers and pleadings on file herein, the
25 Memorandum of Points and Authorities submitted herewith, such other documentary evidence as

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1 maybe presented and any oral arguments at the time of the hearing of this matter.

2 DATED this 18th day of December 2014.

3 MAZZEO LAW, LLC

4 
5 PETER MAZZEO, ESQ.

6 Nevada Bar No. 009387

7 528 S. Casino Center Blvd. Suite 305

8 Las Vegas, Nevada 89101

9 Attorney for Defendant Andrea Awerbach

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **1. Summary of Argument**

12 The sole issue for the Court to decide is whether the January 17, 2011 claim note (hereinafter
13 "Claim Note") establishes that Andrea gave Jared Awerbach (hereinafter "Jared") permission to use
14 her car on January 2, 2011, the day of the subject accident. Plaintiff's Motion to Strike Andrea
15 Awerbach's Answer (hereinafter "Motion") is nothing but another attempt to misstate and misconstrue
16 the facts. The plain reading of the Claim Note does not establish permissive use, either express or
17 implied, in accordance with Nevada Revised Statute ("NRS") 41.440. Specifically, the Claim Note
18 states: (1) Andrea did not know Jared was going to driver her car and (2) Andrea did not give Jared
19 permission to use her vehicle. Therefore, Andrea respectfully request he Court deny the instant
20 Motion.

21 **2. The Claim Note Does Not Establish Permissive Use**

22 When analyzing the Claim Note in comparison with the NRS 41.440, the Claim Note does not
23 establish permissive use, either express or implied. NRS 41.440 states:

24 Any liability imposed upon a wife, husband, son, daughter, father,
25 mother, brother, sister or other immediate member of a family arising
26 out of his or her driving and operating a motor vehicle with **the**
27 **permission, express or implied**, of such owner is hereby imposed upon
28 the owner of the motor vehicle, and such owner shall be jointly and
severally liable with his or her wife, husband, son, daughter, father,
mother, brother, sister or other immediate member of a family for any
damages proximately resulting from such negligence or willful
misconduct, and such negligent or willful misconduct shall be imputed
to the owner of the motor vehicle for all purposes of civil damages.

In summary, the plain reading of the Claim Note states the following: (1) Jared had previous access to Andrea to drive her car to practice to get his permit; (2) Andrea was home the day of the accident; (3) Andrea gave Jared the keys earlier in the day to get something out of the car; (4) Andrea usually keeps the keys on the mantel; (5) Jared does not have his own set of keys; and (5) **Andrea did not know Jared was going to drive her and did not give Jared permission to drive her car.**

As a matter of law, Plaintiff cannot establish permissive use, either express or implied, in accordance with NRS 41.440, solely based upon the Claim Note. While Andrea stated in the Claim Note she gave Jared her keys to get something out of her car, this does not constitute permissive use, let alone implied permissive use. The Claim Note expressly states that Andrea did not know Jared was going to drive her car and did not give Jared permission to drive her care on the day of the subject accident. If anything, the Claim Note, in addition to the other alleged facts in Plaintiff's 24 page Motion, is another disputed fact regarding permissive use. The Claim Note does not establish permissive use in accordance with NRS. 41.440.¹ Therefore, Andrea respectfully requests the Court deny Plaintiff's Motion.

Plaintiff's own Motion contains the following disputed facts regarding permissive use:

Plaintiff's Alleged Undisputed Facts Regarding Permissive Use	Disputed Facts Regarding Permissive Use	Evidence Supporting Disputed Facts Regarding Permission Use
Andrea gave Jared permission to use the car on the day of the subject accident	Andrea did not give Jared permission to use the car on the day of the subject accident	1. Claim Note dated 1/17/11 at 4:44 p.m. bate-stamped Liberty Mutual 001 at Motion at Exhibit 1-K. 2. Recorded Statement of Jared at Motion at Exhibit 1-F at pgs. 2, 3, and 6. 3. Deposition of Jared Awerbach dated March 27, 2014 at Motion at Exhibit 1-A at 177:25-178:1-8 and 180:19-25 4. Deposition of Andrea dated September 12, 2013 at 21:1-3 at Motion at Exhibit 1-I. 5. Deposition of Andrea dated October 24, 2014 at 124:15-25, 126:19-23;

¹ Additionally, Plaintiff's motion raises an issue of fact, not an issue of law, and therefore it is for the jury to decide.

	175:24-25-176:1-2; and 176:17-25-177:1 (attached as Exhibit "A")
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A. Andrea's Placement of Her Keys On The Day of the Subject Accident is Irrelevant to the Analysis of Permissive Use In Accordance With NRS 41.440

Plaintiff provides no binding authority that the location of a family member's keys constitutes permissive use, let alone implied permissive use. The place of Andrea's keys on the day of the accident is immaterial to the analysis of permissive use. In fact, the location of Andrea's keys on the day of the accident, or any other day for that matter, is nothing but a red herring to distract the Court analysis regarding permissive use in accordance with NRS. 41.440. The sole analysis regarding permissive use is whether Andrea gave Jared permission to drive her car on the day of the accident.

3. Andrea Engage In No Discovery Abuse

Plaintiff disingenuously claims Andrea concealed information during discovery. Andrea cannot account for the acts of prior counsel but merely explain to the Court the exhibits attached in Plaintiff's Motion. On July 22, 2013, Andrea disclosed her Second Supplement to List of Witness and Documents (hereinafter "Second Supplement"). Motion at Exhibit I-G. The Second Supplement identifies withheld claim notes and a Privileged Log. The Privilege Log was also disclosed on July 22, 2012. Plaintiff failed to timely object to the claim notes withheld in the Privilege Log that would have identified the Claim Note Plaintiff alleges Andrea "concealed." Andrea properly identified withheld claim notes and Plaintiff took no action for nearly 26 months, yet now claims information was "concealed" during discovery and yet seeks the severe sanction of striking Andrea's answer.

The controlling Nevada case law that provides this Court guidance regarding sanctions resulting from a discovery abuse is *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). The facts of this case are distinct from *Young* such that striking Andrea's Answer is not warranted, let alone any sanction. In *Young*, a plaintiff testified in deposition that notes made in his diary were contemporaneous to conversation with the defendant although the entries looked suspicious. The plaintiff eventually admitted he may have added some notations of the conversations with the defendant up to a year after the conversations, but denied adding any entries during discovery. The trial court conducted an evidentiary hearing and determined the plaintiff willfully fabricated diary entries. As a sanction to the plaintiff, the trial court dismissed the plaintiff's complaint with prejudice.

1 Importantly, in *Young*, the Nevada Supreme Court stated its policy is to adjudicate cases on
2 the merits. *Id.* at 93, 787 P.2d at 780. The *Young* Court enumerated the following factors in
3 considering dismissal with prejudice regarding willful fabrication of evidence: (1) degree of
4 willfulness; (2) non-offending party prejudice by a lesser sanction; (3) severity of sanction of dismissal
5 relative to the discovery abuse; (4) whether the evidence has been irreparably lost; and (5) the
6 feasibility and fairness of an alternative less severe sanction.

7 In this case, there is no willful fabrication of evidence. On July 22, 2012, Andrea properly
8 identified withheld claim notes and concurrently produced a Privilege Log explaining the basis for
9 withholding the claim notes. Motion at Exhibit 1-G. Plaintiff failed to timely take action regarding
10 the withheld claim notes identified in the Privilege Log. In fact, Plaintiff admits she subpoenaed
11 Liberty Mutual's claims notes in October 2014, nearly 26 months after the Privilege Log was
12 produced. Motion at 11:9-12. In November 2014, Liberty Mutual produced all claim notes that were
13 withheld in the Privilege Log, including the Claim Note Plaintiff claims Andrea allegedly tried to
14 "conceal." Motion at 12:15-25. The Claim Note that is the basis for this instant Motion was not
15 irreparably lost and eventually obtained by Plaintiff.

16 Andrea did not engage in any discovery abuse because she properly identified withheld claim
17 notes in a Privilege Log. Importantly, Plaintiff waited 26 months to take action regarding the withheld
18 claim notes identified in the Privilege Log. Because the withheld claim notes were properly identified
19 in a Privilege Log, striking Andrea's Answer is not warranted, including any lesser sanction. Unlike
20 the *Young* case, Plaintiff fails to provide the Court substantial evidence that any discovery abuse
21 occurred, let alone willful fabrication of evidence. Therefore, Andrea respectfully requests the Court
22 deny the instant Motion.
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MAZZEO LAW, LLC
INJURY TRIAL ATTORNEYS
528 S. Casino Center Blvd., Suite 305
Las Vegas, Nevada 89101

DATED this 18th day of December 2014.

PETER MAZZEO ESQ
Nevada Bar No. 009387
528 S. Casino Center Blvd. Suite 305
Las Vegas, Nevada 89101
Attorney for Defendant Andrea Awerbach

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December 2014, I served the foregoing
DEFENDANT ANDREA AWERBACH'S OPPOSITION TO PLAINTIFF'S MOTION TO
STRIKE ANSWER as follows:

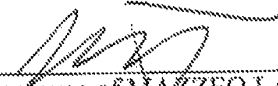
☐ US MAIL: by placing the document(s) listed above in a sealed envelope, postage
prepaid, in the United States Mail at Las Vegas, Nevada, addressed to the following:

☐ 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 Eighth Judicial District Court's WizNet system

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An Employee of MAZZEO LAW, LLC

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Exhibit A

DISTRICT COURT
CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO.: A637773
)	DEPT. NO.: XXVII
JARED AWERBACH, individually;)	
ANDREA AWERBACH, individually;)	
DOES I-X, and ROE CORPORATIONS)	
I-X, inclusive,)	
)	
Defendants.)	
)	

VIDEO DEPOSITION OF ANDREA AWERBACH
LAS VEGAS, NEVADA
FRIDAY, OCTOBER 24, 2014

REPORTED BY: JACKIE JENNELLE, RFR, CCR #809
JOB NO.: 224205

<p style="text-align: right;">Page 2</p> <p>VIDEO DEPOSITION OF ANDREA AWERBACH, taken at 4795 South Durango Drive, Las Vegas, Nevada on FRIDAY, OCTOBER 24, 2014, at 1:30 p.m., before Jackie Jennelle, Certified Court Reporter, in and for the State of Nevada.</p> <p>APPEARANCES:</p> <p>For the Plaintiff:</p> <p>GLEN LERNER INJURY ATTORNEYS BY: ADAM SMITH, ESQ. 4795 South Durango Drive Las Vegas, Nevada 89147 (702) 877-1500</p> <p>For the Defendant, JARED AWERBACH:</p> <p>RENNICK & LOUIS, PC BY: LILY COMPTON, ESQ. 6600 West Charleston Boulevard, Suite 117A Las Vegas, Nevada 89146 (702) 997-8800</p> <p>For the Defendant, ANDREA AWERBACH:</p> <p>BARKIN & FRUTTY, LLP BY: PETER MAZZEO, ESQ. 3890 West Ann Road North Las Vegas, Nevada 89031 (702) 870-2540</p> <p>The Videographer:</p> <p>MONICA HAYWORTH</p>	<p style="text-align: right;">Page 4</p> <p>LAS VEGAS, NEVADA FRIDAY, OCTOBER 24, 2014; 1:30 p.m.</p> <p>-000-</p> <p>THE VIDEOGRAPHER: Today is Friday, October 24, 2014. The time is approximately 1:45 p.m. The location is Glen Lerner Injury Attorneys at 4795 South Durango Drive, Las Vegas, Nevada 89147.</p> <p>My name is Monica Hayworth, court videographer for Litigation Services.</p> <p>This is District Court Clark County Nevada case No. A-11-63772-B entitled Amelia Garcia, plaintiff, versus Jared Awerbach, et al., defendants. The deponent is Andrea Awerbach.</p> <p>This video deposition is requested by the attorneys for the plaintiff.</p> <p>The court reporter is Jackie Jennelle of Litigation Services.</p> <p>Counsel and all present, will you please identify yourselves for the record.</p> <p>MR. SMITH: Adam Smith on behalf of the plaintiff, Amelia Garcia.</p> <p>MR. MAZZEO: Peter Mazzeo on behalf of the defendant, Andrea Awerbach.</p> <p>MS. COMPTON: Lily Compton on behalf of the</p>
<p style="text-align: right;">Page 3</p> <p style="text-align: center;">I N D E X</p> <p>WITNESS: ANDREA AWERBACH</p> <p style="text-align: center;">EXAMINATION</p> <p>BY MR. SMITH 5 BY MR. MAZZEO 202 BY MR. COMPTON 203 BY MR. SMITH 205</p> <p style="text-align: center;">EXHIBITS MARKED</p> <p>EXHIBIT PAGE Exhibit 1 Facebook Printout 196 Exhibit 2 Documents from District Court Case No. A-551677 198 Exhibit 3 Document Bates No. GJL 255 206</p>	<p style="text-align: right;">Page 5</p> <p>defendant, Jared Awerbach.</p> <p>THE VIDEOGRAPHER: The deponent will now be sworn in.</p> <p>Thereupon --</p> <p>ANDREA AWERBACH,</p> <p>was called as a witness, and having been first duly sworn, was examined and testified as follows:</p> <p style="text-align: center;">EXAMINATION</p> <p>BY MR. SMITH:</p> <p>Q. Can you please state your name and spell your last name for the record.</p> <p>A. Andrea Awerbach, A-W-E-R-B-A-C-H.</p> <p>Q. Do you remember coming to my office last year and having your deposition taken?</p> <p>A. Yes.</p> <p>Q. Have you had your deposition taken since that time?</p> <p>A. No.</p> <p>Q. Have you been a party to any lawsuits since the last time you had your deposition taken at my office?</p> <p>A. No.</p> <p>Q. It's been a while since you were here before, so I'm going to go over the ground rules again for you so that I can refresh your memory on</p>

Page 122	Page 123
<p>1 MR. MAZZEO: Shot?</p> <p>2 MR. SMITH: With a gun.</p> <p>3 THE WITNESS: Has Jared ever been what?</p> <p>4 BY MR. SMITH:</p> <p>5 Q. Shot.</p> <p>6 A. I don't know.</p> <p>7 Q. Other than the 2011 accident, what motor</p> <p>8 vehicle accidents are you aware of that Jared has</p> <p>9 been in?</p> <p>10 A. 2008.</p> <p>11 Q. Okay. What happened in 2008?</p> <p>12 A. We were at my school. He went out to -- he</p> <p>13 had my school and car keys to go get something out</p> <p>14 of the car or throw some garbage out. And then I</p> <p>15 got a call from police that he had been in an</p> <p>16 accident at Fuseller near my school.</p> <p>17 Q. He was driving your car, right?</p> <p>18 A. Yes.</p> <p>19 Q. You went out to that accident scene, right?</p> <p>20 A. Yes.</p> <p>21 Q. Was anyone injured?</p> <p>22 A. I don't know.</p> <p>23 Q. Was Jared?</p> <p>24 A. I believe so.</p> <p>25 Q. And what was Jared -- what of Jared was</p>	<p>1 But to move things back and forth from my classroom</p> <p>2 and --</p> <p>3 Q. What kind of discipline did you impose</p> <p>4 after that?</p> <p>5 A. I, again, set some limits. But Jared was</p> <p>6 involved with juvenile court at the time, so they</p> <p>7 extended his -- whatever he was on restriction from,</p> <p>8 and then I did the same thing that I was doing.</p> <p>9 That's when I also was much more deliberate in</p> <p>10 hiding the keys and hiding my wallet. That's when I</p> <p>11 realized he's going to just take whatever he wants.</p> <p>12 Q. Was he charged with stealing your car at</p> <p>13 that time?</p> <p>14 A. I don't know what he was charged with.</p> <p>15 Q. Did you tell the police that he stole it?</p> <p>16 A. Yes. That he was driving without</p> <p>17 permission.</p> <p>18 If I can backtrack for a moment, you didn't</p> <p>19 ask me, but I also told them that in 2011 and they</p> <p>20 wouldn't arrest him for it.</p> <p>21 Q. In 2011 you told the officer that Jared</p> <p>22 stole a car?</p> <p>23 A. Yes. That Jared had the car without</p> <p>24 owner's permission.</p> <p>25 Q. When did you tell them that?</p>
Page 123	Page 125
<p>1 injured?</p> <p>2 A. His back --</p> <p>3 MR. MAZZEO: And before you answer, just a</p> <p>4 standing objection to this line of questioning</p> <p>5 regarding the 2008 accident.</p> <p>6 THE WITNESS: His back and neck I think. I</p> <p>7 don't know if I'm remembering.</p> <p>8 BY MR. SMITH:</p> <p>9 Q. Was it a big accident?</p> <p>10 MR. MAZZEO: Objection, form.</p> <p>11 THE WITNESS: In terms of damage, yes.</p> <p>12 BY MR. SMITH:</p> <p>13 Q. And your car was totalled; right?</p> <p>14 A. Yes.</p> <p>15 Q. The other car was totalled?</p> <p>16 A. I don't know.</p> <p>17 Q. It looked like a lot of damage to both</p> <p>18 vehicles, right?</p> <p>19 A. Yes.</p> <p>20 Q. And how did Jared get your keys?</p> <p>21 A. We were at school and Jared's always helped</p> <p>22 me at school. I've always given him the keys to go</p> <p>23 take things out or go get things from the car. I</p> <p>24 gave him the keys for that purpose or to dump some</p> <p>25 garbage. I'm remembering garbage, but I'm not sure.</p>	<p>1 A. When the officer called me from the scene.</p> <p>2 Q. What did the officer say when you told him</p> <p>3 that?</p> <p>4 A. He said that he couldn't arrest him for it</p> <p>5 because there was no report.</p> <p>6 Q. You -- it's your testimony that you told</p> <p>7 the officer Jared took your car without permission</p> <p>8 and he said he would not arrest him for it?</p> <p>9 A. Um-hmm, yes.</p> <p>10 Q. Yes?</p> <p>11 A. I'm sorry. Yes.</p> <p>12 Q. If the officer said that you never told him</p> <p>13 that, are you saying he's lying?</p> <p>14 MR. MAZZEO: Objection, argumentative.</p> <p>15 THE WITNESS: No. I'm saying it was 2011</p> <p>16 and he may not remember. I remember the</p> <p>17 conversation with the officer because it's one</p> <p>18 conversation I've had.</p> <p>19 How many conversations did the officer have</p> <p>20 that day or in his whole career?</p> <p>21 BY MR. SMITH:</p> <p>22 Q. What else did you talk -- well, how many</p> <p>23 conversations have you had with police about Jared?</p> <p>24 MR. MAZZEO: Objection, form.</p> <p>25 THE WITNESS: I've had quite a few, but I'm</p>

<p style="text-align: right;">Page 128</p> <p>1 still always Jared's mother.</p> <p>2 BY MR. SMITH:</p> <p>3 Q. What else did you and the officer talk</p> <p>4 about when he called you from the scene of the</p> <p>5 accident?</p> <p>6 A. He told me he was arresting Jared for DUI.</p> <p>7 I asked him, Is Jared high or drunk? The officer</p> <p>8 got a little agitated with me and thought -- he was.</p> <p>9 Look, lady, I don't need to do this. I said, Wait,</p> <p>10 let's hold up. I didn't mean for you to take -- I'm</p> <p>11 not trying to cover for Jared. I'm trying to</p> <p>12 understand where we are because Jared is going to</p> <p>13 tell me that wasn't. So can you help me here? Can</p> <p>14 you tell me?</p> <p>15 Q. Were you trying to get the officer to</p> <p>16 arrest Jared for stealing your car?</p> <p>17 A. I don't know if I was trying. I think I</p> <p>18 asked him.</p> <p>19 Q. You asked him to arrest Jared for stealing</p> <p>20 your car?</p> <p>21 A. I don't think I said, Will you arrest</p> <p>22 Jared? I said, He does not have permission to have</p> <p>23 that car. Can we not do something about that?</p> <p>24 Q. And what did he say?</p> <p>25 A. He said, I'm doing this. I have to arrest</p>	<p style="text-align: right;">Page 129</p> <p>1 Jared used the car without your permission in the</p> <p>2 2008 accident?</p> <p>3 A. Yes.</p> <p>4 Q. Do you know if your insurance company made</p> <p>5 a decision of whether Jared's use of your car in the</p> <p>6 2008 accident was permissive?</p> <p>7 A. No.</p> <p>8 Q. Let's talk about the 2005 fight a little</p> <p>9 bit and specifically Jared's injuries.</p> <p>10 What did he hurt in that fight? What</p> <p>11 was -- oh, strikes that. Let me ask you a better</p> <p>12 question.</p> <p>13 What was injured in that fight?</p> <p>14 A. Both eyes. He had some other lacerations,</p> <p>15 but we mostly concentrated on the eyes.</p> <p>16 Q. Any injuries besides his eyes?</p> <p>17 MR. MAZZEO: I'd just object to the extent</p> <p>18 it calls for medical expert opinion.</p> <p>19 THE WITNESS: I believe some soft tissue.</p> <p>20 BY MR. SMITH:</p> <p>21 Q. What do you mean by that?</p> <p>22 A. Neck, back.</p> <p>23 Q. Anything else?</p> <p>24 A. Not that I recall, but, again, my focus has</p> <p>25 always been on his eyes.</p>
<p style="text-align: right;">Page 129</p> <p>1 him for DUI. I have to arrest him for this.</p> <p>2 Q. Besides the 2008 accident, has Jared been</p> <p>3 in any other accidents?</p> <p>4 A. Not that I recall.</p> <p>5 Q. Who was your automobile insurer at the time</p> <p>6 of the 2008 accident?</p> <p>7 A. I don't remember. It was either Liberty</p> <p>8 Mutual or California Casualty.</p> <p>9 Q. Did you make a claim?</p> <p>10 A. Yes.</p> <p>11 Q. And what -- it was a claim for the property</p> <p>12 damage or something else?</p> <p>13 A. I don't recall, but they paid for the car</p> <p>14 so --</p> <p>15 Q. Your insurance company paid for the car?</p> <p>16 A. I believe it was my insurance company.</p> <p>17 Q. Did anyone else make a claim as a result of</p> <p>18 that accident?</p> <p>19 A. I believe the other party.</p> <p>20 Q. And what was their claim for?</p> <p>21 A. I don't know. I'm assuming their damage.</p> <p>22 Q. Was there a lawsuit as a result of that</p> <p>23 accident?</p> <p>24 A. No, I don't think so.</p> <p>25 Q. Did you tell your insurance company that</p>	<p style="text-align: right;">Page 129</p> <p>1 Q. And what were the injuries to his eyes?</p> <p>2 MR. MAZZEO: The same foundation,</p> <p>3 question -- objection.</p> <p>4 THE WITNESS: He had a traumatic macular</p> <p>5 hole in one eye, a scratch on the other that was</p> <p>6 repaired by laser.</p> <p>7 BY MR. SMITH:</p> <p>8 Q. Which eye is the traumatic macular hole?</p> <p>9 A. I believe the left.</p> <p>10 Q. What is his vision like now in the left</p> <p>11 eye?</p> <p>12 A. I don't know.</p> <p>13 MR. MAZZEO: Objection, foundation.</p> <p>14 BY MR. SMITH:</p> <p>15 Q. Do you know what it's been like at any</p> <p>16 point since the November 2005 fight?</p> <p>17 MR. MAZZEO: Objection, speculation.</p> <p>18 THE WITNESS: That he doesn't have vision</p> <p>19 in that eye. He sees what he describes it as as a</p> <p>20 black box.</p> <p>21 BY MR. SMITH:</p> <p>22 Q. What's his vision been like in his right</p> <p>23 eye since the accident -- or strike that, since the</p> <p>24 2005 fight?</p> <p>25 A. I believe it's been strong, but there are</p>

<p style="text-align: right;">Page 174</p> <p>1 minute.</p> <p>2 THE VIDEOGRAPHER: The time is</p> <p>3 approximately 4:59 p.m. We're going off the record.</p> <p>4 (Thereupon, a break was taken.)</p> <p>5 THE VIDEOGRAPHER: The time is</p> <p>6 approximately 5:28 p.m. We're going back on the</p> <p>7 record.</p> <p>8 BY MR. SMITH:</p> <p>9 Q. Let's talk about -- a little bit about the</p> <p>10 January 2011 accident.</p> <p>11 Was Jared ever told you what happened?</p> <p>12 A. Not start to finish.</p> <p>13 Q. What has he told you?</p> <p>14 A. That he was pulling out, that he swears the</p> <p>15 other lady sped up, that he felt she wasn't hurt,</p> <p>16 and something about a truck or a bus that I'm not</p> <p>17 completely clear on.</p> <p>18 Q. Did he say she sped up or she was speeding?</p> <p>19 A. I think he said she he sped up, but I'm not</p> <p>20 sure.</p> <p>21 Q. Did he say anything about why he believes</p> <p>22 she's not hurt?</p> <p>23 A. Because she got up and walked around and</p> <p>24 there was no ambulance at the scene.</p> <p>25 Q. Anything else you remember him telling you</p>	<p style="text-align: right;">Page 175</p> <p>1 A. He has said to me that he knows he didn't</p> <p>2 have permission to take the car.</p> <p>3 Q. When did he tell you that?</p> <p>4 A. He's told me that numerous times,</p> <p>5 especially since he came home from Rawson and we</p> <p>6 started to do the case more.</p> <p>7 Q. Has he told you where he got the keys from?</p> <p>8 A. No.</p> <p>9 Q. Have you asked him?</p> <p>10 A. I don't recall.</p> <p>11 Q. Other than him telling you he didn't have</p> <p>12 permission to take the car, did you have any other</p> <p>13 conversations with him about permission to take the</p> <p>14 car on that day?</p> <p>15 A. I don't understand what other conversations</p> <p>16 we would have had, what you mean.</p> <p>17 Q. Is there anything you talked about with him</p> <p>18 regarding him having permission to take the car</p> <p>19 other than him just telling you he realizes he</p> <p>20 didn't have permission?</p> <p>21 A. No. Other than that was why I'm being</p> <p>22 sued. I think he asked me -- and, again, I may be</p> <p>23 mis-remembering, but I think he asked me, Why are</p> <p>24 they suing you? And I said, Because they're saying</p> <p>25 I gave you permission to drive the car. And he</p>
<p style="text-align: right;">Page 176</p> <p>1 about the accident?</p> <p>2 A. I just need clarification of a time. From</p> <p>3 when it happened or just --</p> <p>4 Q. At any point in time.</p> <p>5 A. He has said that he was not under the</p> <p>6 influence, that he had marijuana on him and didn't</p> <p>7 want to get arrested for that.</p> <p>8 Q. Did tell you that he told police that he</p> <p>9 had been smoking?</p> <p>10 A. I've heard him say that.</p> <p>11 Q. Did tell you why he told the police he had</p> <p>12 been smoking if he hadn't been?</p> <p>13 A. Because he had marijuana on him and I guess</p> <p>14 it was a certain weight that you're not supposed to</p> <p>15 have or something.</p> <p>16 Q. Did he tell you why he thought telling the</p> <p>17 police that he had been smoking would avoid them</p> <p>18 finding the marijuana that was on him?</p> <p>19 A. No. This would be an example of Jared's</p> <p>20 either drug logic or kid logic or where he thinks</p> <p>21 certain things that -- that's why I say sometimes</p> <p>22 that he wasn't lying, he was mistaken because he</p> <p>23 puts two and two together and gets six.</p> <p>24 Q. Anything else he told you about the</p> <p>25 accident?</p>	<p style="text-align: right;">Page 177</p> <p>1 said, But you didn't.</p> <p>2 Q. Did you ever see your car after the</p> <p>3 accident?</p> <p>4 A. Yes.</p> <p>5 Q. You went to go get things out of it, right?</p> <p>6 A. Right.</p> <p>7 Q. What was it you got out of the car?</p> <p>8 A. I don't recall. I think some things for</p> <p>9 school, maybe a CD, maybe a jacket. I don't recall.</p> <p>10 Q. What did the damage to the car look like?</p> <p>11 A. It was extensive. Had it been a newer car</p> <p>12 worth more money, they would have fixed it. So it</p> <p>13 wasn't totalled, but it was enough damage that it</p> <p>14 was worth more than whatever the formula is for the</p> <p>15 percentage of the car.</p> <p>16 Q. Did anyone -- well, strikes that.</p> <p>17 Did anyone tell you what the cost to repair</p> <p>18 the car would be?</p> <p>19 A. I think they told me that it was</p> <p>20 prohibitive. They may have told me an amount, but I</p> <p>21 don't remember. But it was more than whatever their</p> <p>22 formula is.</p> <p>23 Q. How much money did you get for the car?</p> <p>24 A. I still owed on the car, so I didn't get</p> <p>25 anything for the car.</p>

ANDREA AWERBACH - 10/24/2014

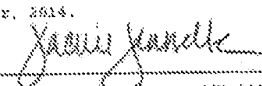
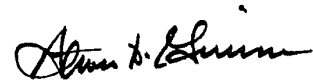
Page 206	Page 208
<p>1 me.</p> <p>2 MR. SMITH: I don't have any further</p> <p>3 questions.</p> <p>4 MR. MAZZEO: We're done.</p> <p>5 THE VIDEOGRAPHER: This concludes the</p> <p>6 videotaped deposition of Andrea Awerbach on Friday,</p> <p>7 October 24, 2014.</p> <p>8 The time is approximately 6:07 p.m. We're</p> <p>9 now off the record.</p> <p>10</p> <p>11</p> <p>12 (Proceedings concluded at 6:07 p.m.)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 CERTIFICATE OF REPORTER</p> <p>2 STATE OF NEVADA)</p> <p>3) SS:</p> <p>4 COUNTY OF CLARK)</p> <p>5 I, Jackie Janselle, a duly commissioned</p> <p>6 Notary Public, Clark County, State of Nevada, do</p> <p>7 hereby certify: That I reported the video</p> <p>8 deposition of ANDREA AWERBACH, commencing on FRIDAY,</p> <p>9 OCTOBER 24, 2014, at 1:30 p.m.</p> <p>10 That prior to being deposed, the witness</p> <p>11 was duly sworn by me to testify to the truth. That</p> <p>12 I thereafter transcribed my said shorthand notes</p> <p>13 into typewriting and that the typewritten transcript</p> <p>14 is a complete, true and accurate transcription of my</p> <p>15 said shorthand notes.</p> <p>16 I further certify that I am not a relative</p> <p>17 or employee of counsel, of any of the parties, nor a</p> <p>18 relative or employee of the parties involved in said</p> <p>19 action, nor a person financially interested in the</p> <p>20 action.</p> <p>21 IN WITNESS WHEREOF, I have set my hand in my</p> <p>22 office in the County of Clark, State of Nevada, this</p> <p>23 3rd day of November, 2014.</p> <p>24 </p> <p>25 JACKIE JANSELLE, RSR, CCR #809</p>
<p>1</p> <p>2 PAGE LINE CHANGE REASON</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 CERTIFICATE OF DEPONENT</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

EXHIBIT E



CLERK OF THE COURT

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9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

11 EMILIA GARCIA, individually,) CASE NO. A637772
12 Plaintiff,) DEPT. NO. XXVII
13 v.) <u>REPLY IN SUPPORT OF PLAINTIFF'S</u>
) <u>MOTION TO STRIKE DEFENDANT</u>
14 JARED AWERBACH, individually; ANDREA) <u>ANDREA AWERBACH'S ANSWER</u>
15 AWERBACH, individually; DOES I - X, and ROE)
16 CORPORATIONS I - X, inclusive,)
17 Defendants.) Date of hearing: Jan. 15, 2015
) Time of hearing: 9:30 a.m.
18)
19)
20)

21 Plaintiff Emilia Garcia files this Reply in Support of her Motion to Strike Defendant Andrea
22 Awerbach's Answer.

23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 This reply is based on the following memorandum of points and authorities, the papers and
2 pleadings on file with this Court, and the oral argument of the parties.

3 GLEN J. LERNER & ASSOCIATES

4
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

15 In this personal injury action, Emilia seeks to strike Defendant Andrea Awerbach's answer
16 because she knowingly and purposefully withheld evidence critical to a jury's determination of
17 permissive use. Andrea, then, actively sought to cover-up the hidden note by giving misleading
18 deposition testimony at two depositions. In response, Andrea disregards the controlling legal
19 standard and offers irrelevant arguments designed to distract the court from the real issue. That is,
20 Andrea spends a significant portion of her opposition attempting to explain why the hidden claims
21 note, alone, is insufficient to prove permission. This argument is a red herring. Emilia is not
22 seeking summary judgment based on the hidden claims note. To the contrary, Emilia has requested
23 this Court strike Andrea's complaint as sanctions for her abusive discovery tactics. This, because
24 evidence Andrea gave Jared the keys to her car on January 2, 2011, and generally made the keys
25 available to him, is more than sufficient to support a finding that Andrea implicitly allowed Jared to
26 drive her car. In fact, this is precisely why Andrea attempted to hide the note from Emilia and the
27 jury's consideration, and this is why severe sanctions must issue.

1 In reality, all of the Nevada Supreme Court’s *Young* factors weigh in favor of striking
2 Andrea’s complaint. Indeed, Andrea fails to provide any analysis under the *Young* factors, other
3 than claiming she did not willfully fabricate evidence. This is clearly inaccurate as Andrea
4 undoubtedly redacted the subject claims note and failed to notify Emilia of the redaction. More
5 importantly, Andrea cannot simply blame prior counsel for the redaction, as Andrea furthered the
6 concealment by offering misleading deposition testimony. Andrea told Liberty Mutual one version
7 of facts days after the accident, she hid evidence of that conversation, and, then, offered a
8 completely different story during her two depositions. In other words, Andrea knowingly and
9 purposefully sought to interfere with the rightful determination of Emilia’s claims by hiding
10 evidence critical to a jury’s determination of permission. Anything less than case terminating
11 sanctions will simply allow Defendants to reap the benefits of their conduct and provide a license to
12 future litigants to engage in the same conduct. Andrea’s answer must, therefore, be stricken and
13 Emilia’s claims against Andrea allowed to proceed to trial on damages.

14 II. ARGUMENT

15 A. Emilia is not seeking to “prove” permissive use through the withheld claims 16 note.

17 Andrea’s entire discussion of whether the withheld claims note, alone, proves permissive use
18 is an irrelevant red herring. This, because “[t]he existence of the requisite permission...is to be
19 determined by the trier of fact based on all the circumstances and inferences reasonably to be drawn
20 therefrom.” *Taylor v. Roseville Toyota, Inc.*, 138 Cal. App. 4th 994, 1004 (2006) (deletion in
21 original, emphasis added). As court have explained, “[w]here the issue of implied permissive use is
22 involved, the general relationship existing between the owner and the operator, is of paramount
23 importance.” *Id.*, at 1002. In other words, in order to obtain sanctions against Andrea, Emilia does
24 not have to show the withheld claims note “proves” Jared had permission to drive Andrea’s car.
25 Instead, it is the province of a jury to determine permission after considering “all the circumstances
26 and inferences reasonably to be drawn therefrom.” Andrea attempted to remove this determination
27 from the province of the jury. Emilia is unquestionably entitled to have the jury consider all
28 relevant evidence pertaining to permission, including Andrea’s admission that she gave Jared the

1 keys earlier in the day on January 2, 2011, and routinely allowed Jared easy access to the keys by
2 leaving them on the mantle. In fact, this is precisely why Andrea's conduct is so egregious and why
3 severe sanctions must be imposed. Andrea purposefully withheld evidence that is crucial to a jury's
4 determination of permission. Indeed, the very reason Andrea hid the January 17, 2011, note is
5 because the obvious inference a jury will draw is that Andrea implicitly allowed Jared to drive her
6 car by giving him the keys earlier the same day and making the keys generally available to him:

7 [e]ven though the testimony of the owner and the driver of the automobile was
8 uncontradicted, the trial judge was not required to accept it. [The mother's]
9 answers were evasive as to whether she had knowledge, prior to the night of
10 the accident, that Robert had been driving the automobile...[S]he continued
11 to keep the keys where they were easily obtainable by him, "in plain view" on
12 the buffet where "We always keep our keys." The court may have concluded
13 that, under circumstances, the keeping of the keys in such an accessible place
14 refuted her testimony that he was told not to use the automobile.

15 *Casey v. Fortune*, 179 P.2d 99, 100 (Cal. 1947) (emphasis added). In other words, evidence that
16 Andrea made the keys available to Jared on January 2, 2011, and routinely left them in plain view
17 on the mantle, is unquestionably sufficient to support a finding that Andrea implicitly gave Jared
18 permission to drive her car on January 2, 2011.

19 In sum, the assertion Emilia cannot prove permission based on the claims note, alone, and
20 Andrea's discussion of "disputed" and "alleged undisputed facts" regarding permission is irrelevant
21 and has no bearing on Emilia's motion. Instead, the issue to be decided is whether Andrea's answer
22 should be stricken as sanctions for withholding discoverable evidence. In light of the Nevada
23 Supreme Court's *Young* factors, the answer is clear.

24 **B. The Young factors weigh in favor of striking Andrea's answer.**

25 Under *Young*, the first factor to consider is the degree of willfulness of the offending party.
26 *Young v. Johnny Ribiero Building, Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Andrea feigns
27 ignorance claiming she "cannot account for the acts of prior counsel" and that she did not willfully
28 fabricate evidence. To the contrary, Andrea purposefully redacted the claims note, did not tell
Emilia the note had been redacted, then actively sought to cover up the concealment through her
own deposition testimony. In particular, Andrea testified during her first deposition she (i) did not
know how Jared obtained the keys on January 2, 2011, (ii) routinely hid the keys from Jared, and

1 (iii) did, in fact, hide the keys on January 2, 2011. During her first deposition, Andrea expressly
2 denied ever leaving the keys on the counter. In other words, not only did Andrea withhold the
3 January 17, 2011, claims note, her deposition testimony directly contradicts the facts stated in the
4 claims note that she gave Jared the keys and routinely made them available to him by leaving them
5 on the mantle. Put differently, if Andrea had not intended to hide the claims note from Emilia and
6 had testified truthfully based on what actually transpired, she would have admitted giving Jared the
7 keys and leaving the keys on the mantle. Instead, her deposition testimony completely contradicts
8 what she told Liberty Mutual days after the accident. This, to further cover up facts critical to a
9 jury's determination of permission.

10 Andrea continued the ruse during her second deposition. Andrea testified during her second
11 deposition that she hid the keys "in any place she could think of" and gave a lengthy explanation of
12 her various hiding places:

13 Under the bed. In the -- in his section of the bathroom like way behind in the
14 cabinet under the sink while I was in the shower. In the closet in different
15 purses. In the closet underneath things. In a briefcase and then I would hide the
16 briefcase under the bed. In dresser drawers. Inside things. Inside garbage cans.
17 Inside garbage I thought he wouldn't go through. In -- while I was cooking, in
various drawers in the kitchen. Sometimes underneath several cushions on the
couch, like underneath the couch. Under the recliner, under the recliner, so I'd
have to get up and he'd have to lift the couch to find it. Any place that I could
think of.

18 Mot., at Ex. 1-J, at 142:5-19; 158:23-159:14. Again, instead of accurately disclosing what happened
19 on January 2, 2011, and in the time leading up to January 2, 2011, Andrea continued to testify she
20 hid the keys from Jared and did not know how he obtained them. This, despite telling Liberty
21 Mutual she gave Jared the keys and routinely made them available to him. Andrea fabricated
22 evidence by making it appear as if the January 17, 2011, claims note never existed, then continued
23 the cover up by testifying to a completely different version of facts during her two depositions.
24 Andrea's participation in the deception was willful and calculated, and Andrea cannot blame prior
25 counsel for her own deposition testimony (given in the presence of prior and current counsel).

26 Similarly, Andrea's claim she served a privilege log along with the redacted claims note is
27 irrelevant. This, because nothing in the claims notes, or the privilege log, gives any indication that
28 the note has been redacted. Instead, Andrea's privilege log gives the impression that all claims

1 notes through January 18, 2011, were produced, and nothing in the log indicates a note from January
2 17, 2011, was being withheld or was even redacted. The mere fact that Andrea produced a privilege
3 log that said nothing about the secretly redacted claims note is not a viable defense to sanctions.
4 Along the same lines, Andrea's claim that Emilia took 26 months to discover the claims note is also
5 unpersuasive as Emilia had no reason to believe Andrea withheld evidence.

6 **C. Andrea fails to address the remaining *Young* factors.**

7 Other than offering a brief, unpersuasive explanation why her conduct was not willful,
8 Andrea fails to provide any analysis or explanation under the remaining *Young* factors. Specifically,
9 the second factor for the Court's consideration is the extent to which Emilia would be prejudiced by
10 a lesser sanction. *Young*, 106 Nev. at 93, 787 P.2d at 780. "A [party] suffers prejudice if the
11 [offending party's] actions impair the [party's] ability to go to trial or threaten to interfere with the
12 rightful decision of the case." *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236
13 (9th Cir. 2006), cited by *Foster*, 126 Nev. Adv. Op. No. 6, 227 P.3d at 1049. Andrea does not
14 dispute the hidden claims note is relevant, nor does she explain why lesser sanctions are appropriate.
15 In reality, Andrea's conduct is inexcusable and clearly impaired Emilia's ability to go to trial and
16 interfered with the rightful decision of the case. This, because Andrea's admissions that she gave
17 the keys to Jared on January 2, 2011, and generally made the keys available to him, is critical to a
18 jury's determination of permission.

19 In addition, if Defendants had disclosed this note when they were required to, it would have
20 allowed Emilia the opportunity to impeach Andrea during her deposition. Proper disclosure would
21 also have saved Emilia a significant amount of time and expense deposing Andrea and Jared on the
22 issue of permissive use and responding to Andrea's baseless summary judgment motion, something
23 Andrea also disregards. In short, imposing any sanctions other than striking Andrea's answer
24 effectively condones Andrea's abusive litigation practices and rewards her underhanded conduct.
25 *Ashton*, 772 F. Supp. 2d at 804-05.

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1 **D. The severity of, and the prejudice caused by, Andrea’s willful discovery abuse,**
2 **far outweighs the severity of striking Andrea’s answer.**

3 The Court must next consider the severity of the dismissal sanction relative to the severity of
4 the discovery abuse. *Young*, 106 Nev. at 93, 787 P.2d at 780. Andrea, again, fails to address this
5 factor or the case law Emilia cites. The reason is simple: allowing Andrea to thwart Emilia’s
6 attempts to prove the required elements of her claims wholly upends the discovery process and
7 places Emilia at a severe disadvantage in this case. Andrea’s active concealment of the January 17,
8 2011, note caused significant delay by forcing Emilia to depose Jared and Andrea on this issue to
9 determine facts that already existed but that were hidden from Emilia. In truth, Andrea’s decision to
10 hide the claims note, then facilitate a cover-up with misleading deposition testimony forced Emilia
11 to conduct a significant amount of unnecessary discovery, wasting Emilia and the Court’s resources.
12 The prejudice inflicted on Emilia as a result of Andrea’s abusive litigation tactics far outweighs any
13 prejudice Andrea will suffer if her Answer is stricken, and Andrea fails to offer any explanation
14 otherwise.

15 **E. Less severe sanctions would likewise result in a finding of Andrea’s joint**
16 **liability anyway.**

17 The Court must also consider “the feasibility and fairness of alternative, less severe
18 sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to
19 be admitted by the offending party.” *Young*, 106 Nev. at 93, 787 P.2d at 780. Andrea also
20 disregards this factor and fails to explain why less severe sanctions should issue. Again, this is
21 because a finding that Jared did, in fact, have permission to drive Andrea’s car on January 2, 2011,
22 achieves the same result as striking Andrea’s answer, *i.e.*, Andrea will be deemed liable for Jared’s
23 conduct under the joint liability statute. It is obvious that less severe sanctions would be patently
24 unfair to Emilia by forcing her to incur additional attorneys’ fees in order to achieve the same end as
25 striking Andrea’s answer now.

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1 **F. By willfully obstructing discovery, Andrea has effectively waived her right to a**
2 **trial on the merits.**

3 The court must next consider the policy of favoring adjudication a case on its merits. *Young*,
4 106 Nev. at 93, 787 P.2d at 780. Although Andrea makes a passing reference to this factor, she
5 completely disregards the Nevada Supreme Court precedent Emilia cites making clear that this
6 policy is not advanced by permitting a party to flaunt its discovery obligations to the detriment of
7 opposing parties. *Foster*, 126 Nev. Adv. Op. No. 6, 227 P.3d at 1049. Indeed, this factor “‘lends
8 little support’ to a party whose responsibility it is to move a case toward disposition on the merits
9 but whose conduct impedes progress in that direction.” *See In re Phenylpropanolamine (PPA)*
10 *Products*, 460 F.3d at 1228.

11 **G. Andrea chose to willfully impede discovery.**

12 The court must also consider “whether sanctions unfairly operate to penalize a party for the
13 misconduct of his attorney.” *Young*, 106 Nev. at 93, 787 P.2d at 780. As explained in detail above,
14 striking Andrea’s complaint does not unfairly penalize her for misconduct of her counsel. This,
15 because Andrea actively engaged in the cover-up by offering misleading deposition testimony on
16 two separate occasions. Indeed, if Emilia had the January 17, 2011, claims note during either of
17 Andrea’s two depositions, the note would have allowed Emilia to impeach Andrea using her prior
18 statements. Jared, in contrast, readily concedes he had permission and that he used Andrea’s car on
19 several occasions prior to the date of the accident. From this, it is obvious that striking Andrea’s
20 answer would not punish Andrea for the conduct of her counsel, but instead punish Andrea for
21 abusing the discovery process and, then, attempting to cover up the abuse.

22 **H. Some evidence has been irreparably lost.**

23 The court must also consider whether evidence has been irreparably lost. *Young*, 106 Nev.
24 at 93, 787 P.2d at 780. “[A] party is required to preserve documents, tangible items, and
25 information relevant to litigation that are reasonably calculated to lead to the discovery of
26 admissible evidence.” *Bass-Davis v. Davis*, 122 Nev. 442, 450, 134 P.3d 103, 108 (2006). “The
27 pre-litigation duty to preserve evidence is imposed once a party is on notice of a potential legal
28 claim.” *Id.* “A party is on notice when litigation is reasonably foreseeable.” *Id.* In response,

1 Andrea merely claims that no evidence was irreparably lost because Emilia has since discovered the
2 hidden note. Notably, Andrea does not address the obvious fact that Emilia lost the benefit of
3 asking Andrea about the note during her two depositions, giving her time to fabricate a different
4 story. In addition, had Emilia known about Andrea's conversation with the Liberty Mutual adjustor,
5 Emilia could have deposed the adjustor much earlier when her memory was fresh. Now, Emilia is
6 being forced to depose Ms. Meraz after the discovery cutoff and less than one month before the
7 February 2, 2015, trial. In short, evidence has been lost as Ms. Meraz and Andrea's memories have
8 faded in the years since the accident and in the years since Andrea feigned production of the
9 complete claims notes.

10 **I. Terminating sanctions are necessary to deter other parties from engaging in**
11 **similar conduct.**

12 Finally, the Court must consider the "need to deter both parties and future litigants from
13 similar abuses." *Young*, 106 Nev. at 93, 787 P.2d at 780. Andrea also fails to address this factor.
14 This, because imposing severe sanctions under these circumstances would serve as a deterrent by
15 showing that this Court will not tolerate willful and intentional discovery abuse, including
16 knowingly and purposefully concealing evidence critical to a fair resolution of this case on its
17 merits.

18 In sum, all of the *Young* factors weigh in favor of striking Andrea's complaint. Indeed,
19 Andrea glosses over the *Young* factors and instead seeks to blame her prior counsel for hiding the
20 note and Emilia for not discovering the concealment earlier. Andrea's arguments are unpersuasive
21 and fail to insulate her from sanctions. Consequently, Andrea's answer must be stricken.

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IV. CONCLUSION

For the reasons set forth above, Emilia's motion should be granted and Andrea's answer stricken. At a bare minimum, Emilia is entitled to a conclusive finding that Jared did, in fact, have permission to drive Andrea's car on January 2, 2011.

GLEN J. LERNER & ASSOCIATES

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EXHIBIT F

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02/25/2015 03:43:40 PM1 **ORDR**
CLERK OF THE COURT2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 * * * * *

6 EMILIA GARCIA,

7 Plaintiff,

CASE NO: A-11-637772

8 v.

DEPARTMENT 27

9 ANDREA AWERBACH and JARED
10 AWERBACH

11 Defendants.

12 **DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO STRIKE**
13 **ANDREA AWERBACH'S ANSWER; GRANTING PLAINTIFF'S MOTION FOR**
14 **ORDER TO SHOW CAUSE; AND GRANTING IN PART AND DENYING IN**
15 **PART PLAINTIFF'S MOTION TO STRIKE SUPPLEMENTAL REPORTS**16 These matters having come on for hearing before Judge Alf on the 15th day of
17 January, 2015; Adam Smith appearing on behalf of Plaintiff Emilia Garcia, (hereinafter
18 "Plaintiff" OR "Emilia"); Peter Mazzeo, Esq., and Danielle Kolkoski, Esq. appearing for
19 and on behalf of Defendant Andrea Awerbach (hereinafter "Andrea") and Roger
20 Strassberg, Esq. and Lily Richardson, Esq. appearing for and on behalf of Defendant
21 Jared Awerbach (hereinafter "Jared") and the Court having heard arguments of counsel,
22 and being fully advised in the premises;23 **COURT FINDS** after review the Court ruled from the bench on some of the
24 matters before the Court. The Court granted the Plaintiff's Motion for Partial Summary
25 Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS
26 484C.110(3) and denied Defendant Jared's Motion for Partial Summary Judgment on
27 Claims for Punitive Damages. The Court granted Defendant Andrea's Motion to
28 Continue Trial, as well as Defendant Jared's Joinder, and set the case on the trial stack

1 beginning April 6, 2015. The Court also ordered the parties to participate in a settlement
2 conference on February 19, 2015; based on the minute order entered by the settlement
3 judge, all parties participated in good faith.

4 **COURT FURTHER FINDS** after review the Court took Plaintiff's Motion to
5 Strike Defendant Andrea Awerbach's Answer under submission on January 15, 2015.
6 Plaintiff moves to strike Defendant Andrea's answer under NRCP 37(b)(C) for conduct
7 in discovery relating to concealment of an entry on her insurance claim log. **COURT**
8 **FURTHER FINDS** after review that striking the answer is inappropriate because
9 Plaintiff became aware of the concealed entry during discovery and was able to conduct a
10 deposition of the claims adjuster, but a lesser sanction is warranted. **COURT**
11 **FURTHER FINDS** after review Andrea gave her son permission to use the car and a
12 finding of permissive use is appropriate because the claims note was concealed
13 improperly, was relevant, and was willfully withheld by Defendant Andrea.
14

15 **COURT FURTHER FINDS** after review that Plaintiff filed a Motion for Order
16 to Show Cause why Defendant Jared Awerbach Should Not be Held in Contempt for
17 Violating the Court's Protective Order. Plaintiff seeks a recovery of attorneys' fees
18 relating to Defendant Jared's violation of the Discovery Commissioner's Report and
19 Recommendations (DCR&R) of August 26, 2014 that limited Defendant Jared's
20 subpoenas to spinal injuries claimed from this accident. **COURT FURTHER FINDS**
21 after review that Defendant Jared did not notify the recipients of the subpoenas of the
22 limitations in the DCR&R and received information outside of the limited scope.
23 Defendant Jared produced the protected documents in a NRCP 16.1 supplement on
24 November 3, 2014. **COURT FURTHER FINDS** after review that Defendant Jared
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1 should be held in contempt for not complying with the August 26, 2014 DCR&R and
2 Plaintiff is entitled to attorneys' fees in the amount of \$5,000.

3 **COURT FURTHER FINDS** after review Plaintiff filed a Motion to Strike 1)
4 December 5, 2014 Supplemental Report of Defendants' Expert Witness Dr. Gregory
5 Brown; 2) December 5, 2014 Supplement of Dr. Joseph Wu; 3) December 5, 2014
6 Supplement of Dr. Raymond Kelly; and 4) December 11, 2014 Supplement of Dr. Curtis
7 Poindexter. **COURT FURTHER FINDS** after review that the Motion should be granted
8 in part and denied in part. As to the Supplemental Report of Dr. Brown, the Court denies
9 the Motion to Strike to remain consistent with the decision of the Court on December 30,
10 2014. The Court held that the scope of the experts' testimony will be determined at the
11 time of trial and experts can consider the opinions of other in their opinions, but they are
12 foundational only and the Court will not allow cumulative evidence. As to the
13 Supplements of Drs. Wu and Kelly, the Court grants the Motion to Strike because after
14 the Court struck Defendant Jared's experts on November 18, 2014, he did not re-
15 designate either Dr. Wu or Dr. Kelly. Because neither Dr. Wu nor Dr. Kelly is an expert
16 witness, their supplemental reports are stricken as well. As to Dr. Poindexter, the Court
17 grants the Motion to Strike as to the billing records because they were not timely
18 disclosed. Dr. Poindexter is limited to opinions set forth at the time of the expert
19 disclosure deadline. To remain consistent with previous rulings, Dr. Poindexter is
20 allowed to consider the opinions of others as part of his opinion, but they are foundational
21 only.
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25 **COURT ORDERS** for good cause appearing and after review the Motion to
26 Strike Defendant Andrea Awerbach's Answer is **DENIED**, but a sanction of a finding of
27 permissive use is **GRANTED**.
28

COURT FURTHER ORDERS for good cause appearing and after review the Motion for Order to Show Cause why Defendant Jared Awerbach Should Not be Held in Contempt is **GRANTED**.

COURT FURTHER ORDERS for good cause appearing and after review Plaintiff's Motion to Strike is **GRANTED** in part and **DENIED** in part; **DENIED** as to Dr. Brown's Supplemental Report, **GRANTED** as to Drs. Wu and Kelly Supplemental Reports, and **GRANTED** as to the billing analysis in Dr. Poindexter's Supplement Report only.

Dated: February 24, 2015

Nancy L. Alf
NANCY ALF
DISTRICT COURT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and/or by Fax transmission to:

Glen J. Lerner & Associates - Adam D. Smith, Esq. - asmith@glenlerner.com
FAX: 702-933-7043

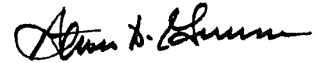
Mazzeo Law, LLC - Peter Mazzeo, Esq. - pmazzeo@mazzeolawfirm.com
FAX: 702-589-9829

Resnick & Louis, P.C. - Roger Strassburg, Esq. - rstrassburg@rlattorneys.com
FAX: 702-997-3800



Karen Lawrence
Judicial Executive Assistant

EXHIBIT G



CLERK OF THE COURT

1 **MOT**
2 **PETER MAZZEO, ESQ.**
3 Nevada Bar No. 9387
4 **MAZZEO LAW, LLC**
5 528 S. Casino Center Blvd, Suite 305
6 Las Vegas, Nevada 89101
7 P: 702.589.9898
8 F: 702.589.9829
9 pmazzeo@mazzeolawfirm.com
10 Attorney for Defendant Andrea Awerbach

7 **DISTRICT COURT**
8
9 **CLARK COUNTY, NEVADA**

10 EMILIA GARCIA, individually,
11 Plaintiff,

12 vs.

13 ANDREA AWERBACH, individually;
14 JARED AWERBACH, individually; DOES I - X,
15 and ROE CORPORATIONS, I - X, inclusive,
16 Defendants.

Case No: A-11-637772-C

Dept No: XXVII

**DEFENDANT ANDREA AWERBACH'S
MOTION FOR RELIEF FROM FINAL
COURT ORDER**

Oral Argument Requested

Date of Hearing: 04/15/15

Time of Hearing: 9:00 AM

17
18 Defendant ANDREA AWERBACH, by and through her attorney of record, PETER
19 MAZZEO, ESQ. of the law firm of MAZZEO LAW, LLC hereby submits her Motion to Amend the
20 Court Order pursuant to NRCF Rule 60 (b) and EDCR 2.24 denying Plaintiff's Motion to Strike
21 Andrea Awerbach's Answer but imposing a lesser included sanction of finding Jared Awerbach had
22 permissive use of her vehicle. This Motion is made and based upon the papers and pleadings on file
23 herein, the Memorandum of Points and Authorities submitted herewith, such other documentary

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evidence as may be presented and any oral arguments at the time of the hearing of this matter.

DATED this 13th day of March 2015.

MAZZEO LAW, LLC

PETER MAZZES, ESQ.
Nevada Bar No. 009387
528 S. Casino Center Blvd. Suite 305
Las Vegas, Nevada 89101

Attorney for Defendant Andrea Awerbach

NOTICE OF MOTION

TO: All interested parties; and

TO: Their respective counsel of record:

YOU WILL PLEASE TAKE NOTICE that Defendant will bring the foregoing **DEFENDANT**
ANDREA AWERBACH'S MOTION FOR RELIEF FROM FINAL COURT ORDER

on for hearing before the Honorable Judge Nancy Alif in Department XXVII on the 15 day of
April, 2015 at the hour of 9:00 AM.
9:00 AM
April, 2015 at the hour of 9:00 AM, or as soon thereafter as counsel may be heard.

DATED this 13th day of March 2015.

MAZZEO LARRY LLC

PETER MAZZEO, ESQ.
Nevada Bar No. 009387
528 S. Casino Center Blvd. Suite 305
Las Vegas, Nevada 89101

Attorney for Defendant Andrea Awerbach

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT

Defendant Andrea Awerbach seeks relief from this Court's Order denying Plaintiff's motion to strike Andrea Awerbach's Answer but imposing a lesser included sanction of finding Jared Awerbach had permissive use of her vehicle at the time of the subject accident. See Order, attached hereto as **Exhibit A**.

Andrea contends this Court exceeded its authority to impose the severe sanction of establishing a contested fact without the adverse party (Plaintiff) first moving the Court for an Order seeking relief pursuant to NRCP Rule 37 (a) by first filing a motion to compel disclosure of the "improperly concealed claim note". Only after a party obtains an Order granting a motion to compel production of certain materials, may the party thereafter move the Court for the party's failure to comply with the Order giving rise to the Rule 37 (c) sanctions which include striking a pleading or refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

In other words, since Plaintiff did not previously obtain relief pursuant to Rule 37(a) seeking to compel Andrea Awerbach to produce the subject "claim note" this Court has no authority to strike a pleading or establish a material disputed fact regarding liability absence an actual violation of an existing Court Order directing the adverse party to produce the requested materials.

In this case, Plaintiff's first motion concerning Defendants' failure to disclose a claim note was when she filed her Motion to Strike Andrea Awerbach's Answer. However, since Plaintiff never previously moved to compel the disclosure of the subject claim note prior to filing the motion to strike Andrea's Answer, this Court exceeded its authority to impose sanctions pursuant to Rule 37(c) which are only available as penalties after it is determined a party has already violated a prior Order. Since Plaintiff never obtained a prior Order seeking to compel disclosure of the claim note, Andrea is not in violation of any Order and therefore this Court imposing the lesser included sanction of finding Jared Awerbach had permissive use of Andrea's vehicle is improper and exceeded the authority of this Court. The prior Order must be vacated and a new order entered denying Plaintiff's Motion to Strike Andrea Awerbach's Answer sans any other sanctions whatsoever.

///

II. LEGAL ARGUMENT

A. This Court Must Amend Its Order Finding Andrea Gave Jared Awerbach Permissive Use of Her Vehicle Because Plaintiff Never Previously Obtained An Order to Compel Disclosure Which is a Prerequisite to Imposing Any Sanction Beyond Attorney's Fees.

NRCP Rule 60 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. EDCR 2.24 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. Since the notice of entry of the order in question was entered on February 27, 2015, this motion is timely filed.

Where a motion for an Order compelling disclosure is granted, then NRCP Rule 37(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..." Period. No other sanction is available at this stage. (Emphasis added).

Rule 37(b) 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, ..." (Emphasis added).

Rule 37(c) provides for sanctions of striking a pleading or finding that designated facts are established only when an ORDER has been violated. "In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37 (b)(2)(A)(B) or (C) and may include informing the jury of the failure to make the disclosure."

1 Plaintiff first sought relief for this apparent 16.1 violation in her instant Motion to Strike
2 Defendant Andrea Awerbach's Answer. And the relief sought was not to compel disclosure of the
3 claim note but to strike Andrea's Answer. However, Plaintiff never brought a motion to compel
4 disclosure of this record nor did the Court previously enter any Order directing Andrea to make the
5 disclosure. Consequently, at no time was Andrea Awerbach in violation of any prior or existing Order
6 to disclose the subject claim note. Even at the time Plaintiff brought her motion to strike Andrea's
7 answer, Andrea was not in violation of any existing prior Order which is a prerequisite for imposing
8 the severe sanction of designating certain facts as established. This Court has no authority to strike a
9 Pleading or establish a disputed material fact regarding liability absent an actual violation of a Court
10 Order which did not occur in this case. In the case at bar, Andrea simply failed to disclose information
11 pursuant to Rule 16.1, 16.2 or 26(e)(1) which, in and of itself, does not give rise to the severe sanctions
12 permitted pursuant to NRCP Rule 37(c) since she was never found to have violated a prior Order
13 directing her to make the disclosure previously.

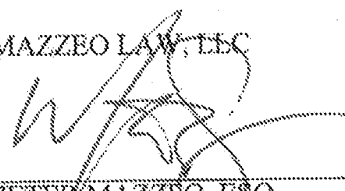
14 Therefore, this Court overstepped its authority in imposing the severe sanction of "establishing
15 any designated facts" such as finding liability unless the Court first entered an Order on the motion
16 for sanctions and only subsequently found the party was in violation of the Court Order. See Rule
17 37(c).

18 III. CONCLUSION

19 Based on the foregoing, Defendant Andrea Awerbach respectfully requests this Court GRANT
20 her NRCP Rule 60 Motion to relief from the Court Order finding Andrea gave Jared Awerbach
21 permissive use of her vehicle at the time of the subject accident and to enter an Order simply Denying
22 Plaintiff's Motion to Strike Andrea Awerbach's Answer.

23 DATED this 13th day of March 2015.

24 MAZZEO LAW, LLC

25 
26 PETER MAZZEO, ESQ.

27 Nevada Bar No. 009387

28 528 S. Casino Center Blvd. Suite 305

Las Vegas, Nevada 89101

Attorney for Defendant Andrea Awerbach

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of March 2015, I served the foregoing
DEFENDANT ANDREA AWERBACH'S MOTION FOR RELIEF FROM FINAL
COURT ORDER 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 Eighth Judicial District Court's WizNet system

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.
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Resnick & Louis, P.C.
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Attorney for Defendant Jared Awerbach


An Employee of MAZZEO LAW, LLC

MAZZEO LAW, LLC
INJURY TRIAL ATTORNEYS
528 S. Casino Center Blvd., Suite 305
Las Vegas, Nevada 89101

EXHIBIT A

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 * * * * *

6 EMILIA GARCIA,

7 Plaintiff,

CASE NO: A-11-637772

8 v.

DEPARTMENT 27

9 ANDREA AWERBACH and JARED
10 AWERBACH

Defendants.

11 **DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO STRIKE**
12 **ANDREA AWERBACH'S ANSWER; GRANTING PLAINTIFF'S MOTION FOR**
13 **ORDER TO SHOW CAUSE; AND GRANTING IN PART AND DENYING IN**
PART PLAINTIFF'S MOTION TO STRIKE SUPPLEMENTAL REPORTS

14 These matters having come on for hearing before Judge Alf on the 15th day of
15 January, 2015; Adam Smith appearing on behalf of Plaintiff Emilia Garcia, (hereinafter
16 "Plaintiff" OR "Emilia"); Peter Mazzeo, Esq., and Danielle Kolkoski, Esq. appearing for
17 and on behalf of Defendant Andrea Awerbach (hereinafter "Andrea") and Roger
18 Strassberg, Esq. and Lily Richardson, Esq. appearing for and on behalf of Defendant
19 Jared Awerbach (hereinafter "Jared") and the Court having heard arguments of counsel,
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22 **COURT FINDS** after review the Court ruled from the bench on some of the
23 matters before the Court. The Court granted the Plaintiff's Motion for Partial Summary
24 Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS
25 484C.110(3) and denied Defendant Jared's Motion for Partial Summary Judgment on
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7 in discovery relating to concealment of an entry on her insurance claim log. **COURT**
8 **FURTHER FINDS** after review that striking the answer is inappropriate because
9 Plaintiff became aware of the concealed entry during discovery and was able to conduct a
10 deposition of the claims adjuster, but a lesser sanction is warranted. **COURT**
11 **FURTHER FINDS** after review Andrea gave her son permission to use the car and a
12 finding of permissive use is appropriate because the claims note was concealed
13 improperly, was relevant, and was willfully withheld by Defendant Andrea.

14
15 **COURT FURTHER FINDS** after review that Plaintiff filed a Motion for Order
16 to Show Cause why Defendant Jared Awerbach Should Not be Held in Contempt for
17 Violating the Court's Protective Order. Plaintiff seeks a recovery of attorneys' fees
18 relating to Defendant Jared's violation of the Discovery Commissioner's Report and
19 Recommendations (DCR&R) of August 26, 2014 that limited Defendant Jared's
20 subpoenas to spinal injuries claimed from this accident. **COURT FURTHER FINDS**
21 after review that Defendant Jared did not notify the recipients of the subpoenas of the
22 limitations in the DCR&R and received information outside of the limited scope.
23 Defendant Jared produced the protected documents in a NRCP 16.1 supplement on
24 November 3, 2014. **COURT FURTHER FINDS** after review that Defendant Jared
25
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1 should be held in contempt for not complying with the August 26, 2014 DCR&R and
2 Plaintiff is entitled to attorneys' fees in the amount of \$5,000.

3 **COURT FURTHER FINDS** after review Plaintiff filed a Motion to Strike 1)
4 December 5, 2014 Supplemental Report of Defendants' Expert Witness Dr. Gregory
5 Brown; 2) December 5, 2014 Supplement of Dr. Joseph Wu; 3) December 5, 2014
6 Supplement of Dr. Raymond Kelly; and 4) December 11, 2014 Supplement of Dr. Curtis
7 Poindexter. **COURT FURTHER FINDS** after review that the Motion should be granted
8 in part and denied in part. As to the Supplemental Report of Dr. Brown, the Court denies
9 the Motion to Strike to remain consistent with the decision of the Court on December 30,
10 2014. The Court held that the scope of the experts' testimony will be determined at the
11 time of trial and experts can consider the opinions of other in their opinions, but they are
12 foundational only and the Court will not allow cumulative evidence. As to the
13 Supplements of Drs. Wu and Kelly, the Court grants the Motion to Strike because after
14 the Court struck Defendant Jared's experts on November 18, 2014, he did not re-
15 designate either Dr. Wu or Dr. Kelly. Because neither Dr. Wu nor Dr. Kelly is an expert
16 witness, their supplemental reports are stricken as well. As to Dr. Poindexter, the Court
17 grants the Motion to Strike as to the billing records because they were not timely
18 disclosed. Dr. Poindexter is limited to opinions set forth at the time of the expert
19 disclosure deadline. To remain consistent with previous rulings, Dr. Poindexter is
20 allowed to consider the opinions of others as part of his opinion, but they are foundational
21 only.
22
23
24

25 **COURT ORDERS** for good cause appearing and after review the Motion to
26 Strike Defendant Andrea Awerbach's Answer is **DENIED**, but a sanction of a finding of
27 permissive use is **GRANTED**.
28

COURT FURTHER ORDERS for good cause appearing and after review the Motion for Order to Show Cause why Defendant Jared Awerbach Should Not be Held in Contempt is **GRANTED**.

COURT FURTHER ORDERS for good cause appearing and after review Plaintiff's Motion to Strike is GRANTED in part and DENIED in part; DENIED as to Dr. Brown's Supplemental Report, GRANTED as to Drs. Wu and Kelly Supplemental Reports, and GRANTED as to the billing analysis in Dr. Poindexter's Supplement Report only.

Dated: February 24, 2018

NANCY ALLEN
DISTRICT COURT JUDGE

1
2 CERTIFICATE OF SERVICE
3

4 I hereby certify that on or about the date signed I caused the foregoing document to be
5 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
6 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit in the mail and/or by Fax transmission to:

7 Glen J. Lerner & Associates - Adam D. Smith, Esq. - asmith@glenlerner.com
FAX: 702-933-7043

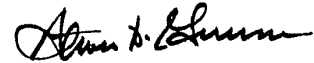
8 Mazzeo Law, LLC - Peter Mazzeo, Esq. - pmazzeo@mazzeolawfirm.com
9 FAX: 702-589-9829

10 Resnick & Louis, P.C. - Roger Strassburg, Esq. - rstrassburg@rlattorneys.com
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12
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14 

15 Karen Lawrence
16 Judicial Executive Assistant
17
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EXHIBIT H



CLERK OF THE COURT

OPPS

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DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,
Plaintiff,

v.

JARED AWERBACH, individually; ANDREA
AWERBACH, individually; DOES I - X, and ROE
CORPORATIONS I - X, inclusive,
Defendants.

) CASE NO. A637772
) DEPT. NO. XXVII
)

**PLAINTIFF'S OPPOSITION TO
PLAINTIFF ANDREA AWERBACH'S
MOTION FOR RELIEF FROM FINAL
COURT ORDER**

) Date of hearing: April 15, 2015
) Time of hearing: 9:00 a.m.
)
)
)
)
)

Plaintiff Emilia Garcia files this Opposition to Defendant Andrea Awerbach's Motion for
Relief from Final Order.

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1 This Opposition is based on the following memorandum of points and authorities, the papers
2 and pleadings on file with this Court, and the oral argument of the parties.

3 GLEN J. LERNER & ASSOCIATES

4
5 By: /s/Craig A. Henderson
6 Corey M. Eschweiler, Esq.
7 Nevada Bar No. 6635
8 Adam D. Smith, Esq.
9 Nevada Bar No. 9690
10 Craig A. Henderson, Esq.
11 Nevada Bar No. 10077
12 4795 South Durango Drive
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14 (702) 877-1500
15 Attorneys for Plaintiff

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION**

18 In this personal injury action, Defendant Andrea Awerbach seeks reconsideration of this
19 Court's conclusive finding that Andrea gave Jared permission to drive her car on January 2, 2011.
20 This, without first seeking leave under EDCR 2.24, and without any new law or facts. Instead,
21 Andrea seeks reconsideration based on an argument she could have raised but did not – that Emilia
22 was first required to obtain an order compelling disclosure under NRCP 37(a) before the Court
23 could enter sanctions under subsection 37(c). In fact, Andrea did not raise this argument during the
24 hearing or in either of her two oppositions.

25 Regardless, Andrea's motion fails for a far simpler reason: the "court did not act here under
26 Rule 37(b)(2)(B)." That is:

27 Rule 37(b)(2)(B) does indeed contemplate a threshold determination by the court
28 that the offending party has failed to comply with a court order issued under Rule
37(a). But the same is not true where automatic discovery provisions of [Rule
16.1] and 26(e) are violated, triggering subsection (c) of the same Rule 37.

29 In other words, "under part (c)...a court order issued under part (a) need not first be violated before
30 the court may impose the sanctions provided under (c)" – sanctions that expressly include entering
31 "[a]n order that the matters regarding which the order was made or any other designated facts shall
32 be taken to be established for the purposes of the action." Simply put, the entire premise of

1 Andrea's motion fails and there is no basis for reconsideration, even if Andrea had met the standard
2 for reconsideration and sought leave under EDCR 2.24. In truth, Andrea has conceded the hidden
3 claims note is relevant and "should have been submitted [during discovery]." Indeed, Andrea's
4 entire argument is illogical because she fails to explain how Emilia should have known to compel
5 production of evidence Andrea intentionally concealed. The Court's order was, therefore, well
6 within its "wide latitude" under Rule 37(c) and its inherent powers to issue "sanctions for discovery
7 and other litigation abuses not specifically proscribed by statute." There is no basis to reconsider or
8 amend the order and it must remain undisturbed.

9 II. FACTUAL BACKGROUND

10 A. Background of the accident.

11 This action arose on January 2, 2011, when Defendant Jared Awerbach, while driving an
12 automobile owned by his mother, Defendant Andrea Awerbach, negligently caused a motor vehicle
13 accident with a vehicle being driven by Plaintiff Emilia Garcia. At the time of the accident, Jared
14 was impaired by marijuana. *See* Order Granting in Part and Denying in Part Plaintiff's Motion for
15 Partial Summary Judgment, on file with this Court.

16 B. Background of the lawsuit.

17 On March 25, 2011, Emilia initiated this lawsuit, suing Jared for negligence and Andrea for
18 negligent entrustment.¹ On May 17, 2012, Emilia served Jared and Andrea with interrogatories,
19 document requests, and requests for admission. *See* Plaintiff's Motion to Strike Defendant Andrea
20 Awerbach's Answer ("Motion to Strike"), at Ex. 1-H, on file with this Court. One of Emilia's
21 document requests to Andrea sought "[t]he entire liability insurance or risk department claims
22 files relating to the accident at issue in Plaintiff's complaint." *Id.*, at Request No. 7 (emphasis
23 added).

24 C. Emilia filed a motion to compel production of the claims notes.

25 On June 14, 2012, Defendants responded to Emilia's interrogatories and requests for
26 production of documents. *Id.* Andrea, however, did not produce a copy of Liberty Mutual's claims
27

28 ¹ After discovery opened, Emilia amended her complaint to assert a cause of action for punitive damages against Jared
and joint liability against Andrea. *See* Amend. Comp., on file with this Court.

1 notes from the accident. Instead, Andrea objected by claiming the information was attorney work
2 product and protected from disclosure by the attorney client privilege. *Id.*, at at Request No. 7.
3 Contrary to Andrea's suggestion otherwise, on July 3, 2013, Emilia did, in fact, file a Motion to
4 Compel Andrea to produce the claims notes. *See* Plaintiff's Motion to Compel Discovery Response,
5 on file with this Court. After Emilia filed her motion, Andrea conceded the claims notes were
6 relevant and agreed to produce the claims file. This rendered Emilia's motion to compel moot. *See*
7 Notice of Withdrawal of Motion to Compel, on file with this Court.

8 **D. Andrea actively concealed the subject claims note.**

9 On July 22, 2013, Andrea produced what appeared to be the complete claims notes from her
10 claim with Liberty Mutual in a pleading styled Second Supplement to List of Witnesses and
11 Documents And Tangible Items Produced At Early Case Conference. *See* Mot. to Strike, at Ex. 1-
12 G. What Andrea did not tell Emilia was that one of the notes dated January 17, 2011, at 4:44 p.m.,
13 had been secretly redacted making it appear as if that note never existed. In fact, Andrea furthered
14 the ruse by producing a misleading disclosure and privilege log that further concealed the existence
15 of the 4:44 p.m. note. That is, Andrea's disclosure indicated that "Adjustor's Claims Notes between
16 January 2-17, 2011 (Bates Labels LM001-LM006; LM019-027)" were disclosed, and only "notes
17 after January 17, 2011, [were being] withheld (Bates labels LM007-018)." *Id.* Indeed, Andrea's
18 privilege log indicated she was only claiming a privilege for claims notes dated "**January 18, 2011,**
19 **et seq.**", i.e., notes dated on or after January 18, 2011. It is now obvious this was misleading
20 because the January 17, 2011, note from 4:44 p.m. was not contained in the disclosure or identified
21 on the privilege log. Instead, that note was whited-out, making it appear as if the note never existed
22 – not that it had been surreptitiously redacted.

23 **E. Andrea furthered the concealment through her deposition testimony.**

24 Emilia first deposed Andrea on September 12, 2013, approximately two months after Andrea
25 served Emilia with the whited-out claims note. During the deposition, Andrea testified inconsistent
26 with the claims note. Andrea also admitted speaking with her insurer following the accident, but
27 claimed ignorance whether the conversation was recorded or when the conversations occurred. In
28 fact, shortly after her first deposition, Andrea filed a Motion for Summary Judgment claiming it was

1 undisputed she did not give Jared permission to drive her car on January 2, 2011. *See* Defendant
2 Andrea Awerbach's Motion for Partial Summary Judgment, on file with this Court. This, while
3 actively concealing evidence that contradicted her motion. Andrea ultimately withdrew her Motion
4 for Partial Summary Judgment. Andrea was deposed again on October 24, 2014. This time she
5 went to even further lengths to contradict the unknown information in the hidden claims note. As
6 detailed below, the withheld information did not come to light until Emilia independently obtained it
7 from Andrea's insurer.

8 **F. The hidden claims not contradicted Andrea's deposition testimony.**

9 Emilia discovered the concealed claims note on November 10, 2014, when Andrea's insurer,
10 Liberty Mutual, produced the note in response to Emilia's subpoena duces tecum. The Liberty
11 Mutual adjustor who created the note subsequently testified to the note's authenticity and confirmed
12 the note accurately memorialized the adjustor's January 17, 2011, conversation with Andrea. In
13 other words, the contents of the concealed note contradicted Andrea's testimony at both of her
14 depositions that she constantly hid her keys and had no idea how Jared obtained the keys prior to the
15 January 2, 2011, accident. Contrary to the premise of Andrea's motion, Emilia had no reason to
16 believe the note had been concealed or to engage in additional motion practice to compel production
17 of a claims note she did not know existed. Similarly, Emilia had no reason to compel its production
18 after discovering the note on November 10, 2014.

19 **G. The Court sanctioned Andrea for concealing the claims note.**

20 On December 2, 2014, Emilia filed her Motion to Strike Defendant Andrea Awerbach's
21 Answer. *See* Motion to Strike, on file with this Court. Emilia's motion sought sanctions against
22 Andrea under NRCp 37(c)(1) and this Court's "inherent equitable powers to...[issue] sanctions for
23 discovery and other litigation abuses not specifically proscribed by statute" as set forth in *Young v.*
24 *Johnny Ribiero Building, Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

25 On December 18, 2014, Andrea filed an opposition to Emilia's motion arguing the hidden
26 claims note in and of itself does not conclusively establish permission, is irrelevant to determining
27 permission under NRS 41.440, and Andrea did not engage in discovery abuse. In other words,
28 Andrea did not argue Emilia was first required to obtain an order compelling production of the

1 hidden note before sanctions could issue against Andrea under NRCP 37(c). *See* Andrea's
2 Opposition to Plaintiff's Motion to Strike, on file with this Court.

3 On February 19, 2015, the parties attended the court ordered settlement conference. Less
4 than 24 hours after the settlement conference concluded with no resolution, Andrea filed a
5 supplemental opposition to Emilia's Motion to Strike. *See* Andrea's Supplemental Opposition to
6 Plaintiff's Motion to Strike, on file with this Court. In her supplemental Opposition, Andrea argued
7 that under *Bass-Davis v. Davis*, striking her answer was not an appropriate sanction; that the claims
8 note is irrelevant; and Emilia suffered no prejudice as a result of Andrea's concealment of the claims
9 note. *Id.* Again, despite filing two briefs in opposition to Emilia's motion, Andrea never claimed
10 Emilia was first required to obtain an order under NRCP 37(b). This, because the argument is
11 illogical and patently incorrect.

12 III. LEGAL STANDARD

13 EDCR 2.24(a) provides: "No motions once heard and disposed of may be renewed in the
14 same cause, nor may the same matters therein embraced be reheard, unless by leave of the court
15 granted upon motion therefor, after notice of such motion to the adverse parties." "Only in very rare
16 instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling
17 already reached should a motion for rehearing be granted." *Masonry & Tile Contrs. v. Jolley, Urga*
18 *& Wirth Ass'n*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (emphasis in original) (internal
19 quotations omitted). A motion for reconsideration "should not be granted, absent highly unusual
20 circumstances, unless the district court is (1) presented with newly discovered evidence, (2)
21 committed clear error, or (3) if there is an intervening change in the controlling law." *389 Orange*
22 *St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).² "Points or contentions not raised, or
23 passed over in silence on the original hearing, cannot be maintained or considered on rehearing."
24 *Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp.*, 112 Nev. 737, 742, 917 P.2d 447, 450
25 (1996), *citing Chowdhry v. NLVH, Inc.*, 111 Nev. 560, 562, 893 P.2d 285, 387 (1995). Evidence not
26 presented at the original hearing cannot be later considered on a motion for reconsideration. *Id.*

27 ² "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada
28 Rules of Civil Procedure are based in large part upon their federal counterparts." *Exec. Mgmt. v. Ticor Title Ins. Co.*,
118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

1 “Motions for reconsideration are not ‘the proper vehicles for rehashing old arguments’ and are not
2 ‘intended to give an unhappy litigant one additional chance to sway the judge.’” *Campbell v. Nev.*
3 *Prop. I, LLC*, 2012 U.S. Dist. LEXIS 192, Case No. 2:10-cv-2169-RLH-PAL, *2-3 (D. Nev. Jan. 3,
4 2012), *quoting Durkin v. Taylor*, 444 F.Supp. 879, 889 (E.D. Va. 1977) & *Resolution Trust Corp. v.*
5 *Holmes*, 846 F.Supp. 1310, 1316 (S.D.Tex. 1994).

6 In contrast, NRCP 60(b) provides in relevant part that “[o]n motion and upon such terms as
7 are just, the court may relieve a party or a party’s legal representative from a final judgment, order,
8 or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.”
9 Andrea fails to meet either standard.

10 IV. ARGUMENT

11 A. Andrea does not identify any new law or facts.

12 Andrea’s motion for reconsideration must be denied because she did not seek leave of the
13 Court to seek reconsideration. Andrea’s motion also fails because she does not identify any new
14 facts, an intervening change in the controlling law, or clear error committed by the Court. In fact,
15 the only basis provided for reconsideration is her argument that the Court cannot issue sanctions
16 under NRCP 37(c) until first finding a violation under NRCP 37(a). Not only is the argument
17 incorrect, Andrea could have made the argument in opposition to Emilia’s motion. Andrea,
18 however, did not make the argument until requesting reconsideration, and “[p]oints or contentions
19 not raised, or passed over in silence on the original hearing, cannot be maintained or considered on
20 rehearing.” *Edward J. Achrem, Chtd.*, 112 Nev. at 742, 917 P.2d at 450. In other words, even if
21 Andrea’s new argument had merit, she waived the argument by waiting to raise it for the first time
22 on reconsideration.

23 Similarly, Andrea does not identify the mistake, inadvertence, surprise, or excusable neglect
24 she claims entitles her to relief under Rule 60. In fact, other than making a passing reference to the
25 rule, Andrea offers no explanation or analysis how Rule 60 entitles her to relief. This, because it
26 does not. The Court’s order was not the result of any mistake, inadvertence, surprise, or excusable
27 neglect. To the contrary, the Court properly exercised its discretion to issue sanctions under Rule
28 37(c) and its inherent, equitable powers. There is no basis for amending the order.

1 **B. The court did not err.**

2 Despite filing two oppositions to Emilia's motion to strike with the Court, Andrea now
3 claims, for the first time, this "Court **has no authority** to...establish a disputed material fact absent
4 an actual violation of a Court order, and the Court "**exceeded its authority** in imposing the severe
5 sanction" absent violation of a prior order. Andrea is mistaken:

6 [This] argument fails because the district court did not act here under Rule
7 37(b)(2)(B)...Rule 37(b)(2)(B) does indeed contemplate a threshold
8 determination by the court that the offending party has failed to comply with a
9 court order issued under Rule 37(a). **But the same is not true where automatic
discovery provisions of Rule 26(a) and 26(e) are violated, triggering
subsection (c) of the same Rule 37.** Subsection (c) of Rule 37 provides, in
relevant part, that should a court find that

10 a party that without substantial justification fails to disclose information
11 required by Rule 26(a) or 26(e)(1) [, that party] shall not, unless such
12 failure is harmless, be permitted to use as evidence at a trial, at a hearing,
13 or on a motion any witness or information not so disclosed. In addition to
14 or in lieu of this sanction, the court, on motion and after affording an
15 opportunity to be heard, may impose other appropriate sanctions. In
addition to requiring payment of reasonable expenses, including
attorney's fees, caused by the failure, these sanctions may include any of
the actions authorized under subparagraphs (A), (B), and (C) of
subdivision (b)(2) of this rule and may include informing the jury of the
failure to make the disclosure.

16 Fed. R. Civ. P. 37(c)(1). **Under part (c), therefore, a court order issued under
part (a) need not first be violated before the court may impose the sanctions
provided under (c).**

18 *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo*, 248 F.3d 29, 33 (1st Cir. 2001) (emphasis
19 added); *see also Young v. Johnny Ribiero Building, Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 780 (1990)
20 (severe sanctions need not first be preceded by less severe sanctions). The Court's order was not
21 entered under NRCP 37(b), and Emilia did not seek sanctions under NRCP 37(b). Instead, as
22 Emilia explained in her motion, reply, and supplemental reply, she requested sanctions against
23 Andrea "pursuant to NRCP 37(c) for [Andrea's] abusive discovery tactics" and this Court's
24 "inherent equitable powers to...[issue] sanctions for discovery and other litigation abuses not
25 specifically proscribed by statute." *Young*, 106 Nev. at 92, 787 P.2d at 779. "Under Rule 37(c), the
26 district court's latitude is wide." *Ortiz-Lopez*, 248 F.3d at 34. The Court was, therefore, well within
27 its authority under Rule 37(c) and its inherent equitable powers to enter "[a]n order that the matters
28

1 regarding which the order was made or any other designated facts shall be taken to be established
2 for the purposes of the action,” without a “warning shot.” NRCp 37(c); NRCp 37(b)(2)(A).

3 **C. Andrea does not explain how Emilia should have known to compel the hidden**
4 **note.**

5 Andrea’s argument is also illogical and fails to explain how Emilia should have known to
6 file a motion to compel evidence Emilia did not know existed. That is, the version of the claims
7 notes Andrea produced in July, 2013, failed to notify Emilia the relevant note had been redacted.
8 Nothing on the face of the document indicated there was a redaction. Instead, there was only white
9 space where the note had existed. Similarly, nothing in Andrea’s privilege log notified Emilia the
10 claims note had been redacted. Instead, the privilege log indicated that all claims notes through and
11 including January 17, 2011, had been produced. In other words, Andrea’s privilege log furthered
12 the concealment. It did not expose the hidden note. Andrea’s contention Emilia should have
13 requested pages 1 through 12 of the claims notes is similarly irrelevant. This, because the hidden
14 note was not contained on those pages. Instead, the note had been contained on “Page 13 of 21” but
15 was whited-out. Thus, even if Emilia requested the additional pages, this would not have revealed
16 the hidden note. In fact, the entire point of Emilia’s motion was that Andrea concealed the note and
17 gave Emilia no notice whatsoever of the concealment. Andrea, then, furthered the deception
18 through her sworn testimony.

19 In sum, Andrea and her counsel concede the hidden claims note is relevant and “should have
20 been submitted [during discovery].” See January 15, 2015, Hearing Trans., at 18, attached as Ex. 1-
21 A to Plaintiff’s Supplemental Reply in Support of Motion to Strike Answer, on file with this Court.
22 The Court was well within its authority to issue sanctions for Andrea’s abusive discovery tactics.
23 The Court must disregard Andrea’s attempt to shift the blame to Emilia for not discovering hidden
24 evidence sooner, even if Andrea had complied with this Court’s rules regarding reconsideration.

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IV. CONCLUSION

For the reasons set forth above, Andrea’s motion to amend or reconsider the Court’s sanction order must be denied and the order left undisturbed.

GLEN J. LERNER & ASSOCIATES

By: /s/ Craig A. Henderson
Corey M. Eschweiler
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Adam D. Smith, Esq.
Nevada Bar No. 9690
Craig A. Henderson, Esq.
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Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

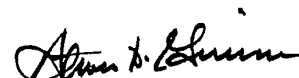
2 Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of
3 GLEN LERNER INJURY ATTORNEYS, and on the 30th day of March, 2015, an electronic copy
4 of **PLAINTIFF'S OPPOSITION TO PLAINTIFF ANDREA AWERBACH'S MOTION FOR**
5 **RELIEF FROM FINAL COURT ORDER** was served on opposing counsel via the Court's
6 electronic service system, WIZNET, to the following counsel of record:
7

8
9 Peter A. Mazzeo, Esq.
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Attorney for Defendant Jared Awerbach

15
16
17 /s/ Miriam Alvarez
18 An Employee of Glen Lerner Injury Attorneys
19
20
21
22
23
24
25
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EXHIBIT I



CLERK OF THE COURT

1 **RPLY**
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10 Attorney for Defendant Andrea Awerbach

7 **DISTRICT COURT**
8
9 **CLARK COUNTY, NEVADA**

10 EMILIA GARCIA, individually,
11 Plaintiff,

12 vs.

13
14 ANDREA AWERBACH, individually;
15 JARED AWERBACH, individually; DOES I – X,
16 and ROE CORPORATIONS, I – X, inclusive,
17 Defendants.

Case No: A-11-637772-C

Dept No: XXVII

**DEFENDANT ANDREA AWERBACH'S
REPLY IN SUPPORT OF MOTION FOR
RELIEF FROM FINAL COURT ORDER**

Date of Hearing: April 15, 2015

Time of Hearing: 9:00 a.m.

18 Defendant ANDREA AWERBACH, by and through her attorney of record, PETER
19 MAZZEO, ESQ. of the law firm of MAZZEO LAW, LLC hereby submits her Reply Brief in Support
20 of her Motion to Amend the Court Order pursuant to NRCP Rule 60 (b) denying Plaintiff's Motion to
21 Strike Andrea Awerbach's Answer but imposing a lesser included sanction of finding Jared Awerbach
22 had permissive use of her vehicle.

23 Although the initial motion noted Andrea was seeking relief pursuant to both NRCP Rule 60
24 (b) and EDCR 2.24, the points and authorities therein clearly sought relief only pursuant to Rule 60,
25 and not EDCR 2.24, despite Plaintiff's apparent confusion and attempt to cloud the issue with this
26 Court. Moreover, Rule 60 is not predicated on any requirements provided for in EDCR 2.24.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT

In her Opposition, Plaintiff fails to specifically identify the supporting legal or statutory authority granting the Court the “inherent powers to issue sanctions for discovery and other litigation abuses” (Pl. Opp. 3:5) permitting the Court, absent a violation of a Court Order, to strike pleadings or “prohibiting the party from introducing designated matters in evidence”. See NRCP 37(b)(2). Since Plaintiff never obtained a prior Order seeking to compel disclosure of the claim note, Andrea is not in violation of any Order and therefore this Court imposing the lesser included sanction of finding Jared Awerbach had permissive use of Andrea’s vehicle is improper. This Court exceeded its authority. The prior Order must be vacated and a new order entered denying Plaintiff’s Motion to Strike Andrea Awerbach’s Answer in its entirety.

Secondly, Plaintiff expresses confusion about how plaintiff should have known to compel production of evidence pertaining to the claim note which it claims was “intentionally concealed”. Id. at 3:5. This is a disingenuous argument since Plaintiff had actual knowledge of the undisclosed insurance claim notes because Andrea’s prior counsel produced a privilege log in July 2013 for the undisclosed claim notes. Since Plaintiff was on notice the subject claim note was not produced she could have moved the court to compel production any time after July 2013.

II. LEGAL ARGUMENT

A. The Subject Order Must Be Amended Denying Plaintiff’s Motion In Its Entirety Because NRCP Rule 37(c) Does Not Permit This Court to Issue Sanctions Authorized by Rule 37(a)(A) (B) and (C) Unless There Has Been a Violation of an Existing Court Order.

District court judges in Nevada have explicit authority to impose sanctions upon parties failing to comply with pretrial conference orders. City of Sparks v. Second Judicial Dist. Ct., 112 Nev. 952, 920 P.2d 1014 (1996). Generally, sanctions will only be imposed where there has been willful noncompliance with the court’s order or where the adversary process has been halted by the actions of the unresponsive party. Fire Ins. Exch. v. Zenith Radio Corp., 103 Nev. 648, 747 P.2d 911 (1987). The court may invoke a broad range of sanctions against a party failing to comply with discovery orders including striking all or part of a party’s pleadings and entering a default judgment. Temora v. Trading Co. v. Perry, 98 Nev. 229, 645 P.2d 436; cert denied, 459 US 1070, 103 S.Ct. 489 (1982).

1 Rule 37 provides for sanctions which may be imposed for a party's failure to make a disclosure
2 or cooperate in discovery. The rule is clear that the aggrieved party shall move for an Order to compel
3 the offending party to make the required disclosure. However, in so moving the Court, "the motion
4 must include a certification that the movant has in good faith conferred or attempted to confer with
5 the person or party failing to make the discovery in an effort to secure the information or material
6 without court action." NRCP Rule 37 (a)(2)(B). Rule 37(c) provides that "[i]n addition to requiring
7 payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may
8 include any of the actions authorized under Rule 37 (b)(2)(A)(B) or (C) and may include informing
9 the jury of the failure to make the disclosure."

10 The Plaintiff in this case did not first make a good faith effort to confer with the Defendant to
11 secure the information without court action. Secondly, at no time prior to filing the motion to strike
12 Andrea's Answer, did Plaintiff move this Court to compel the Defendant to produce the subject claim
13 note. Thirdly, had Plaintiff initially filed a motion to compel, rather than a motion to strike, resulting
14 in an Order granting the relief, then the only sanctions allowable under Rule 37(a)(4) against the
15 offending party for failing to disclose would be the "reasonable expenses incurred in making the
16 motion, including attorney's fees". Fourth, thereafter only if the offending party violates the Order,
17 can the Court issue sanctions pursuant to Rule 37(b) which is entitled, "Failure to comply with order".
18 Therefore, prior to imposing any sanctions pursuant to Rule 37(c), the aggrieved party must first make
19 a good faith attempt to secure the information from the offending party; then move to compel the
20 disclosure, and then the offending party must be in violation of a preexisting order which are all
21 prerequisite to the imposition of the severe sanctions of striking pleadings and prohibiting the party
22 from introducing designated matters into evidence.

23 The Nevada Supreme Court in Young v. Johnny Ribeiro Bldg., Inc., 96 Nev. 88, 92-93, 787
24 P.2d 777, 779-80 (1990), clearly articulated the standard for imposing the sanction of dismissal "must
25 be just and must relate to the claims at issue **in the discovery order which has been violated.**"
26 (Emphasis added). In other words, the District Court has no discretion to dismiss a claim unless there
27 is an actual violation of an order. An existing order is therefore the prerequisite to the consideration
28 of a motion to strike pleadings or "finding that designated facts shall be taken as established." Rule
37(b)(2)(A).

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

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

12 Young, 106 Nev. At 93, 787 P.2d at 780.

13 This Court never had the prerequisite authority or discretion to conduct an analysis of the
14 Young factors for dismissal of Andrea's Answer nor the near equivalent of the lesser sanction
15 permitting the Court to find Andrea gave Jared Awerbach permissive use of her vehicle at the time of
16 the subject accident. Assuming arguendo that Andrea was in violation of a prior order, the sanction
17 imposed would indeed be excessive based on consideration of the Young factors including the degree
18 of severity of establishing liability against Andrea relative to the severity of the discovery abuse; the
19 fact that no evidence has been irreparably lost; the policy favoring adjudication on the merits; and the
20 fact that the sanctions unfairly operate to penalize Andrea for the misconduct of her prior attorney.

21 Therefore, this Court overstepped its authority in imposing the severe sanction of
22 "establishing [the] designated facts" such as finding liability since the Court never first determined
23 that Andrea was in violation of an existing Order giving rise to consideration of the Young factors.

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III. CONCLUSION

Defendant Andrea Awerbach respectfully requests this Court GRANT her NRCP Rule 60 Motion to relief from the Court Order finding Andrea gave Jared Awerbach permissive use of her vehicle at the time of the subject accident and to enter an Order Denying Plaintiff's Motion to Strike Andrea Awerbach's Answer in its entirety.

DATED this 6th day of April 2015.

MAZZEO LAW, LLC

/s/ Peter Mazzeo

PETER MAZZEO, ESQ.
Nevada Bar No. 009387
528 S. Casino Center Blvd, Suite 305
Las Vegas, Nevada 89101
Attorney for Defendant Andrea Awerbach

MAZZEO LAW, LLC
INJURY TRIAL ATTORNEYS
528 S. Casino Center Blvd. Suite 305
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of April 2015, I served the foregoing

**DEFENDANT ANDREA AWERBACH'S REPLY IN SUPPORT OF MOTION FOR RELIEF
FROM FINAL COURT ORDER** 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 Eighth Judicial District Court's WizNet system

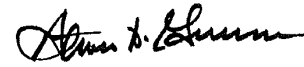
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/s/ Jaklin Guyumjyan

An Employee of MAZZEO LAW, LLC

EXHIBIT J

1 **ORDR**

CLERK OF THE COURT

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 * * * * *

6 EMILIA GARCIA,

7 Plaintiff,

CASE NO: A-11-637772

8 v.

DEPARTMENT 27

9 ANDREA AWERBACH and JARED
10 AWERBACH

Defendants.

11 **DECISION AND ORDER DENYING DEFENDANT ANDREA AWERBACH'S**
12 **MOTION FOR RELIEF FROM FINAL COURT ORDER**13 This matter having come on for hearing before Judge Alf on the 15th day of
14 April, 2015; Adam Smith appearing on behalf of Plaintiff Emilia Garcia, (hereinafter
15 "Plaintiff" OR "Emilia") and Peter Mazzeo, Esq. appearing for and on behalf of
16 Defendant Andrea Awerbach (hereinafter "Andrea"), and the Court having heard
17 argument of counsel, and being fully advised in the premises:
1819 **COURT FINDS** after review that in its February 25, 2015 Decision and Order,
20 the Court denied Plaintiff's Motion to Strike Defendant Andrea's Answer. However the
21 Court did enter a lesser sanction under NRCP 37(c), finding there was permissive use of
22 Defendant Andrea's vehicle because "the claims note was concealed improperly, was
23 relevant, and was willfully withheld by Defendant Andrea."
2425 **COURT FURTHER FINDS** after review Defendant Andrea filed a Motion for
26 Relief from Final Court Order on March 13, 2015 under NRCP 60(b) and EDCR 2.24.
27 Under NRCP 60(b), a moving party can be relieved from an order for "(1) mistake,
28 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due

1 diligence could not have been discovered in time” It is the moving party’s burden to
2 show there was a mistake on the part of the court or there is newly discovered evidence
3 relevant to the previous order. Pursuant to EDCR 2.24, the motion for reconsideration
4 must be filed within 10 days after written notice of the order; here the Notice of Entry of
5 Order was filed on February 27, 2015 and the Motion for Relief was timely filed.
6

7 **COURT FURTHER FINDS** after review Defendant Andrea’s Motion for Relief
8 does not cite to any newly discovered evidence. Instead, Defendant Andrea’s Motion
9 argues, without citation to case law, that the Court cannot issue a sanction under NRCP
10 37(c) unless Plaintiff first moves for a Motion to Compel under NRCP 37(a). Here,
11 however, where Plaintiff discovered the concealed claims note without court intervention,
12 to argue that no sanctions could be entered without an order would have the effect of
13 condoning Defendant Andrea’s concealment of a relevant and discoverable claim note.
14

15 **COURT FURTHER FINDS** after review that although NRCP 37(b) requires a
16 finding that a party failed to comply with a court order, NRCP 37(c) allows the Court to
17 impose an “appropriate sanction” from those allowed under NRCP 37(b)(2), including
18 “(B) An order refusing to allow the disobedient party to support or oppose designated
19 claims or defenses, or prohibiting that party from introducing designated matters in
20 evidence.” The plain language of NRCP 37(c) does not require violation of a previous
21 order, and all case law cited in the reply stems from NRCP 37(b) and the requirement in
22 the language of the rule that a party violate the court order before sanctions may be
23 issued.
24

25 **COURT FURTHER FINDS** after review the Nevada Supreme Court has
26 addressed the court’s ability to issue sanctions.

27 [C]ourts have ‘inherent equitable powers to dismiss actions or enter
28 default judgments for ... abusive litigation practices.’ Litigants and

1 attorneys alike should be aware that these powers may permit sanctions
2 for discovery and other litigation abuses not specifically proscribed by
statute.

3 Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (*internal*
4 *citations omitted*). "Non-case concluding sanctions for discovery sanctions do not have to
5 be preceded by other less severe sanctions." Bahena v. Goodyear Tire & Rubber Co., 126
6 Nev. Adv. Op. 26, 235 P.3d 592 (2010). Here, the finding of permissive use does not
7 conclude the case.
8

9 **COURT FURTHER FINDS** after review Young v. Johnny Ribeiro Bldg. directs
10 a court to a non-exhaustive list of pertinent factors for severe discovery sanctions,
11 specifically dismissal with prejudice. The court must thoughtfully consider the following
12 factors:

13 the degree of willfulness of the offending party, the extent to which the
14 non-offending party would be prejudiced by a lesser sanction, the severity
15 of the sanction of dismissal relative to the severity of the discovery abuse,
16 whether any evidence has been irreparably lost, the feasibility and fairness
17 of alternative, less severe sanctions, such as an order deeming facts
18 relating to improperly withheld or destroyed evidence to be admitted by
the offending party, the policy favoring adjudication on the merits,
19 whether sanctions unfairly operate to penalize a party for the misconduct
of his or her attorney, and the need to deter both the parties and future
litigants from similar abuses.

20 Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).

21 **COURT FURTHER FINDS** after review that here the Court did consider the
22 Ribeiro factors and did enter the less severe sanction of finding there was permissive use
23 rather than striking Defendant Andrea's answer as requested by Plaintiff's Motion. The
24 finding of permissive use specifically relates to the content of the improperly withheld
25 claims note, which included a statement by Defendant Andrea that she had given
26 Defendant Jared permission to use her car at the time of the accident. The finding of
27 permissive use does not prevent adjudication on the merits because Plaintiff still
28

1 maintains the burden of showing causation and damages. The withholding of the note and
2 the misleading privilege log was willful, and sanctions are necessary to "deter the both
3 the parties and future litigants from similar abuses." Id. Although the note was withheld
4 by previous counsel, Defendant Andrea's deposition testimony at both of her depositions
5 was contrary to her statement to her insurance carrier. The sanction was crafted to
6 provide a fair result to both parties, given the severity of the issue.
7

8 **COURT FURTHER FINDS** after review Defendant Andrea has failed to meet
9 her burden under NRCP 60(b) for relief from a final order. Defendant Andrea has not
10 provided any evidence that would change the court's February 25, 2015 order. Defendant
11 has also failed to show there was a mistake of law because Ribeiro and Bahena hold that
12 a court has the equitable power to enter sanctions and not require a lesser sanction to
13 issue or a party to violate a specific discovery order.
14

15 **COURT FURTHER ORDERS** for good cause appearing and after review
16 Defendant Andrea's Motion for Relief from Final Court order is **DENIED**.
17

18 Dated: April 22, 2015.
19

20 Nancy Alf
21 NANCY ALF
22 DISTRICT COURT JUDGE
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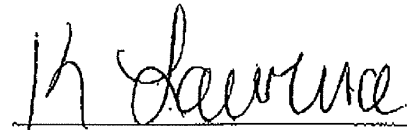
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2 **CERTIFICATE OF SERVICE**
3

4 I hereby certify that on or about the date signed I caused the foregoing document to be
5 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
6 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit in the mail and/or by Fax transmission to:

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16 Karen Lawrence
17 Judicial Executive Assistant
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