Sorry. I'm not a lawyer. I'm an engineer. I don't use words as well as you guys.

Q. Okay. So when you said "final resting place," you didn't mean final resting place; you meant the rotation and motion of the vehicle before it ended up in the resting place.

A. No. I mean the final orientation of the vehicle.

MR. ROBERTS: Okay. Your Honor, I'm sorry. Thank you for your indulgence.

THE COURT: You guys done?

MR. MAZZEO: Yes.

MR. STRASSBURG: Sure.

MR. MAZZEO: Judge, I'd just like to make one -- not for the witness. I'm done with the witness. But I -- I -- you cited Hallmark earlier, and I just wanted to distinguish that from this case.

THE COURT: Okay.

MR. MAZZEO: All right. So Hallmark is the distinguishable, as you -- as you put into the record, you had stated that Tradewinds did not introduce any evidence; that Dr. Bowles attempted to recreate the collision by performing an experiment.

Well, in this case Dr. Scher did recreate the collision by -- by -- he performed a check and actual

reconstruction that focused on the -- obtaining the 180-degree spin, and he used all those factors -- I don't need to go through all of them again, but the vehicle specs, the points of impact, the area of contact, or the -- in the roadway, which really wasn't relevant for the analysis. But he used -- he used the actual area of initial contact in the roadway.

And -- and I cited earlier the reference to Provence v. Cunningham which is a case after the -- that 1968 case you had cited.

THE COURT: Choat, Levine?

MR. MAZZEO: Yeah, regarding photographs.

And this is -- this case, the Provence case, is 95 Nev. 4 and 588 P.2d 1020. And that's a 1979 case, and -- where the Court ruled that photographs are not per se invalid as a basis for expert testimony in accident reconstruction cases.

So I just wanted to add that to the arguments that we cited earlier.

And also, Judge -- oh, that's right. And in the Provence case, the Court noted that expert testimony further -- the expert witness further testified that the precise area of impact could not be determined on the basis of the available information since the angle of impact and the speed of the vehicles

were unknown and no marks were made by the motorcycle upon the pavement at the time that the impact occurred.

He did testify as to -- the expert did -- testify as to the range of probabilities, which included the possibility that the accident had occurred in the northbound lane.

So based on the cases that we cited and the testimony of Dr. Scher, as to all the data that he replied upon and the fact that it satisfies the requirements of the PC-Crash analysis, I would encourage the Court to change its prior decision or ruling in excluding him as an expert with respect to the accident -- the PC-Crash analysis.

MR. ROBERTS: And in Provence, it was rebuttal evidence that was deemed admissible and the court said, "You just put on a witness that had no greater foundation than him. You can't now be heard to say that their rebuttal expert can't give opinions on the same level of information. So it's not in evidence."

THE COURT: Okay, guys. I understand the distinction that you have tried to draw. Unfortunately, I think his calculations in MADYMO are still based on the output from the PC-Crash. The PC-Crash analysis is based on speed, angles -- I mean,

that's where you get the delta-v from. And I think all of the information that went into that is, unfortunately, more assumption, conjecture, and generalization.

I don't take any pleasure in not allowing you to put him on. That's -- I think that's what I have to do in the case. You haven't changed my mind. I'm sorry.

So thanks for being here, Dr. Scher. I don't think we're going to need you any further. Appreciate your time.

When we start tomorrow morning, I'm guessing that you guys have more witnesses.

MR. ROBERTS: Well, they had originally asked to take Poindexter, I believe, out of order tomorrow because of his schedule. We're still willing to accommodate that, but we're also ready to go if they don't need that anymore.

MR. MAZZEO: Yeah. No, we didn't ask to take him out order. We had scheduled Dr. Poindexter for the defense case, which we anticipated starting days before Friday. So he's been scheduled for Friday for several weeks now. And so we -- yeah, we do plan on calling him tomorrow morning. That's his only --

THE COURT: Okay.

MR. MAZZEO: -- availability.

THE COURT: Okay. All right. Start at 8:30, get through as much as we can.

Thanks, guys. Off the record.

(Thereupon, the proceedings concluded at 5:05 p.m.)

CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Kristy L. Clark, a duly commissioned Notary Public, Clark County, State of Nevada, do hereby certify: That I reported the proceedings commencing on Thursday, February 25, 2016, at 10:50 o'clock a.m.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript is a complete, true and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 25th day of February, 2016.

_____

KRISTY L. CLARK, CCR #708

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for the damages caused by Jared.

THE COURT: Do you have a copy of that?

MS. ESTANISLAO: Yes.

THE COURT: I don't have that in my file for some reason.

MS. ESTANISLAO: It was originally my -- it was page 2 of my proposal instructions, my copy.

THE COURT: Rights of the defendants. I got it. We'll mark that as your proposed, not given.

Any others?

MS. ESTANISLAO: That is it, Your Honor.

THE COURT: Okay. Mr. Tindall, Mr. Strassburg, any objections to the instructions that the Court is giving?

MR. TINDALL: Yes, Your Honor.

MR. ROBERTS: On the separate and distinct, I just wanted to put on the record that we objected because the pattern referred to plaintiffs having separate and distinct right. It doesn't mention defendant. So it's taken out of context, and the fact that we have potential joint liability arising out of permissive use makes the instruction confusing in this case.

THE COURT: I agree.

MR. TINDALL: All right, Your Honor.

Regarding Instruction 29 -- it begins, "It has been established as a matter of law" -- the last sentence we believe should read, "Defendant Jared Awerbach has been deemed impaired with marijuana metabolite as a matter of law," because that's the only impairment. Marijuana was not an impairment. When the Court interchangeably allows getting rid of -- see, in the next instruction, the word "marijuana"? That's a falsehood being told to the jury. It's not in evidence. It never has been. It's specifically been banned as a basis for impairment.

So this instruction should be specific.

THE COURT: Okay. And I think that -- as we discussed yesterday, I think that the only way you get marijuana metabolite in your blood, that's the by-product of the marijuana. And I understand that you want to make a distinction, but I don't know that there's evidence in the record that supports a distinction.

MR. TINDALL: So the related instruction, Number 40, which begins, "If you find the plaintiff is entitled to compensatory damages," Subsection 1.

Oh, let's back up to the first paragraph. If we can look at line 4 and 5, beginning, "Defendant Jared Awerbach, on the basis of his impairment with a controlled substance."

All right. So if we look at NRS 453.510 which -- and this is in Subsection 4. This is what defines controlled substances as it pertains -- I mean, there's hundreds of them. This is the subsection specific to marijuana. "Marijuana metabolite not a controlled substance. The State of Nevada does not recognize it as a controlled substance."

So with this jury instructions, with the word "controlled substance," we either need to put in "marijuana metabolite" or take out the word "controlled" because it's not a controlled substance. This misleads the jury.

THE COURT: But marijuana is a controlled substance.

MR. TINDALL: It is, but he's not -- this first paragraph talks about impairment, "on the basis of his impairment with a controlled substance," and it's not a controlled substance and he wasn't impaired on marijuana.

This is a falsehood. It misleads the jury into believing he consumed a controlled substance and he was impaired by that controlled substance, and that's just not the case.

THE COURT: Well, I think there's evidence that he had consumed a controlled substance, marijuana,

and there's a -- there's a ruling by the court that he was impaired as a matter of law, as evidenced by the marijuana metabolite.

MR. TINDALL: So as the Court can see, then -- accepting everything the Court just said as completely accurate, we can't have it read "impairment with a controlled substance" because he wasn't impaired with a controlled substance.

The court, Judge Allf, has ruled he was impaired by marijuana metabolite, which is not a controlled substance.

I'm saying this language has to -- just take out the word "controlled," and then I guess we don't have an objection anymore.

THE COURT: I understand the objection. I think you're making a distinction between the marijuana and the marijuana metabolite that I'm not prepared to make.

MR. TINDALL: Okay. One moment, please.

All right. So if the Court is not going to take out the word "controlled" based on what I've just argued, but if we look at 42.010, the statute doesn't read "controlled substance." We have the word "controlled" in the title, but statute, Subsection 1, reads, "using alcohol or another substance."

So for that basis, we believe the word "controlled" has to come out of this first paragraph.

THE COURT: I think that you're trying to make a distinction that I don't think exists. I understand the argument.

What else? What other instructions do you object to?

MR. TINDALL: Court's indulgence, please.

We have no others to which we object.

THE COURT: Does Jared Awerbach have any other instructions that we propose that are not being given?

MR. TINDALL: Yes. We submit -- purge with. This one reads, "For the purpose of applying NRS 484.110(3)(g), I instruct you that the term 'marijuana' in the statute refers only to the substance delta-9-tetrahydrocannabinols, also referred to as THC.

THE COURT: Okay. Give it to Alice.

And for the same reasons, I'm not comfortable giving that one because you're trying to draw a distinction between the metabolite and marijuana that I don't think exists.

What else?

MR. TINDALL: Your Honor, that is all.

MS. ESTANISLAO: Your Honor, may I add to our objections?

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CLERK OF THE COURT

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

ORDER REGARDING PLAINTIFF'S MOTIONS IN LIMINE NUMBERS 1 THROUGH 49

Date of hearing: May 6, 2015
Time of hearing: 10:00 a.m.

Plaintiff Emilia Garcia's Motions in Limine Numbers 1 through 49 came on for hearing before this Court on May 6, 2015. Plaintiff Emilia Garcia was represented by ADAM D. SMITH, ESQ. and CRAIG A. HENDERSON, ESQ., of Glen Lerner Injury Attorneys; Defendant Jared Awerbach was represented by ROGER STRASSBURG, ESQ. of Resnick & Louis, P.C.; and Defendant Andrea Awerbach was represented by PETER MAZZEO, ESQ. of Mazzeo Law, LLC.

The Court, having considered Plaintiff's Motions in Limine Numbers 1 through 49, any oppositions thereto, and Plaintiff's replies in support of the motions, hereby:

ORDERS Plaintiff's Motion in Limine Number 1 to Preclude Closing Argument That Emilia Asked for a Greater Amount of Money Than Was Expected is GRANTED;

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 2 to Preclude Hypothetical Medical Questions Designed to Confuse Jury is GRANTED;

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 3 To Preclude Defendants from Suggesting to The Jury There Might Be Related Medical Records Prior to the Crash that Have Not Been Disclosed is GRANTED;

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 4 Precluding Defendants From Referring to Case as "Attorney-Driven Litigation" or a "Medical Buildup" Case, and Precluding any Statements Insinuating that Emilia Sought Treatment at the Direction of Attorneys, or Because of this Litigation is GRANTED in part and DENIED in part. Defendants are precluded from using the words "attorney driven litigation," or "medical buildup." If a foundation is laid for facts that the extent of the treatment was improper, unrelated or medically unnecessary, then the defendants can argue that the motive for this case was for secondary gain. The Defendants are not cut off from arguing from the facts that are deduced or brought out by the witnesses with regard to these conclusions. IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 5 Precluding Defendant From Referring to any Ongoing or Past Federal Investigation or Allegations of Conspiracy Between Doctors and Emilia's Attorneys is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 6 Precluding Reference to Emilia's Retention of Counsel is DENIED but the court will grant any objections should the defendants intrude into the attorney client-privilege.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 7 Precluding Reference to Emilia's Counsel Working with Emilia's Treating Physicians on Other Unrelated Cases is DENIED. The Court will allow limited latitude if there is relevance shown with regard to a relationship between the doctor or a referral by the doctor or by the attorneys to the doctor.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 8 Precluding Negative References to Attorney Advertising is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 9 that Closing Arguments Must Be Limited to Evidence Presented at Trial is GRANTED reciprocally.

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IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 10 Precluding Reference to Recent Allegations Against Emilia's Counsel Relating to the BP Oil Spill cases is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 11 Allowing Voir Dire Questions Regarding Relationship to Any Insurance Company is GRANTED and enforced in accordance with Nevada law and limited in scope by Nevada law. .

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 12 Allowing Voir Dire Questioning Regarding Tort Reform Exposure is DEFERRED until jury selection.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 13 Allowing Voir Dire Questioning Regarding Verdict Amounts is DENIED. References to specific verdict amounts will not be allowed during voir dire.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 14 Permitting Treating Physicians to Testify as to Causation, Diagnosis, Prognosis, Future Treatment, and Extent of Disability — Without a Formal Expert Report is GRANTED in accord with the ruling in *FCH, LLC f/k/a Fiesta Palms LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 326 P.3d 440 (2014).

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 15 Regarding Exclusion of Non-Party Witnesses from Courtroom is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 16 Precluding Negative Inference for Failing to Call Cumulative Witness is GRANTED reciprocally.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 17 Precluding Reference to Filing Motions in Limine is GRANTED reciprocally.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 18 Precluding References to Taxation is GRANTED reciprocally.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 19 Precluding Evidence of Offers of Settlement or Compromise is GRANTED reciprocally.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 20 Precluding References to Collateral Sources is GRANTED with respect to all collateral sources other than medical liens, but DENIED with respect to evidence of medical liens.

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IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 21 Excluding Evidence of Prior and Subsequent Unrelated Injuries, Medical Conditions or Medical Treatment, Prior and Subsequent Claims or Lawsuits is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 22 Precluding Defense Counsel from Suggesting that Defendants Will Be Required to Pay Jury Award Out of Pocket is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 23 Preclusion of Brian Lemper's Settlement Agreement with the Government is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 24 Excluding Lack of Other Injuries from the Crash is DENIED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 25 Permitting Emilia to Show Demonstrative Aids Relating to Plaintiff's Surgery is DEFERRED until the EDCR 2.67 conference where the parties will discuss proposed demonstrative trial exhibits.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 26 Permitting the Traffic Accident Report as a Means to Refresh the Police Officer's Recollection is GRANTED but the traffic incident report itself is not admissible.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 27 to exclude evidence that Emilia did not graduate from high school is DENIED. The scope of Defendants' cross-examination of Emilia will be determined at trial based upon the scope of Emilia's testimony on direct examination.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 28 to Exclude Evidence of Emilia's Marital Status is DENIED. The scope of Defendants' cross-examination of Emilia will be limited to what evidence Emilia chooses to introduce on the issue as related to damages.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine Number 29 Excluding Allegations of Improper Billing Practices Against Pacific Hospital of Long Beach is GRANTED.

IT IS FURTHER ORDERED Motion in Limine Regarding Apportionment of Damages (MIL #30) is WITHDRAWN.

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IT IS FURTHER ORDERED Plaintiff's Motion in Limine To Exclude Evidence Plaintiff Received Welfare (MIL #31) is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine To Exclude Allegations Plaintiff Was Speeding At the Time of the Accident (MIL #32) is GRANTED in part and DENIED in part. Defendants are not permitted to argue or suggest Emilia was "speeding" at the time of the accident. Defendant Jared Awerbach is, however, permitted to testify to his observations at the time of the collision, including whether he perceived that Emilia increased the speed of her vehicle immediately prior to the collision.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Admit Evidence Defendant Jared Awerbach Pleaded Guilty to Violating NRS 484C.110 (MIL #33) is DENIED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Preclude Defendants From Arguing Plaintiff Was Malingering or Exhibited Secondary Gain (MIL #34) is DEFERRED until trial.

IT IS FURTHER ORDERED Plaintiff's Motion to in Limine to Exclude Defendants' Expert Witness Dr. Curtis Poindexter (MIL #35) is DENIED. Cumulative testimony will not be allowed at trial, nor will two expert physicians be permitted to testify to the same subject matter at trial.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Preclude Defendants From Arguing Plaintiff Had an MRI on December 30, 2010 (MIL #36) is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Exclude Surveillance Video of Plaintiff At Her Job At Sam's Town Casino (MIL #37) is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Limit the Opinions of Defendants' Expert Witness Dr. Gregory Brown to the Scope of his Expertise (MIL #38) is DEFERRED until trial. Unless Dr. Brown can lay foundation for his personal expertise in interpreting Emilia Garcia's MMPI-2 test, Dr. Brown cannot testify to the MMPI-2 test administered by Jill Margolis, Ph.D. Unless Dr. Brown can lay foundation for his personal experience in interpreting toxicology tests, Dr. Brown cannot testify regarding toxicology testing administered to Jared Awerbach. No testimony will be admitted that contradicts the Court's partial

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summary judgment order finding Defendant Jared Awerbach was impaired at the time of the January 2, 2011, motor vehicle accident.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Preclude Defendants From Arguing Dr. Brian Lemper Overtreated in this Case (MIL #39) is GRANTED in part and DENIED in part. Evidence pertaining to Dr. Lemper's character or reputation as a physician is excluded. Defendants may argue Dr. Lemper provided Emilia with unnecessary treatment in this case provided Defendants' experts can lay foundation for the argument.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Preclude Defendants From Asking About Unrelated Accidents, Exclude Evidence of Plaintiff's Speeding Tickets, And Exclude Questioning Regarding a Trip Plaintiff Took to California (MIL #40) is GRANTED in part and DENIED in part. Evidence pertaining to a prior accident in 1993 involving an unrelated third-party named Emilia Garcia is excluded. Evidence pertaining to Emilia's prior speeding citations, is excluded. The motion is denied with respect to evidence pertaining to Emilia's trip to California following her surgery. The court may allow limited cross-examination on this subject matter depending on the scope of Emilia's direct testimony. Prior to any questions or mention of the trip to California, the questioning party or party who intends to mention the trip must approach the bench to notify the Court and all parties regarding the scope will be of the questioning because the scope of cross-examination cannot be determined until the Court knows what the direct testimony is.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Preclude Defendants' Experts From Opining Counsel Directed Medical Treatment (MIL #41) is GRANTED in part and DENIED in part. Defendants are permitted to offer evidence regarding the usual and customary charges for similar treatment in Las Vegas, Nevada. Defendants may also offer evidence regarding Emilia's referral to her medical providers by her attorneys, if a proper foundation is laid. All other portions of the motion are granted.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Exclude Photographs of Property Damage (MIL #42) is DENIED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Exclude Reference to Plaintiff's Alleged Inconsistent Drug Screen Results (MIL #43) is GRANTED.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Exclude Evidence Pertaining to Her Termination From Aliante (MIL #44) is DEFERRED until the June 19, 2015, continued hearing on Plaintiff and Defendants' motions in limine.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Exclude Emilia's Irrelevant Medical Records (MIL #45) is GRANTED and the following medical records will not be admitted at trial:

- JATX #504: PCH of Nevada, Inc., d/b/a Harmony Healthcare records for Plaintiff
- Canyon Medical Billing
- Keralapura Subramanyam
- Pamela Nyon OD
- Quest Diagnostics
- Walgreens
- CVS
- CIGNA
- Health Plan of Nevada.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Exclude the Opinions of Defendants' Medical Expert Michael R. Klein (MIL #46) is DENIED. Plaintiff will be permitted on cross-examination to explore Dr. Klein's bias. Dr. Klein may not testify to attorneys directing treatment unless there is evidence of a direct referral from attorney to doctor.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Limit the Opinions of Defendants' Expert Witness Dr. David Bearman to the Scope of his Expertise (MIL #47) is GRANTED. Dr. Bearman is not permitted to offer any testimony or opinions that contradict the Court's partial summary judgment order finding Defendant Jared Awerbach was impaired at the time of the January 2, 2011, motor vehicle collision. To the extent Dr. Bearman has given expert opinions that do not contradict the scope of the Court's per se impairment ruling, and to the extent Dr. Bearman is qualified to offer such opinions, then this is permissible provided Defendants lay a proper foundation. Dr. Bearman may be allowed to offer those opinions, provided that on or before June 5, 2015, Dr. Bearman provides Plaintiff with (1) a listing of any other cases in which [Dr.

Bearman] has testified as an expert at trial or by deposition within the preceding four years, and (2) an affidavit from Dr. Bearman identifying the scope of his testimony on each of those occasions.

IT IS FURTHER ORDERED Plaintiff's Motion in Limine to Preclude Defendants From Questioning Dr. Brian Lemper Regarding Marijuana (MIL #48) is GRANTED.

IT IS FURTHER ORDERED Motion in Limine to Exclude Evidence of Defendant Jared Awerbach's Claimed Traumatic Brain Injury (MIL #49) is GRANTED. Defendants may not offer evidence of Jared's claimed traumatic brain injury during the parties' case in chief. If there is a separate punitive damages hearing, the Court will consider the scope of admissible evidence at that time.

IT IS FURTHER ORDERED the hearing on the parties' remaining motions in limine will reconvene on June 19, 2015, at 10:00 a.m.

Dated this 21 day of May, 2015.

Nancy L Allf
DISTRICT COURT JUDGE

Respectfully submitted by:

GLEN J. LERNER & ASSOCIATES

By: _____
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Brief C.V.

1963	B.S., Univ. of Wisconsin
1967	MD, Univ. of Washington
1967-68	USPHS Hospital Seattle, Rotating Internship
1968-70	**Military – USPHS-Senior Assistant Surgeon (equivalent to Major), USPHS Regional Officer Region IX**
1970-74	Founder/Administration/Medical Director/Physician Isla Vista Open Door Medical Clinic
1974-1982	Director of Health Services SDSU
1982-1983	Health Officer/Director Sutter County Health Department
1983-2000	Santa Barbara Regional Health Authority (SBRHA), now CenCal
1983-1997	Medical Director/Director Health Services Department
1997-2000	Interagency/Inter governmental liaison *Lead staff in obtaining a $10 million Calif. Health Care Foundation grant to implement an internet based Health Care Data Exchange*
2000-Present	Private practice in pain management/ cannabinoid medicine

DRUG ABUSE TREATMENT & PREVENTION BACKGROUND

I have taught courses on the pharmacology of psychoactive drugs and on the origins of American drug policy at UCSF, UCSB and SDSU.

I served on the Santa Barbara County Drug Abuse Technical Advisory Committee and on the San Diego County Drug Abuse Technical Advisory Committee. I have been active in providing drug abuse treatment and prevention since 1967.

I was Medical Director of the Santa Barbara County Methadone Maintenance Clinic, Medical Director of the Ventura County Inpatient Opiate Program, Medical Consultant to the Santa Barbara Alcohol Detoxification Program, Medical Consultant to the Santa Barbara Schools Drug Abuse Intervention Program, Medical Director of Zona Seca, Director of the Haight Ashbury Drug Treatment Program, Consultant to the National

PTA, Consultant to NIDA on Rural Drug Abuse, Founder of the American Academy of Cannabinoid Medicine.

American Academy of Cannabinoid Medicine (AACM)
I am the Vice President of the American Academy of Cannabinoid Medicine (AACM), an organization of knowledgeable, ethical physicians who have considerable clinical, research and/or administrative experience in medicine in general and cannabinoid medicine in particular. Our board members have worked governmental jobs in the County, State and Federal government as well as working in private practice.

Discussion of My Experience in Cannabinoid Medicine
My expertise regarding the therapeutic application of cannabis and cannabinoids is derived from several sources including: my 45 years of clinical experience as a physician, and over 500 contact hours of Category I CME (Continuing Medical Education) specifically on substance use and abuse, and medical marijuana. I have learned from preparing for numerous scientific presentations to a variety of groups including but not limited to the California Toxicology Association, Kaiser/St. Theresa Hospital Grand Rounds). I have delivered papers and done presentations on cannabis and cannabinoids at several conferences including the International Cannabinoid Research Society (ICRS), Patients Out of Time (P.O.T.), American Public Health Association (APHA), Pacific Coast College Health Association (PCCHA), Balboa Naval Hospital Pediatric Grand Rounds, University Hospital (UCSD) Grand Rounds, University of Wisconsin School of Medicine, San Luis Obispo County Bar Association, Santa Barbara Rotary Club.

My experience as an academian and being an expert witness since 1972 regarding psychoactive drugs has also allowed me the opportunity and necessity to do much research on the subject of cannabis. My experience includes over 50 years experience providing drug abuse treatment and prevention and eleven years engaged in pain management incorporating the therapeutic use of cannabis and dronabinol. I have taught courses on psychoactive drug pharmacology at UCSF, UCSB and SDSU. My experience/knowledge of studying drugs led me to write the book "Demons Discrimination and Dollars: A Brief History of the Origins of American Drug Laws." I am in the process of writing my second book on psychoactive drugs and how to approach successful policy options. I have done considerable reading on the topic of the therapeutic effects and side effects of not only cannabis but other psychoactive drugs.

I am on the Advisory Board of Patients Out of Time and on the Board of Directors of Americans for Safe Access. The Wall Street Journal Health blog declared me their "Doctor of the Day." I have testified before the Iowa Board of Pharmacy and the Wisconsin State Senate Health Committee.

Relative to the issue of the medicinal use of cannabis I have been actively involved in the practice of pain management and cannabinoid medicine for twelve years. I helped start the third free clinic in the United States (in Seattle in 1967). I have 45 years experience providing drug abuse treatment and prevention including having been the Director of the

Haight Ashbury Medical Clinic Drug Treatment Program, Medical Director of the Santa Barbara County Methadone Maintenance Clinic, Medical Director of the Ventura County Inpatient Heroin Detoxification Clinic, Medical Consultant to the Santa Barbara County Residential Alcohol Detoxification Program, and Advisory Board Member of the Zona Seca Drug Treatment Program. I received a Robert Wood Johnson Foundation grant to develop an intervention program for dual diagnosis patients and their children. Awards include the Santa Barbara Medical Society Humanitarian Award, the Santa Barbara Neighborhood Clinic's Health Care Hero Award, the Wall Street Journal Health Blog Doctor of the Day Recognition, NORML Peter McWilliams Memorial Award.

Even prior to hearing about the medicinal value of cannabis at conferences and from patients, I had some familiarity with the medical history of cannabis because my father was a pharmacist. He had started practicing pharmacy in 1928 and filled numerous cannabis continuing prescriptions early in his career.

An early assignment of his at the School of Pharmacy at the University of Minnesota, where he graduated from, was to make tincture of cannabis. He told me "We had to be very careful because the alcohol was illegal." At any rate, after hearing that story I picked up my father's 1927 edition of Remington's Textbook of Pharmacy. There, on pages 999 and 1000 of the textbook, it provided instruction on how to make tincture of cannabis. Relevant to this discussion is that it listed therapeutic uses for cannabis including analgesia and relaxation.

REVIEW: I HAVE REVIEWED THE FOLLOWING DOCUMENTS:

- Police Report, Blood test results, and field sobriety testing
- Deposition of Police Officer
- PET and MRI-DTI scans with reports by Dr. Joseph Wu
- Report by Dr. Greg Kane regarding scientific validity of SFST
- Report by neurologist, Dr. Russell Shah
- Ophthalmology Report and other records regarding injury 11/2005
- Records from LVMPD Forensic Laboratory
- Deposition of Jared Awerbach
- Accident reconstruction report by Guidance Engineering
- Report of toxicologist, Dr. Raymond Kelly
- Records from Summerlin Hospital ER regarding 11/2005 injury
- Report of Corrotto
- Reports of Elkanich, Odell, and Klein

All of the opinions that I express here are to a reasonable scientific and medical probability.

CONCLUSION:
In sum, it is my opinion that Mr. Awerbach was not impaired by cannabis at the time of the accident on January 2, 2011. Thus, the risks resulting from his actions with respect to the other motorists on the road were not greater than those from an unimpaired driver in his situation. I base my general opinion on the following considerations and evidence set forth below:

CASE OF JARED AWERBACH:
Introduction:

This case involves a low speed automobile accident and the allegation by the Plaintiff of injury resulting from said accident. The issue here, as I understand it, is 'was the defendant's driving impaired from consuming cannabis before the accident.'

This allegation raises many issues that the plaintiff needs to address. These issues include but are not limited to:

—The fact that the mere presence of THC is not indicative of impairment.

—THC frequently does not cause impairment; in fact, some studies show that in experienced cannabis users, it improves hand-eye coordination and improves highway safety.

—FST are not scientifically verified as being 100% accurate in assessing alcohol impairment.

—FST have not been tested on accessory THC impairment.

—FDA says THC often does not cause impairment.

—Department Of Transportation says cannabis has little effect on driving.

Facts:
The facts before us include the following:

MEDICAL HISTORY
Here we have the case of a victim who was severely beaten at age 13 by a gang. Mr. Awerbach was hit in the eye with brass knuckles. The beating resulted in a concussion with 15 minutes of loss of consciousness and injury to his eye.

His right eye vision is characterized as having a "twisted" field. He has acquired with the right eye some sight recognition based on pattern recognition. He cannot read with the right eye. He cannot have depth perception and he is unable to drive with the right eye. Unlike an individual with a blind eye from birth and/or acquired complete blindness of a single eye, Mr. Awerbach's right eye produces twisting visual perceptions that are superimposed on his good left eye visual field. It interferes with his abilities as the right eye is legally blind but is also not able to be "shut off" and is at times quite challenging, annoying, and disruptive on his visual perception. These visual disturbances causes a continued source of anxiety and stress at the current time and when he recalls it was very difficult as a teenager as he had simultaneously changes to his behavior and personality.

He had a macular hole which was later repaired. The repaired macular hole left him with decreased visual acuity and a scotoma. He has decreased peripheral vision. More importantly as a result of the defendant's medical history additional neurology assessment was performed. An MRI and PET scan done in September were abnormal. A PET scan was ordered on performed on 9/30/14. The impression was abnormal scan consistent with brain abnormalities sustained from a TBI. They document evidence of a Traumatic Brain Injury (TBI). TBIs are well known to affect balance and must be taken into consideration when interpreting performance of an FST.

At the time of the accident, he was a chronic regular cannabis user and was taking medical cannabis to control his brain injury symptoms.

To this day, Mr. Awerbach still suffers from outburst and rage. He has dizziness and imbalance. He was an athletic individual prior to the 2005 head injury. He notes that the anger/behavior is still a big issue even today.

Comment:
Even without any clinical correlation the MRI PET scan finding of TBI. The possibility of the eye injury being modified by brain damage and lack of officer taking medical issues into consideration makes the FST findings totally invalid and non-contributory. Because FST are of questionable value even with alcohol, law

enforcement personnel are directed to inquire as to possible medical problems. Even under the best of circumstances and even with alcohol the FST is not a completely reliable predictor of impairment. The FST has a moderate relationship to elevated BAL (85% in some studies, 50% in others) but the FST was never designed for assessing the impact of any other substances. Further its accuracy was never tested with marijuana.

Toxicology

Historical Lab Deficiencies

The Las Vegas toxicology lab indicated that at the time the toxicological studies were done, they did not distinguish between THC and CBD. This is critical. Even though THC often does not cause impairment, it may be associated with euphoria. CBD, on the other hand, not only does not cause euphoria, it partially blocks THC's euphorogenic properties.

According to records subpoenaed from the LVMPD, the Forensic Lab issued a corrective action report on or about May 22, 2012, that noted that they found or discovered a scientific article which prompted the Forensic Lab to revise the methodology used to test for THC and THC Carboxylic acid. This is because they found that the methodology that they were using couldn't tell the difference between delta 9 tetrahydrocannabinol THC in the sample and cannabidiol. According to the report of Dr. Kelly, this fact regarding lab methodology rendered the blood test results of Mr. Awerbach non-probative for the actual levels of THC in his blood.

Toxicology Report

Mr. Awerbach's whole blood tested 3.3 ng/ml (parts per billion) for THC and 47 ng/ml for THC-Carboxylic acid. The legal limit in Nevada is 2.0 for THC and 5 for the metabolite. THC is a psychotrophically active ingredient in marijuana. THC-Carboxylic acid is an inactive ingredient. There is no report of the 11 hydroxy THC. This is an intermediate metabolite of THC. Its lack of presence could indicate 1) that the cannabis did not contain much THC and/or 2) that the cannabis intake was more than an hour ago, and/or 3) that the lab work was incomplete or reflected the problems noted before.

Discussion of Lab Findings:

These numbers can suggest cannabis use anywhere from 3 hours to 5 or 6 days previous to the time the blood was drawn. This is based on pharmacokinetics, the Aguilar study and numerous other studies. These are included further on in this report. The presence of 47 mg/ml of a carboxy indicates a history of fairly regular use.

2) NO 11 OH noted result include in toxicology results

If 11 hydroxy THC was tested and it was not there then Mr. Awerbach would not have used cannabis recently or what he used had a low THC strain. This might also reflect the problems that the lab was having.

Comment:
So we have a low THC of 3.3 ug/ml. We have no idea what it was at time of accident. This finding could reflect THC from days ago. Also we have no idea the THC or CBD content of the cannabis he smoked. Nor how much the defendant consumed. Since there is not a direct correlation between level and impairment there is likely not an issue. To the extent that the level is low and Mr. Awerbach is a regular user of cannabis, this finding is exculpatory.

> "What is known about correlations between driving impairment and drug concentration? - Except for ethanol, determinations of drug concentrations in body fluids are at present of limited value for establishing driving impairment…"

The authoritative Consensus Report of NIDA's Research Technology Branch ("Drug Concentrations and Driving Impairment (JAMA, Nov. 8, 1985 – Vol. 254 #18):

Although this report dates from 1985, its conclusions are still valid. The meaning of these toxicology results are notoriously unreliable in determining driver impairment due to different effects in different subjects due to genetics differences, history of use, weight, strain of cannabis, and basically the variability that exist in both plants and humans.

Marinol/FDA
In the body of the report I address in greater detail what the research has shown to be the effect of cannabinoids on driving, however the best example that the mere presence of THC is not indicative of impairment is the position of the FDA.

In 1985 the federal government approved the sale of Marinol, the synthetic version of delta nine THC (NOTE: THC is the principle euphoriant in cannabis.) Cannabis contains an anti-euphoriant cannabidiols (CBDs). Therefore, because of the presence of CBDs in cannabis and its lack in Marinol. Marinol is more likely to cause dysphoria than cannabis.

It's apparent that the FDA does not believe that the mere presence of cannabinoids or their metabolites is a contraindication to driving or operating heavy equipment. This can be ascertained from the FDA approved package insert for Marinol, which is synthetic THC.

Every FDA approved drug must have an FDA approved package insert. The FDA approved language for Marinol is clear that a patient can drive, operate heavy equipment and engage in dangerous activity so long as the patient has found that this medicine does not interfere with those activities.

Toxicology Conclusions

The conclusion that Marinol is more euphorgenic and has more side effects than the whole cannabis plant is borne out by studies done on tincture of cannabis (Sativex) by GW Pharmaceuticals. According to extensive studies done by GW Pharmaceuticals of the UK, manufacturers of tincture of cannabis (Sativex), cannabis is much less euphorgenic than Marinol. This is because of the presence in marijuana of cannabinoids (CBDs) including cannabidiol. Marinol has no CBDs or any other cannabinoid or terpene. Nevertheless even though Marinol is THC in sesame seed oil, the FDA clearly allows for the driving and operation of heavy equipment and engaging in any hazardous activity once "…it is established that they are able to tolerate the drug and to perform such tasks safely." This quote is from the FDA approval package insert for dronabinol (Marinol) made by Abbott Pharmaceutical Inc.

I concur with Raymond Kelly, Ph.D. DABFT when he says, "THC is highly fat-soluble and not very water-soluble. This produces a pattern after use where it reaches a peak concentration in blood within minutes of smoking. It then distributes to other sites in the body where a fat-soluble substance would go, such as membranes, adipose tissue, and nervous tissue. Thus, as THC is reaching its peak or highest concentration in blood, performance impairment may not be very great, while after its blood concentration is lower, or even not detectable (depending on the lab's assay method), it still can affect performance.

Records from the forensic laboratory at LVMPD included an internal document called a Corrective Action Report, dated 06/26/12 and pertaining to a problem with their analytical method for cannabinoids in blood. In brief, the lab disclosed that during the time frame in which Mr. Awerbach's blood sample apparently was analyzed, the lab's method was unable to distinguish between Δ9-tetrahydrocannabinol (THC) and another cannabinoid found in the marijuana plant, cannabidiol (CBD). The lab's conclusion was based on a published paper where this had been studied. The upshot of this lab problem is that when the lab reported a THC concentration in blood of 4.4 ng/mL, it is theoretically impossible to know how much of that result actually might have been CBD, whose activity is different than THC. It thus potentially invalidates the time of use models referred to in my previous letter. To my knowledge, there are no studies in the literature correlating blood concentrations of CBD, a non-psychoactive compound, with driving impairment.

- **FIELD SOBRIETY TEST (FST)**

As noted by Dr. Greg Kane, whose report I reviewed, Officer Figueroa spoke to Mr. Awerbach shortly after the accident at the scene. Immediately upon his arrival at the scene of the accident, the Officer said that he smelled a strong odor consistent with smoked marijuana coming from inside Mr. Awerbach's vehicle. According to the Officer, Mr. Awerbach said that he had smoked marijuana approximately one hour prior to the accident. After Mr. Awerbach's arrest, a plastic bag containing a green leafy substance weighing in total (bag and contents) 8.8 grams gross weight was found on his person during booking at the jail. The contents tested positive for marijuana based on a NIK test. Officer Figueroa testified that he administered a traffic-police Standardized

Field Sobriety Test. On the traffic-police Horizontal Gaze Nystagmus test, Officer Figueroa scored Mr. Awerbach with 6 clues. On the traffic-police Walk and Turn test, the Officer put down Mr. Awerbach scored 7 points. On the traffic-police One Leg Stand test Officer Figueroa said Mr. Awerbach scored 4 points. A traffic-police Drug Influence Evaluation was not done. The Officer was not qualified as a DRE.

• **Field Sobriety Test**
It is clear that Mr. Awerbach comprehended the instruction per the officer's deposition. He also did not pass the FST. The inference and/or conclusion reached by the officer that he was DUI. That is a leap of faith, not a diagnosis based on diagnostic evidence. Here again the FST performance could be indicative of many things, including possible brain damage, known vision problems, increased fear and anxiety as a consequence of his TBI. The officer apparently did not ask Mr. Awerbach about his medical history. If not it would appear training as to asking about medical was not followed. Invalidates the FST.

As a result of the defendant's medical history, the failure of the officer to inquire as to this history, additional neurological assessment was performed. A PET scan was ordered and performed on 9/30/14. The impression of the physician interpreting the scan was of an abnormal scan consistent with brain abnormalities sustained from a TBI. There is clear correlation with clinical findings Dr. Shah mentions.

In my opinion, the mere presence of THC and/or its metabolites at the levels supposedly detected by LVMPD in Mr. Awerbach's blood (even if those tests actually measured what they purport to measure) does not demonstrate that he was impaired in driving his mother's automobile. These findings were not properly done and do nothing to demonstrate impairment.

EYES
• The defendant's eyes were described as bloodshot, watery, glassy

Discussion of Eye Findings:
In a recent consultation with a local ophthalmologist he expressed the opinion that the police made conclusions based on limited findings and limited knowledge. They are not trained in differential diagnosis, nor do they do extensive testing. These conditions are rarely made to a medical certainty.

—There are many things that can cause the above noted ocular findings.

Bloodshot Eyes
There are numerous conditions that can cause bloodshot eyes. The Conjunctiva, Cornea, and Sclera section from Yater and Oliver's Symptom Diagnosis has a long list of causes for injection of competence in the different diagnosis for "Redness or Injection of the Conjunctiva (Bloodshot Eye)." They point out that there are a wide variety of causes for redness of the eye. Bloodshot eyes include, but are not limited to, allergy, crying, rubbing the eyes, being stunned or shocked from being in an auto accident.

Yater and Oliver's Symptom Diagnosis states that "Simple hyperemia of the conjunctiva, known as dry catarrh, is caused often by local irritation, as from dust, misplaced cilia, tobacco smoke, irritating gases, cold winds, heat, and bright light. It may also be caused by errors of refraction, muscle imbalance, inflammatory nasal conditions, over-activity of the meibomian glands, or riboflavin deficiency.

Other causes include but are not limited to:

Acute Contagious Conjunctivitis (Pink-Eye; Acute Epidemic Conjunctivitis).
Characteristics. The entire conjunctiva is deeply injected, the lids markedly swollen and red, and small hemorrhages may be observed. The condition is usually bilateral contagious, and has seasonal predilection.

Acute Catarrbal Conjunctivity. (Acute Simple Conjunctivitis).

4. Foreign Body in the Eye
5. Asthenopia (Eyestrain).
6. Iritis.
7. Hay Fever
8. Acute Rhinitis
9. Influenza

Then there is a list of less common causes which includes bronchial asthma; chlorosis; trachoma; adenoids; iodism; brominism; mumps; stye; stenosis or obstruction punctum and canaliculi; tumor of the eyelid near the punctum; trigeminal typhus fever; facioscapulohumeral muscular paralysis; exophthalmic goiter

• **Lack of smooth tracking/pursuit**
This could be due to his eye injury, a result of the surgery to repair the hole in the macula, decreased peripheral vision from the scotoma, injury to the vestibular apparatus and/or sequelae of the patient's Traumatic Brain Injury. As noted elsewhere the patient's medical history was not taken into consideration by the officer.

Nystagmus

The patient was said to have Nystagmus at 45°. This extent of the nystagmus in someone a physician was testing would be indicative of the need of further tests to rule out the extent of the brain injury. One has to ask how, if the officer actually measured the angle of onset. Also according to an ophthalmologist I consulted with the macular surgery could affect nystagmus.

What is nystagmus?
Nystagmus is a condition of involuntary eye movement. It can be acquired in infancy or later in life. Nystagmus can be caused by subsequent foveation of moving objects, pathology, sustained rotation or substance use.

When the head rotates about any axis, distant visual images are sustained by rotating eyes in the opposite direction on the respective axis. The semicircular canals in the vestibule sense angular momentum. These send signals to the nuclei for eye movement in the brain. From here, a signal is relayed to the extraocular muscles to allow one's gaze to fixate on one object as the head moves. Nystagmus occurs when the semicircular canals are being stimulated while the head is not in motion. The direction of the ocular movement is related to the semicircular canal that is being stimulated.

Nystagmus is characterized by the combination of smooth pursuit, which usually acts to take the eye off the point of regard, interspersed with the saccadic movement that serves to bring the eye back on target. Without the use of objective recording techniques, it may be very difficult to distinguish between these conditions.

When nystagmus occurs without fulfilling its normal function, it is pathologic (deviating from the healthy or normal condition). Pathological nystagmus is the result of damage to one or more components of the vestibular system, including the semicircular canals, otolith organs, and the vestibulocerebellum.

Types of nystagmus?
There are different types of Nystagmus depending on where it starts as the eye moves from right to left or left to right.

• Central nystagmus
This typically occurs as a result of either normal or abnormal processes not related to the vestibular organ. For example, lesions of the midbrain or cerebellum can result in up- and down-beat nystagmus.

• Peripheral nystagmus
This occurs as a result of either normal or diseased functional states of the vestibular system and may combine a rotational component with vertical or horizontal eye movements and may be spontaneous, positional, or evoked.

• Gaze induced nystagmus
This occurs or is exacerbated as a result of changing one's gaze toward or away from a particular side. This has an affected vestibular apparatus.

Acquired nystagmus may be acquired from:

Diseases.
Some of the diseases that present nystagmus as a pathological sign:

- Aniridia
- Benign paroxysmal positional vertigo
- Brain tumors (medulloblastoma, astrocytoma, or other tumors in the posterior fossa)
- Head trauma

EXHIBIT H

EXHIBIT H

MJUD
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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.: A-11-637772-C Dept. No.: 30 **PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW**

Plaintiff Emilia Garcia ("Plaintiff"), by and through her counsel, hereby files this *Renewed Motion for Judgment as a Matter of Law* pursuant to NRCP 50(b). This Motion is made and based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument that this Court may allow.

DATED this 26th day of May, 2016.

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Marisa Rodriguez-Shapoval, Esq.
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NOTICE OF MOTION

TO: All Interested Parties; and

TO: Their Respective Counsel.

PLEASE TAKE NOTICE that **PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW** ("Motion") will come on for hearing in the above-entitled Court on the 23rd day of June, 2016, at the hour of 9:00 a.m., in Department XXX, or as soon thereafter as counsel may be heard. This Motion in being heard on said date and time in accordance with this Court's instruction on May 10, 2016, at the Post-Trial Motion Status Check hearing.

DATED this 26th day of May, 2016.

D. Lee Roberts, Jr., Esq.
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Marisa Rodriguez-Shapoval, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC.

Corey M. Eschweiler, Esq.
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Attorneys for Plaintiff

ORDER SHORTENING TIME

Good cause appearing, it is ordered that the hearing on **PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW** shall be heard on the 23rd day of June, 2016, in Department XXX at 9:00 a.m.

JERRY A. WIESS II
DISTRICT COURT JUDGE

Submitted by:

D. Lee Roberts, Jr., Esq.
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Marisa Rodriguez-Shapoval, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC.

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AFFIDAVIT OF COUNSEL IN SUPPORT OF ORDER SHORTENING TIME

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Timothy A. Mott, being first duly sworn, deposes and says:

1. I am over the age of eighteen, of sound mind, and give the following affidavit based on my personal knowledge.

2. I am an attorney with WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, and counsel of this matter for Plaintiff Emilia A. Garcia ("Plaintiff").

3. On May 10, 2016, this court held a status check hearing on post-trial motions and at that time, this Court ordered that any and all post trial motions be heard on June 23, 2016 and that such motions be filed by May 26, 2016.

4. If this post-trial motion is filed without an Order Shortening Time ("OST"), master calendar may schedule the motion for a day other than June 23, 2016, as ordered by this Court.

5. Thus, there is good cause to grant Plaintiff's request to hear this motion on an OST and schedule the hearing for June 23, 2016.

Timothy A. Mott, Esq.

Subscribed and Sworn before me
this 2nd day of May, 2016

Notary Public

AUDRA R. BONNEY
Notary Public State of Nevada
No. 00-63044-1
My appt. exp. June 8, 2016

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION & SUMMARY OF THE ARGUMENT

This personal injury action arose on January 2, 2011, when Defendant Jared Awerbach ("Jared"), driving a car owned by his mother, Defendant Andrea Awerbach ("Andrea"), failed to yield the right of way and made an improper left turn in front of Plaintiff Emilia Garcia's ("Emilia") approaching vehicle. Following the accident, Jared was determined to have illegal levels of marijuana metabolite in his blood. Emilia sued Jared for negligence and negligence *per se*, Andrea for negligent entrustment and joint liability pursuant to NRS 41.440, and asserted a claim for punitive damages against both Jared and Andrea.

Prior to trial, it was established as a matter of law that Jared was operating Andrea's car with her permission ("permissive use"). Both sides prepared for trial with this knowledge. On the first day of jury selection, this Court drastically reversed and modified two sanctions orders issued by Judge Allf (a year prior) that conclusively established permissive use as a matter of law. The last minute reversal was made in conjunction with a conversation the Court had with Judge Allf wherein she conveyed her recollection that her initial written decision was not intended to establish permissive use, but instead was only intended to establish a *rebuttable presumption* of permissive use. Contrary to Judge Allf's recollection, two months after entering her original order finding that a finding of permissive use would be appropriate, she clarified her intentions by entering a *second order* affirming her finding of permissive use as a matter of law. She discussed the issues remaining for trial. The remaining issues did not include permissive use in any way, shape or form.

Judge Allf's recollection as to her subjective intention when issuing an order one year prior is conclusively rebutted not only by the objective language of the original order, but by her second order affirming the first: "[T]he Court did consider the *Ribeiro* factors and did enter the less severe sanction of finding there was permissive use" and ***"[t]he finding of permissive use does not prevent adjudication on the merits because Plaintiff still maintains the burden of showing causation and damages.***" The entire purpose of Judge Allf's orders was to preclude Andrea from disputing permission at trial because Andrea concealed critical evidence pertaining to permission, thereby preventing Emilia from adequately investigating the issue during discovery, and thereafter

provided fabricated testimony on two occasions while apparently believing the concealed evidence would never see the light of day. The orders were always intended to be a punitive sanction and there is nothing on the face of the written orders that would indicate a rebuttable presumption was intended by the Court. Judge Allf's orders precluded Andrea from disputing permissive use at trial, and relieved the Plaintiff of its obligation to come forward with any evidence on this issue. Of note, the orders were drafted by Judge Allf herself, not counsel.

Judge Allf had no proper ability or power to change her written orders or influence this Court to modify her orders once she recused herself in August, 2015. The law is abundantly clear that a judge must not substantively influence a case after her recusal. Once Judge Allf voluntarily recused herself from the case, her involvement ended and any influence by her was improper and constitutes reversible error.

Additionally, and of great significance, Andrea had conclusively admitted permissive use on two prior occasions. First, in her Answer to Plaintiff's Complaint she admitted permissive use, only to recant the admission in her Answer to Plaintiff's Amended Complaint. Second, in her responses to Plaintiff's requests for admissions Andrea again admitted permissive use ("permissive use admission"). *This permissive use admission is binding in the absence of the court affirmatively relieving her of the admission.* Andrea later attempted to change her position in these responses—almost one and a half years later and only after obtaining new counsel—amended responses were served, but without leave of Court and without compliance with NRCP 36(b). Thus, Andrea's attempt to recant her permissive use admission was of no legal effect.

Prior to trial, Andrea did not move to be relieved from her permissive use admission nor was such relief granted. Indeed, all of the parties likely assumed this issue was moot in light of the conclusive finding of permissive use by Judge Allf. At trial, finally realizing that Andrea's permissive use admission conclusively established permissive use as a matter of law in the absence of a motion and court order, Andrea's counsel orally moved for Andrea to be relieved from her permissive use admission ***after Plaintiff rested her case***. This Court denied this Motion, but nonetheless refused to give preclusive effect to the admission. When Andrea rested her case,

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Plaintiff moved for directed verdict (*i.e.*, judgment as a matter of law) on the "permissive use" issue, preserving this issue. This Court denied Plaintiff's request.

Before jury deliberation, the jury was presented with Jury Instruction No. 14, which stated: "Plaintiff, Emilia Garcia, served on the Defendant, Andrea Awerbach, a written request for the admission of the truth of certain matters of fact. You will regards as being conclusively proved all such matters of fact which were expressly admitted by the Defendants, Andrea Awerbach . . .." In other words, Jury Instruction No. 14, presented the jury with no choice but to find that permissive use had been conclusively established. Nonetheless, the jury returned a verdict finding Andrea did not give permission to Jared to use her vehicle on January 2, 2011.

In sum, the issue of permissive use should never have been presented to the jury as permissive use had already been established as a matter of law, not only by Judge Allf's Orders but by Andrea's own admission. No reasonable jury could have found a lack of permission in light of Jury Instruction No. 14. Plaintiff renews her motion for judgment as a matter of law and asks this Court to find that "permissive use" was established as a matter of law.

II. STANDARD FOR RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

"Motions for judgment notwithstanding verdict [*i.e.*, renewed motion for a judgment as a matter of law] presents solely a question of law to be determined by court." *Dudley v. Prima*, 84 Nev. 549, PIN CITE, 445 P.2d 31, PIN CITE (1968). Pursuant to NRCP 50(b), a party may move to "renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment." The Court may then "direct entry of judgment as a matter of law." NRCP 50(b)(1)(C).

Here, it is proper for this Court to enter judgment as a matter of law with regard to permissive use and find that Andrea is liable under the negligent entrustment cause of action and jointly liable pursuant to NRS 41.440. First, this Motion presents solely a question of law proper for judicial adjudication. Second, this Motion is timely as it is being filed before a Notice of Entry of Judgment. Finally, this is a renewed motion, filed after Plaintiff already sought judgment as a matter of law (*i.e.*, directed verdict) at trial, after presentation of the evidence, and before jury deliberation.

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III. FACTUAL BACKGROUND

A. ANDREA'S ANSWER TO EMILIA'S COMPLAINT ADMITTING PERMISSIVE USE.

This collision occurred on January 2, 2011. (*See* Complaint (3/25/11), ¶ 9, attached as Exhibit 1). Emilia initiated the lawsuit on March 25, 2011. (*See id.*) Defendants answered Emilia's Complaint on January 23, 2012, and, of great significance, admitted that "Defendant ANDREA AWERBACH, did entrust the vehicle to the control of Defendant JARED AWERBACH." (*See* Complaint (3/25/11), ¶ 23, attached as Exhibit 1; Defendants' Answer to Complaint, ¶ 2, attached as Exhibit 2) One year later, in response to Plaintiff's Amended Complaint, Andrea conveniently flipped her answer on this critical issue. (*See* Amended Complaint (1/14/13), ¶ 23, on file with this Court; *see also* Answer to Amended Complaint (2/7/13, ¶ 17, on file with this Court)

B. ANDREA'S RESPONSE TO EMILIA'S REQUEST FOR ADMISSION.

On June 5, 2012, Andrea responded to Emilia's requests for admissions and unequivocally admitted that Jared operated her vehicle on January 2, 2011 with her permission. Specifically:

> **REQUEST NO. 2:**
>
> Admit JARED AWEBACH was operating your vehicle on January 2, 2011, with your permission.
>
> **RESPONSE TO REQUEST NO. 2:**
>
> Admit.

(*See* Defendant Andrew Awerbach's Responses to Request for Admissions, Req., no. 2, attached as Exhibit 3).

C. ANDREA ACTIVELY CONCEALED EVIDENCE IN THE FORM OF A CLAIMS NOTE.

On July 22, 2013, after Emilia filed a motion to compel, Andrea produced what appeared to be the complete claims notes from her claim with Liberty Mutual in a pleading styled *Second Supplement to List of Witnesses and Documents And Tangible Items Produced At Early Case Conference*. (*See* Second Supplement to List of Witnesses and Documents And Tangible Items Produced At Early Case Conference, attached as Exhibit 4) What Andrea did not tell Emilia was

that one of the notes dated January 17, 2011, at 4:44 p.m., had been secretly redacted making it appear as if that note never existed. In fact, Andrea furthered the ruse by producing a misleading disclosure and privilege log that further concealed the existence of the 4:44 p.m. note. Specifically, Andrea's disclosure indicated that "Adjustor's Claims Notes between January 2-17, 2011 (Bates Labels LM001-LM006; LM019-027)" were disclosed, and only "notes after January 17, 2011, [were being] withheld (Bates labels LM007-018)." *Id.* Indeed, Andrea's privilege log indicated she was only claiming a privilege for claims notes dated "**January 18, 2011, et seq.**", *i.e.*, notes dated on or after January 18, 2011. It is now obvious this was misleading because the January 17, 2011, note from 4:44 p.m. was not contained in the disclosure or identified on the privilege log. Instead, that note was whited-out, making it appear as if the note never existed. It was surreptitiously redacted.

D. ANDREA FURTHERED THE CONCEALMENT THROUGH HER DEPOSITION TESTIMONY.

Emilia first deposed Andrea on September 12, 2013, approximately two months after Andrea served Emilia with the whited-out claims note. During the deposition, Andrea testified inconsistently with the whited-out claims note, which, of course, had not yet been uncovered by Emilia's counsel. (*See e.g.*, Andrea Awerbach's Depo. Tran. Vol I (09/12/13), at 21:1-23, attached as Exhibit 5 (testifying Jared did not ask for permission to drive the car that day, that she did not know where Jared got the keys, that there was no regular place where she would leave the keys, and that she constantly hid the keys)). Andrea also admitted speaking with her insurer following the collision, but claimed ignorance whether the conversation was recorded or when the conversations occurred. (*Id.* at 26:12-19).

In fact, Andrea furthered the ruse shortly after her first deposition by filing a Motion for Summary Judgment claiming it was undisputed she did not give Jared permission to drive her car on January 2, 2011. (*See* Defendant Andrea Awerbach's Motion for Partial Summary Judgment, on file with this Court) Again, this motion was made while Andrea was actively concealing evidence that contradicted her motion. Andrea ultimately withdrew her Motion for Partial Summary Judgment. Andrea was deposed again on October 24, 2014, and again testified extensively to

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material information that clearly contradicted the claims note, which, at that point, had still not yet been uncovered by Emilia's counsel. (*See e.g.*, Andrea Awerbach's Depo. Tran. Vol II (10/24/14), at 82:1-18, attached as Exhibit 6 (testifying she hid the keys)). As detailed below, the withheld information did not come to light until Emilia independently obtained it from Andrea's insurer.

E. THE HIDDEN CLAIMS NOTE, WHICH WAS UNCOVERED ONLY THROUGH THE DILIGENCE OF PLAINTIFF'S COUNSEL, CONTRADICTED ANDREA'S DEPOSITION TESTIMONY.

Emilia discovered the concealed claims note on November 10, 2014, when Andrea's insurer, Liberty Mutual, produced the note in response to Emilia's subpoena *duces tecum*. The Liberty Mutual adjustor who created the note subsequently testified to the note's authenticity and confirmed the note accurately memorialized the adjustor's January 17, 2011, conversation with Andrea. (*See* Teresa Meraz's Depo. Transcript (11/10/14), at 15:19-23, attached as Exhibit 7).

The contents of the concealed note contradict Andrea's adamant testimony at both of her depositions, wherein she vehemently claimed (i) that she constantly hid her keys for fear that her drug abusing son might have access to the car, (ii) that she never gave Jared permission to drive her vehicle, and (iii) that she had no idea how Jared obtained the keys on the day of the crash. The surreptitiously concealed portions of the claims note establish that Andrea told her insurer days after the crash that she had previously let Jared drive her car, she gave him the keys earlier in the day, and she usually kept the keys on the mantle. Amazingly, when Andrea was asked under oath about Jared claiming Andrea left the keys out, Andrea claimed her son was mistaken. (*See* Andrea Awerbach's Depo. Tran. Vol II (10/24/14), at 161:9-19, attached as Exhibit 6). It is clear, however, that Andrea was changing her story and trying to cover for herself once she understood the legal ramifications of permissive use.

F. ANDREA IMPROPERLY AMENDS HER DISCOVERY RESPONSE.

Conveniently, on October 20, 2014, almost eighteen months after Andrea admitted in her Responses to Plaintiff's Requests for Admissions that she gave Jared permission to use her vehicle on January 2, 2011, and only after Andrea changed counsel, Andrea attempted to improperly modify the aforementioned response, ***without leave of court***, to state that "Andrea admits she learned after the accident that Jared Awerbach had operated her vehicle on January 2, 2011 but

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Andrea denies she gave him permission." (*See* Defendant Andrea Awerbach's Correction to her Responses to Request for Admissions, Req., no. 2, attached as Exhibit 8).

This improper and ineffective attempt to amend was of no concern to Emilia. The issue was rendered moot shortly thereafter as a result of Judge Allf entering the finding of permissive use based on Andrea's discovery sanctions, as set forth below.

G. JUDGE ALLF UNAMBIGUOUSLY MADE A CONCLUSIVE FINDING OF PERMISSIVE USE IN TWO SEPARATE ORDERS.

On December 2, 2014, Emilia filed a motion to strike Andrea's answer based on Andrea's intentional concealment of the claims note. *See* Plaintiff's Motion to Strike Andrea Awerbach's Answer, on file with this Court. On February 25, 2015, Judge Allf granted Emilia's motion in part and issued a written decision (drafted by Judge Allf, not counsel) providing in relevant part:

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

(*See* Decision and Order, filed with this Court February 25, 2015 (emphasis added), attached as Exhibit 9) On March 13, 2015, Andrea filed a motion seeking reconsideration of the Court's order. (*See* Defendant Andrea Awerbach's Motion for Relief from Final Court Order (3/13/15), on file with this Court). The Court denied Andrea's motion and issued a second written decision, again drafted by Judge Allf, not counsel:

> COURT FURTHER FINDS after review that here the Court did consider the Ribeiro factors and did enter the less severe sanction of finding there was permissive use rather than striking Defendant Andrea's answer as requested by Plaintiff's Motion. The finding of permissive use specifically relates to the content of the improperly withheld claims note, which included a statement by Defendant

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> Andrea that she had given Defendant Jared permission to use her car at the time of the accident. ***The finding of permissive use does not prevent adjudication on the merits because Plaintiff still maintains the burden of showing causation and damages***. The withholding of the note and the misleading privilege log was willful, and sanctions are necessary to "deter the both the parties and future litigants from similar abuses." *Id.* *Although the note was withheld by previous counsel, Defendant Andrea's deposition testimony at both of her depositions was contrary to her statement to her insurance carrier*. The sanction was crafted to provide a fair result to both parties, given the severity of the issue.

(*See* Decision and Order (4/27/15) (emphasis added), attached as Exhibit 10)

Neither of Judge Allf's two written orders is ambiguous, and neither mentions a rebuttable presumption. Moreover, even if the first order was ambiguous, it was unmistakably clarified through Judge Allf's second order denying reconsideration. The parties relied on Judge Allf's orders for the next year and prepared for trial believing the issue of permissive use was resolved and no longer an issue for trial. This governed the totality of the parties' trial preparation, including drafting motions in limine and making crucial strategic decisions regarding witnesses, evidence, and trial presentation.

H. JUDGE ALLF RECUSES HERSELF.

On August 27, 2015, Judge Allf recused herself because of a conflict with Jared's newly associated counsel, Randall Tindall. (*See* Notice of Department Reassignment, on file with this Court) On September 8, 2015, Emilia requested Mr. Tindall be disqualified and the action re-assigned to Judge Allf because she was familiar with the case, the action was on the eve of trial, and it was improper for new counsel to be hired knowing his retention would result in recusal based on prior recusals by Judge Allf (*i.e.*, forum shopping) (*See* Plaintiff's Motion to Disqualify Defendant Jared Awerbach's Counsel Randall Tindall and Motion for Reassignment to Department 27 on Order Shortening Time (9/8/15), on file with this Court). During the September 15, 2015, hearing on Emilia's motion, this Court denied Emilia's request to reassign the case back to Judge Allf, but made it clear: "I'm going to follow what her rulings were." (*See* Sep. 15, 2015 Hearing Transcript, at 20:19:20, attached as Exhibit 11)

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I. THIS COURT REVERSES JUDGE ALLF'S ORDERS ON PERMISSIVE USE ON THE FIRST DAY OF JURY SELECTION.

On February 8, 2016, one year after Judge Allf issued her sanction order, ten months after she reaffirmed that order, six months after Judge Allf recused herself from the action, and a half day into jury selection, this Court overruled both of Judge Allf's permissive use orders, *sua sponte*:

> THE COURT: ...We're outside the presence of the jury. I know that one of the things that you guys wanted me to tell you how we're going to handle is this issue of permissive use. So I talked to Judge Allf this morning to try to figure out what was her intention when she entered that order. I don't think she understood the difference between permissive use and auto negligent entrustment. That being said, ***it was her intention that her ruling would result in a rebuttable presumption, not a determination as a matter of law, even though that's what the order says***. I'm not going to change from permissive use to negligent entrustment, even though I think that's probably what she envisioned. But I am going to make it a rebuttal presumption as it relates to the permissive use. So -- and that's based upon what her intention was.

(See Feb. 8, 2016, Hearing Transcript, at 61:8-25 (emphasis added), attached as Exhibit 12) The reversal was based upon a discussion with Judge Allf (who had long ago recused herself due to a conflict and should no longer had been influencing the rulings of this court). Moreover, it is without dispute that the Court's decision contradicts the plain language of both of the orders drafted by Judge Allf:

> MR. ROBERTS: -- I'm somewhat taken aback by this. We weren't there at the time. So I've been mainly relying on the order in preparing to try the case. The order says nothing about rebuttable presumption. It says that permissive use is found as matter of law as a sanction.
>
> THE COURT: I know.

(*Id.* at 63:11-17)

Even Andrea's counsel (the primary beneficiary of the reversal) recognized the parties' inability to anticipate a reversal of the permissive use order in preparing for trial:

> MR. MAZZEO: But it does throw a wrench in the works because we didn't anticipate as -- as we're preparing for trial, I'm sure both sides were not looking at this case in terms of, okay, what evidence do we need now to rebut the ruling on permissive use.

(*Id.* at 62:20-63:1)

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J. EMILIA FILES A BRIEF ASKING THE COURT TO RECONSIDER ITS DECISION.

On February 10, 2016, two days after this Court's oral pronouncement of his intention to *sua sponte* amend Judge Allf's prior orders, and before he drafted an order officially amending the orders, Emilia filed a brief asking the court to reconsider its decision. (*See* Plaintiff's Trial Brief Regarding Permissive Use (2/10/16), attached as Exhibit 13). Emilia explained in detail how permission had been established as a matter of law by Judge Allf's orders, by Andrea's Answer to the original Complaint, and by her permissive use admission. (*See generally id.*) Plaintiff's counsel also argued these points in open court. (*See* Trial Transcript (2/10/16), at 139:24-143:11, attached as Exhibit 14). The Court did not issue an order from the bench. (*Id.* at 147:19-148:2). On February 12, 2016, the Court filed an Order he drafted modifying Judge Allf's prior orders, which reversed Judge Allf's sanction that permissive use was established as a matter of law; and, imposing a rebuttable presumption that permissive use was established against Andrea Awerbach. (*See* Order Modifying Prior Order of Judge Allf (2/12/16), attached as Exhibit 15). The 2/12/16 Order did not address Plaintiff's argument with regard to Andrea's permissive use admission. (*See generally id.*)

K. ANDREA TESTIFIES ABOUT THE ADMISSIONS.

At trial, Andrea testified that in her written response to Plaintiff's Request for Admissions, Request No. 2, which stated, "[a]dmit that Jared Awerbach was operating your vehicle on January 2nd, 2011, with your permission;" her "attorney admitted this on her behalf." (*See* Trial Transcript (3/7/16), at 115:13-18, attached as Exhibit 16)

L. EMILIA ASKS FOR A DIRECTED VERDICT.

Also on March 7, 2016, once both sides had rested, counsel for Plaintiff requested a directed verdict on the issue of permissive use. (*See* Trial Transcript (3/7/16), at 146:25-148:25) attached as Exhibit 16). Counsel addressed the lack of "evidence from which a reasonable juror could find that [Andrea], indeed, met [her] burden of proof" as it related to the 2/12/16 Order establishing a rebuttable presumption of permissive use. (*See id.* at 146:25-146:13). Counsel further stressed how Andrea's permissive use "admission conclusively established permissive as a matter of law,"

entitling plaintiff "to directed verdict [*i.e.*, judgment as a matter of law] on that motion." (*Id.* at 147:15-20) This Court denied Plaintiff's request. (*Id.* at 148:25).

M. THE JURY RECEIVES JURY INSTRUCTION NO. 14, ESSENTIALLY OBLIGATING THEM TO FIND PERMISSIVE USE HAD BEEN CONCLUSIVELY ESTABLISHED.

On March 8, 2016, the jury received the Jury Instructions. (*See* Jury Instructions (3/8/16), attached as Exhibit 17) Jury Instruction No. 14 stated as follows:

> In this case, as permitted by law, Plaintiff, Emilia Garcia, served on the Defendant, Andrea Awerbach, a written request for the admission of the truth of certain matters of fact. You will regard as being conclusively proved all such matters of fact which were expressly admitted by the Defendant, Andrea Awerbach, or which Defendant, Andrea Awerbach, failed to deny.

In other words, Jury Instruction No. 14, coupled with Andrea's testimony regarding her permissive use admission, gave the jury with no choice but to find that permissive use had been conclusively established.

N. THE JURY RETURNS A VERDICT OF "NO PERMISSIVE USE"

On March 10, 2016, the jury returned a verdict. (*See* Jury Verdict (2/10/16), attached as Exhibit 18) In spite of Jury Instruction No. 14 and Andrea's testimony regarding her permission use admission the jury found that that Andrea did not give permission to Jared to use her vehicle on January 2, 2011. (*See id.* at 2)

IV. ARGUMENT

A. A RECUSED JUDGE MUST NOT HAVE ANY INFLUENCE ON A CASE AFTER RECUSAL.

"Patently a judge who is disqualified from acting must not be able to affect the determination of any case from which he is barred." *Arnold v. E. Air Lines*, 712 F.2d 899, 904 (4th Cir. 1983); *see also Doe v. Louisiana Supreme Court*, 1991 WL 121211 (E.D. La. June 24, 1991). "[C]ourts have almost uniformly held that a trial judge who has recused [herself] should take no other action in the case except the necessary ministerial acts to have the case transferred to another

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judge." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457 (5th Cir. 1996); *see also Stringer v. United States,* 233 F.2d 947, 948 (9th Cir. 1956) (acknowledging that after disqualification, judges are confined to performing only the "mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication"); *Moody v. Simmons,* 858 F.2d 137, 143 (3d Cir. 1988) (holding that once a judge has disqualified herself, she may only perform the ministerial duties necessary to transfer the case to another judge any may not enter any further orders in the case, except for "housekeeping" ones), *cert. denied*, 489 U.S. 1078, (1989); *El Fenix de P.R. v. The M/Y Johanny*, 36 F.3d 136, 142 (1st Cir. 1994) ("recused judge should take no further action except to enable administrative reassignment of the case").

Once Judge Allf made the decision to disqualify herself, she was not permitted to have any influence on this case. Her recusal ended her involvement and any further influence by Judge Allf that caused this court to ***modify*** her prior orders was improper and constitutes reversible error. Moreover, as set forth in more detail below, Judge Allf's recollection as to her intention when initially entering the permissive use order one year ago is conclusively rebutted by her second order on permissive use. A Judge's belated recollection of her intention cannot prevail over the plain terms of her written order. This is a formula for anarchy, uncertainty and loss of faith in the integrity of the judicial system.

B. THE COURT'S DECISION REWARDS ANDREA'S IMPROPER DISCOVERY TACTICS.

Courts have recognized that "[p]rior interlocutory orders should be vacated or amended by a successor judge only after careful consideration, especially if there is evidence of judge shopping." *Legget v. Kumar*, 212 Ill. App. 3d 255, 274 (Ill. 1991). "In the context of discovery, it is particularly appropriate for a judge before whom a motion for reconsideration is pending to exercise considerable restraint in reversing or modifying previous rulings. A successor judge should revise or modify previous discovery rulings only if there is a change of circumstances or additional facts which would warrant such action." *Id.* In other words, it is improper to reverse an order the parties "justifiably relied upon . . . for over a year . . . as they prepared the case for trial." *Franklin v. Franklin*, 858 So. 2d 110, 122 (Miss. 2003) (Mississippi Supreme Court overturning trial court's order that reversed the original trial court's ruling since the original ruling was made within the

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judge's discretion and the "lawyers justifiably relied upon th[e] order for over a year . . . as they prepared the case for trial"; and further finding that the reversal of the original trial court's ruling "reache[d] an inequitable result"). This case is no different.

The Court's decision to overturn Judge Allf's long standing orders rewards the intentional concealment of evidence and unfairly prejudices Emilia. Permissive use has been established three times in this case and has now been changed (or attempted to be changed) each time:

First, Andrea admitted permissive use in her Answer to Plaintiff's Complaint, only to later switch positions and claim the complete opposite in her Answer to Plaintiff's Amended Complaint.

Second, Andrea admitted permissive use in her responses to Plaintiff's requests for admissions, again only to later switch positions almost one and a half years later, and after retaining new counsel, to claim no permissive use. Of great significance, however, Andrea's attempted "amendment" of her binding admission fails as a matter of law as "[a]ny matter admitted under [Rule 36] ***is conclusively established unless the court on motion permits withdrawal or amendment of the admission.***" NRCP 36(b) (emphasis added). Since Andrea admitted permissive use and never filed a motion to change her admission, ***Andrea must be bound by the admission***, irrespective of any modifications to Judge Allf's long standing orders. It was too late to file a motion once jury selection started.

Finally, Judge Allf conclusively found permissive use based on Andrea's blatant discovery violations and issued two separate orders establishing the permissive use, only to have this court reverse the rulings.

Allowing Andrea to dispute permissive use allowed Andrea to continue committing the same conduct that resulted in the Court's sanctions in the first place. By the time Emilia independently found the hidden claims note in late November, 2014, Emilia had already deposed Andrea twice. Each time, Andrea's testimony contradicted the hidden claims note and Jared's testimony that he obtained the keys from the counter of their home. In other words, Andrea claimed she did not give Jared permission, hid evidence that showed otherwise, and prevented Emilia from discovering the evidence that directly contradicted her deposition testimony. That was the basis for Judge Allf's sanction orders. Judge Allf's orders preventing Andrea from challenging

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permissive use at trial entered the only logical sanction that could have been imposed at that point because it was Andrea's concealment and deceptive deposition testimony that prevented Emilia from being able to properly conduct discovery on the issue. It was also a lesser sanction than the one sought by Emilia. Consequently, it would be patently inequitable to allow Andrea to dispute permission after she (1) intentionally concealed critical evidence that would allow Emilia to prove permissive use and (2) admitted permissive in her Answer and responses to requests for admissions. Allowing Andrea to challenge permissive use gave her the best of both worlds: she was allowed to dispute permission at trial after thwarting Emilia's attempts to prove permissive use by hiding evidence during discovery.

C. EMILIA HAS RELIED ON JUDGE ALLF'S ORDERS IN PREPARING FOR TRIAL.

The Court's intention to reverse Judge Allf's sanction order is also improper because the parties relied on the order for an entire year. *See Franklin*, 858 So. 2d at 122. Emilia adjusted her discovery strategy accordingly, and prepared for trial for a year in reliance on the Court's order that she would not have to prove permission at trial. In other words, after Judge Allf issued her order and confirmed it in a second order, Emilia no longer needed to seek leave to conduct discovery on the issue, and, as a result, she did not seek to re-open discovery, she did not seek to re-depose Andrea or Jared, and she did not seek testimony from other knowledgeable witnesses. Emilia appropriately relied on the Court's order rendering permissive use a non-issue for trial. Now, after jury selection had started and after the parties spent an enormous amount of time preparing for trial not knowing permissive use was an issue, Emilia's entire trial strategy had to be readjusted without the ability to vet evidence that would have been obtainable in discovery. Emilia had to be prepared to rebut Andrea's testimony regarding permissive use, despite the fact that Andrea's prior deposition testimony is unhelpful because it consists of a string of untruths that misled Emilia throughout years of discovery.

D. "PERMISSIVE USED" SHOULD NOT HAVE BEEN AN ISSUE FOR THE JURY BECAUSE ANDREA'S ADMISSION CONCLUSIVELY ESTABLISHED AS A MATTER OF LAW THIS ISSUE.

NRCP 36(b) states, in part, "[a]ny matter admitted under this rule is conclusively established *unless the court on motion* permits withdrawal or amendment of the admission."

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(emphasis added) In this case, Andrea expressly admitted Jared was driving her vehicle on January 2, 2011 with her permission. (*See* Defendant Andrea Awerbach's Responses to Request for Admissions, Req., no. 2, attached as Exhibit 3). Although Andrea attempted to recant her admission, she did not file a motion seeking permission to withdraw or amend her admission. In fact, prior to trial Andrea never sought leave of court to amend her permissive use admission. It was not until Plaintiff had rested her case in chief, that Andrea's counsel orally moved for permission to amend the response. This motion was unequivocally denied. Consequently, Andrea's admission conclusively establishes as matter of law that she gave permission to Jared to driver her car on January 2, 2011. Thus, the issue of permissive use should have never been presented to the jury. As such, Plaintiff renews her motion for judgment as a matter of law regarding permissive use.

IV. CONCLUSION

For the reasons set forth above, Emilia requests that this Court issue an Order finding that "permissive use" has been established as a matter of law and enter judgment with regard to finding Andrea liable for negligent entrustment and joint liability pursuant to NRS 41.440.

DATED this 26th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2016, a true and correct copy of the foregoing **PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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EXHIBIT I

EXHIBIT I

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DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA Plaintiff, vs. JARED AWERBACH, individually, ANDREA AWERBACH, individually, DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	CASE NO. A-11-637772-C DEPT. NO. 30 **JARED AWERBACH'S OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT**

A. Plaintiff waived the right to request additur because she did not request it before the jury was discharged.

Addressing first Plaintiff's alternative argument, the Nevada Supreme Court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented. *Soper v. Means*, 111 Nev. 1290, 903 P.2d 222 (1995). However, "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981).

Parties have a duty to object to inconsistent jury verdicts before the jury is dismissed. *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 628 P.2d 681 (1981); *see also Brascia v. Johnson*, 105 Nev. 592, n. 2, 781 P.2d 765, n.2 (1989) (concluding that where inconsistent verdicts are returned, a party must challenge the verdicts before the jury is discharged and "failure to object while the jury [is] still available and able to clarify its verdict constitute[s] a waiver");

One of a court's primary objectives is to promote the efficient administration of justice. *Cramer v. Peavey*, 116 Nev. 575, 3 P.3d 665 (2000). The efficient administration of justice requires a party to address any concerns or inconsistencies with the jury's verdict before the jury is discharged. *Lehrer*

McGovern Bovis v. Bullock Insulation, 124 Nev. 1102, 197 P.3d 1032 (2008) (clarifying that the parties have the duty to object to inconsistent jury verdicts). This court's policy favoring the efficient administration of justice states that "'failure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury' constitutes a waiver of the issue of an inconsistent verdict." *Cramer*, at 583, 670. Where inconsistent verdicts are returned, party must challenge the verdicts before the jury is discharged and failure to object while the jury is still available and able to clarify its verdict constitutes a waiver. *Carlson v. Battista Antonio Locatelli*, 109 Nev. 257; 849 P.2d 313 (1993).

B. Additur is not available because the verdict was not clearly inadequate.

Additur is a just, speedy, efficient, and inexpensive vehicle to correct an inadequate jury verdict. In order to obtain additur, the moving party must satisfy a two-part test: (1) demonstrate that "the damages are clearly inadequate and, if so, (2) demonstrate that "the case would be a proper one for granting a motion for a new trial limited to damages. If both prongs are met, the court may exercise its discretion to order a new trial unless the nonmoving party acquiesces to the court's additur. *Winchell v. Schiff*, 124 Nev. 938, 193 P.3d 946 (2008).

It is quite easy to see that additur is reserved for situations in which there is catastrophic injury in situations involving damages due to death or dismemberment. In *Drummond v. Mid-West Growers*, 91 Nev. 698, 542 P.2d 198 (1975), this court recognized additur as a viable form of post-judgment relief where a jury award was "clearly inadequate" and a new trial on damages was warranted. In *Drummond*, a jury award of $9,640.35 was clearly inadequate because it did not compensate the plaintiff for pain, suffering, and future disability associated with the loss of his arm. In *Donaldson v. Anderson*, 109 Nev. 1039, 862 P.2d 1204 (1993), the parents of Jeremy Donaldson filed a wrongful death action requesting loss of consortium against Anderson resulting from a car accident in which Jeremy died. The jury found for the parents, finding Jeremy and Anderson each fifty percent at fault for the accident. The jury also awarded zero damages for the loss of consortium claim. The court applied the fundamental additur considerations to the facts and concluded that zero damages for lost consortium resulting from Jeremy's death shocking and clearly inadequate. *Id.*

There is nothing about the Garcia case that indicates additur is warranted or allowed. The jury heard considerable evidence that Plaintiff was injured only slightly and that no further treatment was warranted. This evidence was a combination of expert testimony, both through cross examination of Plaintiff's medical experts and direct testimony of Defendants' medical experts, as well as lay testimony, probably most specifically, from Plaintiff regarding her Facebook information. Additur is not warranted when evidence offered during trial sufficiently undermines the damages claim. Id. Plaintiff will not be able to offer to the court any authority to suggest that a case in which the jury considered ample evidence to deny a tenuous future damages claim for alleged low back pain is a case for which additur can be granted.

*C. **Additur is not available because there is no basis to grant a new trial relating to damages. The experiment was neither improper nor prejudicial.***

When evaluating whether juror misconduct warrants a new trial, the court should consider three factors: The severity of the charge, the closeness of the evidence and the nature of the error. *Big Pond v. State*, 101 Nev. 1, 692 P.2d 1288 (1985). Not every incidence of juror misconduct requires the granting of a motion for a new trial. *Barker v. State*, 95 Nev. 309, 594 P.2d 719 (1979). Even here misconduct has occurred, it will justify a new trial only where prejudice resulted from it. *Id.*

Plaintiff erroneously attempts to classify the situation in Garcia with situations in which misconduct was found. For example, Plaintiff raises the issue in a case where the jury attempted to recreate the effects of heroin. That situation had nothing to do with in-court observations such as what occurred in Garcia. The jury observed Plaintiff as she alternatively sat, then made a big production of having to stand because she allegedly had so much back pain. The Plaintiff erroneously attempts to classify the situation in Garcia with situations in which misconduct was found. For example, Plaintiff raises the issue in a case where the jury attempted to recreate the effects of heroin, which had nothing to do with in-court observations. The fact is Plaintiff injected her in-court activities into the proceedings with her antics. It was mentioned during voir dire by her counsel that she might not be attending court,

or might be moving around the courtroom to stand. What she did was no different than testimony. Her actions were translated to "I need to do these things because I'm in pain due to the accident." She cannot separate her in-court actions which were done for the benefit of her case from her testimony. There was nothing about the experiment the jurors did that invited into the proceeds outside information.

Nevada law is clear that a juror's life experience, general knowledge, specialized knowledge or expertise is not extrinsic information and can be relied upon in deliberating the issues presented and expressing opinions to fellow jurors. *Maetsas v. State*, 128 Nev. Adv. Op. 12, 275 P.3d 74 (2012). The essence of the experiment about which Plaintiff takes exception is no different than any juror using his or her own life experience and common sense to understand the extent of an alleged injury. Further, under Nevada law, a civil jury verdict is determined by three-fourths vote. In this case, polling after the verdict was read revealed that the jury had reached a unanimous verdict. That being the case, it is clear there was no prejudice. There was ample evidence aside from the experiment (assuming for a moment that the experiment made any difference at all) that Plaintiff was not injured nearly as badly as she claimed.

D. The court advising the jury it could award all past medical expenses and no futures was an accurate statement of the law.

Plaintiff does not offer any authority that what the court told the jury was an inaccurate statement of the law. It actually was completely accurate. The jury is free to award or not award compensation as it sees fit, as long as it follows the law. Plaintiff offers no evidence that any juror did not abide by the jury instructions the court gave or clarified in this regard.

E. Scher was stricken at Plaintiff's counsel's request, after the court heard hours of testimony. The court granted the relief Plaintiff requested. Plaintiff has failed to prove that any information Scher provided was considered by the jury.

Plaintiff spends much time reiterating the substance of Dr. Scher's testimony. However, the recitation of it does not meet her burden to show that the verdict was based on Dr. Scher's testimony to

any degree. Plaintiff wholly has failed to demonstrate that any jury disregarded the court's instruction that testimony Dr. Scher gave was stricken.

F. Plaintiff has not proven any pretrial order was violated. None were.

Plaintiff makes a bald assertion that pre-trial orders were violated, actually listing 15 alleged orders violated, but failing to offer reference to any transcript so indicating. The scant references noted after the list of 15 mentions on a few alleged examples, which were not indicative of violations. The court never ruled that any order was violated. This issue is nothing more than an afterthought raised at the tail end of the motion for new trial, in an attempt to inflame the court.

DATED this 8th day of June, 2016.

RESNICK & LOUIS, P.C.

ROGER W. STRASSBURG, JR.
Nevada Bar No. 8682
RANDALL TINDALL
Nevada Bar No. 6522
5940 S. Rainbow Blvd.
Las Vegas, NV 89118
Attorneys for Defendant
JARED AWERBACH

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify that I am an employee of RESNICK & LOUIS, P.C., and that on the 4th day of June, 2016, I served a true and correct copy of DEFENDANT JARED AWERBACH'S OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL AND IN THE ALTERNATIVE ADDITUR on the parties addressed as shown below:

__X__ *Via Electronic Filing* [N.E.F.R. 9(b)]

__X__ *Via Electronic Service* [N.E.F.R. 9]

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Glen Lerner & Associates
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Peter Mazzeo
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Attorney for Andrea Awerbach

An employee of Resnick & Louis, P.C.

EXHIBIT J

EXHIBIT J

OPP
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

EMILIA GARCIA, individually, Plaintiff, vs. JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I-X, and ROE CORPORATIONS I-X, inclusive, Defendants.	Case No: A-11-637772-C Dept No: XXX **DEFENDANT ANDREA AWERBACH'S OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR ADDITUR AND COUNTERMOTION FOR REMITTITUR** Date of Hearing: June 23, 2016 Time of Hearing: 9:00 a.m.

COMES NOW, Defendant Andrea Awerbach, by and through her attorneys, Peter A. Mazzeo, Esq. of Mazzeo Law, LLC, and hereby opposes Plaintiff's Motion for New Trial, or in the Alternative, for Additur and Countermotion for Remittitur. This Opposition and Countermotion for Remittitur are based upon the attached Memorandum of Points and

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Authorities, the pleadings and other documents on file herein, and any oral arguments as permitted by this Court.

DATED this 13th day of June, 2016.

MAZZEO LAW, LLC

PETER MAZZEO, ESQ.
Nevada Bar No. 9387
631 South Tenth Street
Las Vegas, Nevada 89101
Attorneys for Defendant Andrea Awerbach

MAZZEO LAW, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiff is not entitled to a new trial for alleged improper experimentation by a juror because she failed to show that the one juror's mimicking of Plaintiff's actions in open court during trial 1) established the occurrence of juror misconduct 2) show that the alleged misconduct was prejudicial, and 3) that it had any effect on the verdict.

Second, Plaintiff improperly wants this Court to delve into the minds of the jurors and second guess why the jury awarded her all of her past medical expenses. Rather, based on the statements made by several jurors after the verdict, they did not believe Plaintiff's medical treatment was related to the subject accident but apparently awarded her the past medical expenses because they believed one or more doctors committed medical malpractice. The juror's note inquiring about awarding only past medical expenses in light of jury instruction 25 (regarding medical malpractice) suggests the past medical award was not based on causation of damages, but to pay Plaintiff for treatment which was not related to the subject accident. If the jury improperly overpaid Plaintiff's past medical expenses because they did not understand the jury instruction 25, then this Court should grant Remittitur and reduce the amount of the past medical expenses award accordingly.

Third, Plaintiff's counsel criticism with Defense counsel "previewing" Dr. Scher's opinions in Opening Statement and using illustrative comparisons in closing argument, which

involve every day experiences, and might overlap examples taken from an applied science, like biomechanical engineering, is misplaced. In Opening Statements, parties may discuss the anticipated evidence anticipated from its witnesses and in Closing Arguments, parties may use illustrative comparisons and examples to show the jury what they believe the evidence proves.

Fourth, Plaintiff's points and authorities "D" is a garbage bag argument based on an alleged "accumulation of misconduct and error" which is vague, ambiguous and without merit. The Defense will show that Plaintiff's 'prejudice arising from an accumulation of things' argument fails since 1) Defendant disputes Plaintiff's contention of jury misconduct and that the jury accepted Plaintiff theory of the case and 2) neither she nor the Court can presume to know whether the jury was actually prejudiced.

Based on the foregoing, this Court should deny Plaintiff's motion for new trial or in the alternative Additur. This Court should grant Defendant's motion for Remittitur.

II. LEGAL ARGUMENT

A. Since the Juror's Alleged Conduct Did Not Constitute Introducing New Evidence and It Was Not Prejudicial, Plaintiff is Not Entitled to a New Trial.

Plaintiff erroneously contends that one juror's reenactment of actions, which the jurors observed of Plaintiff during trial, constituted an improper experimentation.

The Supreme Court in *Meyer v. State*, 119 Nev. 554, 80 P.2d 447 (2003) provided extensive analysis to determine whether a test or experiment performed during deliberations had the effect of introducing new evidence and if had the substantial effect on the verdict so as to require a new trial. See also *Krause v. Little*, 117 Nev. 933, 34 P.2d 570 (2001), The court looked at situations involving both extrinsic evidence and intrinsic misconduct of jurors. Intrinsic misconduct is the jurors failure "to follow admonishments not to discuss the case prior to deliberations, accessing media reports about the case, conducting independent research or investigation, discussing the case with nonjurors, basing their decision on evidence not admitted, etc." *Meyer* at 453. Extrinsic evidence or influence involves attempts to influence the jury's

decision through improper contact with jurors, threats or bribery. *Id.* However, the Court rejected the position that any extrinsic influence is automatically prejudicial. *Id.* 455.

The party moving for a new trial has the burden to show there is a reasonable probability or likelihood that the juror misconduct affected the verdict. *Id.* at 455. "[P]roof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury. Juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." *Id.* at 454. "Because intrinsic misconduct can rarely be proven without resort to inadmissible juror affidavits that delve into the jury's deliberative process, only in extreme circumstances will intrinsic misconduct justify a new trial." *Id.* at 456.

The court will consider some types of information to be, by their nature, more likely to be prejudicial. Certain information which might be inherently prejudicial would include third party communications with a sitting juror relating to a cause of action or exposure to significant extraneous information concerning a party. *Id.* at 455. Certain extrinsic evidence will be prejudicial by nature, where juror exposure to the information itself might establish a reasonable probability that the verdict would be affected. However, Plaintiff does not contend the jurors were exposed to any information which would be inherently prejudicial.

In determining whether there is a reasonable probability that juror misconduct affected the verdict, the court must consider various factors including "the extrinsic influence in light of the trial as a whole and the weight of the evidence." *Meyer, Supra* at 456. The Court must apply an objective test in evaluating the impact of the extrinsic material or intrinsic misconduct on the verdict and **should not investigate the subjective effects of any extrinsic evidence or misconduct on the jurors.**" (Emphasis added). *Id.* at 456.

In this case, during the trial in this case, Plaintiff herself engaged in certain movements which was plain for the jury to see in the courtroom. In one instance, Plaintiff was observed by one or more jurors leaning over the wood railing and then picking up a water bottle. In any personal injury trial, the movements of the plaintiff party are always under the watchful eye and scrutiny of the entire jury from the start of the trial to verdict. Plaintiff attached to her motion

the affidavit of one juror, Keith Berkery, who claims he observed Plaintiff lean over the railing to pick up a water bottle and then mentioned this to the jury during deliberations. See Berkery Affidavit, attached hereto as **Exhibit A**. Mr. Berkery claims the Court granted them access to the courtroom, pursuant to a written request of the jury, to view the stairs leading up to the witness stand. Berkery contends that while the jurors were in the courtroom to view the stairs, juror No. 6 Jessica Bias, repeated the actions of Plaintiff by leaning over the wood railing and grabbing a water bottle and allegedly stating she thought the action was more difficult than she originally thought it would be.

First, Mr. Berkery's affidavit is inadmissible because it attempts to delve into the jury's deliberative process. Second, Berkery's affidavit does not assist this court in being able to determine, to a reasonable probability, whether the juror conduct –reenacting Plaintiff's actions in the courtroom- affected the verdict. Berkery does not mention any discussion the jurors or jury had in the deliberation room regarding Ms. Bias' actions in repeating Plaintiff's actions in picking up a water bottle. Even if the Court determines it was misconduct for one juror to repeat observable actions of the plaintiff, there is simply no basis whatsoever to conclude that Bias' actions affected or had any impact on the verdict at all. Moreover, there was no discussion whether Ms. Bias' physical condition and limitations were was similar to those of the plaintiff. Arguably, the Court can surmise from Berkery's affidavit concerning Ms. Bias' reenactment in picking up a water bottle ended at that point for there is no further comment by Berkery that the jury used this information during deliberations to render its verdict or that Bias' actions had any impact on the verdict.

In light of the trial as a whole and the weight of the evidence, this jury heard testimony from numerous lay and expert witnesses over the course of five weeks, who testified about plaintiff's alleged injuries, symptoms and limitations, and they were able to observe Plaintiff for the handful of appearances she made during trial. Plaintiff cannot claim prejudice simply because on juror observed Ms. Bias pick up a water bottle and claim it was more difficult than she thought it would be. A simple reenactment made by one juror, whose physical condition is distinguished

from Plaintiff's physical condition regarding injuries sustained, is essentially benign exposure of the jurors with discernable impact of verdict. Furthermore, none of the other jurors engaged in the reenactment done by Ms. Bias, so none of them would be able to experience how it felt to reach over the railing to grab a water bottle. Neither Plaintiff's counsel nor this Court can second guess whether Ms. Bias' mimicking of Plaintiff's actions had any subjective effects on the jurors and there is simply no objective evidence to suggest, to a reasonable probability, that it affected the verdict at all.

Plaintiff's Motion for a New Trial or in the Alternative, Additur, should be denied.

B. Plaintiff Wants this Court to Disregard the Verdict By Second Guessing the Private Deliberations Entered Into by the Jury Merely Because Plaintiff ASSUMES the Jury Accepted Her Theory of the Case.

Additur may be permissible if it meets a two pronged test: 1) whether the damages are clearly inadequate in violation of the court's instructions, and 2) whether the case would be a proper one for granting a new trial limited to damages. *Lee v. Ball*, 121 Nev. 391 116 P.3d 64 (2005).

Plaintiff contends this Court improperly advised the jury it can award Plaintiff all of her past medical expenses and none of her future medical costs because her future medical expenses were either undisputed or disputed on the same exact grounds as her past treatment. See Pl. Mot. 16:3. Plaintiff incorrectly contends that because the jury awarded all of her past medical expenses, they were required to award all of her undisputed future medical expenses. In other words, Plaintiff assumes that since the jury awarded all of Plaintiff's past medical expenses, they did so because they must have accepted Plaintiff's theory of the case and rejected Defendants. This is simply false because Plaintiff is asking the Court to delve into the minds of the jurors and second guess the possible reasons why the jury would award all past medical expenses which might be unrelated to Plaintiff's theory of the case.

Plaintiff's counsel pretends to be psychic in suggesting he knows why the jury returned a verdict for the same amount of all past medical expenses totaling $574,846.01. In fact, in

speaking with the jury, immediately after they returned the verdict, many of them disclosed the following points regarding the evidence:

- They didn't think Plaintiff sustained an aggravation of her preexisting spondylolisthesis.
- They didn't think the lumbar surgery was necessary.
- They thought Plaintiff was sent to the doctors because of the motor vehicle accident.
- They didn't believe the medical treatment was necessary in connection with the accident.
- The jurors sent a note to the judge because of Jury Instruction (JI) No. 25 regarding medical malpractice.
- The jurors were confused with the wording of JI 25 because there was no evidence of medical malpractice.
- The only reason the jury allowed and awarded past medical expenses was because they believed Plaintiff's doctors committed malpractice.

The sentiments expressed by this Jury directly contradict Plaintiff's contention the jury accepted plaintiff's theory of the case. Rather, this Court should grant remittitur to reduce the verdict since the jury clearly did not believe the medical treatment was necessary in connection with the accident. Furthermore, awarding past medical expenses out of sympathy believing one or more treating physicians provided medical treatment below the standard of care, is improper and this Court should use its discretion to reduce the amount of past medical expenses consistent with Defendant's theory.

This Court will recall that Defendant Andrea Awerbach, not the Plaintiff, objected to Jury Instruction No. 25 which states:

> If you find that a Defendant is liable for the original injury to the Plaintiff, that Defendant is also liable for any aggravation of the original injury **caused by negligent medical or hospital treatment** or care of the original injury, or for any additional

> injury caused by negligent medical or hospital treatment or care of the original injury.

(Emphasis added). See Jury Instruction 25, attached hereto as **Exhibit B**. This jury instruction explains why the jury delivered a note to the Court on March 10, 2016 with the following question:

> Based on Instruction 25, would it [be] possible to award the plaintiff [the] entire amount of past medical expenses without awarding anything for future medical expenses?

See Transcript, 3/10/16, at 4:5-10.

This Court was correct in answering "yes" to the jury note regarding jury instruction 25 since such neither this Court nor any party may subjectively delve into the minds of the jurors. Theoretically, for the reasons discussed supra, the jury can certainly award past medical expenses and still not accept Plaintiff's theory of the case. It would appear that the jury did indeed believe there might have been medical treatment below the standard of care which resulted in Plaintiff's continuing complaints after Dr. Gross' surgery. This Court can more readily find the past medical expenses award was given for reasons of sympathy, and not to compensate for treatment related to the accident.

However, this Court should consider why Plaintiff's motion is void of any discussion of the more egregious harm caused by this Court permitting the jury to consider jury instruction 25 in its deliberations. Comparatively, the greater prejudice to the parties lie with giving the jury an instruction regarding medical and hospital negligence when there was no trial evidence regarding this issue. Implanting this issue in the minds of the jurors gave them real reason to consider that Dr. Gross' or Dr. Kidwell's treatment was below the standard of care, when in fact no party raised this issue.

Based on the foregoing, this Court should deny Plaintiff's motion for new trial or in the alternative Additur. However, the record does support the argument that the jury mistakenly assumed there was medical malpractice and awarded Plaintiff past medical expenses for reasons of sympathy and this Court should grant Defendant's motion for Remittitur by reducing the past medical expenses award to $20,000.

- Plaintiff contends while laying a foundation for his biomechanical opinions, Dr. Scher offered testimony about the force of the impact from the subject accident in comparison to the force of impact from activities of daily living. *Id.* at 20:9. Here, Plaintiff cites to some 62 pages of court transcript so it's a bit difficult to follow the sequence of foundational testimony opinion testimony. In any event, arguably an expert would be able to lay a foundation for his opinions by drawing the comparison between two events and using examples to show the relevance of his applied science.
- On another occasion, "Dr. Scher also previewed his ultimate opinion without directly tying it to the case." *Id.*at 20:25-21:11. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." NRS 50.295. An expert's ultimate opinion may be previewed by an expert prior to offering facts supporting same. However, Dr. Scher was disqualified before he had an opportunity to testify to support his opinion based on the evidence in this case.
- During closing arguments, Mr. Awerbach's counsel referenced forces of impact on Plaintiff's spine from the car accident compared to activities of daily living. *Id.*at 21:12. The word "forces" is not a scientific or technical term. Using mere examples of activities Plaintiff engages in in her daily life which might exert different forces on her spine would be considered permissible argument. This Court recognized that the examples and comparisons used by counsel constituted mere argument and were permissible. *Id.* at 21:19-28.

Plaintiff's contention regarding statements made by counsel during opening statements and closing arguments were not improper and did not result in prejudice to Plaintiff. Based on the argument presented by Plaintiff in this section, she is not entitled to a new trial or additur.

D. Plaintiff's Alleged 'Prejudice Arising from an Accumulation of Error and Misconduct' Argument Is Vague, Ambiguous, Incorrect and Without Merit.

Plaintiff claims prejudice from an accumulation of things including alleged jury

analogies to make their points, to comment on the credibility of the witnesses, to discuss how the various pieces of the puzzle fit and to argue about the overall weight of the evidence.

The Court must restrain itself from entertaining what will become a slippery slope of inane endless second guessing and invading the province of the jury's deliberative process. This Court may not undermine the independent verdict rendered based on Plaintiff's "accumulation of alleged misconduct and error" argument which falls short of proving misconduct and error and which further fails to show the conduct had any effect on the verdict.

III. COUNTERMOTION FOR REMITTITUR

The relief sought in Defendant's Countermotion references the points and authorities made in Points and Authorities II. B. supra. In particular, Andrea contends that the jury's award of all past medical expenses was motivated by jury instruction 25 which the jury referenced in their note to the Court during deliberations when asking whether, based on jury instruction 25, they can award all of Plaintiff's past medical expenses "without awarding anything for future medical expenses?" This jury note shows two indisputable facts: 1) they had some concern about whether any treatment fell below the standard of care and 2) the jury considered the award of past medical expenses because they believed a treating physician, possibly Dr. Gross, rendered treatment which caused Plaintiff to have continued problems after surgery. Defense counsel vehemently objected to the Court's use of this medical malpractice instruction because there was no evidence and no suggestion by the Defense that any treaters committed malpractice. Moreover, in speaking with the jurors immediately after the verdict, there seemed to be a consensus among them that the Plaintiff did not sustain an aggravation of a preexisting spondylolisthesis, that Plaintiff did not require surgery for her spondylolisthesis, and that all of her medical treatment was not necessary in connection with the accident.

This Court can make the finding, based on a reasonable probability or likelihood, that the award of past medical expenses was directly based on the jury's improper assumption that malpractice had been committed in this case. The award of medical expenses is directly linked to a jury note concerning awarding past medical expenses and a jury instruction regarding medical malpractice. Since there can be no mistake concerning the jury's award of past medical

expenses was improperly tied to sympathy by the jury, contrary to the jury instruction regarding sympathy, this Court must grant Remittitur and reduce the award of past medical expenses to $20,000 consistent with the Defendant's theory of causation.

IV. CONCLUSION

For the reasons above stated, Defendant Andrea Awerbach respectfully request that this Court DENY Plaintiff's Motion for New Trial, or in the Alternative, for Additur but should GRANT Defendant Andrea Awerbach's Countermotion for Remittitur.

DATED this 13th day of June, 2016.

MAZZEO LAW, LLC

/s/ *Peter Mazzeo*

PETER MAZZEO, ESQ.
Nevada Bar No. 9387
MARIA LOVENTIME U. ESTANISLAO, ESQ.
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Attorneys for Defendant Andrea Awerbach

CERTIFICATE OF SERVICE

HEREBY CERTIFY that on the 13th day of June, 2016, I served the foregoing **DEFENDANT ANDREA AWERBACH'S OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR ADDITUR AND COUNTERMOTION FOR REMITTITUR** as follows:

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

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

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

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/s/ Jodi Lyddon

an employee of MAZZEO LAW, LLC

EXHIBIT A

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
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(702) 938-3838

DECLARATION OF KEITH BERKERY

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Keith Berkery, being first duly sworn, deposes and says:

1) I am over the age of eighteen, of sound mind, and give the following affidavit based on my personal knowledge.

2) I was a deliberating juror in the matter of *Garcia v. Awerbach*, Case Number A637772, in Department 30 wherein voir dire started on February 8, 2016 and a verdict was returned on March 10, 2016.

3) On March 10, 2016, I, along with many of the other jurors, conversed with the attorneys for the parties after the verdict was returned to discuss my thoughts and opinions on the case as well as explain the deliberation process.

4) On May 24, 2016, on or about 5:45 p.m., I was contacted telephonically by attorney Timothy Andrew Mott, Esq. and his fellow associate attorney Nathan Quist, Esq., attorneys for Plaintiff Emilia Garcia.

5) During this telephonic conversation, Mr. Quist took notes while Mr. Mott inquired about the deliberation process and specifically about the experiment conducted by me and the other jurors in the courtroom during the deliberation process.

6) As I told Mr. Mott over the telephone, during the course of the trial, I witnessed Plaintiff Ms. Garcia bend over the wood hand-rail/divider which is located directly behind her attorneys' table to grab a water bottle which was located (to the best of my recollection) on top of a box on the other side of the wood hand-rail/divider. The water bottle was not located on the ground.

7) When I witnessed Ms. Garcia bend over the wood hand-rail/divider to grab the bottle of water, it did not appear to hurt her.

8) I mentioned this incident during the deliberation process and, as a result, we (the jury) decided to return to the courtroom to see for ourselves how difficult it was to lean over the

wood hand-rail/divider to pick up a bottle of water.

9) We wrote a letter to Judge Wiese requesting to see the stairs leading up to the witness stand and the attorney area and Judge Wiese granted us access.

10) To conduct the experiment, we decided to have a juror with what we guessed was a similar size and body type to Ms. Garcia attempt to reach over the hand-rail/divider to pick up a bottle of water. As a result, we selected Juror Number 6, Jessica Bias.

11) Ms. Bias communicated to myself and the rest of the jurors that she has "a hole in her back" as a result of having spina bifida. She also communicated to myself and the rest of the jurors that her spina bifida has caused her pain in her back throughout her life.

12) Ms. Bias positioned herself on the audience side of the wood hand-rail/divider and reached over the wood hand-rail/divider to pick up a water bottle placed on the ground on the other side of the wood hand-rail/divider.

13) After doing so, Ms. Bias informed myself and the rest of the jurors that it was more difficult to grab the water bottle off the ground by reaching over the wood hand-rail/divider than she originally thought it would be.

14) Mr. Mott drafted this Affidavit based on my telephonic conversation with him and he e-mailed it to me for my review and revisions.

15) I have reviewed the Affidavit and it precisely reflects my testimony.

16) I agree under the penalty of perjury that the foregoing testimony is true and accurate to the best of my beliefs.

17) Although I have a busy schedule, I am happy to assist the Court as needed, so long as I am available.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 25th day of May, 2016

Keith Berkery

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

EXHIBIT B

INSTRUCTION NO. 25

If you find that a Defendant is liable for the original injury to the Plaintiff, that Defendant is also liable for any aggravation of the original injury caused by negligent medical or hospital treatment or care of the original injury, or for any additional injury caused by negligent medical or hospital treatment or care of the original injury.

EXHIBIT K

EXHIBIT K

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DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, Plaintiff, vs. JARED AWERBACH, individually, ANDREA AWERBACH, individually, DOES I - X, and ROE CORPORATIONS I - X, inclusive, Defendants.	CASE NO. A637772 DEPT. NO. XXVII

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Granting, in Part, and Debying, in Part, Plaintiff's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3); and Denying Defendant Jared Awerbach's Motion for Partial Summary Judgment on Punitive Damage Claims, in the above-entitled action was entered and filed on the 28th day of January, 2015, a copy of the Order is attached hereto.

GLEN LERNER INJURY ATTORNEYS

/s/ Adam D. Smith
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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a) and N.E.F.C.R. 9, I hereby certify that I am an employee of GLEN LERNER INJURY ATTORNEYS, and on the 29th day of January, 2015 the foregoing **NOTICE OF ENTRY OF ORDER** was served by electronic copy via the Court's electronic service system, WIZNET, addressed to the following counsel of record:

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/s/ Miriam Alvarez
An Employee of Glen Lerner Injury Attorneys

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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

ORDER GRANTING, IN PART, AND DENYING, IN PART, PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT THAT DEFENDANT JARED AWERBACH WAS PER SE IMPAIRED PURSUANT TO NRS 484C.110(3); AND DENYING DEFENDANT JARED AWERBACH'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PUNITIVE DAMAGE CLAIMS

Date of hearing: Jan. 15, 2015
Time of hearing: 9:30 a.m.

Plaintiff Emilia Garcia's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3); and Defendant Jared Awerbach's Motion for Partial Summary Judgment on Punitive Damage Claims came on for hearing before this Court on January 15, 2015. Plaintiff Emilia Garcia was represented by ADAM D. SMITH, ESQ., of Glen Lerner Injury Attorneys; Defendant Jared Awerbach was represented by ROGER STRASSBURG, ESQ. of Resnick & Louis, P.C.; and Defendant Andrea Awerbach was represented by Peter Mazzeo of Mazzeo Law, LLC.

The Court, having considered the papers and pleadings on file in this matter and the oral argument of the parties, now finds and concludes as follows:

FINDINGS OF FACT

1. On January 2, 2011, Plaintiff Emilia Garcia and Defendant Jared Awerbach were involved in a car crash.

2. After the crash, Jared consented to having the Las Vegas Metropolitan Police Department take a blood sample from him.

3. The Las Vegas Metropolitan Police Department toxicology laboratory tested Jared's blood and determined that, at the time of the January 2, 2011, crash, Jared had 47 nanograms of marijuana metabolite per milliliter of blood.

4. Jared has come forward with no admissible evidence creating a genuine issue of material fact regarding the level of marijuana metabolite in his blood system following the January 2, 2011, crash.

CONCLUSIONS OF LAW

1. Pursuant to NRCP 56(d):

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. **It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.** Upon the trial of the action the facts so specified **shall be deemed established**, and the trial shall be conducted accordingly.

NRCP 56(d) (emphasis added).

2. NRS 42.010(1) provides:

> In an action for the breach of an obligation, where the defendant caused an injury by the operation of a motor vehicle in violation of NRS 484C.110, 484C.130 or 484C.430 after willfully consuming or using alcohol or another substance, knowing that the defendant would thereafter operate the motor vehicle, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant.

3. Under NRS 484C.110(3)(h), "[i]t is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his or her blood or urine that is equal to or greater than… five

nanograms per milliliter of marijuana metabolite." NRS 484C.110(3)(h); *see also Williams v. State*, 118 Nev. 536, 540-41, 50 P.3d 1116, 1119 (2002).

4. "In passing the prohibited substance statute, the Legislature clearly articulated its intent to follow the lead of nine other states and create a per se drug violation similar to the alcohol per se statute." *Williams*, 118 Nev. at 541, 50 P.3d at 1119.

5. The toxicology test results from the Las Vegas Metropolitan Police Department toxicology laboratory demonstrate Jared had 47 ng/mL of marijuana metabolite in his blood at the time of the crash. This exceeds the legal level of 5 ng/mL of marijuana metabolite set forth in NRS 484C.110(3)(h).

6. Jared is, therefore, deemed per se impaired as a matter of law based on the undisputed level of marijuana metabolite in his blood at the time of the crash, regardless of whether Jared was actually impaired at the time of the January 2, 2011, accident. This fact is deemed conclusively established for purposes of trial.

ORDER

Based on the foregoing, and good cause appearing, it is, therefore:

1. ORDERED Plaintiff Emilia Garcia's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3)(h) is GRANTED. Defendant Jared Awerbach is deemed per se impaired as a matter of law based on the undisputed level of marijuana metabolite in his blood at the time of the crash. This fact is conclusively established for purposes of trial.

2. ORDERED Plaintiff Emilia Garcia's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3)(g) based on the level of marijuana in Jared's blood system is DENIED.

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3. Defendant Jared Awerbach's Motion for Partial Summary Judgment on Punitive Damages claims is DENIED without prejudice.

Dated this 26 day of January, 2015.

Nancy L. Allf
DISTRICT COURT JUDGE

Respectfully submitted by:

GLEN J. LERNER & ASSOCIATES

By: _____

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