EXHIBIT 12

EXHIBIT 12

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

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.

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED TUESDAY, SEPTEMBER 15, 2015

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

purpose of getting Judge Allf to recuse herself. I don't -- I'm not convinced that that evidence is there. So I'm going to deny the motion to disqualify and the reassignment.

What I'm going to ask is this: My understanding is that you guys are set for trial in front of me in two months; is that right, November?

MR. MAZZEO: Yes.

MR. STRASSBURG: November 16th stack.

THE COURT: Not like it moved from September to -- to two or three years from now. I mean, it got moved two months; right?

So I understand that I don't know everything about this case like Judge Allf did, so what -- what I'm going to suggest is that each side file some sort of brief, a pretrial memorandum or something, and outline what you think I need to know that she previously ruled on. And I'm happy to -- happy to look at that. It's a lot of case, so I'm going to -- I'm going to follow what her rulings were.

MR. MAZZEO: And, Judge, we have that. We have the orders regarding motions in limine except for Jared Awerbach's because he was in bankruptcy. So his motions were not entertained by Judge Allf. So we do have to get -- get those back on. I have a few motions

EXHIBIT 13

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CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

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.

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED MONDAY, FEBRUARY 8, 2016

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

just --

THE COURT: Probably half an hour.

MR. ROBERTS: Very good.

THE COURT: Okay? All right. Off the record. See you back at 1:00.

(Whereupon a lunch recess was taken.)

THE COURT: Go back on the record, Case No. A637772. 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.

So what that means is I need both of you to propose an instruction dealing with the rebuttal presumption on permissive use. Because it's a rebuttal presumption, the defense gets to put on whatever evidence you have to try to rebut it. Okay? I know that's not what everybody has prepared for.

MR. MAZZEO: No, but ...

THE COURT: It's -- I think it's the only thing I can do to try to -- to try to move forward the trial with the orders that are in place based on the intention of the judge that issued those orders. Doesn't make either of you happy; right?

MR. MAZZEO: Well, no, it makes the defense somewhat happy. It's not --

MR. STRASSBURG: Doesn't make me happy, Judge.

THE COURT: Okay.

MR. MAZZEO: But --

THE COURT: Sorry.

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 so that we can fight both the joint liability, 41.440, and

negligent entrustment. So wow.

The good thing is we'll be doing jury selection today and tomorrow, and I don't anticipate getting to openings until Wednesday, but it may create a little --

THE COURT: That gives you time.

MR. MAZZEO: It gives us some time, you know.

MR. ROBERTS: Look, Judge, I have to -- to say that --

THE COURT: I know.

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.

MR. ROBERTS: There's no rebuttal presumption. The file and the admissions that were made were made to an insurance adjustor. The insurance adjustor was excluded as a witness because permissive use has already been found as a matter of law. We would have moved to reopen discovery.

Now, we have the burden -- I know it's not really our burden, but now we have to be prepared to

EXHIBIT 14

EXHIBIT 14

CASE NO. A-11-637772-C

DEPT. NO. 30

DOCKET U

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.

REPORTER'S TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE JERRY A. WIESE, II

DEPARTMENT XXX

DATED MONDAY, MARCH 7, 2016

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708, CA CSR #13529

sitting here waiting for each other to get back together again. You still can't do that. Okay? You can't talk to each other until everything is done and you are in the deliberation room together. All right? I'm just emphasizing that to you because sometimes people get confused once both sides have rested. Nothing has changed. I will tell you when you can talk about the case. Okay?

Thank you, folks. We'll see you tomorrow morning at 10:00 o'clock.

(The following proceedings were held outside the presence of the jury.)

THE COURT: All right. We're now outside the presence of the jury. Anything we need to put on the record now, Counsel?

MR. ROBERTS: I have got a few motions to make. I don't know if -- and then we need to settle jury instructions, but we can ...

THE COURT: Go ahead. Make your motions.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: You have a few?

MR. ROBERTS: Well, a few. Sorry, Your Honor. So many I have to get out my notes to remember them all.

The first one is, we would request a directed

verdict on the issue of permissive use on whether or not Mr. Awerbach had permission, express or implied, to use the vehicle. Under the Court's modified order on the sanctions, there is a presumption of permissive use shifting the burden of proof to the defendants to rebut.

I would submit that there was no evidence from which a reasonable juror could find that they, indeed, met their burden of proof. There's been undisputed evidence now that she allowed Mr. Awerbach to drive her car on past occasions. There's been undisputed evidence that she put the keys to the car in his hand on the day of the incident. And while I understand that it's -- it was a close question and might not otherwise have been an appropriate motion, I think what pushes us over the top is the admission. The -- under the rules, the admission conclusively establishes permissive use as a matter of law; and, therefore, we're entitled to directed verdict on that motion.

While Counsel stated that they were going to introduce into evidence an amended admission and proof that this was withdrawn and later corrected, I don't recall seeing that come into evidence. If I missed it because I was doing something else, I apologize. I

don't think -- I think they rested their case without putting the amended admission into evidence; therefore, the only thing in evidence is an admission that he had permissive use, and that's conclusive.

THE COURT: But didn't we just have an argument on that on our last break, and I said I wasn't going to allow the amendment based on the -- based on the rule, but I was going to allow them to use the interrogatory answer?

MR. MAZZEO: You did.

MR. ROBERTS: I guess I'm confused. Because if it's conclusively established and they're not being allowed to amend, how could there be an issue of fact for the jury?

THE COURT: That goes back to Mr. Tindall's argument. And -- and I said -- I read it as being conclusively presumed as it related to Rule 36. That's why I didn't allow the amended admission response, but I was going to allow additional discovery responses because I knew they were inconsistent.

MR. ROBERTS: Okay. Well, I still want to make my motion.

THE COURT: That's fine.

MR. ROBERTS: You can deny it.

THE COURT: Okay. Denied.

EXHIBIT 15

EXHIBIT 15

JI

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 0 8 2016
BY, ALICE JACOBSON, DEPUTY

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

JURY INSTRUCTIONS

A-11-637772-C
JI
Jury Instructions
4533115

OSC APP 109

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INSTRUCTION NO. 14

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.

EXHIBIT 16

EXHIBIT 16

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 10 2016
BY, ALICE JACOBSON, DEPUTY

VER

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

JURY VERDICT

A-11-637772-C
JV
Jury Verdict
4530909

On the questions submitted, the jury finds as follows:

1. What amount of damages do you find were sustained by Emilia Garcia (excluding any punitive damages) as a proximate result of the auto collision on January 2, 2011.

Past medical expenses	$ 574,846.01
Future medical expenses	$ 0
Past Loss of household services	$ 0
Future Loss of household services	$ 0
Past pain, suffering and loss of enjoyment of life	$ 250000.00
Future pain, suffering and loss of enjoyment of life	$ 0
TOTAL	$ 824,846.01

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OSC APP 112

2. Do you find that Plaintiff proved, by clear and convincing evidence, that Jared Awerbach willfully consumed marijuana, knowing that he would thereafter operate a motor vehicle?

YES ✓ NO _____

If you answered "YES," answer question 3. If you answered "NO," please skip to question 5.

3. Should punitive damages be assessed against Defendant Jared Awerbach for the sake of example and by way of punishing the defendant?

YES ✓ NO _____

If you answered "YES," answer question 4. If you answered "NO," please skip to question 5.

4. We assess punitive damages against Jared Awerbach in the amount of:

$ 2,000,000.00 .

5. Did Defendant Andrea Awerbach give express or implied permission to Defendant Jared Awerbach to use her vehicle on January 2, 2011?

YES _____ NO ✓

If you answered "YES" to question 5, answer question 6. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated

6. Did Defendant Andrea Awerbach negligently entrust her vehicle to an inexperienced or incompetent person on January 2, 2011?

YES _____ NO ✓

If you answered "YES" to question 6, answer question 7. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated.

7. Was that negligence a proximate cause of harm to Emilia Garcia?

YES _____ NO _____

If you answered "YES" to question 7, answer question 8. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated.

8. Did Plaintiff prove by clear and convincing evidence that Andrea Awerbach acted with oppression or malice (express or implied) in negligently causing harm to Emilia Garcia?

YES _____ NO _____

If you answered "YES", answer question 9. If you answered "NO", please skip to the end of the form and have the Jury Foreperson sign where indicated.

9. Should punitive damages be assessed against Defendant Andrea Awerbach for the sake of example and by way of punishing the defendant?

YES _____ NO _____

DATED this 10th day of March, 2016.

FOREPERSON

EXHIBIT 17

EXHIBIT 17

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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 MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR

OSC APP 116

Plaintiff Emilia Garcia ("Plaintiff"), by and through her counsel, hereby files Plaintiff's Motion for a New Trial or, In the Alternative, for Additur. 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 20th day of May, 2016.

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

Corey M. Eschweiler, Esq.
Adam D. Smith, Esq.
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NOTICE OF MOTION

TO: All Interested Parties; and

TO: Their Respective Counsel.

PLEASE TAKE NOTICE that **PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR** 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.[1]

DATED this 26th day of May, 2016.

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

Corey M. Eschweiler, Esq.
Adam D. Smith, Esq.
Craig A. Henderson, Esq.
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Attorneys for Plaintiff

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

[1] The Court requested during a Status Check on May 10, 2016 that the hearing for all post-trial motions be set for June 23, 2016 at 9:00 a.m. and requested that Counsel note the same in their post-trial motions.

ORDER SHORTENING TIME

Good cause appearing, it is ordered that the hearing on **PLAINTIFF'S MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR** 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.
Timothy A. Mott, Esq.
Marisa Rodriguez-Shapoval, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC.

Corey M. Eschweiler, Esq.
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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. This Motion must be heard on an order shortening time as the Court requested during a Status Check on May 10, 2016 that the hearing for all post-trial motions be set for June 23, 2016 at 9:00 a.m. and requested that Counsel note the same in their post-trial motions.

4. Thus, Plaintiff respectfully requests that this matter be heard on order shortening time on the date so indicated.

Timothy A. Mott, Esq.

Subscribed and Sworn before me
this 20th day of May, 2016

Notary Public

KELLY L. PIERCE
Notary Public State of Nevada
No. 14-12464-1
My appt. exp. Dec. 4, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION/STATEMENT OF FACTS

This personal injury action arose on January 2, 2011, when Defendant Jared Awerbach, while driving a car owned by his mother, Defendant Andrea Awerbach, failed to yield the right of way and made an improper left turn and crashed into Plaintiff Emilia Garcia's approaching vehicle. Following the collision, Mr. Awerbach was found to have illegal levels of marijuana metabolites in his blood, and ultimately plead guilty to the crime. As a result of the collision, Ms. Garcia suffered severe injuries to her spine and underwent a two level lumbar fusion on December 26, 2012. Ms. Garcia incurred $574,846.01 in past medical special damages. Ms. Garcia sued Mr. Awerbach for negligence and negligence *per se*, Ms. Awerbach 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, the Court entered an order deeming Jared liable for causing the collision.

Trial started on February 8, 2016 and a verdict was returned almost five weeks later on March 10, 2016. The jury returned a verdict awarding Ms. Garcia all of her past medical expenses amounting to $574,846.01, zero dollars in future medical expenses, zero dollars in past and future loss of household services, $250,000 for past pain, suffering, and loss of enjoyment of life, and zero dollars for future pain, suffering, and loss of enjoyment of life. (*See* Jury Verdict, Ex. 1). The jury also awarded $2,000,000 in punitive damages against Mr. Awerbach and found that Ms. Awerbach did not give Mr. Awerbach permission to drive her vehicle on the day in question. (*Id.*).

Ms. Garcia now files a Motion for a New Trial or, in the Alternative, for Additur. The Motion is based on the following: (1) jury misconduct; (2) the verdict being contrary to the undisputed evidence; (3) improper biomechanical engineering opinions and arguments being presented to the jury; (4) the aggregate effect of the aforementioned in addition to repeated violations of Pre-Trial Orders by Defendants' Counsel; and (5) the damages awarded being inadequate.

First, the jury engaged in improper experimentation during deliberations on a critical issue that materially effected Ms. Garcia's credibility in the eyes of the jury and, as a result, substantially prejudiced Ms. Garcia and substantially affected the verdict. According to deliberating juror number 5

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(Mr. Keith Burkery), he witnessed Ms. Garcia, during the trial, while sitting in the front row of the audience chairs directly behind her lawyers, lean over the wood hand-rail/divider behind her lawyers and grab a water bottle (to the best of his recollection) off a box and, based on his observations, the task did not appear to hurt Ms. Garcia.[2] As a result, during deliberations, the jurors gained access to the courtroom and selected a juror they believed was similar in size and stature to Plaintiff (Juror Number 6, Ms. Jessica Bias), and the juror attempted to reenact Ms. Garcia's actions by picking up a bottle of water off the ground on the other side of the wood hand-rail/divider. Ms. Bias (has spina bifida, has had back pain throughout her life, among other considerations) found the task more difficult to complete than she originally had thought. The improper experimentation conducted by the jury created new evidence outside the trial and was done at its own doing. The credibility of Plaintiff was assaulted repeatedly throughout the course of the trial by the Defendants and was Defendants' primary defense. The jury's improper experimentation had the effect of improperly introducing new evidence into trial that prejudiced Ms. Garcia and had an impact on the jury's verdict.

Second, during deliberations, the jury was improperly advised by the Court that it may award Ms. Garcia all of her past medical expenses and none of her future medical expenses under Jury Instruction 25 related to aggravation of original injury caused by negligent medical or hospital treatment. Having been give express permission by the Court to award nothing for future treatment caused by negligent medical care, the jury returned a verdict awarding Ms. Garcia all of her past medical expenses (i.e., $574,846.01) and none of her future medical expenses. The advisement was improper because Ms. Garcia's future medical expenses was either undisputed or was disputed on the exact same grounds as her past expenses. Because the jury determined that all of Ms. Garcia's past medical expenses were directly and causally related to the subject collision, the jury had no choice but to award Ms. Garcia future medical expenses. The jury cannot disregard the undisputed evidence to issue an inconsistent verdict, and advising the jury that it may do so was improper.

Third, Defendants inappropriately previewed Dr. Scher's foundationless opinions pertaining to forces of impact several times during opening statements, inappropriately rung the bell on his

[2] Mr. Burkery's testimony is attached hereto via a Declaration, and is addressed in great detail in the Argument below. (*See* Declaration of Keith Burkery, Ex. 2).

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foundationless testimony pertaining to forces of impact during his direct examination over repeated sustained objections from Ms. Garcia's Counsel, and then, even after Dr. Scher was stricken in full and the jury was admonished to disregard his testimony, Mr. Awerbach's Counsel inappropriately drew (as the testimony had already been previewed several times and the bell had already been rung) on the stricken testimony, over constant objection by Ms. Garcia's Counsel, by comparing the forces of the subject collision to Ms. Garcia's activities of daily living. Mr. Awerbach's Counsel then took it even further and *testified* as a biomechanical engineer in closing that the forces of impact from riding a roller coaster were greater on Ms. Garcia's lumbar spine than the subject collision. The bell was rung on Dr. Scher's foundationless opinions (which were stricken in full) and Mr. Awerbach's Counsel's antics (i.e., misconduct) of repeatedly re-ringing the bell and setting forth *his own biomechanical engineering opinions* in closing arguments tainted the jury and without question prejudiced Ms. Garcia and prevented her from having a fair trial.

Fourth, in addition to the aforementioned, the myriad violations of motions in limine by Defendants' Counsel throughout the course of trial, collectively prejudiced Ms. Garcia and substantially affected the jury's verdict. Defendants' Counsel violated, at a minimum, 15 Pre-Trial Orders, many of which were violated multiple times. The accumulation of juror misconduct, advisement to the jury that it may award all past medical expenses and no future medical expenses, the improper presentation of biomechanical engineering opinions, and repeated violations of Pre-Trial Orders (some of which being blatantly intentional), in the aggregate, prejudiced Ms. Garcia, denied her a fair trial, and substantially affected the jury's verdict.

Finally, the damages awarded to Ms. Garcia are clearly inadequate as they fail to compensate her for undisputed future medical care and future pain and suffering (which stems from the undisputed future medical care). As a result, the Court should order a new trial or, in the alternative, an additur in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering.

LEGAL STANDARD FOR A MOTION FOR A NEW TRIAL

A motion for new trial must be filed within ten (10) days after service of written notice of the entry of the judgment. NRCP 59(b). As the judgment has not yet been entered in this case, and,

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instead, a briefing schedule was set for post-trial motions wherein opening briefs are due on May 26, 2016, the instant Motion is timely.

Pursuant to NRCP 59(a):

> A new trial may be granted to all or any of the parties and on all or part of the issues for an of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) . . . abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion.

The court may also grant a motion for a new trial for a reason not stated in the motion, but must specify the reason in the order. *Id.* at 59(d).

The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse. *S. Pac. Transp. Co. v. Fitzgerald,* 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978). In 1969, the Nevada Supreme Court amended NRCP 59 to eliminate, as a ground for granting a new trial, insufficiency of the evidence that supports the verdict, but carved out a strictly construed exception where there is plain error or manifest injustice. *Kroeger Properties & Dev. v. Silver State Title Co.,* 102 Nev. 112, 114-15, 715 P.2d 1328, 1330 (1986) (citing *Price v. Sinnott,* 85 Nev. 600, 607, 460 P.2d 837, 841 (1969); *Rees v. Roderiques,* 101 Nev. 302, 701 P.2d 1017 (1985)). In order to find manifest injustice, a case must be presented where "the verdict or decision strikes the mind, at first blush, as manifestly and palpably contrary to the evidence . . . ." *Id.; Holderer v. Aetna Cas. & Sur. Co.,* 114 Nev. 845, 853, 963 P.2d 459, 464-65 (1998); *Cathcart v. Robison, Lyle, Belaustegui & Robb,* 106 Nev. 477, 479, 795 P.2d 986, 987 (1990); *Meyer v. Estate of Swain,* 104 Nev. 595, 598, 763 P.2d 337, 339 (1988).

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ARGUMENT

I. Juror Misconduct during Deliberations Requires the Ordering of a New Trial for Ms. Garcia.

In addressing the issue of improper jury experimentation, the Nevada Supreme Court has stated, "[i]t is well established that jurors may not receive evidence out of court." *Krause Inc. v. Little*, 117 Nev. 929, 935, (2001) (internal quotation and citation omitted). In the same breath, the Court expressed that experiments carried out by the jury during deliberations can have the effect of introducing new evidence into trial. *Id.* at 936. The rule exists because "[f]or a jury to consider independent facts, unsifted as to their accuracy by cross-examination, and unsupported by the solemnity attending their presentation on oath, before a judge, jury, parties and bystanders, and without an opportunity to contradict or explain them can never be countenanced." *Id.* (internal quotation and citation omitted). The court went on to explain, "insofar as tests or experiments carried out by the jury during deliberations have the effect of introducing new evidence out of the presence of the court and parties, such tests and experiments are improper and, if the new evidence . . . has a substantial effect on the verdict, prejudicial." *Id.* (internal quotation and citation omitted).

The Ninth Circuit also addressed the problem with introducing information outside the regular proceedings of trial into evidence. The Ninth Circuit stated, "[t]he introduction of outside influences into the deliberative process of the jury is inimical to our system of justice. The jury's consideration of extraneous information deprives defendants of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction." *U.S. v. Navarro-Garcia*, 926 F.2d 818, 823 (Ninth Cir. 1991) (internal quotation and citation omitted).

Where there is potential juror misconduct, two elements must be satisfied through admissible evidence before a new trial is given: "(1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." *Meyer v. State*, 119 Nev. 554, 563-64, (2003). "Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." *Id.* at 564. In some instances, when the misconduct is egregious, prejudice to warrant a new trial is presumed. *Id.* However, a "[j]uror's exposure to extraneous information via independent research or

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improper experiment is . . . unlikely to raise a presumption of prejudice. *Id.* at 565. Rather, in cases where the jury has conducted independent research or improper experiments, "the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." *Id.* There are a number of factors to consider when trying to determine whether there is a reasonable probability that juror misconduct affected a verdict. *Id.* at 566. These are the factors that the Nevada Supreme Court has given:

> [A] court may look at how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). In addition, a court must consider the extrinsic influence in light of the trial as a whole and the weight of the evidence. These factors are instructive only and not dispositive.

Id. (internal quotation and citation omitted).

When applying these factors, the Nevada Supreme Court emphasized that "[t]he district 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." *Id.* It is the duty of the court to determine "whether the average, hypothetical juror would be influenced by the juror misconduct." *Id.* And while affidavits or statements by jurors can be used to establish that extraneous evidence existed, or to illustrate "objective facts of extrinsic evidence", affidavits may not be used to establish the actual effect of the misconduct on the deliberations. *Id.*; *see also Smith v. Pitman Mfg. Co.*, 952 F.2d 1400, 1 (9th Cir. 1992) (internal citation omitted).

The following cases illustrate instances "in which the jury took it upon itself to devise its own experiment on the admitted evidence, or considered objects or expert opinions not admitted into evidence." *Krause*, 117 Nev. at 937. In *Russell v. State*, during a recess in the trial proceedings, a juror drove from Reno to Carson City to determine if the evidence of the time it took to travel between those places was valid. 99 Nev. 265, 266 (1983). The Nevada Supreme Court found that such conduct by the juror was an improper experiment and thus a new trial was necessary. *Id.* In so holding, the court stated:

> [J]uror misconduct is particularly egregious where, as here, the juror has engaged in independent "research" of the facts. Moreover, the information disclosed by the juror related to a crucial aspect of appellant's defense. Appellant's case was therefore significantly harmed by his inability to cross-examine the juror, during the trial, concerning the many variables which may have affected his driving time.

Id. (internal citation omitted); *see also e.g., People v. Baker*, 31 Cal.App. 4th 1156 (Cal.App. 2nd Dist. 1995) (finding that trial court erred in robbery prosecution by allowing bailiff to perform experiment for deliberating jury wherein the bailiff removed the defendant's gun from his holster as it generated new evidence); *People v. Andrew*, 549 N.Y.S. 2d. 268 (1989) (finding new trial necessary when jurors test-fired handgun during deliberation to determine amount of pressure necessary to pull trigger); *Smoketree-Lake Murray, Ltd. V. Mills Concrete Construction Co.*, 234 Cal.App. 3d. 1724 (Cal.App. 4th Dist. 1991) (finding juror experiment involving a box of cat litter and crayons depicting concrete construction forms with rough plumbing before concrete is poured was improper as it created new evidence and, as a result, a new trial was necessary); *Carter v. State*, 753 S.W.2d 432 (Tex.App. 1988) (finding that trial court properly granted new trial where jurors experimented by throwing cups of water while one juror lay under a table to determine the credibility of defendant's claim that he tripped and accidentally splashed gasoline on the victim who was working under the vehicle, and where several jurors testified that they based their verdict partially on results of experiments); *Barker v. State*, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979) (finding misconduct where juror introduced outside research on the effects of heroin); *State v. Thacker*, 95 Nev. 500, 502, 596 P.2d 508, 509 (1979) (finding misconduct where juror offered expert opinion on cattle weight); *People v. Castro*, 184 Cal.App.3d 849, 229 Cal.Rptr. 280, 281-82 (1986) (finding misconduct where juror conducted visibility experiment at crime scene); *Ex Parte Thomas*, 666 So.2d 855, 857-58 (Ala. 1995).

Here, the jury engaged in improper experimentation during deliberations on a critical issue that materially effected Ms. Garcia's credibility in the eyes of the jury and, as a result, substantially prejudiced Ms. Garcia and substantially affected the verdict. According to deliberating juror number 5, Mr. Keith Burkery, he witnessed Ms. Garcia, during the course of the trial, while sitting in the front row of the audience chairs directly behind her lawyers, lean over the wood hand-rail/divider behind her

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lawyers and grab a water bottle off what he believes was the top of a box on the other side of the wood hand-rail/divider. (*See* Declaration of Keith Burkery, Ex. 2, at ¶ 6)[3]. Based on Mr. Burkery's observation, the task did not appear to hurt Ms. Garcia. (*See id.*, Ex. 2, at ¶ 7). As a result of witnessing Ms. Garcia lean over the wood hand-rail/divider and pick up the bottle of water and with the desire to determine how difficult it was to lean over the wood hand-rail/divider to pick up a bottle of water, during deliberations, and just shortly prior to inquiring with the Court whether it was permitted to award past medical expenses and no future medical expenses, the jury inquired with the Court whether it was permitted to "see the courtroom to see the stairs in the witness area and the attorney area." (*See id.* at ¶¶ 8-9; *see also* Transcript 3/10/16 at 3:7-13, Ex. 3). The Court allowed the jury to enter the courtroom, but was unaware of "what they looked at and what they did." (*See* Declaration of Keith Burkery, Ex. 2, at ¶ 9; *see also* Transcript 3/10/16 at 3:18-22, Ex. 3).

Once the jury entered the courtroom during deliberations, the jury decided to conduct an experiment by reenacting Ms. Garcia leaning over the wood hand-rail/divider to determine the difficulty of the action. (*See* Declaration of Keith Burkery, Ex. 2, at ¶¶ 8, 10). The jury selected a juror (Ms. Jessica Bias—Juror Number 6) that it believed was similar in size and stature to Plaintiff. (*Id.* at ¶ 10). Of note, Ms. Bias communicated to Mr. Burkery, and the rest of the jurors, that she has "a hole in her back", as a result of having spina bifida, which has caused her pain in her back throughout her life. (*Id.* at ¶ 10). Ms. Bias assumed her position behind the wood hand-rail/guardrail where Ms. Garcia was located and she leaned over the wood hand-rail/guardrail and picked up a bottle of water placed on the ground on the other side of the wood hand-rail/divider. (*See id.* at ¶ 12).

The jury conducted this experiment to determine the difficulty of leaning over the wood hand-rail/divider. (*Id.* at ¶ 8). Upon completion of the experiment, Ms. Bias communicated to Mr. Burkery, as well as the rest of the jury, that she found the task more difficult to complete than she originally thought it would be. (*Id.* at ¶ 13). The jury shortly thereafter decided to not award Ms. Garcia any future medical care.[4]

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[3] Ms. Garcia's Counsel attempted to contact all of the jurors during the drafting of this Motion (including via social media) in an effort to obtain affidavits attesting to the facts surrounding the subject experiment, but was only able to make contact with Mr. Burkery.

[4] Mr. Burkery also expressed to Mr. Mott how great of an impact the experiment had on a majority of the jurors' opinions, but the case law indicates that the actual effect of the experiment should be considered against the mythical

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The improper experimentation conducted by the jury created new evidence and was done at its own doing unbeknownst to Ms. Garcia and her Counsel, Ms. Awerbach and her Counsel, Mr. Awerbach and his Counsel, and the Court. At no point did any Counsel have an opportunity to examine the authenticity of the experiment, examine the juror acting as Ms. Garcia during the experiment (e.g., Ms. Bias has spina bifida, has had back pain throughout her life, her functionality and degree of pain levels are unknown, and her height, weight, size, reach, and flexibility in comparison to Ms. Garcia are unknown), examine the controlled factors and many variables relevant to the experiment (e.g., the water bottled retrieved by Ms. Garcia was on a box, not on the ground like it was during the experiment), cross-examine the jury as to the viability of the examination, present evidence from medical experts as to Ms. Garcia's ability to lean over hand-rails/dividers, examine Ms. Garcia as to her ability lean over hand-rails/dividers, or present evidence of any medications Ms. Garcia was taking to mask her pain. It cannot be disputed that the jury's consideration of the new evidence derived from the improper experimentation deprived Ms. Garcia from the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction.

The timing of the improper experimentation is also critical as it occurred just shortly prior to the jury inquiring with the Court whether it was permitted to award all past medical expenses but no future medical expenses. (*See* Transcript 3/10/16, Ex. 3, at 4:5-10 ("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?")). This is persuasive evidence of the actual prejudice suffered by Ms. Garcia as a result of the improper experimentation. In fact, this experiment may be the only "evidence" from which they could have drawn the conclusion that Ms. Garcia needed no future care and would have no future pain and suffering, despite the undisputed evidence and the concessions of the defense experts.

The credibility of Plaintiff was assaulted repeatedly throughout the course of the trial and was Defendants' primary defense. In fact, by the time of closing arguments, Ms. Awerbach's Counsel did not even hide the fact that he was accusing Ms. Garcia of being a liar:

"reasonable jury", and the effect of the experiment on the actual jury should not be considered by the court. As a result, Mr. Burkery's testimony as to the actual impact of the experiment on the jury was omitted from his Declaration.

> Ladies and gentlemen, I submit that she did exaggerate because the evidence is there in the record, the onset of symptoms, the nature of her activities of daily living before and after the accident. Her work limitations. That is not credible and you're allowed to consider that. There's a jury instruction that allows you to consider that, ladies and gentlemen.

(*See* Transcript 3/8/16, Ex. 4, at 174:7-13). Ms. Awerbach's Counsel further acknowledged his position during argument on an objection from Ms. Garcia's Counsel regarding Ms. Awerbach's Counsel arguing to the jury that Ms. Garcia is dishonest:

> The Court: Well, he didn't – he didn't use the word "liar" but he did –
>
> Mr. Mazzeo: I didn't.
>
> The Court: -- imply that she was being dishonest, I agree.
>
> Mr. Mazzeo: Well, yes, about her antics on the stand when we had side bars. That's correct. I definitely did. Absolutely.

(*Id.* at 191:24-193:1-8). Thus, the improper experimentation addressed one of the most key issues litigated during the five week long trial.

The jury's improper experimentation had the effect of introducing new evidence into trial that prejudiced Ms. Garcia and had an impact on the jury's verdict. As explained by the Nevada Supreme Court, "[f]or a jury to consider independent facts, unsifted as to their accuracy by cross-examination, and unsupported by the solemnity attending their presentation on oath, before a judge, jury, parties and bystanders, and without an opportunity to contradict or explain them **can never be countenanced**." *Krause Inc*, 117 Nev. at 935 (emphasis added). Likewise, deliberations were tainted by an improper experiment by the jury addressing a critical issue litigated over the course of the five week trial. As demanded by the Nevada Supreme Court, this is never acceptable. A new trial is required to cure the improper experimentation conducted by the jury.

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II. The Jury was Improperly Advised that it May Award all Past Medical Expenses and No Future Medical Expenses, which Resulted in a Verdict that Contradicts the Undisputed Evidence.

During deliberations, the jury was improperly advised that it may award Ms. Garcia all of her past medical expenses and none of her future medical expenses. The advisement was improper because Ms. Garcia's future medical expenses were either undisputed or disputed on the exact same grounds as her past care and treatment. The Court should not have given the jury permission to reach an inconsistent verdict not supported by the evidence. Based on this advisement, the jury returned a verdict awarding Ms. Garcia all of her past medical expenses (i.e., $574,846.01) and none of her future medical expenses.

More specifically, during deliberations, the jury sent the following question to the Court:

> 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, Ex. 3, at 4:5-10). After the Court inquired with Counsel for all parties in regards to their positions, the Court responded to the jury with a "yes". (*Id.*). Ms. Garcia's Counsel strongly opposed the answering of this question with a "yes" and restated its objection on the record prior to the reading of the verdict:

> [Court:] Anybody want to make a record on any of those?
>
> Mr. Smith: We do on the third question about whether the jury could award only past medical expenses and not future medical expenses. Under Jury Instruction Number 25, and when we had a discussion we asked the Court either not to answer that question or to answer that question no.
>
> As we explained, there is no evidence put on by the defense that the future damages are unnecessary. That wasn't their argument. The defense's argument was that the injury and the treatment past a muscle sprain or ligament strain is not related to the crash.
>
> So if the jury determines that any treatment beyond that is related to the crash, then, the undisputed future medical treatment is also related to the crash, and the jury has to order future damages in addition to the past medical specials that lead up to that.

> If the Court had disagreed with that, then the Court's other option would have been to not answer the question because answering the question – if the Court can answer – cannot answer the question no, then the Court also should not have answered the question yes and explained it further to the jury in a way that it is contrary to the evidence that was put on in the case.

(*Id.* at 5:2-25). The Court explained its position by stating:

> I thought that there was – there's always a choice and I didn't want to take that choice away. So whether it was based on a doctor's testimony or a party's testimony or whatever it was, I think they still have the choice. I told them they have a choice.

(*Id.* at 6:18-23).

Jury Instruction Number 25 reads as follows:

> 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.

(Jury Instructions, Ex. 5, at p. 26).

It was improper for the Court to instruct the jury that it may award Ms. Garcia all of her past medical expenses but none of her future medical expenses under Instruction 25. At trial, Ms. Garcia presented evidence and argued to the jury that she is entitled to $574,846.01 in past medical expenses, all of which were directly and causally related to the subject collision. Defendants argued that Ms. Garcia only suffered a muscle sprain and/or ligament strain as a result of the subject collision and anything beyond treatment for a sprain and/or strain was not directly and causally related to the subject collision and, as a result, Ms. Garcia should only be awarded $30,018.52 (Ms. Awerbach) or $50,000 (Mr. Awerbach). (*See* Transcript 3/8/16, Ex. 4, at 188:2-13 (Ms. Awerbach's Counsel requesting a verdict of $20,018.52 for past medical expenses and $10,000 for past pain and suffering); Transcript 3/9/16, Ex. 6, at 121:5-122:2 (Mr. Awerbach's Counsel requesting a verdict of $50,000)). The jury agreed with Ms. Garcia and found that all of Ms. Garcia's past medical expenses totaling $574,846.01 were directly and causally related to the subject collision, and, as a result, awarded her every penny.

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Because the jury determined that all of Ms. Garcia's past medical expenses were directly and causally related to the subject collision, the jury had no choice but to award Ms. Garcia future medical expenses that were supported by the exact same causation arguments. In fact, even Defendants' expert orthopedic surgeon, Dr. Klein, opined that Ms. Garcia will need a future spine surgery as a result of her first surgery. (*See* Trial Transcript 3/2/16, Ex. 7, at 218:10-220:18). There were no defense arguments related to causation or need for future treatment which did not apply equally to the past treatment that was awarded in whole. Thus, an award of nothing for Ms. Garcia's future medical expenses is not only unsupported by the evidence, it is also inconsistent with the evidence presented by both parties (i.e., Ms. Garcia will need a future spine surgery).

It is well established that a verdict unsupported by the undisputed evidence is improper and must be overturned. *See e.g., Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 614, 707 P.2d 1137, 1139 (1985) (granting additur on appeal where plaintiff lost a limb and the awarded damages did not include pain and suffering or loss of earnings); *Fillmore v. Hill*, 665 A.2d 514 (Pa. Super. 1995) (plaintiff was entitled to a new trial in a negligence action for injuries suffered in an automobile accident where the jury awarded the plaintiff zero damages despite undisputed evidence of damages); *Clark v. Viniard by and through Viniard*, 548 So. 2d 987 (Miss. 1989) (trial court did not abuse its discretion in ordering a new trial on all issues where the jury awarded no damages despite finding for the plaintiff and hearing uncontroverted proof of substantial damages); *Skelly v. Hartford Cas. Ins. Co.*, 445 So. 2d 415 (Fla. Dist. Ct. App. 4th Dist. 1984) (where there was undisputable evidence that the plaintiff suffered pain and a permanent partial disability from a demonstrable injury, a zero damage award for those items was grossly inadequate, requiring a new trial).

The jury cannot award a verdict that is contrary to the undisputed evidence and that contradicts itself. A finding that Ms. Garcia's past medical expenses were directly and causally related to the subject collision necessitates a finding that Ms. Garcia's future treatment is also directly and causally related to the subject collision as this point is undisputed. The jury cannot disregard the undisputed evidence to issue an inconsistent verdict and advising the jury that it may

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do the same was improper. A new trial is necessary to cure the improper advisement and inconsistent verdict.[5]

III. Biomechanical Engineering Opinions of a Stricken Expert Pertaining to Forces of Impact were Presented and Argued to the Jury Creating Great Prejudice to Ms. Garcia.

During opening statements, Defendants discussed and previewed in detail their biomechanical engineer's (Dr. Scher) opinions (while using slides from Dr. Scher's report), including opinions that the forces of impact from activities of daily living are greater than the forces of impact from the subject collision. (*See* Transcript 2/12/16, Ex. 8, at 194:19-196:8 (e.g. from Ms. Awerbach's Counsel: "[Dr. Scher] determined that the lumbar loads during activities of daily living that we engage in were greater on Ms. Garcia than the motor vehicle accident and concluded that it was not scientifically probable that the motor vehicle accident causes damage to the lumbar spine or exacerbated any preexisting condition of the lumbar spine"); Transcript 2/16/16, Ex. 9, at 26:14-29:21 (e.g. from Mr. Awerbach's Counsel: "And what [Dr. Scher] will prove to you is that the forces on [Ms. Garcia's] spine from the collision were less than the forces on her spine from the activities of daily living that she had gotten used to for years before the accident."). For example, Counsel for Mr. Awerbach explained to the jury:

> So whatever forces she was subjecting her spine to before the accident, climbing stairs, walking, running, whatever, they were not enough to move the spinal bones to cause her pain. So if the force of the collision was even less than that, that's going to prove that the forces of the collision aren't responsible for her pain because they're so much less than the forces of daily living.

(Transcript 2/16/16, Ex. 9, at 28:4-12).

Knowing that Dr. Scher's opinions lacked a foundation, Ms. Garcia's Counsel vehemently objected—prior to Ms. Awerbach's opening statements—to the use of slides from Dr. Scher's

[5] Of note, the fact that the jury awarded no future medical expenses while contemplating Jury Instruction Number 25 related to medical negligence is highly questionable as it was undisputed by the parties that there was no medical negligence in this case. (*See* Transcript 3/8/16, Ex. 4, at 93:12-24 (e.g., "Mr. Mazzeo: Objection, Your Honor. There's no evidence of negligent medical treatment in this case."). Thus, the fact the jury considered Jury Instruction Number 25 related to medical negligence and decided to award no future medical expenses is also contrary to the undisputed evidence.

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report and to the presentation of Dr. Scher's opinion contained within the slides as the slides are hearsay and there is no foundation for Dr. Scher's opinions. (*See* Transcript 2/16/16, Ex. 9, at 49:14-53:18). The Court allowed the slides and the presentation of Dr. Scher's opinions contained within the slides based, in part, on Ms. Awerbach's Counsel's representation that a foundation can be laid for Dr. Scher's opinions. (*Id.* at 53:11-18 ("The Court: I'm hoping that you can lay the foundation for the information contained in it. Mr. Mazzeo: For the information contained, but you're not going to admit this as an exhibit . . . . The Court: I'm going to allow it for demonstrative.").

Mr. Awerbach's Counsel called Dr. Scher to testify on February 25, 2016. (*See* Transcript 2/25/16, Ex. 10). While attempting to lay a foundation for his biomechanical engineering opinions, Dr. Scher discussed in great length biomechanical engineering principles generally and specifically in relation to this case. (*See generally id.* at 5:23-67:21). Dr. Scher further discussed the facts of this case and repeatedly attempted to introduce his opinions as to force of impact from the subject collision in comparison to the force of impact from Ms. Garcia's activities of daily living over repeated objections from Ms. Garcia's Counsel. (*See id.*). Despite numerous sustained foundation objections from Ms. Garcia's Counsel, Dr. Scher was still able to slide his opinion in by sneaking it into an answer to a question clearly not calling for such an opinion:

> Q. All right. And, then, how did you get from the comparison of forces to checking the national databases?
>
> A. Sure. So my result for 2D, the comparison of forces, said that the likelihood for injury was very low. The forces from the subject accident – well, we'll get into that. But I then wanted to check with the NASS?CDS database – that's the NHTSA database – **to see if, in fact, accidents like this would be likely to create this damage. And the answer was no, it's not likely**.

(*Id.* at 31:12-25 (emphasis added)). Ms. Garcia's Counsel quickly objected and the Court sustained. (*Id.*) On repeated other occasions, Dr. Scher also previewed his ultimate opinion without tying it directly to the case. For example:

> Q. All right. And so, then, of what relevance is it to you, the forces on her spine from the accident?

A. Well, if the forces from the accident are lower than the forces that can be resisted by the spine, then it would not create damage to the spine.

(*See e.g., id.* at 34:7-12).

As a result of Dr. Scher lacking a foundation for his opinions, Ms. Garcia's Counsel was permitted to voir dire Dr. Scher to establish his lack of foundation. (*See id.* at 67:23-79:25; 177:3-194:10). After lengthy voir dire from all parties and great consideration from the Court, Dr. Scher was ultimately stricken in full as he lacked a proper foundation for his opinions. (*See id.* at 134:11-140:2; 196:21-197:11). The jury was "instructed to disregard [Dr. Scher's] testimony." (*See* Transcript 2/26/16, Ex. 11, at 8:11-15 ("I'm going to tell you that the Court concluded yesterday that there was inadequate foundation for Dr. Scher's testimony. So you're instructed to disregard his testimony that you heard yesterday.").

During closing arguments, Mr. Awerbach's Counsel, over constant objections from Ms. Garcia's Counsel, repeatedly referenced forces of impact on Ms. Garcia's spine from the car collision compared to activities of daily living, despite having no evidence in the record to support the arguments as a result of Dr. Scher being stricken in full. (*See* Transcript 3/9/16, Ex. 6, at 7:17-21:10). In fact, Mr. Awerbach's Counsel's first argument to the jury addressed forces of impact and, as a result, the Court was forced to remind the jury that Dr. Scher's testimony was stricken in full:

Let's talk about the first assumptions they want you to make and that is that the physical forces on her spine from the collision had to be greater than the physical forces on her spine from all those 30-odd year of the activities of daily living.

Mr. Roberts: Objection, Your Honor. No argument based on all the evidence.

Mr. Strassburg: I get to point out what's not been proven too.

The Court: Come on up.

(A discussion was held at the bench, not reported.)

The Court: Okay, folks. I'm just going to reinstruct you again. I'm going to let Mr. Strassburg talk about the forces of – as he said so far, anyway, but you need to remember that Dr. Scher came

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> and testified about forces of impact, and I struck that testimony and instructed you to disregard it, so you're not to consider any testimony by Dr. Scher as it relates to this argument that is being made.

(*See id.* at 7:17-8:11).

Mr. Awerbach's Counsel, during closing arguments, side stepped the Court's striking of Dr. Scher by drawing on the testimony he was able to sneak in over objection and by drawing on the testimony that was previewed to the jury multiple times during opening statements by arguing that "*Plaintiff failed to show* that the force of impact from the collision was greater than the force of impact from her activities of daily living." In other words, Mr. Awerbach's Counsel, knowing the jury has improperly heard Dr. Scher's ultimate opinion on multiple occasions, based his closing around this fact and repeatedly rang the bell on improper arguments by claiming to reference what Plaintiff did not prove by directly referencing the substance of Dr. Scher's ultimate opinion and by claiming to be appealing to the jury's commonsense. For example, Mr. Awerbach's Counsel argued:

> Now, let me show you the Plaintiff's logic that I'll prove to you it's wrong. Here's what they want to show you. They want you to assume that the force of the collision was greater than the strength of her spinal structure, and that's this and all the ligaments and the muscles that support it. The force of the collision was greater than the strength of her spine to resist it, and the strength of her spine, that was greater than all the forces of the activities of daily living before the accident. Because we know that those forces of daily living, those didn't cause her any pain because she was pain free before the accident.
>
> So, however strong her spine was, it was strong enough for the vertebra not to move during her activities of daily living before the accident. What did those involve? Well, you've heard her say she rode the roller coasters. She rode the roller coasters at New York-New York. She road them at Circus Circus. And that didn't hurt her spine one bit.
>
> And the spondylolisthesis, the offset, was present for all those roller coaster rides, didn't cause her any pain. And they want you to assume that the forces from this fender-bender, you've seen the pictures of the vehicle, those forces caused her spine to move, and those forces were greater than the forces of the roller coasters that she rode before the accident that didn't cause her any pain. They haven't

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> proven it. They want you to make that assumption. You should not do that.

(*Id.* at 9:17-10:23; *see also e.g., id.* at 10:24-16:25 (argument pertaining to forces of impact, including argument based on Dr. Scher's demonstrative exhibits pertaining to forces of impact); 19:6-20:16 (argument pertaining to forces of impact from crash compared to roller coasters); 20:17-21:10 (argument that force of impact not enough to deploy airbags)).[6]

In fact, Mr. Awerbach's Counsel specifically argued, with no supporting evidence in the record, that the forces of impact from the roller coasters Ms. Garcia rode were greater than the forces of impact from the subject crash. Ms. Garcia's Counsel's objection was overruled:

> No edema, no bruising. **No physical forces greater than the roller coasters she rode before.** No causation. Unless you're willing to make an assumption and that you should not do.
>
> Mr. Roberts: Objection. Move to strike there the reference of physical forces greater than the roller coaster.
>
> The Court: He's not relying on Dr. Scher. He's just using common sense. I'll allow it.

(*Id.* at 19:6-14 (emphasis added)).

Although the Court overruled Ms. Garcia's Counsel's objection, when revisited out of the presence of the jury, the Court made it clear, without reviewing the objectionable statement, that "I think if the statement was made that the forces of this impact were less than forces of a roller coaster, I would have sustained that objection because that's a conclusion that doesn't have a basis in evidence . . . ." (*See* Transcript 3/8/16, Ex. 4, at 65:10-24). As quoted above, it is clear that Mr. Awerbach's Counsel stated that the forces of impact from the subject collision were less than the forces of impact from a roller coaster.

As a result of Mr. Awerbach's Counsel's *testimony* in closing arguments pertaining to forces of impact from the subject collision compared to forces of impact from Ms. Garcia's activities of daily living, Ms. Garcia's Counsel was forced to argue forces of impact in rebuttal, and

[6] Ms. Garcia's Counsel lodged a lengthy objection to Mr. Awerbach's Counsel's closing arguments addressing forces of impact outside of the presence of the jury. (*See* Transcript 3/9/16, Ex. 6, at 63:14-66:15).

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even had to try to explain how the forces of impact from the subject collision are different than forces of impact from Ms. Garcia's activities of daily living. (*Id.* at 149:18-152:22).

Dr. Scher was properly excluded under *Hallmark* as he lacked a foundation to opine as to forces of impact on Ms. Garcia's spine. *See Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008). (*See also* Transcript 2/25/16, Ex. 10, at 134:11-140:2; 196:21-197:11). There is no authority to support argument from counsel regarding comparisons of forces of impact without corroborating expert testimony. Such arguments contain sophisticated mathematical calculations and considerations far beyond lay persons' common knowledge. A biomechanical engineer must opine as to forces of impact prior to Counsel making any arguments regarding the same. The Nevada Supreme Court recently released a decision addressing (1) its holdings in *Hallmark* and (2) the necessity of biomechanical engineering expert testimony for low impact defenses. *See Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203 (March 17, 2016). The Court reaffirmed its holdings in *Hallmark* concerning the striking of a biomechanical engineer expert that lacks the foundation to opine as to forces of impact. *Id.* The Court further held that expert testimony from a biomechanical engineer is not necessary to address the nature of an accident for purposes of a low impact defense. *Id.* at 368 P.3d at 1208. Of great significance, though, the Court **did not hold** that counsel may compare the forces of impact in a collision to the forces of impact from an activity of daily living without corroborating biomechanical engineering expert testimony. Such a position would not stand to reason.

Defendants inappropriately previewed Dr. Scher's foundationless opinions pertaining to forces of impact several times during opening statements, inappropriately rung the bell on his foundationless testimony pertaining to forces of impact during his direct examination over repeated sustained objections from Ms. Garcia's Counsel, and then, even after Dr. Scher was stricken in full and the jury was admonished to disregard his testimony, Mr. Awerbach's Counsel inappropriately drew (as the testimony had already been previewed several times and the bell had already been rung) on the stricken testimony, over constant objection by Ms. Garcia's Counsel, by comparing the forces of the subject collision to Ms. Garcia's activities of daily living. Mr. Awerbach's Counsel then took it even further and *testified* as a biomechanical engineer in closing that the forces of

impact from riding a roller coaster were greater on Ms. Garcia's lumbar spine than the subject collision.

The bell was rung on Dr. Scher's foundationless opinions and Mr. Awerbach's Counsel's antics (i.e., misconduct) of repeatedly re-ringing the bell and setting forth his own biomechanical engineering opinions in closing arguments tainted the jury and without question prejudiced Ms. Garcia and prevented her from having a fair trial. The tainting of the jury and the ensuing prejudice to Ms. Garcia cannot be countenanced and must be cured by the ordering of a new trial.

IV. The Accumulation of Juror Misconduct, Error, and Improper Presentation of Biomechanical Engineering Testimony, in Addition to Repeated Violations of Pre-Trial Orders by Defendants' Counsel Prejudiced Ms. Garcia and Affected the Verdict.

In addition to the aforementioned, which Ms. Garcia believes each individually necessitate the granting of a new trial, they, along with the myriad violations of motions in limine by Defendants' Counsel throughout the course of trial, collectively prejudiced Ms. Garcia and substantially affected the jury's verdict. Defendants' Counsel violated, at a minimum, 15 Pre-Trial Orders, many of which were violated multiple times. The list of Pre-Trial Orders violated by Defendants' Counsel includes the following:

- Suggested pre-accident medical records exist;
- Asked hypothetical question based on facts that are not present in this case;
- Asked question about Dr. Lemper accepting less on liens;
- Asked Dr. Lemper about his settlement with the government;
- Suggested Ms. Garcia was terminated from Aliante;
- Asked the jury if it would award zero dollars during voir dire;
- Asked about Pacific Hospital's billing practices;
- Inaccurately told the jury Ms. Garcia failed a drug screen;
- Talked about a pre-crash MRI that did not exist;
- Dr. Klein offered opinions outside the scope of his report and offered new opinions during trial;
- Provided personal opinions by indicating that they do not trust Dr. Gross and by referring to Select Physical Therapy as a mill;
- Argued that loss of enjoyment of life damages cannot be calculated;
- Inquired about Ms. Garcia's trip to California;
- Suggested that Defendants will have to pay the verdict out of their own pocket; and
- Did not limit closing argument to evidence at trial, including Mr. Awerbach's Counsel's statement that the forces of impact from riding a roller coaster are greater on Ms. Garcia's spine than the subject collision.

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While Defendants' Counsel repeatedly represented at trial that their violations of Rules and Orders were unintentional, their repeated conduct contradicts those claims. For example, Ms. Awerbach's Counsel was instructed by the Court, at the bench, to not inquire into the selling of Dr. Lemper's medical liens at a discount, and seconds later, Ms. Awerbach's Counsel asked Dr. Lemper specifically about the selling of his liens at a discount, in direct defiance to the Court's order. (*See* Transcript 2/18/16, Ex. 12, at 84:23-94:15 (improper questioning of Dr. Lemper concerning liens and argument on Ms. Awerbach's Counsel's misconduct outside of the presence of the jury)). As another example, through the admitted assistance of Defendants' Counsel, Dr. Klein set forth new opinions on critical issues during re-direct examination based on a June 2014 x-ray that he had not reviewed prior to the day of his re-direct examination, and that he was specifically precluded from discussing since he had not previously reviewed. (*See* Transcript 3/2/16, Ex. 7, at 213:3-218:9). Dr. Klein admitted that he had not seen the June 2014 x-ray prior to trial and was only shown a demonstrative, not the actual x-ray, in the hall during a break in his testimony. (*See id.*).

The accumulation of juror misconduct, advisement to the jury that it may award all past medical expenses and no future medical expenses, the improper presentation of biomechanical engineering opinions, and repeated violations of Pre-Trial Orders (some of which being blatantly intentional), in the aggregate, prejudiced Ms. Garcia and substantially affected the jury's verdict. A new trial is warranted as a result.

V. In the Alternative to a New Trial, Additur is Appropriate.

Additur, in its simplest form, allows trial judges to add additional damages to an inadequate jury verdict. The leading case on additur in Nevada is *Drummond v. Mid-West Growers*, 91 Nev. 698 (1975). In *Drummond*, the Court discussed at length the long standing acceptance of remitter and, based on sound logic, adopted additur:

> The issue of additur was not presented until modern times, but it is a logical step in the growth of the law relating to unliquidated damages as remittitur was at an earlier date. Its acceptance, though still somewhat retarded, is growing. It should not be treated any differently from other modern devices aimed at making the relationship between judge and jury as to damages as well as to other matters, one that preserves the essentials of the right to jury trial

> without shackling modern procedure to outmoded precedents. Additur does not detract from the substance of the common law trial by jury. Like its fraternal twin remittitur, now over 100 years old in this state, it promotes economy and efficiency in judicial proceedings.

Id. at 710-711.

Consistent with the adoption of additur as an approved practice in Nevada, the Nevada Supreme Court set forth a two-prong test to assist trial courts in determining whether additur is appropriate: "(1) whether the damages are clearly inadequate, and (2) whether the case would be a proper one for granting a motion for a new trial limited to damages." *Lee v. Ball*, 121 Nev. 391, 393-94 (2005) (quoting *Drummond*, 91 Nev. at 708 (internal quotation marks omitted)). "If both prongs are met, then the district court has discretion to grant a new trial, unless the defendant consents to the court's additur." *Id.* "The district court has broad discretion in determining motions for additur, and we will not disturb the court's determination unless that discretion has been abused." *Id.*

It is important to note that "[a]lthough *Drummond* articulates two threshold determinants before additur is available (clearly inadequate and ripe for new trial), in practical application there is only one primary consideration. In essence, if damages are clearly inadequate or 'shocking' to the court's conscience, additur is a proper form of appellate relief." *See, e.g., Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 614 707 P.2d 1137, 1139 (1985) (granting additur on appeal where damages did not include pain and suffering or loss of earnings attributable to loss of limb); *see also Truckee-Carson Irr. Dist. v. Barber*, 80 Nev. 263, 268, 392 P.2d 46, 48 (1964); *Shere v. Davis*, 95 Nev. 491, 596 P.2d 499 (1979) (where damages are clearly inadequate, new trial is warranted under NRCP 59(a)(5) because jury failed to follow court instructions).

Since additur's adoption by the Nevada Supreme Court in 1975, the Court has revisited additur numerous times and has repeatedly affirmed its use and role. *See e.g., Jacobson v. Manfredi*, 100 Nev. 226 (1984) (holding that additur does not violate the State constitution as long as the lower court properly follows the *Drummond* test, while affirming an additur of $650,000 to a $200,000 jury verdict); *Arnold*, 101 Nev. 612 (granting additur on appeal where damages for loss of limb were inadequate); *Donaldson v. Anderson*, 109 Nev. 1039 (1993) (reversing trial court and holding that trial court judge abused his discretion in not granting an additur where jury did not

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reward compensation for grief, sorrow, and loss of consortium); *Lee*, 121 Nev. 391 (affirming trial court judge's additur but finding the district court judge errored in not offering the defendant a new trial instead of the additur).

Here, in the alternative to a new trial, additur is appropriate in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering.

Ms. Garcia is entitled to an additur of $2,166,715 for her future medical expenses. At trial, Ms. Garcia presented evidence and argued to the jury that she is entitled to $574,846.01 in past medical expenses, all of which were directly and causally related to the subject collision. Defendants argued that Ms. Garcia only suffered a muscle sprain and/or ligament strain as a result of the subject collision and anything beyond treatment for a sprain and/or strain was not directly and causally related to the subject collision. The jury agreed with Ms. Garcia and found that all of Ms. Garcia's past medical expenses totaling $574,846.01 were directly and causally related to the subject collision, and, as a result, awarded her the same. Because the jury determined that all of Ms. Garcia's past medical expenses were directly and causally related to the subject collision, Ms. Garcia is entitled to an additur to include all of her future medical treatment amounting to $2,166,715, as her future medical treatment is undisputed in light of the jury's finding on causation of her injuries. In fact, even Defendants' expert orthopedic surgeon, Dr. Klein, opined that Ms. Garcia will need a future spine surgery as a result of her first surgery. (*See* Trial Transcript 3/2/16, Ex. 7, at 218:10-220:18). Thus, an award of nothing for Ms. Garcia's future medical expenses is not only inconsistent with the jury's award of all past medical expenses as well as the undisputed evidence presented at trial, it is also inconsistent with the evidence presented by both parties (i.e., Ms. Garcia will need a future spine surgery). The jury's award of all past medical expenses in addition to the undisputed evidence in this case and the evidence presented by both parties establishing that Ms. Garcia will need an additional spine surgery in the future establishes that Ms. Garcia is entitled to an additur of $2,166,715 for her future medical expenses.

Ms. Garcia is also entitled to an additur of $250,000 for her future pain and suffering. Consistent with the arguments set forth above establishing that Ms. Garcia is entitled to $2,166,715 in future medical expenses, which includes annual rhizotomies and a future spine surgery, it was

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improper for the jury to award nothing to Ms. Garcia for her future pain and suffering. *See Arnold*, 101 Nev. at 614 (finding an abuse of discretion and granting additur on appeal where plaintiff suffered a compensable injury and the awarded damages did not include pain and suffering or loss of earnings); *Drummond*, 91 Nev. 698 (trial court is reversed for denying motion for new trial or additur when jury did not award damages for past pain and suffering or future medical expenses and pain and suffering). $250,000 in future pain and suffering (which covers the remainder of Ms. Garcia's life) is conservative considering the undisputed future treatment Ms. Garcia will require and in light of the fact that the jury awarded her $250,000 for the past five years of pain and suffering. Thus, Ms. Garcia is entitled to an additur of $250,000 for her future pain and suffering.

In summary, the damages awarded to Ms. Garcia are clearly inadequate and require the Court to order a new trial or, in the alternative, an additur in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering.

RELIEF REQUESTED

For the aforementioned reasons, Ms. Garcia respectfully requests that the Court order a new trial or, in the alternative, an additur in the amount of $2,166,715 for Ms. Garcia's future medical expenses and $250,000 for her future pain and suffering..

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 MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR** 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 18

EXHIBIT 18

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

EMILIA GARCIA,	)	
	)	
Plaintiff,	)	**CASE NO.: A637772**
	)	**DEPT. XXX**
vs.	)	
	)	
JARED AWERBACH, individually, and ANDREA AWERBACH, individually,	)	**NOTICE OF ENTRY OF ORDER RE: POST-TRIAL MOTIONS**
	)	
Defendants.	)	
	)	

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CLERK OF THE COURT

NOTICE OF ENTRY OF ORDER

RE: POST-TRIAL MOTIONS

You are hereby notified that this Court entered an Order Re: Post-Trial Motions, a copy of which is attached hereto.

DATED this 16th day of August, 2016.

JERRY A WIESE
DISTRICT COURT JUDGE

Certificate of Service

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system, or, if no e-mail was provided, mailed or placed in the Clerk's Office attorney folder for:

ADAM SMITH

CRAIG HENDERSON

DANIEL POLSENBERG

MARIA ESTANISLO

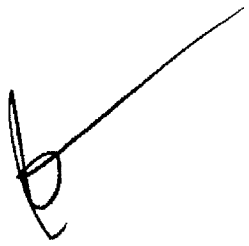
PETER MAZZEO

RANDY TINDALL

AUDRA BOONEY

GEMMA ENDOZO

TIM MOTT



Tatyana Ristic, Judicial Executive Assistant

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

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CLERK OF THE COURT

EMILIA GARCIA,	
Plaintiff,	**CASE NO.: A637772** **DEPT. XXX**
vs.	
JARED AWERBACH, individually, and ANDREA AWERBACH, individually,	**ORDER RE: POST-TRIAL MOTIONS**
Defendants.	

On June 23, 2016, the above-referenced matter came on for hearing before Judge Jerry A. Wiese II, with regard to Plaintiff's Motion for New Trial or, in the Alternative, for Additur, Plaintiff's Renewed Motion for Judgment as a Matter of Law, Jared Awerbach's Motion for New Trial, and Andrea Auerbach's Countermotion for Remittitur. The Court had previously reviewed the pleadings, and at the time of the hearing allowed oral argument on the part of all parties. The Court indicated that it would subsequently issue an Order, and the Court's Order now follows:

With regard to Plaintiff's and Jared Awerbach's Motions for New Trial, NRCP 59 provides the following standard:

> **(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

[As amended; effective January 1, 2005.][1]

Plaintiff argues that she is entitled to a New Trial, based upon the following arguments: 1) the jury engaged in improper experimentation during deliberations; 2) the jury was improperly advised by the Court during deliberations that they may award Ms. Garcia past medical expenses and not award future medical expenses; 3) Defendants inappropriately previewed Dr. Scher's opinions, and then used them again in closing argument, even though Dr. Scher's opinions were stricken; 4) defense counsel violated numerous pre-trial Orders; and 5) the damages awarded to Ms. Garcia were clearly inadequate, and consequently, additur is necessary. The Court will address each argument in order.

1) Did the jury conduct an improper experiment during deliberations, which warrants a new trial?

Plaintiff argues that she is entitled to a new trial because the jury conducted an improper experiment during deliberations. This argument is obviously premised on the Declaration of Keith Berkery, (Juror 5) in which he explained how the jury chose Juror 6, Jessica Bias, to reach over the wood hand/rail/divider, to pick up a water bottle, which the Jurors had apparently seen the Plaintiff do during the Trial, so they could determine the effect that it had on Ms. Bias, and therefore, on the Plaintiff.

In *ACP Reno Assoc., ACP v. Airmotive and Villanova,*[2] the Nevada Supreme Court affirmed its adherence to the general rule "prohibiting the use of juror affidavits to impeach the jury's verdict."[3] The Court has held that there is an exception to the general rule, and "[w]here the misconduct involves extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted."[4] An extraneous influence includes, among other things, publicity or media reports received and discussed among jurors during deliberations, consideration by jurors of extrinsic evidence, and third-party communications with sitting jurors. In contrast, intra-jury or intrinsic influences

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[1] NRCP 59.

[2] 109 Nev. 314, 849 P.2d 277 (1993).

[3] *ACP Reno Assoc., ACP v. Airmotive and Villanova*, 109 Nev. 314, 318, 949 P.2d 277 (1993); See also *Weaver Brothers, Ltd. V. Misskelley*, 98 Nev. 232, 645 P.2d 438 (1982).

[4] *Meyer v. State*, 119 Nev. 554, 80 P.3d 447, 454.

involve improper discussions among jurors (such as considering a defendant's failure to testify), intimidation or harassment of one juror by another, or other similar situations that are generally not admissible to impeach a verdict."[5] The Court stated that "proof 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."[6]

The Nevada Supreme Court has cited heavily to the case of *Meyer v. State*, for the proposition that "[A] motion for a new trial may . . . be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental processes of any juror."[7] Additionally, *ACP Reno Assocs. v. Airmotive & Villanova, Inc.*,[8] holds that "juror affidavits [are] inadmissible to show that the jurors misunderstood the judge's instructions." In order to prevail on a motion for a new trial based on juror misconduct, admissible evidence must establish "(1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial."[9] "Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict."[10]

Plaintiff's Motion cites to the case of *Russell v. State*,[11] in which the appellant's counsel argued during closing argument, that the accused would not have been able to get from Reno to Carson City in time to commit the alleged offense. During a recess in the trial, a juror drove to Reno, and then measured the time it took him to drive to Carson City from the accused's place of employment in Reno. During the jury deliberations, he told the other jurors that it took him twenty-five minutes to travel that distance. The District Court agreed that the juror's actions constituted "misconduct," but concluded that the misconduct was "harmless." The Nevada Supreme Court, however, concluded that the district court's conclusion was an abuse of discretion. The

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5 *Meyer v. State*, 119 Nev. 554, 562, 80 P.3d 447, 454 (2003).
6 *Id.*, at pg. 563.
7 *Meyer* at pg. 563.
8 109 Nev. 314, 318, 849 P.2d 277, 279 (1993).
9 *Meyer* at pgs. 563-64.
10 *Meyer* at pg. 564, (Note that the Court has taken these citations directly from a Nevada Supreme Court Order of Reversal and Remand in *Estate of William George Dyer v. Vicky Guernier, et al.*, Nev. Supreme Court Case No.: 62941, filed 2/19/2015.)
11 99 Nev. 265, 661 P.2d 1293 (1983).

Supreme Court noted that "juror misconduct is particularly egregious where, as here, the juror has engaged in independent 'research' of the facts."[12] The Court further noted that "the information disclosed by the juror related to a crucial aspect of appellant's defense. Appellant's case was therefore significantly harmed by his inability to cross-examine the juror, during the trial, concerning the many variables which may have affected his driving time."[13]

This Court notes that the "experiment" conducted by the jury in the present case, occurred after the jury had asked to return to the courtroom to view the steps leading into the witness stand.[14] The Court saw no problem with this "view" because it was something that the jury had been able to view throughout the trial. There was no indication that the jury intended to conduct any type of experiment, or the Court would not have allowed it. Based upon Mr. Berkery's affidavit, however, the jury used the opportunity to conduct an "experiment" and reenact what Mr. Berkery had apparently seen the Plaintiff do (the Plaintiff leaning over the wooden rail to obtain a bottle of water.) According to the Nevada Supreme Court, a juror's affidavit may only be considered as it relates to establishing objective facts.[15] In the present case, this Court may rely on Mr. Berkery's affidavit, only to the extent that it establishes the objective fact that an "experiment" was conducted, and how it was conducted. The determination of whether, and to what extent, the experiment affected the jurors, must be determined based on an "objective" standard, not on a juror's affidavit. This Court concludes that the experiment conducted by the jurors, in the Courtroom, constituted juror misconduct. The jurors had been instructed that they were to "decide all questions of fact in this case from the evidence received in this trial and not from any other source."[16] They were instructed not to "make any independent investigation . . . [or to] visit the scene, conduct experiments, or consult reference works for additional

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[12] *Russell* at pg. 267, citing to *Barker v. State*, 95 Nev. 308, 312, 594 P.2d 719 (1979).

[13] *Russell* at pg. 267.

[14] The actual question from the jury foreperson said, "We would like to see a courtroom to see the stairs in the witness area and the attorney area." (See Court Exhibit 17, March 10, 2016).

[15] "A motion for a new trial may . . . be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental processes of any juror." *Meyer v. State*, 119 Nev. 554, 563, 80 P.3d 447, 454 (2003).

[16] See Jury Instruction No. 6.

information."[17] Clearly, the affidavit of Mr. Berkery establishes that the jury did conduct an "independent investigation," and conducted an "experiment" in violation of Jury Instruction No. 6. As the Supreme Court has indicated, "juror misconduct is particularly egregious where . . . the juror has engaged in independent 'research' of the facts."[18]

After concluding that misconduct occurred, the more important question, and the one that is more difficult to answer, is whether the jury's misconduct was "prejudicial."[19] The Supreme Court has indicated that "[p]rejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict."[20] This Court concludes that the experiment conducted by the jurors "related to a crucial aspect" of the Plaintiff's case – credibility of the plaintiff, and the nature and extent of the plaintiff's injuries. The Court further concludes that the Plaintiff's case was "significantly harmed by [her] inability to cross-examine the juror . . . concerning the many variables which may have affected [the result of the experiment]."[21] The Court concludes that there is a reasonable probability or likelihood that the juror misconduct affected the verdict."[22]

Did the Court improperly advise the jury that it could award past medical expenses and no future medical expenses?

Plaintiff contends that it was error for the Court to advise the jury that it could award the Plaintiff her past medical expenses and no future medical expenses. The question posed by the jury foreperson was as follows: "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?" The Court responded with "yes."[23] The Plaintiff argues that the Plaintiff's future medical expenses were "either

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[17] See Jury Instruction No. 6 .

[18] *Russell* at pg. 267, citing to *Barker v. State*, 95 Nev. 308, 312, 594 P.2d 719 (1979).

[19] See *Meyer* at pgs. 563-64.

[20] *Meyer* at pg. 564.

[21] *Russell* at pg. 267.

[22] *Meyer* at pg. 564.

[23] See Court Exhibit 19, March 10, 2016. Note that Instruction No. 25 read as follows: If you find that a Defendant is liable for the original injury to the Plaintiff, then 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."

undisputed or [were] disputed on the exact same grounds as her past expenses."[24] Consequently, since the jury awarded all of Ms. Garcia's past medical expenses ($574,846.01), Plaintiff argues that the jury had no choice but to award the Plaintiff her future medical expenses.

This Court finds that Plaintiff's argument lacks merit, as the jurors were instructed to "bring to the consideration of the evidence [their] everyday common sense and judgment as reasonable men and women;"[25] they were instructed that it was up to them to determine the "credibility or believability" of the witnesses;[26] they were instructed about "discrepancies in a witness's testimony;"[27] they were told that they were "not bound" by any expert testimony, but that they were to give such testimony "the weight to which [they] deem it entitled;"[28] and with regard to damages, they were instructed that they could award the Plaintiff the "damages [they] believe from the evidence Plaintiff has sustained," and they could award "[t]he reasonable medical expenses which [they believed] Plaintiff probably will incur in the future as a result of the accident;"[29] and finally, the jurors were instructed that "[w]hether any of these elements of damage have been proven by the evidence is for [them] to determine."[30] The jury was free to disregard the testimony of the experts, and was free to believe or disbelieve the testimony of the Plaintiff, the treating doctors, etc. This Court will not disturb the verdict of the Jury with regard to its award of future medical expenses, or refusal to award such damages. The Court recalls that there was sufficient evidence presented, through cross-examination of the medical care providers, cross-examination of the Plaintiff herself, and other evidence, upon which the Jury could have based its decision to deny the Plaintiff any future medical expenses. Particularly, the Court recalls Facebook pictures that were presented to the Jury showing the Plaintiff participating in activities which could have been interpreted as inconsistent with the Plaintiff's pain complaints. Although Plaintiff argues that the evidence supporting past and future damages was "undisputed," the Court does not agree, and the Jury was free

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[24] (See Motion for New Trial at pg. 7 of 30).
[25] See Jury Instruction No. 7.
[26] See Jury Instruction No. 15.
[27] See Jury Instruction No. 16.
[28] See Jury Instruction No. 18.
[29] See Jury Instruction No. 33.
[30] See Jury Instruction No. 37.

to accept or to disregard the evidence which it saw and heard, and reach the verdict that it reached. A verdict that is unsupported by evidence is improper and must be overturned,[31] but in this case, the verdict was supported by the evidence, and need not be overturned.

2) Did the Court err in allowing Defense counsel to preview Dr. Scher's opinions during opening statement, and then refer to such opinions during closing argument?

Plaintiff next argues that the Court erred in allowing Defense counsel to preview Dr. Scher's foundationless opinions regarding forces of impact, during opening statement, and then Defense counsel again referred to such evidence in Closing Argument, even after Dr. Scher's testimony had been stricken. The Court allowed a preview of Dr. Scher's opinions during opening statement, because the Court allows the attorneys to explain what the evidence will show, and what they have a good faith belief will be entered into evidence during the course of the trial. Based upon representations from Defense counsel, the Court had no reason to believe at the outset, that Dr. Scher's testimony would be stricken. Prior to Trial, the Court had evaluated the proposed testimony of Dr. Scher, and was convinced that there was "at least arguably" sufficient foundation for that testimony. During the presentation of evidence, however, it became evident that there was "inadequate foundation" for Dr. Scher's opinions, and consequently, his testimony was stricken from the record, and the Jury was instructed to disregard it. During closing argument, Mr. Awerbach's counsel argued that the Plaintiff sustained "no physical forces greater than the roller coasters she rode before."[32] The Court overruled an objection to that statement, indicating that the Court felt that Mr. Strassburg was simply using a "common sense" argument, but later the Court noted that the Court should have sustained the objection because it was a conclusion that didn't have any basis in evidence.[33] The Court acknowledges that the objection should have been sustained, and Defense counsel should have been admonished not to "testify" or refer to Dr. Scher's opinions during closing argument, since Dr. Scher's opinions had been stricken from the record. Although the Court acknowledges the error, the Court is not convinced that the statement regarding the

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[31] *Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 614, 707 P.2d 1137, 1139 (1985).
[32] See Trial Transcript 3/9/16 at pg. 19:6-7.
[33] See Trial Transcript 3/9/16 at pg. 65:10-24.

"roller coasters" or the other general references to "forces" were sufficiently prejudicial to have made a difference to the Jury. There is no indication that such statements made a difference in the minds of the jurors, and the jurors were instructed more than once that opening statements and closing arguments were "not evidence." Although the Court acknowledges the error, the Court finds that such error may have been harmless, and by itself such error would not justify a new trial. In combination with the other irregularities during Trial, however, it may.

3) Did the accumulation of juror misconduct, error, and improper presentation of biomechanical testimony, and repeated violation of Pre-Trial Orders prejudice the Plaintiff to the extent that a new trial is warranted?

Plaintiff's final argument in support of its Motion for New Trial is that the accumulation of juror misconduct, error, and improper presentation of biomechanical testimony, in addition to repeated violations of Pre-Trial Orders by Defense counsel, prejudiced the Plaintiff and affected the verdict. Plaintiff argues that defense counsel violated at least 15 Pre-Trial Orders. This Court acknowledges that Defense counsel did walk a fine line, coming close to violating, and sometimes went past the line, actually violating, some of the Pre-Trial Orders. Consequently, many of Plaintiff's counsel's objections in that regard were sustained. The Court is not convinced that such violations, by themselves, justify a new trial, but in combination with other irregularities, they may.

4) Are the damages "clearly inadequate" such that Plaintiff is entitled to an "additur?"

Plaintiff argues that as an alternative to a new trial, she is entitled to an "additur." The Plaintiff correctly cites to the cases of *Drummond v. Mid-West Growers,*[34] and *Lee v. Ball,*[35] as authority for the potential use of an additur, but those cases stand for the proposition that an additur is only appropriate if 1) the damages are clearly inadequate; and 2) the case would be a proper one for granting a motion for new trial limited to damages. This Court cannot conclude that the damages awarded by the Jury are "clearly inadequate," and consequently, the Court does not feel comfortable

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[34] 91 Nev. 698 (1975).
[35] 121 Nev. 391, 393-94 (2005).

substituting its judgment regarding damages for that of the Jury. As a result, the Court concludes that an "additur" in this case would not be appropriate. A similar analysis would preclude the Court from granting Andrea Awerbach's request for "remittitur."

CONCLUSION AND ORDER

Based upon the foregoing, this Court finds that a "new trial" of all issues is warranted, based upon NRCP 59(a)(2) (Misconduct of the jury – conducting an experiment); NRCP 59(a)(5) (Manifest disregard by the jury of the instructions of the court – specifically the instruction that the jury was prohibited from conducting its own experiments or investigation); and NRCP 59(a)(7) (Error in law occurring at the trial and objected to by the party making the motion – specifically the statements by Defense Counsel during closing argument, improperly referencing the "forces of impact" testimony of Dr. Scher, as well as the cumulative effect of multiple violations of various Pre-Trial Orders). Based upon these irregularities, the Court concludes that the parties were prejudiced, and were prevented from having a fair trial.

Based upon the foregoing, and good cause appearing therefor,

IT IS HEREBY ORDERED that Plaintiff's Motion for New Trial or, in the Alternative, for Additur, is hereby **GRANTED** as it relates to a request for a new trial, and **DENIED** as it relates to a requested additur.

IT IS FURTHER ORDERED that Andrea Awerbach's Countermotion for Remittitur is hereby **DENIED**.

IT IS FURTHER ORDERED that a new trial will be scheduled at the Court's next available date in the regular course, and a new Trial Setting Order will issue.

DATED this 12th day of August, 2016.

JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT XXX

Certificate of Service

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system, or, if no e-mail was provided, mailed or placed in the Clerk's Office attorney folder for:

ADAM SMITH

CRAIG HENDERSON

DANIEL POLSENBERG

MARIA ESTANISLO

PETER MAZZEO

RANDY TINDALL

AUDRA BOONEY

GEMMA ENDOZO

TIM MOTT

Tatyana Ristic, Judicial Executive Assistant

EXHIBIT 19

EXHIBIT 19

ELECTRONICALLY SERVED
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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.

D. Lee Roberts, Jr., Esq.
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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.
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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.
Timothy A. Mott, Esq.
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 24th 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

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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

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

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 20

EXHIBIT 20

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

EMILIA GARCIA,	)	
	)	
Plaintiff,	)	**CASE NO.: A637772**
	)	**DEPT. XXX**
vs.	)	
	)	
JARED AWERBACH, individually, and ANDREA AWERBACH, individually,	)	**NOTICE OF ENTRY OF ORDER RE: MINUTE ORDER OF 8/22/16**
	)	
Defendants.	)	
	)	

You are hereby notified that this Court entered an Order Re: Minute Order of 8/22/16 (re: Plaintiff's Renewed Motion for Judgment as a Matter of Law), a copy of which is attached hereto.

DATED this 22nd day of August, 2016.

JERRY A WIESE
DISTRICT COURT JUDGE

Certificate of Service

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system, or, if no e-mail was provided, mailed or placed in the Clerk's Office attorney folder for:

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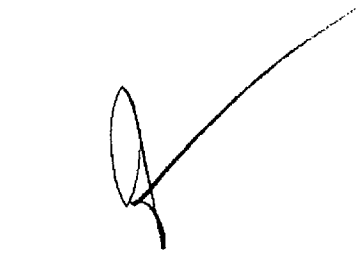

Tatyana Ristic, Judicial Executive Assistant

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Auto | COURT MINUTES | August 22, 2016

A-11-637772-C Emilia Garcia, Plaintiff(s)
vs.
Jared Awerbach, Defendant(s)

August 22, 2016 **9:00 AM** **Minute Order**

HEARD BY: Wiese, Jerry A. COURTROOM: RJC Courtroom 14A

COURT CLERK: Alice Jacobson

RECORDER:

REPORTER: Kristy Clark

PARTIES
PRESENT:

JOURNAL ENTRIES

- The above-referenced matter last came on for hearing on June 23, 2016. Subsequently, the Court issued a written Order Re: Post-Trial Motions, which was filed on 8/12/2016. It has come to the Court s attention that the Court erroneously failed to rule on the Plaintiff s Renewed Motion for Judgment as a Matter of Law. The Court now Orders that based upon the same reasoning that the Motion was denied previously, that the Plaintiff s Renewed Motion for Judgment as a Matter of Law is hereby DENIED.

EXHIBIT 21

EXHIBIT 21

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Steven D. Grierson
CLERK OF THE COURT

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

JUDGMENT UPON JURY VERDICT

This action proceeded to trial before the Court and a jury, the Honorable Jerry A. Wiese, district judge, presiding. The issues were duly tried and, on March 10, 2016, the jury rendered its verdict in favor of plaintiff and against defendant Jared Awerbach, but in favor of defendant Andrea Awerbach against plaintiff.

IT IS SO ORDERED AND ADJUDGED that plaintiff Emilia Garcia be given and granted judgment against defendant Jared Awerbach as follows:

1. Past medical expenses..... $574,846.01
2. Past pain, suffering and loss of enjoyment of life..... $250,000.00

TOTAL..... $824,846.01

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Emilia Garcia be given and granted punitive damages against Jared Awerbach in the amount of **$2,000,000.00**.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Emilia Garcia take nothing from defendant Andrea Awerbach, and that judgment is entered in favor of Andrea Awerbach, based on the jury's findings that Andrea Awerbach

did not give express or implied permission to Jared Awerbach to use her vehicle on January 2, 2011, and did not negligently entrust her vehicle to an inexperienced or incompetent person on January 2, 2011.

Dated this 17 day of August, 2017.

JERRY A. WIESE
DISTRICT COURT JUDGE – DEPT. 30

EXHIBIT 22

EXHIBIT 22

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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 **ORDER VACATING JUDGMENT AS TO JARED AWERBACH ONLY**

IT IS HEREBY ORDERED that the judgment in favor of plaintiff and against defendant Jared Awerbach, contained in the "Judgment Upon Jury Verdict," entered on August 18, 2017, is VACATED pursuant to this Court's order of August 12, 2016, which granted plaintiff's motion for new trial. (*See* August 12, 2016 "Order Re: Post-Trial Motions.")

The Court clarifies that the judgment entered in favor of defendant Andrea Awerbach and against plaintiff, contained in the "Judgment Upon Jury Verdict," entered on August 18, 2017, remains in effect. Pursuant to NRCP 54(b), the Court determines and certifies that the August 18, 2017 "Judgment Upon Jury Verdict" constitutes a "final judgment" as to all claims between plaintiff and Andrea Awerbach. There is no just reason to delay such finality.

IT IS FURTHER ORDERED that Jared Awerbach's motion for new trial, filed May 26, 2016, is DENIED AS MOOT, as the Court concludes that it is unnecessary to reach the grounds raised in that motion as a new trial has already been granted.

Dated this 21 day of August, 2017.

JERRY A. WIESE
DISTRICT COURT JUDGE – DEPT. 30

EB

EXHIBIT 23

EXHIBIT 23

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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

NOTICE OF APPEAL

OSC APP 193

Case Number: A-11-637772-C

Please take notice that Emilia Garcia hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. Order denying Plaintiff's Oral Motion for Directed Verdict, entered on March 7, 2016 (Exhibit A: Trial Transcript (3/7/2016), at 146:25-148:25);

3. "Order RE: Post-Trial Motions," entered on August 12, 2016, notice of entry of which was served electronically on August 17, 2016 (Exhibit B);

4. "Order RE: Minute Order of 8/22/16," entered on August 22, 2016, notice of entry of which was served electronically on August 22, 2016 (Exhibit C);

5. "Order Modifying Prior Order of Judge Allf", entered on February 12, 2016 (Exhibit D);

6. "Judgment Upon Jury Verdict," entered on August 21, 2017, notice of entry of which was served electronically on August 21, 2017 (Exhibit E);

7. "Order Vacating Judgment as to Jared Awerbach Only," entered on August 21, 2017, notice of entry of which was served electronically on August 21, 2017 (Exhibit F); and

8. All ruling and interlocutory orders made appealable by any of the foregoing.

DATED this 19th day of September, 2017.

D. Lee Roberts, Jr., Esq.
Timothy A. Mott, Esq.
Marisa Rodriguez-Shapoval, Esq.
Weinberg, Wheeler, Hudgins,
Gunn & Dial, LLC.
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2017, a true and correct copy of the foregoing **NOTICE OF APPEAL** 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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Attorneys for Plaintiff
Emilia Garcia

An Employee of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

EXHIBIT 1

EXHIBIT 1

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CLERK OF THE COURT

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Attorneys for Plaintiff

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 **AMENDED COMPLAINT**

Plaintiff EMILIA GARCIA, complains as follows:

GENERAL ALLEGATIONS

1. That Plaintiff EMILIA GARCIA (hereinafter "Plaintiff") is, and at all times mentioned herein was, a resident of the County of Clark, State of Nevada.

2. That Defendant JARED AWERBACH is, and at all times mentioned herein was, a resident of the County of Clark, State of Nevada.

3. That Defendant ANDREA AWERBACH is, and at all times mentioned herein was, a resident of the County of Clark, State of Nevada.

4. That the true names and capacities of the Defendants designated herein as Doe or Roe Corporations are presently unknown to Plaintiff at this time, who therefore sues said Defendants by such fictitious names. When the true names and capacities of these defendants are ascertained, Plaintiff will amend this Complaint accordingly.

5. That at all times pertinent, Defendants were agents, servants, employees or joint venturers of every other Defendant herein, and at all times mentioned herein were acting within the scope and course of said agency, employment, or joint venture, with knowledge and permission and consent of all other named Defendants.

6. That at all times mentioned herein, Plaintiff was the owner and operator of a 2001 Hyundai Santa Fe.

7. That at all times mentioned herein Defendant JARED AWERBACH was the operator of a 2007 Suzuki Forenza (hereinafter referred to as the "Vehicle").

8. That at all times mentioned herein Defendant ANDREA AWERBACH was the owner of the Vehicle.

9. That on January 2, 2011, in Clark County, Nevada, Defendant JARED AWERBACH negligently failed to yield to Plaintiff's right-of-way, causing a collision with Plaintiff.

10. At the time of the crash, Defendant JARED AWERBACH was driving under the influence of alcohol and/or an illegal drug substance.

11. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff sustained injuries to Plaintiff's shoulders, back, bodily limbs, organs and systems, all or some of which condition may be permanent and disabling, and all to Plaintiff's damage in a sum in excess of $10,000.

12. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff received medical and other treatment for the aforementioned injuries, and that said services, care, and treatment are continuing and shall continue in the future, all to the damage of Plaintiff.

13. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff has been required to, and has limited occupational and recreational activities, which have caused and shall continue to cause Plaintiff loss of

earning capacity, lost wages, physical impairment, mental anguish, and loss of enjoyment of life, in a presently unascertainable amount.

14. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff's vehicle was damaged and Plaintiff lost the use of that vehicle.

15. That as a direct and proximate result of the aforementioned negligence of all Defendants, Plaintiff has been required to engage the services of an attorney, incurring attorney's fees and costs to bring this action.

FIRST CAUSE OF ACTION

(Negligence Against Defendant Jared Awerbach)

16. Plaintiff incorporates paragraphs 1 through 15 of the Complaint as though said paragraphs were fully set forth herein.

17. Defendant JARED AWERBACH owed Plaintiff a duty of care to operate the Vehicle in a reasonable and safe manner. Defendant JARED AWERBACH breached that duty of care by striking Plaintiff's vehicle on the roadway. As a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff has been damaged in an amount in excess of $10,000.00.

18. The actions or omissions of Defendant JARED AWERBACH, at least in part, were willful and/or wanton and oppressive, in conscious disregard of the safety of others, and therefore, an award of punitive damages is appropriate in an amount to be determined at trial.

SECOND CAUSE OF ACTION

(Negligence Per Se Against Defendant Jared Awerbach)

19. Plaintiff incorporates paragraphs 1 through 18 of the Complaint as though said paragraphs were fully set forth herein.

20. The acts of Defendant JARED AWERBACH as described herein violated the traffic

laws of the State of Nevada and Clark County, constituting negligence per se, and Plaintiff has been damaged as a direct and proximate result thereof in an amount in excess of $10,000.00.

THIRD CAUSE OF ACTION

(Negligent Entrustment Against Defendant Andrea Awerbach)

21. Plaintiff incorporates paragraphs 1 through 20 of the Complaint as though said paragraphs were fully set forth herein.

22. Defendant ANDREA AWERBACH was the owner, or had custody and control, of the Vehicle.

23. That Defendant ANDREA AWERBACH, did entrust the Vehicle to the control of Defendant JARED AWERBACH.

24. That Defendant JARED AWERBACH was incompetent, inexperienced, or reckless in the operation of the Vehicle.

25. That Defendant ANDREA AWERBACH actually knew or, by the exercise of reasonable care, should have known that Defendant JARED AWERBACH was incompetent, inexperienced, or reckless in the operation of motor vehicles.

26. That Plaintiff was injured as a proximate consequence of the negligence and incompetence of Defendant JARED AWERBACH, concurring with the negligent entrustment of the Vehicle by Defendant ANDREA AWERBACH.

27. That as a direct and proximate cause of the negligent entrustment of the Vehicle by Defendant ANDREA AWERBACH to Defendant JARED AWERBACH, Plaintiff has been damaged in an amount in excess of $10,000.00.

FOURTH CAUSE OF ACTION

(Joint Liability Against Defendant Andrea Awerbach)

28. Plaintiff incorporates paragraphs 1 through 27 of the Complaint as though said paragraphs were fully set forth herein.

29. Pursuant to NRS 41.440 ANDREA AWERBACH is liable jointly and severally for damages resulting from JARED AWERBACH's negligence.

30. As a direct result of JARED AWERBACH's negligence, Plaintiff was damaged in an amount in excess of $10,000.00, for which all Defendants' are liable.

FIFTH CAUSE OF ACTION

(Driving Under the Influence Against Defendant Jared Awerbach)

31. Plaintiff incorporates paragraphs 1 through 31 of the Complaint as though said paragraphs were fully set forth herein.

32. Defendant JARED AWERBACH knew or should have known that he was in no condition to operate his vehicle in a safe manner.

33. Plaintiff seeks an award of exemplary and punitive damages pursuant to NRS 42.001 *et seq.* in an amount in excess of $10,000.00 for Defendant JARED AWERBACH's despicable conduct with a conscious disregard of the rights or safety of others by operating the Vehicle while under the influence of an intoxicating liquor or controlled substance, which rendered Defendant JARED AWERBACH unable to safely operate the Vehicle in violation of the Nevada Revised Statutes.

WHEREFORE, Plaintiff, expressly reserving the right to amend this complaint prior to or at the time of trial of this action to insert those items of damage not yet fully ascertainable, prays judgment against all Defendants, and each of them, as follows:

1. For general damages sustained by Plaintiff in an amount in excess of $10,000.00;
2. For special damages sustained by Plaintiff in an amount in excess of $10,000.00;
3. For punitive damages in an amount to be determined at trial;
4. For property damages sustained by Plaintiff;
5. For reasonable attorney's fees and costs;

. . .

. . .

6. For interest at the statutory rate; and

7. For such other relief as the Court deems just and proper.

GLEN J. LERNER & ASSOCIATES

Adam D. Smith, Esq.
Nevada Bar No. 9690
4795 South Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500
Facsimile: (702) 933-7043
Attorneys for Plaintiff

CERTIFICATE OF MAILING

Pursuant to NRCP 5(a) and EDCR 7.26(a), I hereby certify that I am an employee of GLEN J. LERNER & ASSOCIATES, and on the 14 day of January, 2013, the foregoing **AMENDED COMPLAINT** was served by depositing a true and correct copy of the Notice in the United States Mail, postage prepaid, addressed as follows, to the following counsel of record:

Alexandra McLeod, Esq.
BRADY, VORWERCK, RYDER & CASPINO
2795 E. Desert Inn Rd., Suite 200
Las Vegas, Nevada 89121
Attorney for Defendants

Brittany Glen
An Employee of Glen J. Lerner & Associates

EXHIBIT 2

EXHIBIT 2

ORDR
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Attorneys for Plaintiff

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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 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: _____

COREY M. ESCHWEILER, ESQ.
Nevada Bar No. 6635
ADAM D. SMITH, ESQ.
Nevada Bar No. 9690
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Attorneys for Plaintiff

EXHIBIT 3

EXHIBIT 3

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Attorneys for EMILIA GARCIA

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CLERK OF THE COURT

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. XXVIII **EMILIA GARCIA COMPLAINT**

Plaintiff EMILIA GARCIA, by and through attorney of record, PAUL D. POWELL, ESQ., of THE POWELL LITIGATION GROUP, complains against Defendants as follows:

GENERAL ALLEGATIONS

1. That Plaintiff EMILIA GARCIA (hereinafter "Plaintiff") is, and at all times mentioned herein was, a resident of the County of Clark, State of Nevada.

2. That Defendant JARED AWERBACH is, and at all times mentioned herein was, a resident of the County of Clark, State of Nevada.

3. That Defendant ANDREA AWERBACH is, and at all times mentioned herein was, a resident of the County of Clark, State of Nevada.

4. That the true names and capacities of the Defendants designated herein as Doe or Roe Corporations are presently unknown to Plaintiff at this time, who therefore sues

POWELL LITIGATION GROUP
ATTORNEYS AT LAW

said Defendants by such fictitious names. When the true names and capacities of these defendants are ascertained, Plaintiff will amend this Complaint accordingly.

5. That at all times pertinent, Defendants were agents, servants, employees or joint venturers of every other Defendant herein, and at all times mentioned herein were acting within the scope and course of said agency, employment, or joint venture, with knowledge and permission and consent of all other named Defendants.

6. That at all times mentioned herein, Plaintiff was the owner and operator of a 2001 Hyundai Santa Fe.

7. That at all times mentioned herein Defendant JARED AWERBACH was the operator of a 2007 Suzuki Forenza (hereinafter referred to as the "Vehicle").

8. That at all times mentioned herein Defendant ANDREA AWERBACH was the owner of the Vehicle.

9. That on January 2, 2011, in Clark County, Nevada, Defendant JARED AWERBACH negligently failed to yield to Plaintiff's right-of-way, causing a collision with Plaintiff.

10. At the time of the crash, Defendant JARED AWERBACH was driving under the influence of alcohol and/or an illegal drug substance.

11. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff sustained injuries to Plaintiff's shoulders, back, bodily limbs, organs and systems, all or some of which condition may be permanent and disabling, and all to Plaintiff's damage in a sum in excess of $10,000.

12. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff received medical and other treatment for the aforementioned

POWELL LITIGATION GROUP
ATTORNEYS AT LAW

injuries, and that said services, care, and treatment are continuing and shall continue in the future, all to the damage of Plaintiff.

13. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff has been required to, and has limited occupational and recreational activities, which have caused and shall continue to cause Plaintiff loss of earning capacity, lost wages, physical impairment, mental anguish, and loss of enjoyment of life, in a presently unascertainable amount.

14. That as a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff's vehicle was damaged and Plaintiff lost the use of that vehicle.

15. That as a direct and proximate result of the aforementioned negligence of all Defendants, Plaintiff has been required to engage the services of an attorney, incurring attorney's fees and costs to bring this action.

FIRST CAUSE OF ACTION

16. Plaintiff incorporates paragraphs 1 through 15 of the Complaint as though said paragraphs were fully set forth herein.

17. Defendant JARED AWERBACH owed Plaintiff a duty of care to operate the Vehicle in a reasonable and safe manner. Defendant JARED AWERBACH breached that duty of care by striking Plaintiff's vehicle on the roadway. As a direct and proximate result of the negligence of Defendant JARED AWERBACH, Plaintiff has been damaged in an amount in excess of $10,000.00.

18. The actions or omissions of Defendant JARED AWERBACH, at least in part, were willful and/or wanton and oppressive, in conscious disregard of the safety of others,

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ATTORNEYS AT LAW

and therefore, an award of punitive damages is appropriate in an amount to be determined at trial.

SECOND CAUSE OF ACTION

19. Plaintiff incorporates paragraphs 1 through 18 of the Complaint as though said paragraphs were fully set forth herein.

20. The acts of Defendant JARED AWERBACH as described herein violated the traffic laws of the State of Nevada and Clark County, constituting negligence per se, and Plaintiff has been damaged as a direct and proximate result thereof in an amount in excess of $10,000.00.

THIRD CAUSE OF ACTION

21. Plaintiff incorporates paragraphs 1 through 20 of the Complaint as though said paragraphs were fully set forth herein.

22. Defendant ANDREA AWERBACH was the owner, or had custody and control, of the Vehicle.

23. That Defendant ANDREA AWERBACH, did entrust the Vehicle to the control of Defendant JARED AWERBACH.

24. That Defendant JARED AWERBACH was incompetent, inexperienced, or reckless in the operation of the Vehicle.

25. That Defendant ANDREA AWERBACH actually knew or, by the exercise of reasonable care, should have known that Defendant JARED AWERBACH was incompetent, inexperienced, or reckless in the operation of motor vehicles.

26. That Plaintiff was injured as a proximate consequence of the negligence and incompetence of Defendant JARED AWERBACH, concurring with the negligent

POWELL LITIGATION GROUP
ATTORNEYS AT LAW

entrustment of the Vehicle by Defendant ANDREA AWERBACH.

27. That as a direct and proximate cause of the negligent entrustment of the Vehicle by Defendant ANDREA AWERBACH to Defendant JARED AWERBACH, Plaintiff has been damaged in an amount in excess of $10,000.00.

WHEREFORE, Plaintiff, expressly reserving the right to amend this complaint prior to or at the time of trial of this action to insert those items of damage not yet fully ascertainable, prays judgment against all Defendants, and each of them, as follows:

1. For general damages sustained by Plaintiff in an amount in excess of $10,000.00;
2. For special damages sustained by Plaintiff in an amount in excess of $10,000.00;
3. For punitive damages in an amount to be determined at trial;
4. For property damages sustained by Plaintiff;
5. For reasonable attorney's fees and costs;
6. For interest at the statutory rate; and
7. For such other relief as the Court deems just and proper.

DATED this 24th day of March 2011.

THE POWELL LITIGATION GROUP

#10522

Paul D Powell, Esq.
Nevada Bar No. 7488
9525 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Attorneys for EMILIA GARCIA

POWELL LITIGATION GROUP
ATTORNEYS AT LAW

EXHIBIT 4

EXHIBIT 4

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CLERK OF THE COURT

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Attorneys for Defendants
Jared Awerbach and Andrea Awerbach

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA,

Plaintiffs,

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.: XXVIII

[ELECTRONIC FILING CASE]

DEFENDANTS' ANSWER TO COMPLAINT

COMES NOW Defendants, JARED AWERBACH and ANDREA AWERBACH, by and through their counsel of record, ALEXANDRA B. M^{c}LEOD, ESQ., of the law firm of BRADY, VORWERCK, RYDER & CASPINO, and hereby answer the allegations of Plaintiff's Complaint as follows:

1. In answering Paragraphs 1, 4 and 6 of Plaintiff's Complaint, Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds, deny each and every allegation contained therein.

2. In answering Paragraphs 2, 3, 7, 8, 22 and 23 of Plaintiff's Complaint, Defendants admit the allegations contained therein.

3. In answering Paragraphs 5, 9, 10, 17, 18, 20, 24, 25 and 26 of Plaintiff's Complaint, Defendants deny each and every allegation contained therein.

4. In answering Paragraphs 11, 12, 13, 14, 15 and 27 of Plaintiff's Complaint, these answering Defendants deny as to the claims of negligence and/or gross negligence of Defendants, but are without sufficient knowledge or information to form a belief as to the truth or falsity of the residual of said allegations contained therein, and therefore deny the same.

5. In answering Paragraphs 16, 19, and 21, Defendants repeat and reallege their answers to the preceding Paragraphs, respectively, and incorporate the same as if fully set forth herein.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim against these answering Defendants upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to join a party necessary for just adjudication under NRCP 19.

THIRD AFFIRMATIVE DEFENSE

Plaintiff had notice of all the facts and acts of Defendants set forth in the Complaint, and has thereby been guilty of laches as should in equity bar the Plaintiff from maintaining this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate Plaintiff's alleged injuries and damages, if any.

FIFTH AFFIRMATIVE DEFENSE

That, at the time and place alleged in Plaintiff's Complaint, and for a period of time prior thereto, Plaintiff did not exercise ordinary care, caution or prudence for the protection of Plaintiff's own safety and the injuries and damages complained of by the Plaintiff in the Complaint, if any, were directly and proximately caused or contributed to by the fault, failure to act, carelessness and negligence of the Plaintiff herself and, as such, is responsible for comparative fault in excess of fifty percent (50%), thereby exonerating any liability as against

BRADY, VORWERCK
RYDER & CASPINO
2795 East Desert Inn Road
Suite 200
Las Vegas, NV 89121-3635

these Defendants. Should Plaintiff's comparative fault be assessed at less than fifty percent (50%), these Defendants are entitled to reduce Plaintiff's recovery accordingly.

SIXTH AFFIRMATIVE DEFENSE

At all times referenced in Plaintiff's Complaint on file herein, and for a period of time prior thereto, Defendant JARED AWERBACH was operating a vehicle with due care and caution. All damages as allegedly sustained by Plaintiff in the Complaint on file herein were caused by the negligence, carelessness or want of care among the known third parties.

SEVENTH AFFIRMATIVE DEFENSE

The damages and injuries sustained by Plaintiff, as alleged in the Complaint herein, if any, were the result of an unavoidable accident.

EIGHTH AFFIRMATIVE DEFENSE

That at all times referenced in Plaintiff's Complaint on file herein, and for a period of time prior thereto, to the best of the knowledge of Defendant ANDREA AWERBACH, Defendant JARED AWERBACH was known to be a safe driver and to operate the vehicle with due care and caution. Defendant ANDREA AWERBACH had no knowledge nor should have had knowledge that JARED AWERBACH was an unsafe driver.

NINTH AFFIRMATIVE DEFENSE

That an award of punitive damages would be unconstitutional, in that it would deny the answering Defendants their rights as guaranteed in the Due Process and Equal Protection Clauses of both the United States and Nevada Constitutions.

TENTH AFFIRMATIVE DEFENSE

That an award of punitive damages would be unconstitutional, in that it would deny the answering Defendants, in theory and application, their rights under the Eighth and Fourteenth Amendment protections of the United States and Nevada Constitutions.

ELEVENTH AFFIRMATIVE DEFENSE

No award of punitive damages can be made against this answering Defendants pursuant to NRS 41.031, et seq.

///

BRADY, VORWERCK
RYDER & CASPINO
2795 East Desert Inn Road
Suite 200
Las Vegas, NV 89121-3635

TWELFTH AFFIRMATIVE DEFENSE

That an award of punitive damages against the answering Defendants under NRS 42.010 would be unconstitutional, as such statute is a "vague sentencing provision."

THIRTEENTH AFFIRMATIVE DEFENSE

If punitive damages are recoverable in this case, which the answering Defendants specifically deny, such are criminal punishment in nature, and must be proven by at least clear and convincing evidence. Plaintiff has failed to allege any facts sufficient to satisfy Plaintiff's burden of proof *by convincing evidence* that Defendants engaged in any conduct that would support an award of punitive damages.

FOURTEENTH AFFIRMATIVE DEFENSE

If punitive damages are recoverable in this case which the answering Defendants specifically deny, such an award cannot be disproportionate to the actor's(s') alleged misconduct.

FIFTEENTH AFFIRMATIVE DEFENSE

No award of punitive damages can be awarded against these answering Defendants under the facts and circumstances alleged in Plaintiff's Complaint.

LAST AFFIRMATIVE DEFENSE

Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendants' Answer, and therefore Defendants reserve the right to amend this answer to allege additional affirmative defenses if subsequent investigation warrants.

WHEREFORE, Defendants prays that the Plaintiff take nothing by reason of the Complaint on file herein, and that Defendants recover from Plaintiff a reasonable attorney's fee,

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BRADY, VORWERCK
RYDER & CASPINO
2795 East Desert Inn Road
Suite 200
Las Vegas, NV 89121-3635

costs and disbursements in this action, and, for such other and further relief as the Court may deem proper.

DATED: January 23, 2012

BRADY, VORWERCK, RYDER & CASPINO

Alexandra B. M'Leod
Nevada Bar No. 8185
2795 East Desert Inn Road, Suite 200
Las Vegas, Nevada 89121-3635
Telephone: (702) 697-6500
Fax: (702) 697-6505
amcleod@bvrclaw.com
Attorneys for Defendants,
JARED AWERBACH and
ANDREA AWERBACH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of January, 2011, I served the foregoing documents described as **DEFENDANTS' ANSWER TO COMPLAINT,** on the parties set forth below by:

☒ **VIA U.S. MAIL:** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada.

☐ **VIA FACSIMILE:** pursuant to E.D.C.R. Rule 7.26, by sending a true and correct copy to counsel on the attached service list at the facsimile numbers specified.

☐ **VIA PERSONAL OR HAND DELIVERY:**

Adam D. Smith
Glen Lerner & Associates
4795 South Durango Drive
Las Vegas NV 89147
(702) 877-1500
(702) 877-0110 - FAX
Attorneys for Plaintiff

Kim L. Allerson
An employee of
BRADY, VORWERCK, RYDER & CASPINO

BRADY, VORWERCK
RYDER & CASPINO
2795 East Desert Inn Road
Suite 200
Las Vegas, NV 89121-3635

EXHIBIT 5

EXHIBIT 5

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CLERK OF THE COURT

ANAC
Alexandra B. McLeod
Nevada Bar No. 8185
amcleod@bvrclaw.com
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2795 East Desert Inn Road, Suite 200
Las Vegas, Nevada 89121
Telephone: (702) 697-6500
Facsimile: (702) 697-6505

Attorneys for Defendants, Jared Awerbach and Andrea Awerbach

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA,

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.: XXVII

DEFENDANTS' ANSWER TO AMENDED COMPLAINT

COME NOW, Defendants JARED AWERBACH and ANDREA AWERBACH, by and through their counsel of record, ALEXANDRA B. McLEOD, ESQ., of the law firm of BRADY, VORWERCK, RYDER & CASPINO, and hereby answer the Plaintiff's Amended Complaint as follows:

1. In answering Paragraph 1 of Plaintiff's Amended Complaint, Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds deny each and every allegation contained therein.

2. In answering Paragraphs 2 and 3 of Plaintiff's Amended Complaint, Defendants admit the allegations contained therein.

3. In answering Paragraph 4 of Plaintiff's Amended Complaint, Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds deny each and every allegation contained therein.

4. In answering Paragraph 5 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

5. In answering Paragraph 6 of Plaintiff's Amended Complaint, Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein, and upon such grounds deny each and every allegation contained therein.

6. In answering Paragraphs 7 and 8 of Plaintiff's Amended Complaint, Defendants admit the allegations contained therein.

7. In answering Paragraphs 9 and 10 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

8. In answering Paragraphs 11 through 14 of Plaintiff's Amended Complaint, these answering Defendants deny as to the claims of negligence and/or gross negligence of Defendants, but are without sufficient knowledge or information to form a belief as to the truth or falsity of the residual of said allegations contained therein, and therefore deny the same.

9. In answering Paragraph 15 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

10. In answering Paragraph 16, Defendants repeat and reallege their answers to Paragraphs 1 through 15 and incorporate the same as if fully set forth herein.

11. In answering Paragraph 17 of Plaintiff's Amended Complaint, these answering Defendants deny as to the claims of negligence and/or gross negligence of Defendants, but are without sufficient knowledge or information to form a belief as to the truth or falsity of the residual of said allegations contained therein, and therefore deny the same.

12. In answering Paragraph 18 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

13. In answering Paragraph 19, Defendants repeat and reallege their answers to Paragraphs 1 through 18 and incorporate the same as if fully set forth herein.

14. In answering Paragraph 20 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

15. In answering Paragraph 21, Defendants repeat and reallege their answers to Paragraphs 1 through 20 and incorporate the same as if fully set forth herein.

16. In answering Paragraph 22 of Plaintiff's Amended Complaint, Defendants admit the allegations contained therein.

17. In answering Paragraphs 23 through 26 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

18. In answering Paragraph 27 of Plaintiff's Amended Complaint, these answering Defendants deny as to the claims of negligence and/or gross negligence of Defendants, but is without sufficient knowledge or information to form a belief as to the truth or falsity of the residual of said allegations contained therein, and therefore deny the same.

19. In answering Paragraph 28, Defendants repeat and reallege their answers to Paragraphs 1 through 27 and incorporate the same as if fully set forth herein.

20. In answering Paragraphs 29 and 30 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

21. In answering Paragraph 31, Defendants repeat and reallege their answers to Paragraphs 1 through 30 and incorporate the same as if fully set forth herein.

22. In answering Paragraphs 32 and 33 of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint fails to state a claim against these answering Defendants upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Amended Complaint fails to join a party necessary for just adjudication under NRCP 19.

THIRD AFFIRMATIVE DEFENSE

Plaintiff had notice of all the facts and acts of Defendants set forth in the Amended Complaint, and has thereby been guilty of laches as should in equity bar the Plaintiff from maintaining this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate Plaintiff's alleged injuries and damages, if any.

FIFTH AFFIRMATIVE DEFENSE

That, at the time and place alleged in Plaintiff's Amended Complaint, and for a period of time prior thereto, Plaintiff did not exercise ordinary care, caution or prudence for the protection of Plaintiff's own safety and the injuries and damages complained of by the Plaintiff in the Amended Complaint, if any, were directly and proximately caused or contributed to by the fault, failure to act, carelessness and negligence of the Plaintiff herself and, as such, is responsible for comparative fault in excess of fifty percent (50%), thereby exonerating any liability as against these Defendants. Should Plaintiff's comparative fault be assessed at less than fifty percent (50%), these Defendants are entitled to reduce Plaintiff's recovery accordingly.

SIXTH AFFIRMATIVE DEFENSE

At all times referenced in Plaintiff's Amended Complaint on file herein, and for a period of time prior thereto, Defendant JARED AWERBACH was operating a vehicle with due care and caution. All damages as allegedly sustained by Plaintiff in the Amended Complaint on file herein were caused by the negligence, carelessness or want of care among the known third parties.

SEVENTH AFFIRMATIVE DEFENSE

The damages and injuries sustained by Plaintiff, as alleged in the Amended Complaint herein, if any, were the result of an unavoidable accident.

EIGHTH AFFIRMATIVE DEFENSE

That an award of punitive damages would be unconstitutional, in that it would deny the answering Defendants their rights as guaranteed in the Due Process and Equal Protection Clauses of both the United States and Nevada Constitutions.

///

///

NINTH AFFIRMATIVE DEFENSE

That an award of punitive damages would be unconstitutional, in that it would deny the answering Defendants, in theory and application, their rights under the Eighth and Fourteenth Amendment protections of the United States and Nevada Constitutions.

TENTH AFFIRMATIVE DEFENSE

No award of punitive damages can be made against these answering Defendants pursuant to NRS 41.031, et seq.

ELEVENTH AFFIRMATIVE DEFENSE

That an award of punitive damages against the answering Defendants under NRS 42.010 would be unconstitutional, as such statute is a "vague sentencing provision."

TWELFTH AFFIRMATIVE DEFENSE

If punitive damages are recoverable in this case, which the answering Defendants specifically deny, such are criminal punishment in nature, and must be proven by at least clear and convincing evidence. Plaintiff has failed to allege any facts sufficient to satisfy Plaintiff's burden of proof *by convincing evidence* that Defendants engaged in any conduct that would support an award of punitive damages.

THIRTEENTH AFFIRMATIVE DEFENSE

If punitive damages are recoverable in this case which the answering Defendants specifically deny, such an award cannot be disproportionate to the actor's(s') alleged misconduct.

FOURTEENTH AFFIRMATIVE DEFENSE

No award of punitive damages can be awarded against these answering Defendants under the facts and circumstances alleged in Plaintiff's Complaint.

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LAST AFFIRMATIVE DEFENSE

Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendants' Answer, and therefore Defendants reserve the right to amend this answer to allege additional affirmative defenses if subsequent investigation warrants.

WHEREFORE, Defendants prays that the Plaintiff take nothing by reason of the Complaint on file herein, and that Defendants recover from Plaintiff a reasonable attorney's fee,

DATED: February 6, 2013

BRADY, VORWERCK, RYDER & CASPINO

By _____
ALEXANDRA B. McLEOD
Nevada Bar No. 8185
2795 East Desert Inn Road, Suite 200
Las Vegas, Nevada 89121
Attorneys for Defendants, Jared Awerbach and Andrea Awerbach

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of February, 2013, I forwarded a copy of the above and foregoing **DEFENDANTS ANSWER TO AMENDED COMPLAINT** as follows:

X by depositing in the United States mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope, pursuant to NRCP 5(b)(2)(B) and EDCR 7.26(a)(1); and/or

_____ by facsimile transmission pursuant to NRCP 5(b)(2)(D) and EDCR 7.26(a)(3); as indicated below; and/or

_____ by electronic transmission [via CM/ECF], pursuant to NRCP 5(b)(2)(D) and EDCR 7.26(a)(4); and/or

_____ by email as indicated below pursuant to NRCP 5(b)(2)(D) ;

TO:

Corey M. Eschweiler, Esq.
Adam D. Smith, Esq.
GLEN LERNER & ASSOCIATES
4795 South Durango Drive
Las Vegas, Nevada 89147
(702) 877-1500
(702) 933-7043 – Fax
Attorneys for Plaintiff

Susan Carbajal

Employee of
BRADY, VORWERCK, RYDER & CASPINO

EXHIBIT 6

EXHIBIT 6

Alexandra B. McLeod
Nevada Bar No. 8185
amcleod@bvrclaw.com
BRADY, VORWERCK, RYDER & CASPINO
2795 East Desert Inn Road, Suite 200
Las Vegas, Nevada 89121
Telephone: (702) 697-6500
Facsimile: (702) 697-6505

Attorneys for Defendants, Jared Awerbach and Andrea Awerbach

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA,

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.: XXVII

DEFENDANT ANDREA AWERBACH'S RESPONSES TO REQUEST FOR ADMISSIONS

COMES NOW, Defendant, ANDREA AWERBACH by and through her counsel of record, ALEXANDRA B. McLEOD, ESQ., of the law firm of BRADY, VORWERCK, RYDER & CASPINO, and hereby responds to Plaintiff's Request for Admissions.

PRELIMINARY STATEMENT

It should be noted that this Responding Party has not fully completed its investigation of the facts relating to this case, has not fully completed discovery in this action, and has not completed preparation for trial. All of the responses contained herein are based only upon such information and documents which are presently available to and specifically known to this Responding Party and discloses only those contentions which presently occur to such Responding Party. It is anticipated that further discovery, independent investigation, legal research and analysis will supply additional facts,

add meaning to known facts, as well as establish entirely new factual conclusions and legal contentions, all of which may lead to substantial additions to, changes in, and variations from the responses herein set forth. The following responses are without prejudice to Responding Party's right to produce evidence of any subsequently discovered fact or facts which this Responding Party may later recall or discover. Responding Party accordingly reserves its right to change any and all responses herein as investigation is conducted, additional facts are ascertained, analyses are made, legal research is concluded and contentions are made. The responses contained herein are made in a good faith effort to supply as much factual information as is presently known but should in no way be to the prejudice of this Responding Party in relation to further discovery, research or analysis. These responses are made solely for the purpose of this action.

RESPONSES TO REQUEST FOR ADMISSIONS

REQUEST NO. 1:

Admit that on January 2, 2011, a traffic accident occurred between an automobile owned by you, and an automobile driven by Plaintiff Emilia Garcia in Clark County, Nevada.

RESPONSE TO REQUEST NO. 1:

Admit

REQUEST NO. 2:

Admit JARED AWERBACH was operating your vehicle on January 2, 2011, with your permission.

RESPONSE TO REQUEST NO. 2:

Admit

REQUEST NO. 3:

Admit JARED AWERBACH's negligent operation of your vehicle was the proximate cause of the subject accident occurring between Plaintiff Emilia Garcia and Jared Awerbach on January 2, 2011.

RESPONSE TO REQUEST NO. 3:

Denied

REQUEST NO. 4:

Admit Plaintiff suffered injuries as a result of the crash.

RESPONSE TO REQUEST NO. 4:

Denied

REQUEST NO. 5:

Admit Plaintiff did not contribute to the crash.

RESPONSE TO REQUEST NO. 5:

Denied

REQUEST NO. 6:

Admit Plaintiff's medical treatment was reasonable and necessary and that the costs of Plaintiff's medical care was customary and in keeping with the standards of the community.

RESPONSE TO REQUEST NO. 6:

Denied

DATED: June 5, 2012

BRADY, VORWERCK, RYDER & CASPINO
A Law Corporation

By _____
ALEXANDRA B. McLEOD
Nevada Bar No. 8185
2795 East Desert Inn Road, Suite 200
Las Vegas, Nevada 89121

Attorneys for Defendants, Jared Awerbach and Andrea Awerbach

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of May, 2012, I forwarded a copy of the above and foregoing **DEFENDANT ANDREA AWERBACH'S RESPONSES TO REQUEST FOR ADMISSIONS** as follows:

X by depositing in the United States mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope, pursuant to NRCP 5(b)(2)(B) and EDCR 7.26(a)(1) [FRCP 5(b)(2)(C)]; and/or

____ by facsimile transmission pursuant to NRCP 5(b)(2)(D) and EDCR 7.26(a)(3) [FRCP 5(b)(2)(E)]; as indicated below; and/or

____ by electronic transmission [via CM/ECF], pursuant to NRCP 5(b)(2)(D) and EDCR 7.26(a)(4) [FRCP 5(b)(2)(E)]; and/or

____ by email as indicated below pursuant to NRCP 5(b)(2)(D) [FRCP 5(b)(2)(E)];

TO:

Adam D. Smith, Esq.
Glen J. Lerner & Associates
4795 South Durango Drive
Las Vegas, Nevada 89147
(702) 877-1500
(702) 933-7043 – Fax
Attorneys for Plaintiff

Susan R Sonderfer
Employee of
BRADY, VORWERCK, RYDER & CASPINO

EXHIBIT 7

EXHIBIT 7

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CLERK OF THE COURT

MOT
Corey M. Eschweiler, Esq.
Nevada Bar No. 6635
Adam D. Smith, Esq.
Nevada Bar No. 9690
Craig A. Henderson, Esq.
Nevada Bar No. 10077
GLEN J. LERNER & ASSOCIATES
4795 South Durango Drive
Las Vegas, Nevada 89147
Telephone: (702) 877-1500
Facsimile: (702) 933-7043
asmith@glenlerner.com
chenderson@glenlerner.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, individually, Plaintiff, v. JARED AWERBACH, individually; ANDREA AWERBACH, individually; DOES I - X, and ROE CORPORATIONS I - X, inclusive, Defendants.	CASE NO. A637772 DEPT. NO. XXVII **PLAINTIFF'S MOTION TO STRIKE DEFENDANT ANDREA AWERBACH'S ANSWER** Date of hearing: Time of hearing:

Plaintiff Emilia Garcia, pursuant to NRCP 37 and this Court's authority as set forth in *Young v. Johnny Ribiero Building, Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990), files this Motion to Strike Defendant Andrea Awerbach's Answer.

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This motion is based on the Declaration of Craig A. Henderson (Exhibit 1), the following memorandum of points and authorities, the papers and pleadings on file with this Court, and the oral argument of the parties.

GLEN J. LERNER & ASSOCIATES

By: /s/Craig A. Henderson
Corey M. Eschweiler, Esq.
Nevada Bar No. 6635
Adam D. Smith, Esq.
Nevada Bar No. 9690
Craig A. Henderson, Esq.
Nevada Bar No. 10077
4795 South Durango Drive
Las Vegas, NV 89147
(702) 877-1500
Attorneys for Plaintiff

NOTICE OF MOTION

Take notice that the foregoing Motion to Strike Defendant Andrea Awerbach's Answer will be heard on the **15** day of **JANUARY**, 2015 at **9: 30** a.m./p.m. in this Court, or as soon thereafter as counsel may be heard.

GLEN J. LERNER & ASSOCIATES

By: /s/Craig A. Henderson
Corey M. Eschweiler, Esq.
Nevada Bar No. 6635
Adam D. Smith, Esq.
Nevada Bar No. 9690
Craig A. Henderson, Esq.
Nevada Bar No. 10077
4795 South Durango Drive
Las Vegas, NV 89147
(702) 877-1500
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this personal injury action, Andrea knowingly and willfully concealed evidence that is dispositive of the central issue to her defense – whether Andrea gave Jared permission to drive her car. In particular, Andrea secretly redacted claims notes she produced from her insurance company – removing the one conversation Andrea had with the insurer about permissive use. This conversation is neither privileged nor confidential, and Andrea did not reveal she deleted it.

In the deleted note, Andrea admits Jared had used her vehicle before the accident, Andrea gave Jared the keys on the day of the accident, and Andrea usually left the keys on the mantle. After concealing the note, Andrea was deposed twice. Andrea initially claimed she never let Jared drive her car before the accident. When this was rebutted by other evidence, Andrea admitted Jared had driven her car, but denied giving him the keys and denied ever leaving the keys out in the open. In fact, Andrea testified at length about her many hiding spots for the keys and how she would never leave them out. When questioned about Jared claiming Andrea left the keys on the counter, Andrea used Jared's drug use as a shield, arguing he cannot be trusted.

After Andrea twice gave sworn testimony, Emilia was finally able to independently obtain additional documents from Andrea's insurer through a third-party subpoena. The insurer, for the first time, provided the missing note detailing Andrea's admissions made two weeks after the accident. Andrea's concealment of the note was fraudulent and must result in severe sanctions – particularly considering the note was revealed shortly before trial and after extensive discovery was completed.

Andrea cannot blame her counsel for concealing the note. Even if counsel responded to the discovery requests, Andrea, not her counsel, contradicted her earlier statements and failed to disclose those statements were made. Andrea's tampering with evidence and sworn testimony covering up that tampering must result in striking of her answer. At this point, Andrea cannot be allowed to contest permissive use when she concealed evidence central to that issue.

///

II. FACTS

A. Jared admits the purpose of his trip on January 2, 2011, was to sell a "substantial amount of marijuana."

This action arose on January 2, 2011, when Defendant Jared Awerbach, while driving an automobile owned by his mother, Defendant Andrea Awerbach, negligently caused a motor vehicle accident with a vehicle being driven by Plaintiff Emilia Garcia. In particular, on January 2, 2011, Jared received a phone call from the godmother of his child, Cherise Killian, who wanted "a substantial amount of marijuana." *See* Mar. 27, 2014, Jared Awerbach Trans., at 113:21-24, attached hereto as Ex. 1-A. Jared used his mother's car to drive to Cherise's apartment to sell her marijuana, *Id.*, at 113-115. Cherise lived in the Villa del Sol apartment complex on Rainbow Boulevard in Las Vegas. *Id.* Cherise has sworn under oath she "saw Jared smoking marijuana outside my apartment less than 20 minutes before the [January 2, 2011] accident." Ex. 1-B. After completing the marijuana sale and after smoking marijuana, Jared got back into his mother's car and proceeded to the driveway that exited the complex onto Rainbow Boulevard. *Id.* Jared intended to make a left turn from the driveway onto Rainbow. *Id.* As Jared was looking toward his left, he saw a city bus approaching in the right lane of the two southbound Rainbow travel lanes, and he saw Emilia's white car behind the bus. Ex. 1-A, at 114:12-115:12. After the bus passed in front of Jared, he initiated his left turn and crashed the front of his mother's car into the rear passenger quarter panel of Emilia's car. *Id.* Emilia's car spun 180 degrees. Ex. 1-C, at 24. Jared attempted to flee the scene of the accident but was unable to do so because his mother's car was rendered undriveable as a result of the accident. Ex. 1-A, at 114.

B. Jared admits he was in possession of marijuana at the time of the accident.

The police were dispatched to the scene of the accident, and Officer Figueroa of the Las Vegas Metropolitan Police Department generated a Traffic Accident Report detailing his observations and conclusions regarding the accident. Ex. 1-D. Officer Figueroa smelled a strong odor or marijuana on Jared. Ex. 1-E, at 39. Jared admits he had marijuana on him at the time of the accident, and that he told Officer Figueroa he had smoked marijuana before the accident. Ex. 1-A, at 127-128. Officer Figueroa testified Jared admitted smoking marijuana. Ex. 1-E, at 39. Jared was

administered several field sobriety tests at the accident scene and failed all of them. *Id.* According to Officer Figueroa, Jared's breath also smelled strongly of "marijuana" and his eyes were "bloodshot," "watery," and "glassy." *Id.*; Ex. 1-D.

Jared admits (i) he is a "longtime consumer of [marijuana]"; (ii) he drove his mother's car on January 2, 2011, to sell "a substantial amount of marijuana;" (iii) he was in possession of a substantial amount of marijuana when the accident occurred; (iii) he smelled of marijuana when Officer Figueroa was speaking with him after the accident; and (iv) he told the officer he was smoking marijuana prior to the accident. *See* Defendant Jared Awerbach's Motions in Limine Nos. 22-26, at 7:5-6 (conceding Jared is a "longtime consumer of cannabis"), on file with this Court. Indeed, Jared also admitted during his deposition that his mother was well aware of his marijuana use before the accident because she had caught him using marijuana on numerous occasions before the accident:

> Q: When you were expelled for possession of marijuana, did they hold a hearing or any type of proceeding before they expelled you?
>
> A. No, sir.
>
> Q. Did they tell your mom?
>
> A. Yes, sir.
>
> Q. So your mom knew that you had possession of marijuana at Green Valley High School?
>
> A. Yes, sir.
>
> Q. Did your mom know that you were smoking weed since you were twelve?
>
> A. Yes, sir.
>
> Q. How did she know that?
>
> A. From the multiple times that she caught me.

Ex. 1-A, at 18-20.

C. Jared admits Andrea gave him the keys to her car prior the accident.

Following the accident, Andrea's insurer, Liberty Mutual, opened a claim. On January 4, 2011, days after the accident, Jared gave a recorded statement to Andrea's insurer, admitting he obtained the keys to Andrea's vehicle from the counter in the home they shared. Specifically, Jared

said Andrea knew he used her car prior to the January 2, 2011, accident:

> TM: Do you normally drive the vehicle or have you driven the vehicle in the past.
>
> JA: Yeah, I have in the past.
>
> TM: Okay, and, um, how many times would you say you've driven the vehicle?
>
> JA: I can't tell you, Ma'am.
>
> ***
>
> TM: Okay, and when you've driven the vehicle in the past, did your mother know about it then also?
>
> JA: Uh, once or twice she knew about it when I was going to the store, but others times...

See Ex. 1-F, at 2 (emphasis added). Jared further admitted he obtained the keys by taking them off the counter where Andrea had left them:

> TM: And where were the keys?
>
> JA: They were on the counter.

Id. When Jared was asked why he was using Andrea's car on January 2, 2011, he said he needed to run an errand for his infant son:

> TM: And, I did forget to ask one more question. Um, why were you using the vehicle at the time?
>
> JA: Uh, I want to go see. I just had a child, so I was getting something for my son from her godmother.

Id., at 6. Jared further confirmed he lived with Andrea at the time of the accident:

> TM: So I'm showing that her address is the same apartment complex, do you have different apartments?
>
> JA: Yeah, we, we did, we did, yeah, we did live together....

Id. In fact, within weeks of the accident, Andrea's insurer concluded Jared had permission to drive Andrea's car on January 2, 2011. *See* Ex. 1-G, at 1.[1]

[1] Evidence of liability insurance "is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." It is, however, admissible "when it is relevant for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness." NRS 48.135. Here, it is relevant to resolving the permission issue.

D. Andrea initially admitted giving Jared permission to drive her car on January 2, 2011.

On March 25, 2011, Emilia initiated this lawsuit, suing Jared for negligence and Andrea for negligent entrustment.[2] *See generally*, Comp., on file with this Court. On January 23, 2012, Defendants answered Emilia's Complaint. Andrea admitted she "did entrust control of the vehicle to Jared Awerbach." *See* Comp., ¶ 23, on file with this Court (emphasis added); Defendants' Answer to Complaint, ¶ 2, on file with this Court.

E. Andrea admitted giving Jared permission to drive her car in response to Emilia's requests for admission.

On May 17, 2012, Emilia served Jared and Andrea with interrogatories, document requests, and requests for admission. *See* Ex. 1-H. One of Emilia's document requests to Andrea sought "**[t]he entire liability insurance or risk department claims files relating to the accident at issue in Plaintiff's complaint.**" *Id.*, at Request No. 7 (emphasis added).

On June 14, 2012, Defendants responded to Emilia's interrogatories and requests for production of documents, confirming Andrea is Jared's mother. *Id.* Andrea, however, did not produce a copy of Liberty Mutual's claims notes from the accident. Instead, Andrea objected by claiming the information was attorney work product and protected from disclosure by the attorney client privilege. Ex. 1-H, at Request No. 7.

F. Andrea changed her story and denied giving Jared permission to drive her car.

Emilia filed her Amended Complaint on January 14, 2013. Defendants answered Emilia's amended complaint on February 2, 2013. *See* Amend. Comp., on file with this Court; *see* Defendants' Answer to Amended Complaint, on file with this Court. In her Answer to Emilia's Amended Complaint, Andrea changed her original story and for the first time denied giving Jared permission to drive her car on January 2, 2011. *See* Amend. Comp., ¶ 23; *see* Answer to Amended Complaint, ¶ 17, on file with this Court.

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

G. Andrea feigned production of the complete claims file from her insurer.

On July 3, 2013, Emilia filed a Motion to Compel Andrea to produce the claims file from her January 2, 2011, claim with Liberty Mutual. *See* Plaintiff's Motion to Compel, on file with this Court. After Emilia filed her motion, Andrea agreed to produce the claims file and Emilia agreed to withdraw her motion to compel. *See* Notice of Withdrawal of Motion to Compel, on file with this Court. On July 22, 2013, Andrea produced what appeared to be the complete claims notes from her claim with Liberty Mutual. *See* Ex. 1-G.

H. Andrea, then, testified she did not remember how Jared obtained the keys to Andrea's car on January 2, 2011.

Emilia first deposed Andrea on September 12, 2013. Andrea testified that, as of January 2, 2011, she had personal knowledge Jared used illegal drugs, and had attended various counseling and treatment sessions with him.[3] Ex. 1-I, at 14-15. Andrea also testified she knew Jared did not have a driver's license on January 2, 2011, and to her knowledge, had never had a driver's license. *Id.*, at 22:17-23. At that time, Andrea claimed she had never given Jared permission to drive her car prior to the accident. Andrea further testified she knew Jared used her car prior to January 2, 2011:

> Q. Before – well, as of January 2, 2011, were you aware that he had previously driven your car without your permission?
>
> A. Yes.
>
> Q. Do you know on how many occasions?
>
> A. No.
>
> Q. Prior to January 2, 2011, had he ever asked for permission to use your car?
>
> A. No, I don't think so.

Id., at 17:18-18:9. When asked about how Jared obtained the keys to her car on January 2, 2011, Andrea was unable to provide an explanation:

> Q. How did he get the keys?
>
> A. I don't know.

[3] This evidence is relevant to proving Emilia's negligent entrustment claim against Andrea, and her negligence claim against Jared. Andrea's firsthand knowledge of Jared's illegal drug use makes it more likely (i) she breached her duty of care to Emilia by entrusting Jared with her vehicle, and (ii) Jared breached his duty of care to Emilia by driving with illegal levels of marijuana in his blood system.

Q. Where were the keys when he took the car?

A. I don't know, because I don't know when he took them.

Q. Do you know where you were when he took your car?

A. No.

Q. Would you have been home when he took your car?

A. Yeah, I'd have to be.

Id., at 21:4-13. Andrea further claimed she "constantly" hid her keys, but could not identify where she hid them on January 2, 2011, and that she "doubts" the keys were left on the counter:

Q: At the time, on January 2, 2011, was there a regular place where you kept your car keys in your house?

A. I think I was answering based on January 2. No. I constantly hide the keys.

Q. You didn't hide them that day, did you?

A. Yes.

Q. Now, Jared said the keys were left out on the counter. Is he not telling the truth?

A. I doubt they were left on the counter.

Q. You're not sure correct.

A. I'm sure. I never leave the keys out on the counter.

***

Q. Do you know where you hid the keys that day?

A. No.

Id., at 21:1-22:23. Andrea further admitted she spoke with her insurer:

Q: Have you ever given a statement to your insurance company about the accident?

A. Yes.

Q. When was that?

A. I'm sure days following the accident. I don't remember the dates.

Q. Do you know if they recorded that statement?

A. I don't know.

Q. You know, sometimes they tell you, at the beginning of the call, we're going to be recording this.

A. Uh-huh.

Q. Do you recall if that happened?

A. Assuming that it happened.

MR. SMITH: Can I have you check into that, because I don't think we received a recorded statement from her.

MS. McLEOD: I'll be happy to recheck. But I'll tell you, for purposes of the record, that we've produced all recorded statements that were provided in the claims file. But I have no problem double-checking for you.

Id., at 26:12-27:6. Despite this conversation, Andrea did not provide her statement to Emilia.[4]

I. Andrea frivolously seeks summary judgment on the issue of permissive use.

Instead of producing the concealed evidence, on November 8, 2013, Andrea filed a Motion for Summary Judgment claiming it was undisputed she did not give Jared permission to drive her car on January 2, 2011, and seeking judgment as a matter of law on Emilia's negligent entrustment claim and her claim for joint liability pursuant to NRS 41.440. Andrea's motion was based primarily upon Andrea's September 12, 2013, deposition testimony where Andrea testified, under oath, that she could not remember how Jared obtained her car keys on January 2, 2011, and that she "always" hid her keys from Jared. *See* Andrea Awerbach's Motion for Summary Judgment, on file with this Court. Jared opposed Andrea's motion, conceding he had used Andrea's car with permission prior to January 2, 2011, and that he obtained the keys to Andrea's car from the counter in the home they shared. *See* Defendant Jared Awerbach's Opposition to Andrea Awerbach's Motion for Summary Judgment, on file with this Court.

Emilia opposed Andrea's motion explaining the issue of implied permission was an issue of fact for a jury and that there is more than sufficient evidence in the record to support a finding of permission, whether express or implied. *See generally* Plaintiff's Opposition to Andrea Awerbach's Motion for Summary Judgment, on file with this Court. Days after Emilia and Jared opposed

[4] As detailed below, Andrea's statements furthered her ruse. In particular, Andrea produced a document showing she spoke to her insurer the day after the accident. She did not, however, produce the relevant note regarding a conversation she had two weeks after the accident.

Andrea's motion, Andrea withdrew the motion from the Court's consideration. *See* Defendant Andrea Awerbach's Withdrawal of Motion for Summary Judgment, on file with this Court.

J. Jared admitted driving Andrea's car with her permission on January 2, 2011.

On March 27, 2014, Jared was deposed. Jared testified that prior to January 2, 2011, he had used Andrea's car with her permission. Ex. 1-A, at 178-179. Jared also testified that on January 2, 2011, Andrea "left them [the keys] on the counter the day of the accident." *Id.*, at 180:5-7. In other words, Jared's version of events contradicts Andrea's September 12, 2013, deposition testimony.

K. Emilia subpoenaed Liberty Mutual's claims notes.

On October 9, 2014, Emilia served a subpoena duces tecum on Liberty Mutual seeking its internal documents regarding insurance claims Andrea had made, including prior claims where Jared was driving Andrea's vehicle. Liberty Mutual initially objected to the subpoena through counsel. Ultimately, Liberty Mutual agreed to produce a claims file from the accident.

L. Andrea continues to feign ignorance regarding how Jared obtained her car keys.

On October 24, 2014, Emilia took a second deposition of Andrea. Andrea conceded Jared had driven her car on several occasions prior to January 2, 2011. Ex. 1-J, at 141:10-25. When asked how Jared obtained the keys to drive her car on those prior occasions, Andrea claimed she does not know how Jared obtained the keys because she claims she hid the keys in "[a]ny place she could think of":

> Q: What were the hiding places that you used for your keys around the time of the January 2011 accident?
>
> A: Under the bed. In the -- in his section of the bathroom like way behind in the cabinet under the sink while I was in the shower. In the closet in different purses. In the closet underneath things. In a briefcase and then I would hide the briefcase under the bed. In dresser drawers. Inside things. Inside garbage cans. Inside garbage I thought he wouldn't go through. In -- while I was cooking, in various drawers in the kitchen. Sometimes underneath several cushions on the couch, like underneath the couch. Under the recliner, under the recliner, so I'd have to get up and he'd have to lift the couch to find it. Any place that I could think of.

Id., at 142:5-19; 158:23-159:14. Despite this, Andrea claimed she could not remember where she hid the keys on January 2, 2011, or if she had hidden them at all that day. *Id.*, at 158:23-159:21.

Further, when asked about Jared's testimony that he obtained the keys from the counter on January 2, 2011, Andrea continued to spin her web of deception:

> Q. You know Jared says that he took the keys off the counter; correct?
>
> A. I have read that.
>
> Q. Why would he lie about that?
>
> MR. MAZZEO: Objection, mischaracterizes --
>
> (Multiple parties speaking.)
>
> MR. SMITH: Well, wait a minute. Let me ask you the question first.
>
> BY MR. SMITH:
>
> Q. Do you think he's lying about that?
>
> A. I think he's mistaken. I think he may have seen them there earlier.

Id., at 161:9-20. Ultimately, Andrea conceded "there's a chance" that the "keys were on the counter when [Jared] took them" on January 2, 2011. *Id.*, at 162:10-13.

M. Andrea concealed her conversation with Liberty Mutual's adjustor.

On November 10, 2014, after Andrea's second deposition, Liberty Mutual disclosed a version of Liberty Mutual's claims notes that are much different from the version Andrea disclosed in July, 2013. In particular, the first page of the notes Liberty Mutual produced contained a note detailing a January 17, 2011, conversation between Liberty Mutual adjustor, Teresa Meraz, and Andrea at 4:44 p.m.:

> I called insd and was able to reach her. She states opac and his girlfriend were living w/ her. Opac has used her veh in the past when he was practicing to get his permit. Insd was home the day of the ax. She had let opac use her keys earlier that day to get something out of her car. **She usually keeps the car keys on the mantle.** Opac does not have his own set of car keys. She thought opac had returned the keys but he didn't. Opac and his girlfriend were at a friend's home in the same apt complex. His girlfriend came home but insd later got the call that opac was in accident and was arrested.

Ex. 1-K (emphasis added). Amazingly, this note appears to have been erased from the claims notes Andrea produced:

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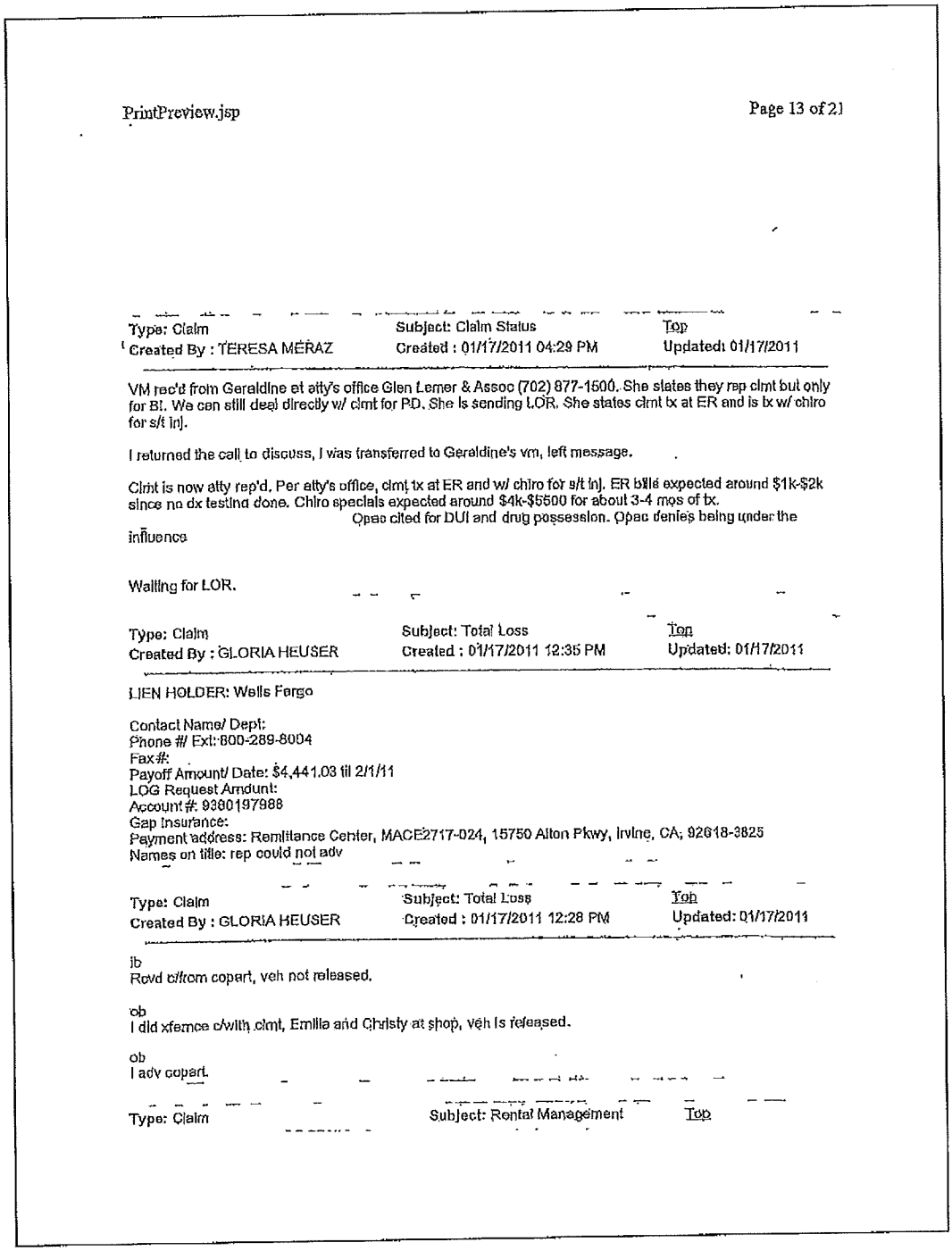
Andrea's version produced in July, 2013:



PrintPreview.jsp Page 13 of 21

Type: Claim | Subject: Claim Status | Top
Created By : TERESA MERAZ | Created : 01/17/2011 04:29 PM | Updated: 01/17/2011

VM rec'd from Geraldine at atty's office Glen Lemer & Assoc (702) 877-1500. She states they rep clmt but only for BI. We can still deal directly w/ clmt for PD. She is sending LOR. She states clmt tx at ER and is tx w/ chiro for s/t inj.

I returned the call to discuss, I was transferred to Geraldine's vm, left message.

Clmt is now atty rep'd. Per atty's office, clmt tx at ER and w/ chiro for s/t inj. ER bills expected around $1k-$2k since no dx testing done. Chiro specials expected around $4k-$5500 for about 3-4 mos of tx.
Opac cited for DUI and drug possession. Opac denies being under the influence

Waiting for LOR.

Type: Claim | Subject: Total Loss | Top
Created By : GLORIA HEUSER | Created : 01/17/2011 12:35 PM | Updated: 01/17/2011

LIEN HOLDER: Wells Fargo

Contact Name/ Dept:
Phone #/ Ext: 800-289-8004
Fax #:
Payoff Amount/ Date: $4,441.03 til 2/1/11
LOG Request Amount:
Account #: 9380197988
Gap Insurance:
Payment address: Remittance Center, MACE2717-024, 15750 Alton Pkwy, Irvine, CA, 92618-3825
Names on title: rep could not adv

Type: Claim | Subject: Total Loss | Top
Created By : GLORIA HEUSER | Created : 01/17/2011 12:28 PM | Updated: 01/17/2011

jb
Rcvd c/from copart, veh not released.

ob
I did xfernce c/with clmt, Emilia and Christy at shop, veh is released.

ob
I adv copart.

Type: Claim | Subject: Rental Management | Top

Ex. 1-G, at Exhibit K thereto. In other words, Andrea made it look like the last note was on January 17, 2011, at 4:29 p.m. Instead, Andrea whited-out the 4:44 p.m. note before producing the claims notes to Emilia.

Andrea also produced an earlier note to further her ruse. In particular, Andrea produced a January 3, 2011, note showing she called her insurer the day after the accident. Then, when Andrea claimed during her deposition that she spoke with her insurer "days following the accident," it would appear Andrea produced the relevant claims notes. All along, however, Andrea was concealing the January 17, 2011, note. Other notes also appear whited-out, and Defendants have not produced complete copies. In other words, while Defendants have repeatedly modified their story regarding permissive use, Defendants have been actively concealing relevant evidence regarding key issues. This, despite Emilia's requests for the information. Moreover, Emilia has deposed Andrea twice regarding this issue without complete information. Both times, Andrea's story directly contradicted the evidence she concealed.

III. ARGUMENT

A. The Court is well within its discretion to strike Andrea's pleadings.

Under NRCP 37(c)(1):

> A party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

Under NRCP 37(b)(2)(A), (B), and (C), the Court may make:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

In addition, the Nevada Supreme Court has made clear the district courts have "inherent equitable powers to dismiss actions or enter default judgments for . . . abusive litigation practices" and

"[l]itigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute." *Young v. Johnny Ribiero Building, Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (deletion in original). Other courts agree:

> [d]ismissal is an available sanction when a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings because courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.

Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006) (internal quotations omitted). In *Young*, the trial court found:

> that appellant Bill Young (Young) willfully fabricated evidence during discovery. Based on this finding, the court sanctioned Young by dismissing his entire complaint, ordering Young to pay certain of the fees and costs of respondent Johnny Ribeiro Building, Inc. (JRBI), and adopting the accounting proposed by JRBI as the final accounting of Young's and JRBI's interests in the parties' partnership.

Young, 106 Nev. at 90, 787 P.2d at 778. The Nevada Supreme Court affirmed the sanctions. *Id.* Indeed, the Nevada Supreme Court has routinely upheld district court orders striking pleadings and entering terminating sanctions for discovery abuses. *See, e.g.*, *Foster*, 126 Nev. Adv. Op. No. 6, 227 P.3d 1042 (Feb. 25, 2010); *Bahena*, 126 Nev. Adv. Op. No. 26, 235 P.3d at 594-96; *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998); *Temora Trading Co. Ltd. v. Perry*, 98 Nev. 229, 645 P.2d 436 (1982); *Kelly Broadcasting Co., Inc. v. Sovereign Broadcast, Inc.*, 96 Nev. 188, 606 P.2d 1089 (1980) *Havas v. Bank of Nevada*, 96 Nev. 567, 613 P.2d 706 (1980).

Nevada is in line with other jurisdictions. For example, in *Berglund v. Boeing*, the plaintiff manipulated emails in order to support her whistleblower claim. The district court dismissed the claim on that basis:

> Boeing charges Berglund altered email messages and lied about doing so while under oath at deposition. During discovery, Berglund produced hundreds of pages of email messages to Boeing she claimed were the same email messages provided to the government during its false claims investigation. Among these emails are Berglund's exchanges with co-workers in late 2001 and early 2002, immediately before Berglund filed this case in February 2002, in which they discuss at length Boeing's compliance with internal manufacturing specification BAC 5008. Boeing represents that it compared Berglund's email messages to those produced by Boeing employees and found certain key emails key [sic] appeared repeatedly but differed in content. The record proves Boeing's charge.

Bergland v. Boeing Co., 835 F. Supp. 2d 1020, 1045 (D. Or. 2011). In *Ashton v. Knight*, the Defendants removed key pieces of evidence from an automobile crash scene in an attempt to conceal their involvement in the crash and then, as here, sought summary judgment based on the "missing evidence" in an attempt to escape liability. The court struck the defendants' pleadings and their defenses to liability, explaining:

> The Defendants' attempts to conceal their involvement in the accident are highly relevant both to liability and potential damages. Indeed, the Defendants are well aware of this truth. Having failed in their attempts on summary judgment to argue that there was no evidence that Muthee struck Ashton, they attempted to stipulate to the very instruction the Court is now considering as a sanction. The stipulation was never formally agreed to by the Plaintiff because the Defendants insisted that the stipulation foreclosed the admission of evidence of their bad faith conduct at trial, obviously aware of its potential prejudicial effect. Obviously, a more severe sanction than an instruction similar to that already posed by the Defendants is appropriate.
>
> Key to crafting the most appropriate remedy in this case is the requirement that the sanction serve as a deterent to spoliation. A deemed admission or a less severe sanction such as attorneys fees caused by their conduct might conceivably encourage Muthee, Knight, and similar defendants to conceal and destroy evidence against them in the future. Why not, if it aids them in avoiding liability and carries minimal risk by way of consequences to the enterprise? It cannot be overlooked that here, if not for the displaced fairing left at the accident scene, it is unlikely that Muthee or Knight would have been tied to the accident scene. Defendants in similar accident situations must be on notice that fleeing the scene and destroying evidence of their involvement will carry a stiff penalty, a penalty so harsh that it stops this type of conduct in its tracks. Consideration of this requirement weighs heavily in favor of a harsher sanction.

Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 804-05 (N.D. Tex. 2011). In other words, there is substantial precedent supporting striking a party's answer and entering a finding of liability for willful concealment of relevant evidence.

B. The Nevada Supreme Court's factors support striking Andrea's pleadings.

The Nevada Supreme Court has explained that case terminating sanctions must be supported with an analysis of several factors, including:

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

Young, 106 Nev. at 93, 787 P.2d at 780. The Court has since clarified that dismissal of an action as a discovery sanction need not be preceded by other less severe sanctions. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. Adv. Op. No. 26, 235 P.3d 592, 598 (June 1, 2010), *citing Young v. Johnny Ribiero Building, Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Further, the District Court's imposition of discovery sanctions, including case terminating sanctions, is reviewed for abuse of discretion, and "[e]ven if [the Nevada Supreme Court] would not have imposed such sanctions in the first instance, [it] will not substitute [its] judgment for that of the District Court." *Id.*, 106 Nev. at 92, 787 P.2d at 779. This case is no different.

C. Andrea has willfully impeded discovery.

Under *Young*, the first factor to consider is the degree of willfulness of the offending party. *Young*, 106 Nev. at 93, 787 P.2d at 780. Here, the record is clear Andrea willfully withheld critical information that is highly relevant to Emilia's claims and highly unfavorable to Defendants' defenses. Most importantly, Andrea produced claims notes that appeared complete. This, while knowing she intentionally deleted the most relevant note containing her admissions of liability. Andrea secretly redacted relevant factual information regarding how Jared obtained the keys to Andrea's car and confirming that Andrea, at a minimum, gave Jared implied permission to drive Andrea's car on January 2, 2011, by giving Jared the keys to her car that day. Andrea also failed to disclose she had previously said she usually left the keys on the mantle. Instead, Andrea testified at length during her depositions about allegedly hiding the keys at all times.

In fact, not only did Andrea hide this information from Emilia, she has amended her version of events, first admitting Jared had permission, then denying he had permission and claiming under oath she does not know how he obtained the keys to her car. This, while knowing the entire time she gave Jared the keys shortly before the crash and routinely made them available to him by leaving them on the mantle. Andrea's conduct also forced Emilia to expend significant time and money to conduct discovery regarding permissive use, including two depositions of Andrea and a lengthy deposition of Jared to investigate permissive use. This, while knowing the entire time Andrea was suppressing evidence that contradicted her sworn testimony and her answer to Emilia's amended complaint. Andrea willfully impeded discovery by challenging a critical issue to the case,

then withholding key information that effectively resolves the issue in Emilia's favor. This Court is well within its discretion under NRCP 37 and the court's inherent powers to punish abusive litigation practices to strike Andera's answer, enter a default on liability, and allow Emilia to prove her damages.

D. Emilia would be prejudiced by a lesser sanction.

Under *Young*, the court must next consider the extent to which Emilia would be prejudiced by a lesser sanction. *Young*, 106 Nev. at 93, 787 P.2d at 780. "A [party] suffers prejudice if the [offending party's] actions impair the [party's] ability to go to trial or threaten to interfere with the rightful decision of the case." *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir. 2006), cited by *Foster*, 126 Nev. Adv. Op. No. 6, 227 P.3d at 1049. "In order to satisfy the prejudice requirement, the party seeking sanctions must demonstrate that the missing or altered evidence would have been relevant to her case." *Ashton*, 772 F. Supp. 2d at 801. "[L]ost or destroyed evidence is 'relevant' if a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it." *Id.* "Prejudice to the non-culpable party can range from an utter inability to prove claims or defenses to minimal effects on the presentation of proof. Generally, the prejudice element is satisfied where a party's ability to present its case or to defend is compromised." *Id.* This factor is particularly applicable here.

Emilia seeks to hold Andrea liable for Jared's conduct under NRS 41.440, providing that any liability imposed upon a defendant arising out of his or her driving a vehicle with the express or implied permission of the vehicle's owner is imputed to the vehicle's owner if the owner is a family member of the defendant. "The existence of the requisite permission...is to be determined by the trier of fact based on all the circumstances and inferences reasonably to be drawn therefrom." *Taylor v. Roseville Toyota, Inc.*, 138 Cal. App. 4th 994, 1004 (2006) (deletion in original, emphasis added). "Where the issue of implied permissive use is involved, the general relationship existing between the owner and the operator, is of paramount importance." *Id.*, at 1002. In other words, facts pertaining to Jared's prior use of Andrea's car and Andrea's pattern of making the keys easily available to Jared by leaving them on the mantle is critical to a jury's determination of permissive use.

In refusing to overturn a jury's determination of permissive use in *Casey v. Fortune*, the appellate court explained:

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

Casey v. Fortune, 179 P.2d 99, 100 (Cal. 1947) (emphasis added).

Andrea's decision to withhold the January 17, 2011, claims note detailing the conversation between Andrea and Ms. Meraz threatens to interfere with the rightful decision of the case. This, because evidence showing Andrea routinely made the keys available to Jared prior to January 2, 2011, and, in fact, gave Jared the keys on January 2, 2011, is critical to a jury's determination of permissive use. This is precisely why Defendants decision to withhold the January 17, 2011, note is so egregious. If Defendants had disclosed this note when they were required to, it would have allowed Emilia the opportunity to impeach Andrea during her deposition, and depose Liberty Mutual and its adjustor regarding the conversations with Andrea. Proper disclosure would also have saved Emilia a significant amount of time and expense deposing Andrea and Jared on the issue of permissive use. In addition, if Andrea had disclosed the complete claims note, Andrea would never have filed her motion for summary judgment, and Emilia would not have had to spend significant time and expense opposing the motion. Imposing any sanctions other than striking Andrea's answer effectively condones Defendants' abusive litigation practices and rewards their underhanded conduct. *Ashton*, 772 F. Supp. 2d at 804-05.

In the event the Court determines alternative sanctions are appropriate, Emilia requests that the court enter conclusive findings that Jared had permission to drive Andrea's car on January 2, 2011, relieving Emilia of the burden of having to prove that fact during trial.

E. The severity of, and the prejudice caused by, Defendants' willful discovery abuse, far outweighs the severity of striking Andrea's answer.

The Court must next consider the severity of the dismissal sanction relative to the severity of the discovery abuse. *Young*, 106 Nev. at 93, 787 P.2d at 780. Allowing Defendants to thwart

Emilia's attempts to prove the required elements of her claims wholly upends the discovery process and places Emilia at a severe disadvantage in this case. "[T]he purpose of discovery is to aid a party in the preparation of its case." *Pac. Fisheries, Inc. v. U.S.*, 484 F.3d 1103, 1111 (9th Cir. 2007). An additional purpose of discovery "is to reveal what evidence the opposing party has, thereby helping determine which facts are undisputed...and which facts must be resolved at trial." *In re Phenylpropanolamine (PPA) Products*, 460 F.3d at1239.

Here, Emilia has suffered severe prejudice as a result of Defendants' discovery abuses. Not only did Defendants refuse to properly respond to Emilia's written request for the entire claims file, Defendants produced the claims file and actively withheld unprivileged, discoverable information in the claims notes that is favorable to Emilia. Defendants' active concealment of the January 17, 2011, note caused significant delay by forcing Emilia to depose Jared and Andrea on this issue to determine facts that already existed but that were hidden from Emilia. In short, the prejudice inflicted on Emilia as a result of Defendants' abusive litigation tactics far outweighs any prejudice Defendants will suffer if Andrea's Answer is stricken as a result of Defendants' intentional conduct.

F. Less severe sanctions would likewise result in a finding of Andrea's joint liability anyway.

The Court must also consider "the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party." *Young*, 106 Nev. at 93, 787 P.2d at 780. Less severe sanctions would be unfair to Emilia. Emilia specifically requested Liberty Mutual's claims notes in order to obtain evidence regarding permissive use. If the Court enters less severe sanctions by making a finding that Jared did, in fact, have permission to drive Andrea's car on January 2, 2011, the outcome is the same, as Andrea will be deemed liable for Jared's conduct under the joint liability statute. In reality, less severe sanctions would be patently unfair to Emilia by forcing her to incur additional attorneys' fees in order to achieve the same end as striking Andrea's answer now. *Ashton*, 772 F. Supp. 2d at 804-05 ("A deemed admission or a less severe sanction such as attorneys fees caused by their conduct might conceivably encourage...similar defendants to conceal and destroy evidence against them in the future").

G. By willfully obstructing discovery, Andrea has effectively waived her right to a trial on the merits.

The court must next consider the policy of favoring adjudication a case on its merits. *Young*, 106 Nev. at 93, 787 P.2d at 780. Although the Nevada Supreme Court has recognized that public policy favors resolution of a case on its merits, it has also recognized that policy is not advanced by permitting a party to flaunt its discovery obligations to the detriment of opposing parties. *Foster*, 126 Nev. Adv. Op. No. 6, 227 P.3d at 1049. The policy of resolving an action on its merits presumes that both sides to an action will have equal opportunity to obtain the information necessary to advance their position. When a party fails to cooperate in the discovery process, the party itself frustrates this policy because it prevents the opposing party from being able to properly determine what facts remain disputed for trial. As the Ninth Circuit stated:

> a case that is stalled or unreasonably delayed by a party's failure to comply with deadlines and discovery obligations cannot move forward toward resolution on the merits. Thus, we have also recognized that this factor 'lends little support' to a party whose responsibility it is to move a case toward disposition on the merits but whose conduct impedes progress in that direction.

See In re Phenylpropanolamine (PPA) Products, 460 F.3d at 1228.

In this action, Defendants' willful concealment of the January 17, 2011, claims note, and other information in the claims file, proves the lack of merit in Andrea's defense. That is, Andrea, at a minimum, gave Jared implied permission to drive her car by making the car keys readily available to him and giving him the keys on January 2, 2011. Otherwise, Andrea would have had no motivation to conceal the January 27, 2011, claims note. Andrea cannot complain about not having a liability trial on the merits when Andrea transparently attempted to thwart Emilia's right to a trial on the merits by concealing the proverbial smoking gun. By refusing to cooperate in the discovery process, Andrea has waived her right to trial on the merits and this factor "lends little support" to preserving that right. *Id.*

H. Defendants themselves have chosen to willfully impede discovery.

The court must also consider "whether sanctions unfairly operate to penalize a party for the misconduct of his attorney." *Young*, 106 Nev. at 93, 787 P.2d at 780. Although the attorney-client privilege prevents Emilia from inquiring into whether Andrea's discovery abuses are attributable to

Andrea, or to her counsel, Andrea's deposition testimony indicates Andrea is responsible for her own conduct. That is, Andrea claimed during her deposition that she did not give Jared permission to drive her car and that she does not know how he obtained her car keys. This was clearly an orchestrated ruse as Andrea was fully aware she gave Jared the keys because she told her insurer that 15 days after the accident. Andrea also testified at length about routinely hiding the keys from Jared. This, even though she told her insurer she usually kept the keys on the mantle. Again, Andrea's sworn testimony contradicted the statement she gave her insurer 15 days after the accident. At a minimum, if Emilia had the January 17, 2011, claims note during either of Andrea's two depositions, the note would have allowed Emilia to impeach Andrea using her prior statements. Jared, in contrast, readily concedes he had permission and that he used Andrea's car on several occasions prior to the date of the accident. From this, it is obvious that striking Defendants' answer would not punish Andrea for the conduct of her counsel, but instead punish Andrea for abusing the discovery process and her refusal to cooperate in the litigation process.

I. Some evidence has been irreparably lost.

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

Without knowing what other information contained in the claims notes is being withheld, it is difficult for Emilia to know whether any evidence has been irreparably lost. Indeed, Emilia still does not know what other information has been redacted or omitted from the claims notes considering there are a number of blank spaces in the claims notes. Regardless, Andrea's depositions would have been significantly more effective if Emilia had known about the January 17, 2011, note as Emilia could have asked Andrea about the note during either of her depositions. Instead, withholding the information effectively bought Andrea a significant amount of time, allowing her to fabricate a different version of events and, then, claim ignorance regarding the true

facts. Now, years later, memories fade, and evidence is lost. Indeed, Emilia only recently noticed Ms. Meraz's deposition because prior to receiving the complete claims notes, Emilia was unaware Ms. Meraz's testimony was critical to permissive use. Evidence has been lost as Ms. Meraz's memory has faded in the years since the accident and in the years since Andrea feigned production of the complete claims notes nearly a year and a half earlier.

J. Terminating sanctions are necessary to deter other parties from engaging in similar conduct.

Finally, the Court must consider the "need to deter both parties and future litigants from similar abuses." *Young*, 106 Nev. at 93, 787 P.2d at 780. As the United States Supreme Court has acknowledged, "[u]nfortunately, the cost of litigation in this country -- furthered by discovery procedures susceptible to gross abuse -- has reached the point where many persons and entities simply cannot afford to litigate even the most meritorious claim or defense." *Delta Air Lines v. August*, 450 U.S. 346, 363 n.1 (1981) (Powell, J. concurring). Striking Andrea's answer would deter Andrea and other parties from conducting themselves in the same manner in other litigation by willfully concealing critical evidence. *Foster*, 126 Nev. Adv. Op. No. 6, 227 P.3d at 1049 ("In light of appellants' repeated and continued abuses...the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders"). Emilia has already expended tens of thousands of dollars litigating this case, all to have her efforts impeded and frustrated by Defendants' conduct over a nearly two year period. Imposing severe sanctions under these circumstances would likewise serve as a deterrent by showing that this Court will not tolerate willful and intentional discovery abuse, including knowingly and purposefully concealing evidence critical to a fair resolution of this case on its merits.

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IV. CONCLUSION

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

GLEN J. LERNER & ASSOCIATES

By: /s/ Craig A. Henderson
Corey M. Eschweiler
Nevada Bar No. 6635
Adam D. Smith, Esq.
Nevada Bar No. 9690
Craig A. Henderson, Esq.
Nevada Bar No. 10077
4795 South Durango Drive
Las Vegas, NV 89147
(702) 877-1500
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of GLEN LERNER INJURY ATTORNEYS, and on the 2nd day of December, 2014, an electronic copy of **PLAINTIFF'S MOTION TO STRIKE DEFENDANT ANDREA AWERBACH'S ANSWER** was served on opposing counsel via the Court's electronic service system, WIZNET, to the following counsel of record:

Peter A. Mazzeo, Esq.
Baron & Pruitt, LLP
3890 W. Ann Road
N. Las Vegas, NV 89031
Attorney for Defendant Andrea Awerbach

Roger Strassburg, Esq.
Mitchell J. Resnick, Esq.
RESNICK & LOUIS, P.C.
6600 W. Charleston, Suite 117A
Las Vegas, NV 89146
Attorney for Defendant Jared Awerbach

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

EXHIBIT 8

EXHIBIT 8

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CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * * *

EMILIA GARCIA,

Plaintiff,

v.

ANDREA AWERBACH and JARED AWERBACH

Defendants.

CASE NO: A-11-637772

DEPARTMENT 27

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

These matters having come on for hearing before Judge Allf on the 15th day of January, 2015; Adam Smith appearing on behalf of Plaintiff Emilia Garcia, (hereinafter "Plaintiff" OR "Emilia"); Peter Mazzeo, Esq., and Danielle Kolkoski, Esq. appearing for and on behalf of Defendant Andrea Awerbach (hereinafter "Andrea") and Roger Strassberg, Esq. and Lily Richardson, Esq. appearing for and on behalf of Defendant Jared Awerbach (hereinafter "Jared") and the Court having heard arguments of counsel, and being fully advised in the premises:

COURT FINDS after review the Court ruled from the bench on some of the matters before the Court. The Court granted the Plaintiff's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3) and denied Defendant Jared's Motion for Partial Summary Judgment on Claims for Punitive Damages. The Court granted Defendant Andrea's Motion to Continue Trial, as well as Defendant Jared's Joinder, and set the case on the trial stack

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

COURT FURTHER FINDS after review the Court took Plaintiff's 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 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.

COURT FURTHER FINDS after review that Plaintiff filed a Motion for Order to Show Cause why Defendant Jared Awerbach Should Not be Held in Contempt for Violating the Court's Protective Order. Plaintiff seeks a recovery of attorneys' fees relating to Defendant Jared's violation of the Discovery Commissioner's Report and Recommendations (DCR&R) of August 26, 2014 that limited Defendant Jared's subpoenas to spinal injuries claimed from this accident. **COURT FURTHER FINDS** after review that Defendant Jared did not notify the recipients of the subpoenas of the limitations in the DCR&R and received information outside of the limited scope. Defendant Jared produced the protected documents in a NRCP 16.1 supplement on November 3, 2014. **COURT FURTHER FINDS** after review that Defendant Jared

should be held in contempt for not complying with the August 26, 2014 DCR&R and Plaintiff is entitled to attorneys' fees in the amount of $5,000.

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

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

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

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

Dated: February 24, 2015

Nancy L Alff

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

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

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

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

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

K Lawrence

Karen Lawrence
Judicial Executive Assistant

EXHIBIT 9

EXHIBIT 9

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CLERK OF THE COURT

MOT
PETER MAZZEO, ESQ.
Nevada Bar No. 9387
MAZZEO LAW, LLC
528 S. Casino Center Blvd. Suite 305
Las Vegas, Nevada 89101
P: 702.589.9898
F: 702.589.9829
pmazzeo@mazzeolawfirm.com
Attorney for Defendant Andrea Awerbach

DISTRICT COURT

CLARK COUNTY, NEVADA

EMILIA GARCIA, individually,

Plaintiff,

vs.

ANDREA AWERBACH, individoally; JARED AWERBACH, individually; DOES I – X, and ROE CORPORATIONS, I – X, inclusive,

Defendants.

Case No: A-11-637772-C

Dept No: XXVII

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

Oral Argument Requested

Date of Hearing: 04/15/15

Time of Hearing: 9:00 AM

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

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

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

DATED this 13th day of March 2015.

MAZZEO LAW, LLC

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

NOTICE OF MOTION

TO: All interested parties; and

TO: Their respective counsel of record:

YOU WILL PLEASE TAKE NOTICE that Defendant will bring the foregoing **DEFENDANT ANDREA AWERBACH'S MOTION FOR RELIEF FROM FINAL COURT ORDER** on for hearing before the Honorable Judge Nancy Allf in Department XXVII on the 15 day of April, 2015 at the hour of 9:00AM .m. or as soon thereafter as counsel may be heard.

DATED this 13th day of March 2015.

MAZZEO LAW, LLC

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

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT

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

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

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

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

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

II. LEGAL ARGUMENT

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

NRCP Rule 60 provides a party may seek relief from an order or judgment "upon such terms as are just" and may relieve a party from a final judgment, order or proceeding for mistake, inadvertence, surprise or excusable neglect. EDCR 2.24 provides a party seeking reconsideration of a ruling of the court, must file a motion for such relief within 10 days after service of written notice of order or judgment. Since the notice of entry of the order in question was entered on February 27, 2015, this motion is timely filed.

Where a motion for an Order compelling disclosure is granted, then NRCP Rule 37(a)(4)(A) permits the court to "require the party … whose conduct necessitated the motion … to pay the moving party **reasonable expenses including attorney's fees**... unless the court finds…" the movant did not "first mak[e] a good faith effort to obtain the disclosure…" Period. No other sanction is available at this stage. (Emphasis added).

Rule 37(b) provides that only when "a party **fails to obey an Order** to provide or permit discovery, … or if a party fails to obey an order entered under Rules 16, 16.1, and 16.2 the court may make such orders in regard to the failure as are just" including: (A) **an [o]rder that the matters regarding which the order was made or any other designated facts shall be taken as established** for the purposes of the action in accordance with the claim of the party obtaining the order; (B) an [o]rder refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; (C) an [o]rder striking out pleadings or parts thereof, …" (Emphasis added).

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

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

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

III. CONCLUSION

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

DATED this 13th day of March 2015.

MAZZEO LAW, LLC

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of March 2015, I served the foregoing **DEFENDANT ANDREA AWERBACH'S MOTION FOR RELIEF FROM FINAL COURT ORDER** as follows:

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

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

☒ BY ELECTRONIC SERVICE: by electronically filing and serving the document(s) listed above with the Eighth Judicial District Court's WizNet system

COREY M. ESCHWEILER, ESQ.
ADAM SMITH, ESQ.
Glen Lerner & Associates
4795 S. Durango Dr.
Las Vegas, Nevada 89147
Facsimile: (702) 877-0110
Attorney for Plaintiff Emilia Garcia

ROGER STRASSBURG, ESQ.
LILY COMPTON, ESQ.
Resnick & Louis, P.C.
6600 W. Charleston Blvd., #117A
Las Vegas, NV 89146
Facsimile: (702) 997-3800
Attorney for Defendant Jared Awerbach

An Employee of MAZZEO LAW, LLC

EXHIBIT A

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * * *

EMILIA GARCIA,

Plaintiff,

v.

ANDREA AWERBACH and JARED AWERBACH

Defendants.

CASE NO: A-11-637772

DEPARTMENT 27

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

These matters having come on for hearing before Judge Allf on the 15th day of January, 2015; Adam Smith appearing on behalf of Plaintiff Emilia Garcia, (hereinafter "Plaintiff" OR "Emilia"); Peter Mazzeo, Esq., and Danielle Kolkoski, Esq. appearing for and on behalf of Defendant Andrea Awerbach (hereinafter "Andrea") and Roger Strassberg, Esq. and Lily Richardson, Esq. appearing for and on behalf of Defendant Jared Awerbach (hereinafter "Jared") and the Court having heard arguments of counsel, and being fully advised in the premises:

COURT FINDS after review the Court ruled from the bench on some of the matters before the Court. The Court granted the Plaintiff's Motion for Partial Summary Judgment that Defendant Jared Awerbach was Per Se Impaired Pursuant to NRS 484C.110(3) and denied Defendant Jared's Motion for Partial Summary Judgment on Claims for Punitive Damages. The Court granted Defendant Andrea's Motion to Continue Trial, as well as Defendant Jared's Joinder, and set the case on the trial stack

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

COURT FURTHER FINDS after review the Court took Plaintiff's 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 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.

COURT FURTHER FINDS after review that Plaintiff filed a Motion for Order to Show Cause why Defendant Jared Awerbach Should Not be Held in Contempt for Violating the Court's Protective Order. Plaintiff seeks a recovery of attorneys' fees relating to Defendant Jared's violation of the Discovery Commissioner's Report and Recommendations (DCR&R) of August 26, 2014 that limited Defendant Jared's subpoenas to spinal injuries claimed from this accident. **COURT FURTHER FINDS** after review that Defendant Jared did not notify the recipients of the subpoenas of the limitations in the DCR&R and received information outside of the limited scope. Defendant Jared produced the protected documents in a NRCP 16.1 supplement on November 3, 2014. **COURT FURTHER FINDS** after review that Defendant Jared

should be held in contempt for not complying with the August 26, 2014 DCR&R and Plaintiff is entitled to attorneys' fees in the amount of $3,000.

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

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

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

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

Dated: February 24, 2015

Nancy L Alf

NANCY ALLP
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

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

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

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

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

Karen Lawrence
Judicial Executive Assistant

EXHIBIT 10

EXHIBIT 10

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ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * * *

EMILIA GARCIA,

Plaintiff,

v.

ANDREA AWERBACH and JARED AWERBACH

Defendants.

CASE NO: A-11-637772

DEPARTMENT 27

DECISION AND ORDER DENYING DEFENDANT ANDREA AWERBACH'S MOTION FOR RELIEF FROM FINAL COURT ORDER

This matter having come on for hearing before Judge Allf on the 15th day of April, 2015; Adam Smith appearing on behalf of Plaintiff Emilia Garcia, (hereinafter "Plaintiff" OR "Emilia") and Peter Mazzeo, Esq. appearing for and on behalf of Defendant Andrea Awerbach (hereinafter "Andrea"), and the Court having heard argument of counsel, and being fully advised in the premises:

COURT FINDS after review that in its February 25, 2015 Decision and Order, the Court denied Plaintiff's Motion to Strike Defendant Andrea's Answer. However the Court did enter a lesser sanction under NRCP 37(c), finding there was permissive use of Defendant Andrea's vehicle because "the claims note was concealed improperly, was relevant, and was willfully withheld by Defendant Andrea."

COURT FURTHER FINDS after review Defendant Andrea filed a Motion for Relief from Final Court Order on March 13, 2015 under NRCP 60(b) and EDCR 2.24. Under NRCP 60(b), a moving party can be relieved from an order for "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due

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

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

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

COURT FURTHER FINDS after review the Nevada Supreme Court has addressed the court's ability to issue sanctions.

> [C]ourts have 'inherent equitable powers to dismiss actions or enter default judgments for ... abusive litigation practices.' Litigants and

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

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

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

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

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

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 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.

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

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

Dated: April 22, 2015.

Nancy Allf

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

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

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Karen Lawrence
Judicial Executive Assistant

EXHIBIT 11

EXHIBIT 11

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

EMILIA GARCIA, PLAINTIFF(S) VS. JARED AWERBACH, DEFENDANT(S)	CASE NO: A-11-637772-C DEPARTMENT 12

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Michelle Leavitt.

☒ This reassignment is due to: Attorney/Judge Conflict

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below:

Status Check; Status Check, on August 20, 2015; September 09, 2015, at 9:30 AM; 9:00 AM.

Motion-Andrea Awerbach's Motion to Incorporate by Reference To Select Motions in Limine Filed by Defendant Jared Awerbach-on September 14, 2015 at 8:30 AM

Motion in Limine-Defendant Andrea Awerbach's Motion In Limine To Exclude Reference and Evidence of Jared's Marijuana Sale and Use-on September 14, 2015m at 8:30 AM

Motion for Summary Judgment-Defendant Andrea Awerbach's Motion for Summary Judgment Regarding Punitive Damages on OST on - September 14, 2015m at 8:30 AM

Jury Trial on September 21, 2015 at 9:30 AM

Pretrial/Calendar Call on September 17, 2015 at 10:30 AM

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/Laura Reveles
Laura Reveles,
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this: 27th day of August, 2015

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-11-637772-C.

Adam D. Smith*
Gary W. Call*
Peter Mazzeo*
Andrew Green*

/s/Laura Reveles
Laura Reveles,
Deputy Clerk of the Court

No. 71348

IN THE SUPREME COURT OF THE STATE OF NEVADA

JARED AWERBACH,
Appellant/ Cross-Respondent
vs.

EMILIA GARCIA,
Respondent/Cross-Appellant,
and

ANDREA AWERBACH,
Respondent.

Electronically Filed
Mar 26 2018 02:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENT/CROSS-APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

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Docket 71348 Document 2018-11596

SUMMARY OF RESPONSE

Respondent/Cross-Appellant Emilia Garcia ("Emilia") hereby responds to the Order to Show Cause issued by this Court and filed February 8, 2018. This Court has ordered appellant/cross-respondent Jared Awerbach ("Jared") to show cause why (i) Jared's appeal should not be dismissed for lack of jurisdiction, and (ii) why Andrea's cross-appeal should not be dismissed in part for lack of jurisdiction.

Emilia admits that her cross-appeal is overbroad and should be dismissed in part for lack of jurisdiction, at least as to all issues related to her claims against Jared. Emilia also submits that the Court lacks jurisdiction over the broad notice of appeal filed by Jared, but suggests that the Court has jurisdiction over Jared's notice of appeal to the extent he is challenging the final judgment in favor of Andrea on the issue of permissive use. Emilia files this response in order to clarify the procedural posture of the case, and the portion of the appeal and cross-appeal over which she contends this Court has jurisdiction.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY

Emilia is the Plaintiff in this civil lawsuit arising out of a January 2, 2011 motor vehicle crash (the "Crash") in Las Vegas, Nevada. Jared and Respondent Andrea Awerbach ("Andrea") are the Defendants in the action. Jared is Andrea's son and was living in her household at the time of the Crash.

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///

On the day of the Crash, Jared was driving his mother Andrea's vehicle. He was returning home from a drug deal[1] after being observed "smoking out" with his customer before he got back behind the wheel. He had no driver's license and was at ten times the legal limit for marijuana metabolites in his blood (at a time when recreational use was illegal), when he failed to yield the right-of-way and crashed into the passenger side of Emilia's approaching vehicle. (*See* Amended Complaint (1/14/13), at ¶ 9, attached as Exhibit 1 (OSC APP 002-008)). Before the jury trial, Jared was found to be impaired as a matter of law. (Order Regarding Plaintiff's Motion for Partial Summary Judgment on Impairment (1/28/15), attached as Exhibit 2 (OSC APP 0010-013)).

On March 25, 2011, Emilia filed a Complaint suing Jared for negligence and Andrea for negligent entrustment and joint liability pursuant to NRS 41.440, and asserted a claim for punitive damages against both Jared and Andrea. (*See* Complaint (3/25/11), attached as Exhibit 3 (OSC APP 015-019); *see a*lso Amended Complaint (1/14/13), at ¶ 9, attached as Exhibit 1 (OSC APP 002-008)). It was established at trial that Andrea regularly entrusted her vehicle to Jared, despite knowledge that he was high on marijuana almost every day and had previously crashed into another car while

[1] The fact that Jared was a drug dealer and was returning home after a drug sale was excluded from evidence by Judge Weise. Emilia includes a number of facts for background. As a full Appendix has not yet been filed, no citations to the record are provided for facts not material to the determination of the court's jurisdiction.

driving her vehicle without a license. Andrea's liability for the injuries caused by Jared hinged in part on the issue of permissive use.

A. ANDREA'S ANSWER AND ADMISSION OF PERMISSIVE USE.

On January 23, 2012, Andrea answered Emilia's Complaint and admitted that she "did entrust the vehicle to the control of Defendant JARED AWERBACH." (*See id*. at ¶ 23; Defendants' Answer to Complaint, at ¶ 2, attached as Exhibit 4 (OSC APP 021-026)). One year later, in response to Emilia's Amended Complaint, Andrea flipped her answer. (*See* Amended Complaint (1/14/13), at ¶ 23, attached as Exhibit 1 (OSC APP 002-008); *see also* Answer to Amended Complaint (2/7/13), at ¶ 17, attached as Exhibit 5 (OSC APP 028-034)).

B. ANDREA ADMITTED PERMISSIVE USE IN RESPONSE TO EMILIA'S REQUESTS FOR ADMISSION.

On June 5, 2012, Andrea responded to Emilia's Requests for Admissions in accord with her original Answer and once again admitted that she entrusted the operation of her vehicle to Jared with her "permission". ("Admit JARED AWEBACH was operating your vehicle on January 2, 2011, with your permission". Response: "Admit". *See* Defendant Andrew Awerbach's Responses to Request for Admissions, Req., No. 2, attached as Exhibit 6 (OSC APP 036-039)).

C. JUDGE ALLF SANCTIONED ANDREA WITH A FINDING OF PERMISSIVE USE AS A RESULT OF ANDREA'S IMPROPER CONCEALMENT OF EVIDENCE.

On December 2, 2014, Emilia filed a motion to strike Andrea's Answer based on Andrea's intentional concealment of admissions made to her insurance company.

(*See* Plaintiff's Motion to Strike Andrea Awerbach's Answer, attached as Exhibit 7 (OSC APP 041-065)). 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 Plaintiff's 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 on February 25, 2015 (emphasis added), attached as Exhibit 8 (OSC APP 067-071)).

On March 13, 2015, Andrea filed a Motion seeking reconsideration of Judge Allf's Order. (*See* Defendant Andrea Awerbach's Motion for Relief from Final Court Order (3/13/15), attached as Exhibit 9 (OSC APP 073-084)). 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 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 (OSC APP 086-090)).

On August 12, 2015, Andrea filed a Writ of Mandamus or Prohibition (Case No.: 68602) requesting that this Court vacate Judge Allf's permissive use sanction. Andrea's Petition was denied on September 11, 2015.

The parties relied on Judge Allf's permissive use sanction for the next year and prepared for trial believing the issue of permissive use was resolved and no longer an issue for trial.[2] This governed the totality of the parties' trial preparation, including drafting motions in limine and making crucial strategic decisions regarding witnesses, evidence, trial counsel, and trial presentation.

D. JUDGE ALLF RECUSES HERSELF.

On August 27, 2015, Judge Allf recused herself because of a conflict with Jared's newly (and possibly strategically) associated counsel, Randall Tindall. (*See*

[2] Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC. first appeared for Emilia after the sanction was entered, and reasonable relied on the sanction finding permissive use in negotiating a contingency fee for the trial of the case.

Notice of Department Reassignment, attached as Exhibit 11 (OSC APP 092-094)). On September 8, 2015, Emilia requested Mr. Tindall be disqualified and the action re-assigned to Judge Allf. During the September 15, 2015, hearing on Emilia's Motion, the District 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 29:13-20, attached as Exhibit 12 (OSC APP 096-097)) (emphasis added). On November 10, 2015, Emilia filed a Writ of Mandamus (Case No.: 69134) requesting that Jared's Counsel, Randall Tindall, be disqualified and that the case be reassigned to Judge Allf's Department. Emilia's Petition was denied.

E. THE DISTRICT COURT SUA SPONTE REVERSES JUDGE ALLF'S PERMISSIVE USE SANCTION DURING VOIR DIRE.

On February 8, 2016, approximately one year after Judge Allf issued her sanction order, approximately nine months after she reaffirmed that order, six months after she recused herself from the action based on the strategic retention of Mr. Tindall, and one-half day into voir dire, the District Court orally vacated and modified both of Judge Allf's permissive use orders, *sua sponte*, apparently based on a conversation the District Court improperly had with Judge Allf regarding her intentions for the permissive use sanction:

> 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, Trial Transcript, at 61:8-25 (emphasis added), attached as Exhibit 13 (OSC APP 099-102)). As indicated by Judge Weise, the reversal of Judge Allf's permissive use sanction was based upon a discussion with Judge Allf (who had long ago recused herself due to a conflict) as to her recollection of her intention – an apparent recollection at odds with the plain language of her orders. It is without dispute that the District Court's reversal contradicts the plain language of both of the orders drafted by Judge Allf (not counsel) which the parties had relied upon in preparation for trial:

> 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 (OSC APP 099-102)) (emphasis added). 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 62-63:20-1 (OSC APP 099-102)).

F. EMILIA ASKS FOR JUDGMENT AS A MATTER OF LAW ON PERMISSIVE USE.

On March 7, 2016, once both sides had rested, Emilia's Counsel requested Judgment as a Matter of Law on the issue of permissive use. (*See* Trial Transcript (3/7/16), at 146:25-148:25) attached as Exhibit 14 (OSC APP 104-148)). 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 (OSC APP 104-148)). Counsel further stressed how Andrea's permissive use "admission conclusively established permissive use as a matter of law" as set forth in NRCP 36(b), entitling plaintiff "to directed verdict [*i.e*., judgment as a matter of law] on that motion." (*Id*. at 147:15-20 (OSC APP 104-148)). The District Court denied Emilia's request. (*Id*. at 148:25 (OSC APP 104-148)).

G. JURY INSTRUCTION NO. 14 CORRECTLY REQUIRES THE JURY TO FIND THAT PERMISSIVE USE IS "CONCLUSIVELY PROVED."

On March 8, 2016, the jury received the Jury Instructions. (*See* Jury Instruction No. 14 (3/8/16), attached as Exhibit 15 (OSC APP 109-110)). Jury Instruction No. 14 read 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.

(*Id*.). Jury Instruction No. 14, consistent with NRCP 36(b), seemed to give the jury no choice but to find that permissive use had been conclusively established as a result of Andrea's Response to Request for Admission Number 2, which the district court had refused to allow Andrea to amend.[3]

Remarkably, Andrea's counsel was improperly allowed to argue that permissive use was not conclusively established because she had not "failed to deny" the request for admission. The alleged "denial" was in an interrogatory answer served ***after*** she had admitted permissive use in response to the request for admission. This argument was improper. Once admitted, the matter was conclusive established "unless the court on motion permits withdrawal or amendment of the admission". NRCP Rule 36(b). It is undisputed that the court never permitted withdrawal of the admission. In fact, the Court specifically denied a request to amend the admission as untimely filed. There was nothing for the jury to decide on the issue of permissive use and a finding of permissive use should have been directed as a matter of law.

H. THE JURY RETURNS A VERDICT FINDING OF "NO PERMISSIVE USE."

On March 10, 2016, the jury returned a verdict. (*See* Jury Verdict (3/10/16), attached as Exhibit 16 (OSC APP 112-114)). The jury awarded $824,846.01 in past

[3] This begs the question -- why not simply grant judgment as a matter of law on permissive use instead of inviting error by instructing the jury that Andrea was conclusively bound by her admission and then giving counsel leeway to argue inconsistently with the instruction?

damages and $2,000,000 in punitive damages against Jared. No future damages were awarded. The jury also found that Andrea did not give express or implied permission to Jared to use her vehicle on January 2, 2011, and did not negligently entrust her vehicle to Jared. (*See id*. at p. 2 (OSC APP 113)).

I. EMILIA FILES A MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR ADDITUR.

On May 26, 2016, Emilia filed a motion for a new trial or, in the Alternative, for additur based on a number of reasons, including jury misconduct in performing an experiment with a juror having a similar spine condition which led the jury not to award any future damages. (*See* Plaintiff's Motion for a New Trial or, in the Alternative, for Additur, attached as Exhibit 17 (OSC APP 116-145)). On August 17, 2016, the District Court granted Emilia's motion for new trial and denied Emilia's request for additur. (*See* Notice of Entry of Order Re: Post-Trial Motions (8/17/16), attached as Exhibit 18 (OSC APP 147-158)). The District Court awarded a new trial "on all issues". (*Id*.).

J. EMILIA FILES A RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF PERMISSIVE USE.

On May 26, 2016, Emilia filed Plaintiff's Renewed Motion for Judgment as a Matter of Law on the issue of permissive use based on the conclusive effect of Andrea's Response to Request for Admission Number 2, pursuant to NRCP 36(b), among other things. (*See* Plaintiff's Renewed Motion for Judgment as a Matter of Law, attached as Exhibit 19 (OSC APP 160-180)). On August 22, 2016, the District

Court denied Emilia's Renewed Motion for Judgment as a Matter of Law "based upon the same reasoning that the Motion was denied previously." (*See* Notice of Entry of Order Re: Minute Order of 8/22/16, attached as Exhibit 20 (OSC APP 182-185)).

K. JARED FILES A PREMATURE APPEAL BEFORE FINAL JUDGMENT.

On September 23, 2016, Jared filed a Notice of Appeal and, as a result, the appeal was docketed in this Court on that day. The parties participated in a settlement conference as ordered by this Court that failed.

L. THE COURT ENTERS JUDGMENT ON THE JURY VERDICT, AS TO ANDREA ONLY.

On August 18, 2017, after the failed settlement discussions and additional motion practice, the Court entered and filed the Judgment Upon Jury Verdict. (*See* Judgment Upon Jury Verdict, attached as Exhibit 21 (OSC APP 187-188)). The district court entered judgment against Jared and in favor of Emilia in the amount of $2,824,846.01. The district court also entered final judgment against Emilia and in favor of Andrea on all issues based on the jury's findings that Andrea did not give express or implied permission to Jared to use her vehicle on January 2, 2011, and did not negligently entrust her vehicle to Jared. (*See id*. at 1-2:26-3)

Three days later, pursuant to the order of August 12, 2016 granting Emilia a new trial, the district court filed an order vacating the judgment against Jared. (*See* Order Vacating Judgment as to Jared Awerbach Only, filed August 21, 2017, attached

as Exhibit 22 (OSC APP 190-191)). This order also denied Jared's request for a new trial as moot, as a new trial had already been granted to Emilia and there was no need to reach Jared's motion seeking the same relief. (*Id*.)

M. THE TRIAL COURT CERTIFIES THE JUDGMENT IN FAVOR OF ANDREA AS FINAL PURSUANT TO NRCP 54(B).

Even though Andrea obtained a judgment in her favor on August 18, 2017, the subsequent "Order Vacating Judgment as to Jared Awerbach Only" meant that the judgment in her favor did not resolve all claims against all parties. In order to enter a "final judgment" in favor of Andrea, the district court determined and certified:

> … that the August 18, 2017 "Judgment Upon Jury Verdict" constitutes a "final judgment" as to all claims between plaintiff and Andrea Awerbach. There is no just reason to delay such finality.

(*See* Order Vacating Judgment as to Jared Awerbach Only, filed August 21, 2017, attached as Exhibit 22 (OSC APP 190-191)).

N. EMILIA FILES A TIMELY APPEAL OF THE FINAL JUDGMENT IN FAVOR OF ANDREA.

Emilia filed a timely notice of appeal of the final judgment entered against her and in favor of Andrea, notice of entry of which was served on August 21, 2017. (*See* Notice of Appeal, filed September 19, 2017, attached as Exhibit 23 (OSC APP 193-195)). Out of an abundance of caution, Emilia also broadly filed an appeal of "All judgments and orders in this case."

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II. JURISDICTION BEFORE THIS COURT.

A. THIS COURT HAS JURISDICTION OVER EMILIA'S APPEAL OF THE FINAL JUDGMENT IN FAVOR OF ANDREA AND ALL RELATED ORDERS.

Nevada Rules of Appellate Procedure, Rule 3A(b)(1), provides that an appeal may be taken from a "final judgment entered in an action or proceeding commenced in the [district] court in which the judgment is rendered". As explained above, the district court entered final judgment against Emilia and in favor of Andrea on August 18, 2017. Although the district court subsequently vacated the judgment as to Jared, the district court properly certified the judgment in favor of Andrea as final and it remains appealable under NRAP Rule 3A(b)(1), together with all rulings and interlocutory orders made appealable by the entry of final judgment in favor of Andrea.

Emilia concedes that her notice of appeal was overbroad, and it should be dismissed as premature as to all rulings and interlocutory orders related only to her claims against Jared.

B. THIS COURT HAS JURISDICTION OVER PART OF JARED'S APPEAL.

The court granted Emilia's motion for new trial and therefore vacated her judgment against Jared. While Jared also wanted a new trial, he is not aggrieved by the fact that the district court denied his motion as moot, because he gets a new trial based on the granting of Emilia's motion for new trial. There is no final judgment

against Jared, and at first blush there would appear to be no appealable order or judgment which would give this Court jurisdiction over his appeal.

Nevertheless, Jared has also been aggrieved by the entry of final judgment in favor of Andrea on the issue of permissive use. Jared has no insurance in his own name. A finding of permissive use would make Andrea jointly and severally liable for the judgment entered against Jared and require Andrea's insurance to indemnify Jared for any judgment ultimately rendered against him on retrial.[4] To the extent that Jared limits his appeal to the entry of judgment in favor of Andrea, he is aggrieved and this Court has jurisdiction over his appeal pursuant to NRAP Rule 3A(b)(1). While Andrea's insurance may yet have to answer for any judgment against Jared, regardless of a finding of permissive use pursuant to NRS 485.185, Jared still has an interest in eliminating any uncertainty through a finding of permissive use.

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[4] Given the apparent conflict between Andrea's insurance company and Jared, Emilia assumes that counsel of record for Jared are *Cumis* counsel with obligations only to Jared. In light of Jared's interest, it would be odd if he did not wish to appeal the final judgment in Andrea's favor finding no permissive use.

III. CONCLUSION

This Court has jurisdiction over the appeal of the final judgment in favor of Andrea Awerbach, which was properly certified pursuant to NRCP 54(b). No other issues are currently ripe for appeal.

DATED this 26th day of March, 2018.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

/s/ D. Lee Roberts

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response to order to show cause complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this response to order to show cause has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point, double-spaced, Times New Roman font.

I understand that I may be subject to sanctions in the event that the accompanying response to order to show cause is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of March, 2018.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC.

/s/ D. Lee Roberts

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 26, 2018, a true and correct copy of the foregoing **RESPONSE TO ORDER TO SHOW CAUSE** 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:

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