EXHIBIT D
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STATEMENT

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CLERK OF THE COURT

NEO
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Attorneys for Plaintiffs

MAINOR EGLET

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	CASE NO.: A539455 DEPT. NO.: X **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Denying Defendant's Motion for New Trial was entered in the above-entitled matter on August 24, 2011 and is attached hereto as Exhibit "24."

DATED this 25 day of August, 2011.

MAINOR EGLET

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400 South Fourth Street, Ste. 600
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Attorneys for Plaintiffs

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 25th day of August, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF ORDER was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendants

An employee of MAINOR EGLET

MAINOR EGLET

EXHIBIT "1"

ORDR
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Attorneys for Plaintiffs

MAINOR EGLET

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,

Plaintiffs,

v.

JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive.

Defendants.

CASE NO.: A539455
DEPT. NO.: X

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

This Honorable Court, having read the pleadings and papers on file herein regarding the

Defendant's Motion for New Trial, the matter being heard in Chambers on July 21, 2011 for hearing, and good cause appearing therefore, hereby rules that Defendant's Motion for New Trial is **DENIED.**

IT IS SO ORDERED.

DATED this 23 day of August, 2011.

JESSIE WALSH

DISTRICT COURT JUDGE

Respectfully submitted by:

MAINOR EGLET

ROBERT T. EGLET, ESQ.
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Nevada Bar No. 2805
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Attorneys for Plaintiffs

EXHIBIT E
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STATEMENT

NEO

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MAINOR EGLET

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	CASE NO.: A539455 DEPT. NO.: X **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Motion for Attorney's Fees was entered in the above-entitled matter on September 14, 2011 and is attached hereto as Exhibit "1".

DATED this 15 day of September, 2011.

MAINOR EGLET

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Attorneys for Plaintiffs

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 15 day of September, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF ORDER was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
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Attorneys for Defendants

An employee of MAINOR EGLET

EXHIBIT "1"

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CLERK OF THE COURT

ORDR
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Fx.: (702) 384-8222
Attorneys for Plaintiffs

MAINOR EGLET

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,

Plaintiffs,

v.

JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,

Defendants.

CASE NO.: A539455
DEPT. NO.: X

ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEY'S FEES

This Honorable Court, having read the pleadings and papers on file herein regarding the

Plaintiffs' Motion for Attorney's Fees, the matter being heard in Chambers on July 21, 2011 for hearing, and good cause appearing therefore, hereby rules that Plaintiffs' Motion for Attorney's Fees is **GRANTED.** The Plaintiffs are entitled to attorney's fees pursuant to NRS 17.115 and NRCP 68, calculated from the date the offer was rejected, using the lodestar method with a multiplier of 2.5, which amounts to **$1,078,125.00.** The plaintiffs are also entitled to prejudgment interest pursuant to NRCP 68(f)(2) and NRS 17.115.

IT IS SO ORDERED.

DATED this 9th day of September, 2011.

DISTRICT COURT JUDGE

Respectfully submitted by:

MAINOR EGLET

ROBERT T. EGLET, ESQ.
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Attorneys for Plaintiffs

MAINOR EGLET

EXHIBIT F
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STATEMENT

NJUD

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Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,

Plaintiffs,

v.

JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,

Defendants.

CASE NO.: A539455
DEPT. NO.: X

NOTICE OF ENTRY OF FINAL JUDGMENT

PLEASE TAKE NOTICE that a Final Judgment was entered in the above-entitled matter on September 23, 2011 and is attached hereto as Exhibit "1".

DATED this 28 day of September, 2011.

MAINOR EGLET

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 29 day of September, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF FINAL JUDGMENT was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendants

An employee of MAINOR EGLET

EXHIBIT "1"

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CLERK OF THE COURT

JUDG

ROBERT T. EGLET, ESQ.
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs. v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive. Defendants.	CASE NO.: A539455 DEPT. NO.: X

FINAL JUDGMENT

This action came on for trial before the Court and the jury, the Honorable Jessie Walsh

MAINOR EGLET

District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS PREVIOUSLY ORDERED AND ADJUDGED, based upon the Jury Verdict and applicable pre-judgment and post-judgment interest that Plaintiff, WILLIAM SIMAO, have and recover of the Defendant, JENNY RISH, a judgment of Two Million, Seven Hundred Thirteen Thousand, One Hundred Fifty One and 96/100 Dollars ($2,713,151.96), and CHERYL SIMAO, have and recover of the Defendant, JENNY RISH, a judgment of Six Hundred Eighty One Thousand, Two Hundred Eighty Six and 00/100 Dollars ($681,286.00), respectively.

Additionally, motions having come on for hearing before the above-entitled Court upon Plaintiffs' Motion for Attorneys' Fees, Defendant's Motion to Retax Costs, Defendant's Motion for New Trial, Plaintiffs' Motion to Quash Subpoena Duces Tecum to Hans Jorg Rosler, M.D. at Nevada Spine Clinic, and Defendant's Motion to Compel Production of Documents; Plaintiffs appearing by and through their counsel of record, Robert T. Eglet, Esq., David T. Wall, Esq., and Robert M. Adams, Esq., and Defendant appearing by and through her counsel of record, Stephen H. Rogers, Esq., and the Court having read the papers and pleadings on file herein, having heard the arguments of counsel and being fully advised in this matter;

IT WAS ORDERED that Plaintiffs be awarded and entitled to attorneys' fees in the amount of $1,078,125.00, pursuant to the Lodestar method;

IT WAS ORDERED that Plaintiffs be awarded and entitled to costs in the amount of $99,555.49;

MAINOR EGLET

IT WAS ORDERED that Plaintiffs be awarded Pre-Judgment Interest from the date of the service of the Summons and Complaint, July 23, 2007 through May 18, 2011, in the amount of $452,231.10;

IT WAS FURTHER ORDERED that Plaintiffs be awarded Post-Judgment interest from June 1, 2011 through September 20, 2011, in the amount of $62,436.00;[1]

NOW, THEREFORE the Final Judgment in favor of the Plaintiffs, WILLIAM SIMAO and CHERYL SIMAO, is hereby entered for Five Million, Eighty Six Thousand, Seven Hundred Eighty Five and 55/100 Dollars ($5,086,785.55), against Defendant which will bear post-judgment interest at the current rate of 5.25% or $731.66 per day, until the post-judgment interest is changed pursuant to the provisions of NRS 17.130.

DATED this 21st day of September, 2011.

Jessie Walsh
DISTRICT COURT JUDGE

Prepared & Submitted by:
MAINOR EGLET

By: _____
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

MAINOR EGLET

[1] In accordance with Lee v. Ball, 116 P.3d 64 (2005) at the rate of 5.25% per annum from the date of service of the Summons and Complaint, on July 23, 2007, to present. June 1, 2011 to September 20, 2011 is 110 days at $567.60 per day which amount to $62,436.00.

EXHIBIT G
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CLERK OF THE COURT

MNTR
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Phone (702) 383-3400
Fax (702) 384-1460
Attorneys for Defendant Jenny Rish

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,	CASE NO. A539455
Plaintiff,	DEPT. NO X
v.	
JENNY RISH; JAMES RISH; LINDA RISH; DOES I - V; and ROE CORPORATIONS I - V, inclusive;	
Defendants.	

DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits this Motion for New Trial.

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This Motion is based upon the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument the Court is willing to entertain at the time of the hearing.

DATED this 1st day of May, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendant Jenny Rish

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the foregoing **DEFENDANT'S MOTION FOR NEW TRIAL** will come on for hearing before the above-entitled court on the 16 day of June, 2011, at chambers a.m. in Department X.

DATED this _____ day of May, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendant Jenny Rish

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This personal injury action arises out of a motor vehicle accident ("MVA") that occurred April 15, 2005. Defendant Jenny Rish rear-ended a vehicle driven by Plaintiff William Simao. Plaintiff alleged personal injuries. The trial began on March 14, 2011, and concluded on March 31, 2011, after the Court struck the Answer and dismissed the jury as a sanction for Defendant's purported violation of pre-trial orders. The Court found in favor of the Plaintiff, and awarded damages in the amount of $3,500,000.

Upon the Plaintiff's Motion, the Court excluded photographs, property damage estimates, and biomechanic-style argument that a minor impact cannot cause injury. At the beginning of trial, the defense pointed out that the Court's order did not extend to percipient witnesses, such as the parties. The Court declared that the Defendant was permitted to testify of the facts of the accident, noting that the Plaintiff's "motion didn't really talk anything at all about what [Defendant] Jenny Rish might testify to. . . ." (Trial transcript, March 18, 2011, pg. 126, lns. 9 - 10). The Court stated, "I never said defendant can't testify." (Id., pg. 125, lns. 24-25). The Defendant then pointed out that the Plaintiff objected to the Defendant's testimony at her deposition that the impact was a "tap." (Id., pg. 126, lns. 13 - 19). The Defendant asked for clarification: "[W]hat we're not clear on now is what can she say and what can't she say. If she's going to appear before this jury and be asked, please describe this accident, where can she begin and where does she end?" (Id.) The Court responded, "I urge you to re-read the order." (Id., pg. 126, ln. 20). The defense replied, "You can see the order has confused plaintiff's counsel and us." (Id., pg. 126, lns. 21 - 22). The defendant added, "I think, Your Honor, it is admissible for the witnesses to say it was a minor impact." (Id., pg. 127, lns. 10 - 11). The Court replied, "I don't know what to tell you. I'm not going to tell you how to defend your case." (Id. Pg. 127, lns. 12 - 13).

The defense sought to introduce sufficient facts of the accident to support the jury's verdict on causation. The Court permitted same in the defendant's opening statement. However, when cross-examining the Plaintiff's treating medical providers, the Plaintiff objected to questions relating to the facts of the accident. The Court sustained the objections, and permitted the treating providers

to offer expert opinion on cause without laying any foundation in terms of facts about the MVA. (Trial Transcript, March 22, 2011, pg. 73:24 to pg. 74: 21).

Next, the defendant sought to introduce facts of the accident to rebut the Plaintiffs' repeated characterization of the impact as a "crash." The Court denied the Defendant's request.

Next, the defendant sought to introduce facts of the accident to rebut the Plaintiff's medical provider's testimony that the MVA created a "substantial mechanism of injury." For example, Jaswinder Grover, M.D., one of the Plaintiff's treating medical providers, testified that the subject MVA created a "substantial mechanism of injury where he had acute onset of pain after hitting the back of his head on a metal cage. . . ." (Trial, March 25, 2011, pg. 98, lns. 11-13). Dr. Grover testified that as a result of the MVA, the Plaintiff "struck the back of his head on a cage. Had a potential hyperflexion extension injury to his neck." (Id., pg. 91, ons. 24-25). Plaintiff asked Dr. Grover to define a hyperflexion and extension movement. Dr. Grover responded, "[I]t is more commonly called a whiplash type of injury where if a patient is unexpectedly *jarred*, the next - - in a rear end type of collision, actually is a hyperextension and flexion injury where they extend their neck first and then *bounce* forward. . . . But the actual mechanism by which the neck is injured or traumatized is a *rapid*, unexpected extension of the neck followed by a return in flexion or back to neutral again. And during that, you know, *rapid* process . . ., somebody can be injured." (Id., pg. 92, lns. 4-16; emphasis added). The defense asked Dr. Grover questions about the facts of the MVA. The Plaintiff objected. The Court sustained the objection.

Next, the defense sought to introduce facts of the accident to rebut the Plaintiff's testimony of the accident. The Plaintiff testified that as a result of the "crash" his head hit the cage behind his driver's seat. (Trial, March 31, 2011, pg. 54, ln. 7). The Defendant asked questions about the facts of the accident. The Plaintiff objected. The Court sustained Plaintiff's objection.

Next, the defense sought to introduce evidence of the accident so that the jury could assess the Plaintiff's credibility. The Plaintiff offered differing versions of the impact to his various medical providers. For example, he told a physical therapist that the impact occurred at 55 miles per hour. Again, the Court excluded such evidence.

Next, the Plaintiff's medical providers all related his alleged condition to the MVA, yet each one also admitted that the Plaintiff's condition could exist without a MVA. The providers admitted under oath that their causation opinion relied on the Plaintiff's history, which, in turn, was a function of the Plaintiff's credibility. Still, the Court denied the Defendant's request.

Next, the Court excluded expert opinion testimony on the Plaintiff's veracity. However, when the Plaintiff asked treating medical provider Patrick McNulty, M.D. whether the Plaintiff was "truthful," over the defendant's objection, the Court overruled the objection and permitted the testimony. (Trial, March 23, 2011, pg. 21, ln. 14 - 22). Still, the Court excluded any questioning of Adam Arita, M.D., who questioned the Plaintiff's credibility in his deposition by testifying, "it would probably be in his [plaintiff's] best interest not to have surgery because I think that there are some secondary-type gains that are being sought by considering surgery in this particular legal case." (Deposition of Adam Arita, pg. 75, lns. 8 - 12).

The Court declared at the beginning of trial, and again in its order striking the answer, that the percipient witnesses and parties were not precluded from offering testimony about the facts of the accident by witnesses. Still, at every turn, the Court sustained the Plaintiff's objections to such questions. When Defendant asked the Plaintiff about the facts of the accident, the Plaintiff objected and the court struck the answer. Given the Court's declaration at the outset of trial, the defense understood it could ask the Plaintiff, who is not an expert witness, about the facts of the MVA. The defense asked the Plaintiff if the accident occurred in stop and go traffic. (Trial, March 31, 2011, pg. 91, ln. 16 through pg. 96, ln. 7). The Plaintiff objected on the basis that "this court ordered that the defense can present no evidence of the facts surrounding this accident." (Id., pg. 94, lns. 13-14). The defense pointed out that the Plaintiff and his medical providers opened the door, and that there can be no prejudice because the Court had already granted the Plaintiff an irrebuttable presumption that the accident was sufficient to cause the alleged injuries. (Id., pg. 93, ln. 10 - pg. 96, ln. 5). The Court sustained the Plaintiff's objection. (Id., pg. 96, ln. 7).

Then, because the Plaintiff testified on direct that an ambulance came to the scene (Id., pg. 54, lns. 16-17), the defense asked whether the paramedics transported anyone from the scene. (Id., pg. 98, lns. 13-19). The Plaintiff objected, and on this final question, the Court struck the Answer

and dismissed the jury.

There are several other issues which warrant a new trial. Although all of these issues cannot be detailed here without this motion becoming too unwieldy, Defendant incorporates and re-asserts all of the arguments contained in the pre-trial motions in limine, and oppositions thereto, including but not limited to, the orders excluding evidence of the subject accident, of other accidents, vehicle photographs, evidence that this was a low impact accident, admission of expert testimony, and supplemental evidence of future damages during trial without prior disclosure, etc. Defendant also incorporates all of the arguments made during trial regarding those issues, and the motions for mistrial filed by Defendant.

Defendant never had the opportunity to present its case to the jury because after striking the Answer, the Court dismissed the jury over the Defendant's objection. If the Court had not stricken the Answer, the Defendant would have concluded the cross-examination of Plaintiff William Simao, who testified during his deposition that this was a minor impact, and that he had no neck pain for four to five months following the MVA; the direct examination of Jeffrey Wang, M.D., who would have testified that Plaintiff's counsel misunderstood his reports and prior testimony regarding adjacent segment breakdown, and would have refuted the claim for future fusion surgery; Defendant Jenny Rish, who would have testified that this impact was slight, and that no one in her vehicle was injured or even shaken by the MVA; Linda Rish, who would have corroborated the Defendant's testimony; defense medical expert Mark Winkler, M.D., who would have testified that there was no evidence on the diagnostic films of traumatic injury; and Plaintiff's treating medical provider Ross Seibel, M.D., who would have testified that patient history in a med-legal case is often an unreliable foundation for causation opinion, and that the Plaintiff did not need a future spinal cord stimulator, contrary to the suggestion of Plaintiff's treating provider Patrick McNulty, M.D. The depositions, affidavits and reports of some of these witnesses, and the cost of vehicle repair are attached to further demonstrate what the evidence would have been. (See exhibits 1-13.)

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II. LAW AND ARGUMENT

A. The Court Improperly Granted the Plaintiff an Irrebuttable Presumption on Cause, then Inappropriately Struck the Answer and Dismissed the Jury

The court imposed three sanctions for purported violations of the orders in limine regarding the vaguely described "minor impact defense." First, the Court read a jury instruction which gave the Plaintiff an irrebuttable presumption that the forces from the MVA were sufficient to cause the Plaintiff's alleged injuries. The second sanction was the striking the answer. The third was dismissing the jury. None of the sanctions were appropriate.

Case law from the Supreme Court establishes that sanctions for violations of pre-trial orders are appropriate only when the pre-trial order is clear, and unfair prejudice is shown. In the present case, the order was not clear, and the Plaintiffs were not unfairly prejudiced, as the Court already gave them an irrebuttable presumption that the accident could cause the plaintiff's alleged injuries.

1. The Court Cannot Sanction a Party for Violating an Ambiguous, Changing Order

A district court may not strike an Answer, or even enter the lesser sanction of a new trial, based on "attorney misconduct" for violation of evidentiary rulings where, as here, (1) those rulings are unclear, and (2) the court has refused to clarify them when asked to do so. In the recent decision by the Nevada Supreme Court, *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 50262, 2011 WL 1436499 (Nev. Apr. 14, 2011) ("BMW"), a unanimous court provided a standard under which to determine whether sanctions are proper when a party violates an order in limine. The court held that for a violation of an order in limine to constitute attorney misconduct requiring a new trial: (1) the order must be specific; (2) the violation must be clear; and (3) unfair prejudice must be shown. Id. at 1.

For an order to be specific it "must be specific in its prohibition." *Id.* at 5 (internal citation omitted). Where the meaning of an order is not clear, a party may not realize it has violated the order without the court's ruling on a contemporaneous objection. *Id.* at 11. The court in *BMW* held that the order was not specific as to its prohibition because the order was "definite and specific only in permitting evidence to be introduced on whether Roth was wearing a seatbelt. It was neither definite nor specific, however, as to the limitations being imposed on use of the seatbelt evidence." *Id.* at 7.

Thus, the court held that in its prohibitory aspect, the order in limine was not definite enough to obviate the need for a contemporaneous objection, much less specific enough to make a subsequent violation clear for purposes of establishing attorney misconduct. *Id.* The *BMW* court also noted that the district court had declined to make the line of impropriety clear to defense counsel when asked for clarification. Id.

In addition, an order may be found to be lacking in specificity if the court is providing differing interpretations of the order during trial. For example, in the case of *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 416 N.E.2d 268 (1981), the court held that the granting of a new trial for alleged violations of the in limine order was an abuse of discretion because the in limine order was not clear and the parties did not have an accurate understanding of its limitations. *Id.* at 550, 419 N.E.2d at 271. In *Reidelberger* the court found that the trial court's rulings were not particularly clear. The court stated that "the statements by the court at trial set progressively more restrictive limitations on the discussion of speed and movement than those contained in Judge Harrison's original in limine order." *Id.* at 555-54, 416 N.E.2d at 273. The record showed that the court made several statements adopting differing restrictions as to movement and speed. These statements were not only inconsistent with the original order, but also inconsistent with each other. *Id.* at 551, 416 N.E.2d at 272.

Further, a party is entitled to a new trial only where the attorney's misconduct will lead to "unfair prejudice." "Unfair prejudice" includes "whether the argument was actually proper or improper under the law." *BMW*, 2011 WL 1436499 at 5. Thus, to justify the extreme sanction of granting a new trial, as opposed to some other sanction, the violation must results in prejudicial error; prejudicial error is "error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it." *Black v. Shultz*, 530 F.3d 702, 706 (8th Cir. 2008). For objected-to misconduct, the party moving for a new trial bears the burden of demonstrating that the misconduct was so extreme that objection, admonishment, and a curative instruction could not remove its effect. *BMW*, 2011 WL 1436499 at 6. A violation of an order in limine alone is insufficient to establish reversible error. Instead, the introduction of the evidence must be shown to cause harmful error. See *Phyfer v. State*, 259 Ga. App. 356, 577 S.E.2d 56 (2003).

2. ***Defendant Had a Right to Adduce Facts from Percipient Witnesses About the Accident, As this Court Acknowledged Before Trial***

a. The trial transcript shows numerous attempts by Defendant to clarify the court's order.

The court has submitted a 34 page order, on Plaintiff's attorney's letterhead, detailing its conclusions of the propriety of the sanction of striking the answer. The Court's position seems to be that the intent of the Order was clear, in that no defense or argument would be allowed to the effect that the accident was too minor to cause the injuries for which Plaintiff sought to recover damages. (Order, pg. 8). The court further states that there was no wholesale exclusion of any discussion of the facts of the accident in question:

> The response from the Defendant was essentially that she should not be precluded from any discussion of the accident in question. Such an argument, this court noted, misses the point and unfairly and incorrectly broadens the scope of the pretrial order. An incorrect summary of the court's order that any and all discussion of the accident in question is precluded is vastly different from questioning four separate witnesses as to whether anyone from the Defendant's vehicle was injured in the crash. On this issue, the Court's prior pronouncements could not have been clearer.
>
> (Order, pg. 25).

It was not Defendant's intention to violate this order. However, the Court's order was not as clear as the Order represents. The order did not prevent witnesses from testifying about the facts of the accident. (See order). Instead, as the trial went forward, the boundary lines of the order kept being expanded by the Court, without the Court informing the Defense where the line was.

The Defendant told the Court that at the EDCR 2.67 conference, the parties had conflicting understandings of the boundaries of the order. Specifically, the Defendant alerted the Court to the following discussion from the EDCR 2.67 conference, regarding whether witnesses could testify to the facts of the accident:

> At the 2.67 conference, which counsel reported so there is a record of this, there was a point where Plaintiff's counsel asked me whether -- whether we were calling the Defendant to the stand. And when he first asked the question I thought it was a -- I didn't even think he was serious. He then asked later on, "Are you going to call the Defendant?"
>
> And I said, "Well, of course I am." "Well, what is she going to testify to?"
>
> I said, "The facts of the accident." And he said, "Well, what's the relevance of the facts of the accident?" And I said, "My goodness, you are not taking the position that this jury

will not hear a single fact about this accident; are you?"

And he said, "Yes, that is the meaning of the order."

And I said, "That is not at all what happened at that hearing. And if that is your position, you'll be inviting the jury to do nothing but speculate. How could they possibly reach a determination on the elements of this negligence claim when they don't know a single thing about the car accident?"

He said, "That's our very position."

The defense asked the Court for clarification, given the parties' conflicting understanding of the order. Following jury selection, the defense apprised the Court of the confusion. Defendants contended that there was no limitation placed on discussing the facts of the accident :

> Now, this is why I think it is at most a motion to clarify because I understand having read the briefing on the motion in limine that there is authority for the determination that Your Honor made on the accident photos. I think there's counter authority. I don't think that Nevada would necessarily go that way, but I do see that there is Illinois, Delaware authority keeping out the accident photos.
>
> But there is no authority for keeping out the percipient witness. The testimony of a percipient witness to say, "This is my recollection of the day." Why? Because it bears on the creditability of the representations about that day the plaintiff is making to his doctors. None of those cases suggest that a defendant can't say, "This is my recollection of the event."
>
> Hallmark doesn't say that. What Hallmark says is that you cannot come in and elevate somebody to the lofty status of an exert and have that expert say to a jury, "Take away from them the ultimate determination in an opinion as to whether or not this accident could have possibly caused these injuries." But what it doesn't say and what no case that's been cited to you says is that the percipient witness can't come in and say, "This is my recollection of the day." And if that is necessarily out -- I'm sorry, I'll be very brief. If that is necessarily out because there is no correlation between the type of impact and the type of damages you could have, then I think Your Honor would have to reconsider whether or not the subsequent accident comes in.

(Trial transcript, March 18, 2011, pg. 121, lns. 3 - 18).

Defendant continued to outline the distinction between the order excluding photographs and biomechanic-style arguments from exclusion of the facts of the accident:

> Now, you can see why you would need an expert to make the leap from photographs and estimates to the speed. But we don't have that here. We have percipient testimony of the speed. And the fact of an accident is not something you need an expert for. In United Exhibition Services they talk about two different ways to cause causation. Now, I don't think the defendant has the duty to prove causation, only to refute what they're arguing. But the two different ways are through an expert or through the facts. And so I think it would be a grievous error for the Court to preclude those facts. Thank you, Your Honor.

(Trial transcript, March 18, 2011, pg. 125, lns. 7 - 18).

At the hearing, the court agreed with the Defendant, in that the court would not preclude the Defendant from testifying about the facts of the accident. However, when Defendant asked the Court to explain where the "line" was set by the order, the Court refused to discuss it:

> THE COURT: Okay. Thank you. I appreciate the brief argument. Here's the thing, I don't know that this motion was really even necessary because the Court's ruling was based on the written pleadings and the argument that the Court heard. And it was a very specific ruling. And I never said defendant can't testify. I don't know what she's going to testify to. I sure hope she complies with the Court's pretrial orders.
>
> This motion didn't really talk anything at all about what Jenny Rish might testify to, although it's titled trial brief on percipient testimony regarding the accident.

(Trial transcript, March 18, 2011, pg. 125, ln. 19 - pg. 126, ln. 1)

This statement by the Court is telling, as it addresses three issues involved in this new trial motion. Namely, the pre-trial order had nothing to do with fact witnesses, only expert testimony and photographs. Second, the Court's statement reveals that Plaintiffs submitted ex-parte trial briefs after trial had begun, discussing expansion of the pre-trial order. These briefs were not in compliance with EDCR 7.27, as an ex-parte brief after trial has begun is not permitted. Third, the Court's statement shows the reluctance of the court to define what the "new" line is on testimony, despite Defendant's requests to the contrary:

> MR. ROGERS: Okay. Let me tell you one thing she has said and then the defend-- plaintiff's counsel actually used the word. She described the impact as a tap. And what we're not clear on now is what can she say and what can't she say. If she's going to appear before this jury and be asked please describe this accident, where can she begin and where does she end?
>
> THE COURT: I urge you to re-read the order.
>
> MR. ROGERS: Well, the -- you can see that the order has confused plaintiff's counsel and us.
>
> MR. WALL: Not one bit. Not one bit.
>
> MR. ROGERS: That's why we're here.
>
> MR. WALL: No, I'm here because I've got a brief telling me that what's inadmissible is going to come in and that there was going to be an opening that referenced it.
>
> MR. ROGERS: It's --
>
> MR. WALL: That's why we're here. I'm not confused one bit on a very clear order.
>
> THE COURT: I didn't think you were, Mr. Wall.

MR. ROGERS: The 267 discussion that he just recited to you show that the parties are not clear on this.

THE COURT: Well, I don't know what to tell you then.

MR. POLSENBERG: And I think, Your Honor, it is admissible for the witnesses to say it was a minor impact.

THE COURT: Well, I don't know what to tell you. I'm not going to tell you how to defend your case. I sure would never presume to tell anybody how to try or defend a case. But, you know, I think the order is pretty clear. There was plenty of opportunity to brief it and respond to it. The Court gave counsel lots of time to argue it because that's my standard procedure. I think we've made a pretty clear record. And I just really hope that, you know, both sides would honor the Court's pretrial orders.

MR. POLSENBERG: But, Your Honor, on what we've done today, if I were doing the opening statement I would say to the jury that this was a minor accident.

MR. WALL: And then I would seek contempt.

THE COURT: I would say that would be a problem.

MR. POLSENBERG: And that's why we're asking for direction from you.

THE COURT: I'm not going to -- you know, I can't tell you you can say this, you can't say that, you can say the other. I mean, you're all very smart individuals. You're very respectable lawyers. You're very capable and you're certainly capable of reading and comprehending the Court's order that all the parties briefed and argued.

MR. POLSENBERG: Well, Your Honor, I don't think we briefed and argued this issue. And we certainly would be able to say to the jury that this was just a tap.

THE COURT: Well, I don't think so, Mr. Polsenberg. But I really don't want to engage in any sort of argument. That's not the Court's role. I think I've done my job to the best of my ability and I would expect all of you to do the same.

MR. POLSENBERG: Here's the problem I have though, the Court said that you wouldn't tell us how to try the case.

THE COURT: Right.

MR. POLSENBERG: I've suggested two things that I would say in opening statement and you've told me both of those I couldn't say. I can't figure out what I can say.

THE COURT: Are you the attorney making the opening statement?

MR. POLSENBERG: No.

THE COURT: Well, then it's not really an issue.

MR. POLSENBERG: Well, it is an issue, Your Honor.

THE COURT: Well, Mr. Polsenberg, I don't want to argue with you.

MR. POLSENBERG: Well, I'll let you argue with Mr. Rogers then.

THE COURT: Well, that's fine.

MR. POLSENBERG: All right.

THE COURT: I've made my ruling. Unless there are any other issues we need to address, I'm inclined to call it a day.

(Trial Transcript, March 18, 2011, pp. 126 - 129)

Despite repeated attempts to clarify the order, the court refused to discuss with counsel the limits of the order. When the Defendant wanted to discuss what the limits of the order were, and suggested alternatives, the court sustained the Plaintiff's objections, but refused to discuss the limits of the order. The above transcript clearly shows that the Court did not make clear what the boundaries of the order were. This was especially egregious, considering the Plaintiffs were submitting ex-parte briefs, giving their positions in secret without the knowledge of Defendant, and depriving the Defendant of the ability to respond to the arguments. Defendant was presenting its arguments in open court. Plaintiffs' secret brief presented an unfair advantage.

b. Plaintiff's Position and the Court's Ruling Were in Error; Facts of an Accident Are Admissible and Need Not be Admitted Via Expert Testimony

The rationale behind plaintiff's argument is the faulty assumption that, if an expert cannot offer opinion testimony about a subject, then the jury may not learn facts on the subject. Plaintiff offered no authority for this proposition, and it simply isn't true. For instance, outside the context of medical malpractice, a medical expert is not necessary even to prove medical causation: "A testifying physician must state to a reasonable degree of medical probability that the condition in question was caused by the industrial injury, or sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury." *United Exposition Service Co. v. S.I.I.S.*, __ Nev. __, 851 P.2d 423, 425 (1993).

One of the courts' general concerns about "expert" testimony is the effect of putting a particular witness's opinion on a pedestal. As some courts have indicated, "the problem here (as with all expert testimony) is not the introduction of one man's opinion on another's future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as an "expert") gives him significant credibility in the eyes of the jury as one whose

opinion comes with the imprimatur of scientific fact." *Flores v. Johnson*, 210 F.3d 456, 465-466 (5th Cir. 2000). Thus, the court's hesitancy to admit expert testimony is not to shelter juries from facts, but rather to prevent uninformed opinions from invading the province of the jury. C.f., *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992) (danger of speculative expert testimony is the risk that it can "lend a stamp of undue legitimacy" to conclusions that should be left to the jury)(criminal). The court does not bestow the honor "expert" lightly.

Rather, An abundance of Nevada case law has held that in negligence actions, issues of causation are factual issues for the jury to determine. See *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981) (stating that in Nevada, issues of negligence and proximate cause are considered issues of fact for the jury to resolve); see also *Barreth v. Reno*, 77 Nev. 196, 198 (1961); *White v. Demetelin*, 84 Nev. 430, 433 (1968). More specifically, in automobile accident cases, the issue of proximate cause as well as the cause of the damages for which compensation is sought, are issues of fact for the jury to decide. See *Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 467 (1975).

With regard to the matter of injury and damage, it is within the province of the jury to decide that an accident occurred with or without compensable injury. Id. It is for the jury to evaluate the evidence presented and to assess the weight to give that evidence. Thus, an expert need not testify as to causation and damages in order to admit relevant evidence. See *Krause Inc. v. Little*, 117 Nev. 929, 938-39, 34 P.3d 566, 572 (2001) (concluding that a jury did not require a medical expert's testimony to appreciate the extent to which a broken bone causes pain and suffering and what amount of future damages would be appropriate). See also *Brenman v. Demello*, 921 A.2d 1110 (N.J. 2007), which allowed photographs of a "minor impact" into evidence, and allowed argument on the same, without the need for expert testimony:

> In the main, the fundamental relationship between the force of impact in an automobile accident and the existence or extent of any resulting injuries does not necessarily require "scientific, technical, or other specialized knowledge" in order to "assist the trier of fact to understand the evidence or to determine a fact in issue[.]"N.J.R.E. 702. Of course, a party opponent remains free to offer expert proofs for the purpose of persuading the factfinder to overcome an absence of proportionality between the force of the impact and the cause and severity of the resulting injuries. Conversely, a party proponent may tender its own expert proofs to further support the proposition in its case-in-chief-either that slight impact force results in no or slight injury, or that great impact force results in great injury-or to rebut its opponent's assertions. Such expert proofs, however, address the weight to be given to photographs of impact, not their admissibility.

c. Plaintiff Cited No Authority to Support Excluding Testimony of a Percipient Witness or Party

At most the authorities cited by plaintiff in his motion in limine stand only for the proposition that, without testimony from a biomechanical expert, a defendant may not extrapolate from the amount of damage to a vehicle the likely severity of resultant physical injury. See *Davis v. Maute*, 770 A.2d 36 (Del. 2001) (vehicle photographs inadmissible); *Eskin v. Carden*, 842 A.2d 1222 (Del. 2004) (same); *DiCosola v. Bowman*, 794 N.E.2d 875 (Ill. Ct. App. 2003) (same). And, even that appears to be a minority position.[1] Undersigned counsel is aware of no authority that would curtail the testimony of the plaintiff and defendant drivers, based on independent recollections.

d. The Jury was free to use its common sense to determine the facts

In Nevada, juries need not check their common sense at the door and are not obligated to accept the conclusions of plaintiff's experts, even though (1) they spout the magic words "reasonable degree of medical probability." and (2) the defendant has does not call opposing experts. A trier of fact "has the right to consider the credibility of witnesses and disbelieve testimony, even though

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[1] For example, in *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 564, 895 N.E.2d 1125, 1129 (Ill. App. Ct. 2008), the court held that expert testimony on the correlation between vehicular damage and plaintiff's injuries was not needed in order to admit photographs of the parties' damaged vehicles. Similarly, the court in *Ferro v. Griffiths*, 361 Ill.App.3d 738, 742, 297 Ill. Dec. 194, 836 N.E.2d 925 (2005), stated that a trial court has to determine "whether the photographs make the resulting injury to the plaintiff more or less probable" and "whether the nature of the damage to the vehicles and the injury to the plaintiff are such that a lay person can readily assess their relationship, if any, without expert interpretation." Id.

In this case, the jury is entitled to hear testimony and to see evidence that establishes causation or establishes the extent of damages. There is no requirement that such relevant evidence is admissible only if an expert is willing to testify as to its relevance. See, e.g., *Brenman v. Demello*, 921 A.2d 1110, 1120, 191 N.J. 18, 28 ("We cannot subscribe to the limits of Davis' s logic. In the main, the fundamental relationship between the force of impact in an automobile accident and the existence or extent of any resulting injuries does not necessarily require 'scientific, technical, or other specialized knowledge' in order to 'assist the trier of fact to understand the evidence or to determine a fact in issue' ... expert proofs ... address the weight to be given to photographs of impact, not their admissibility."); *Marron v. Stromstad*, 123 P.3d 992, 1009 (Alaska 2005) ("[W]e decline to adopt the rigid approach represented by [Davis]. We are unaware of any other jurisdiction which has adopted a rule that collision evidence is per se inadmissible without expert testimony, and we decline to do so. The trial court properly has the discretion to weigh the prejudicial and probative value of photographs and other evidence of the severity of an accident."); *Murray v. Mossman*, 329 P.2d 1089, 1091 (Wash.1958) (affirming admission of photographs of accident scene for the limited purpose of showing the force of the impact that caused plaintiff's whiplash injury); *DiCosola v. Bowman*, 794 N.E.2d 875, 881 (Ill.App.2003) ("[W]e are rejecting a bright-line rule ... We do not hold that expert testimony must always be required for such photographic evidenceto be admissible,") (ultimately upholding trial court's use of discretion to require expert testimony). Thus, once the evidence is shown to be relevant and admissible under Nevada's Rules of Evidence, expert testimony is not required.

uncontradicted." *Fox v. First Western Sav. & Loan Ass'n*, 86 Nev. 469, 472, 470 P.2d 424, 426 (1970). And, that includes unrebutted expert testimony. *Smith v. Andrews*, 959 A.2d 597, 606 (Conn. 2008) (quotations omitted) ("the jury is under no obligation to credit the evidence offered by any witnesses, including experts; even if that evidence is uncontroverted"); *Dionne v. LeClerc*, 896 A.2d 923, 929 (Me. 2006) ("a fact-finder, whether it be a jury or a court, is "not required to believe witnesses, even if the testimony of those witnesses, be they experts or lay witnesses, is not disputed ...and has the prerogative selectively to accept or reject it, in terms of the credibility of the witnesses or the internal cogency of the content"); *Olander Contracting Co. v. Gail Wachter Investments*, 643 N.W.2d 29, 41 (N.D. 2002) ("The jury need not accept undisputed testimony, even of experts."); *Lucks v. Lakeside Mfg., Inc.*, 830 N.Y.S.2d 747, 749 (N.Y. App. Div. 2007) ("the jury was entitled to discredit the testimony of the plaintiff and his expert, in whole or in part, even though the defendant adduced no contradictory evidence").

As this Court will instruct, the jurors "are not bound" by the experts' opinions:

> A person who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his or her opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given to such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled. Nev. J.I. 2.11 (emphasis added). To exercise that right of skepticism, the jury is entitled to know the bare facts. And, a defendant is entitled to introduce those facts.

e. A Defendant Need Not Offer Direct Evidence, and May Rest on Cross-Examination of Plaintiff's Witnesses

The defendant may contest the conclusions of plaintiff's medical expert's without calling his own witnesses, and without proposing affirmative, alternative theories. Even were medical causation is at issue, "a defendant is not obligated to put on testimony about the cause of an injury or to provide an alternative theory about causation," but may dispute plaintiff's causation theory "through cross-examination, presentation of contrary evidence that the negligence was not the probable cause of the injury, or presenting evidence of alternative causes of the injury." *Werth v. Davies*, 698 N.E.2d 507, 511 (Ohio Ct. App. 1997). It is well settled that a defendant may cross-examine, rebut and criticize plaintiff's theory of the case without having to prove an alternative theory:

The defendant ordinarily need not prove, with certainty or otherwise, that he or she is innocent of the alleged wrongdoing. Absent an affirmative defense or a counterclaim, the defendant's case is usually nothing more than an attempt to rebut or discredit the plaintiff's case. *Neal v. Lu*, 530 A.2d 103, 109 - 110 (Pa. Super. Ct. 1987). Indeed, "evidence that rebuts or discredits is not necessarily proof" at all, as "it simply vitiates the effect of opposing evidence." *Neal*, 530 A.2d at 109-10; see also 29A AM. JUR. 2D Evidence § 1373 ("Reasons not to accept the plaintiff's evidence, through cross-examination and argument, may suffice to prevent the meeting of a plaintiff's burden of proof, even without affirmative countervailing evidence").

f. Hallmark Does Not Condition Admissibility of the Facts of an Accident on the Introduction of a Biomechanical Expert

Nothing in *Hallmark v. Eldridge* even suggests that biomechanical expert testimony is a prerequisite for percipient testimony about the facts of an accident. Instead, Hallmark teaches that biomechanical engineering is probably not an appropriate subject for "expert" opinion testimony. Indeed, the Nevada Supreme Court cast doubt that expert testimony from a biomechanical expert would ever be admissible: "this court has not yet judicially noticed the general reliability of biomechanical engineering[.]" *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646, 653 n. 27 (2008) (expressing skepticism whether "biomechanics was within a recognized field of expertise" and whether "these types of opinions were generally accepted in the scientific community"). Holding open even the possibility, the supreme court suggested a standard that would be practically insurmountable. To be admissible, an biomechanical opinion would require knowledge and assessment of (a) "the speeds at impact," (b) "the length of time that the vehicles were in contact during impact," (c) "the distances traveled," (d) "the angle at which the vehicles collided," and possibly even an attempt to "recreate the collision by performing an experiment." *Hallmark*, 189 P.3d at 649, 653. In many cases this information simply isn't available, and the cost of experiments would be cost-prohibitive, especially to plaintiffs.

Under plaintiff's reading of Hallmark, no fact testimony about an accident would ever be allowed, because obtaining proper biomechanical expert testimony would be unfeasible. There is no language in *Hallmark*, or any other case from our supreme court, contemplating that absurd result.

3. Under the authority cited above, the jury was entitled to determine the this accident did not cause Plaintiff's injuries

The jurors were entitled to conclude that plaintiff was lying both to them about the event/source of his pain, and to his doctors. His doctors attributed his damages to this accident based entirely on plaintiff's representations to them. His doctors did not do any of the accident reconstruction analysis that Hallmark lays out to reach that conclusion independently.

Therefore, it was within the province jurors to conclude that it is unlikely that THIS minor impact was the event that genuinely caused the plaintiff's pain complaints. In fact this was specifically allowed by the language of the jury instruction, in that while there was an irrebuttable presumption that the accident could have cause the injuries suffered by Plaintiff, it was still up to the jury to determine whether it actually did so.

4. Defendant did not willfully violate the pre-trial order

Furthermore, under the standard set forth in *BWW*, there was no willful violation of any motion in limine, as the boundaries of the motion in limine were unclear. The court stated during trial, and again in its order, that discussion of the facts of the accident were not precluded. Yet when Defendant discussed the facts of the accident with a percipient witness (the Plaintiff) an objection was raised and the court struck the answer. This was in contrast to the court's pre-trial declaration that the percipient witness would be treated differently. Still, the "line" was unclear as to what they could and could not say. Previously, the objection had been sustained because the question was asked of "expert" witnesses, not of percipient witnesses.

When the Plaintiff was on the stand, Defendant attempted to elicit from Plaintiff the traffic situation on the freeway; namely that it was stop-and-go traffic. (3/31 Pages 92-96) Plaintiff objected and the court sustained. When discussing further facts of the accident (i.e. whether the parties requested medical attention), another objection was raised, and the answer stricken. This was a precepient witness, not an expert, who should have been allowed to answer based upon the ruling cited in the above transcript.

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5. Unfair prejudice was not shown, as Plaintiff already had an irrebuttable presumption

Plaintiff had already received a jury instruction which told the jury that the forces involved in the car accident would be sufficient to cause Plaintiff's injuries. Because this instruction had been entered, the jury could not have disregarded it. There was no need for a dismissal of the jury, as an objection to the question had been sustained by the court, and the court noted that there was no need to approach:

Q. And the paramedics didn't transport anyone from Mrs. Rish's car?

MR. WALL: Objection. Your Honor --

THE COURT: Sustained.

MR. WALL: -- may we approach?

THE COURT: Sustained. No need to approach. Sustain the objection.

MR. WALL: Well –

(TR 3-31.)

Plaintiff, however, demanded a further sanction from the court:

THE COURT: Do you really need to do that?

MR. WALL: That's my --

THE COURT: I'm a little --

MR. WALL: My request is that he be sanctioned in front of this jury.

THE COURT: You really made to do that? We were making such progress with your examination of these other --

MR. EGLET: I'm sorry?

THE COURT: -- this witness.

MR. WALLS: How many times?

THE COURT: We've been making such --

MR. WALL: How many times?

THE COURT: -- progress in terms of this trial moving along since we began with Mr. Wall's examination of your first witness. Now [indiscernible]. Can we just keep this thing moving?

The court immediately sustained Plaintiff's objection. The sustaining of the objection, coupled with the jury instruction, was certainly sufficient to remove any "unfair prejudice" that resulted from the question.

6. It was Inappropriate to Sanction a Party for Violating an Order in Limine by Entering Default Judgment

Although the sanction for violation of an order in limine is within the discretion of the trial court, a sanction for violating a court order must be appropriate to the circumstances of the case. See *Foster v. Dingwall*, 227 P.3d 1042, 1048 (Nev. 2010). As its most extreme sanction, a court may declare a mistrial and grant a new trial for violating an order in limine. See *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 50262, 2011 WL 1436499 (Nev. Apr. 14, 2011) (examining whether there was an abuse of discretion in granting a new trial for violating a motion in limine); see also *McDonnell v. McPartlin*, 192 Ill. 2d 505, 535, 249 Ill. Dec. 636, 653, 736 N.E.2d 1074, 1091 (2000) (noting that mistrial is appropriate grounds for in limine violation only where the violation results in the denial of a fair trial). In addition, a court may hold an attorney who violates an order in limine in contempt or impose a monetary sanction. See *Charbonneau v. Superior Court*, 42 Cal. App. 3d 505, 513, 116 Cal. Rptr. 153, 159 (2d Dist. 1974) (upholding imposition of contempt sanction where counsel intentionally violated an express instruction in the motion in limine ruling not to mention brake cylinders on car models subsequent to the 1967 model involved in the litigation); *Ball v. Rao*, 48 S.W.3d 332 (Tex. App. Fort Worth 2001) (upholding a monetary sanction against the attorneys for repeated violations of the court's in limine orders). Thus, courts, at the most extreme, may grant a new trial as a sanction for violating an order in limine.

The court erred in imposing the ultimate sanction of striking Defendant's Answer for violating the court's in limine orders. Even assuming defendant did violate an order—which it did not—the sanction was inappropriate. There simply is no precedent for imposing such a sanction for attorney misconduct at trial. And, even assuming there are circumstances that would warrant the ultimate sanction for such conduct, in no wise would the standard for imposing it be lower than for granting a new trial. Where, as here, the court is not justified in granting a new trial under *BMW*, striking the Answer is beyond the pale.

B. **Plaintiff abused EDCR 7.27 bu submitting ex-parte briefs after trial had begun**

Plaintiff filed an EDCR 7.27 prior to trial. The practice of submitting ex-parte briefs may or may not be constitutional. However, in the present case, Plaintiff actually violated the provisions of EDCR 7.27., by filing ex-parte briefs after trial began. This practice created unfair prejudice and caused error, where Plaintiff was allowed to present its improper arguments, with erroneous citations, without the knowledge and ability to respond by Defendant.

1. Two Circuits Prohibit Delayed Exchange of Briefs

At least two Federal Circuit Courts of Appeal have exercised their supervisory powers to direct district courts to refrain from allowing delayed brief exchanges. In *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), the Seventh Circuit explained that allowing delayed exchange of trial briefs is prejudicial, unsound, and prone to confuse the judge with incorrect concepts. *Id.* at 710. The court also declared that the practice is inconsistent with the goal of eliminating gamesmanship and is contrary to the ultimate aims of the adversarial system--the search for truth. *Id.*

Any benefits that a delayed exchange may provide are outweighed by the increased potential for prejudice and by the added difficulties resulting from postponing until after trial the curing of any real prejudice caused by the trial briefs. The district court judge, particularly in the case of a long and complex trial, who has entertained incorrect concepts about some aspects of the case during the course of the trial because of some ex parte brief, is placed in the difficult position of returning to a status quo ante position prior to engaging in the decisional process.
Id. To eliminate these problems, the Seventh Circuit in Photovest ordered that each party must "serve his trial brief on all other parties at some reasonably short time before or after he files the brief with the court, or provides a copy to the judge."

Following the lead of the Photovest opinion, the Sixth Circuit, too, has utilized its supervisory power to direct that no district court shall accept ex parte briefs. *Whitaker-Merrell Co. v. Profit Counselors, Inc.*, 748 F.2d 354 (6th Cir. 1984) ("it is inconsistent with our adversary system for parties to submit and judges to accept ex parte trial briefs").

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2. The Impractical and Inequitable Results of Delayed Exchange

Among the hazards of delayed exchange of briefs are: (1) the possibility that the party may gain an advantage by having the first word; (2) the possibility that the trial judge may prejudge the evidence before it may be answered and challenged; (3) the insidious nature of the relationship between the court and the party which would allow such ex parte disclosures; and (4) the danger that the district court will possess information that does not become a part of the record. *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984).

A Nevada "judge shall not initiate, permit or consider ex parte communication, or consider other communications made to the judge outside the presence of the parties...." Canon 3B(7). The local rule does not operate as an exception to this proscription. *In re Fine*, 116 Nev. 1001, 13 P.3d 400, 409 (2000). There is a danger of prejudice whenever ex parte contact occurs between the judge and opposing litigants. *Gunether*, 939 F.2d at 761. Where the content of the communication is substantive, as opposed to merely procedural, the risk of prejudice is even greater. *Id.*; *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir.), cert. denied, 429 U.S. 858 (1976); *Haller v. Robbin*, 409 F.2d 857 (1st Cir. 1969).

3. Such Ex Parte Communication Undermines Confidence in the Courts

Due process requires "neutrality in civil proceedings, both in reality and in appearance." *Gunether v. C.I.R.*, 939 F.2d 758 (9th Cir. 1991) (emphasis added). In addition to raising questions of due process[, ex parte communication] ... involve[s] a breach of legal and judicial ethics. Regardless of the propriety of the court's motives ... the practice should be discouraged since it undermines the confidence in the impartiality of the court. 8B MOORE'S FEDERAL PRACTICE ¶ 43.03[2] at 43-23 (1983) (footnote omitted), cited by *United States v. Earley*, 746 F.2d at 416. Any such ex parte communications "shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding." *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir.), cert. denied, 429 U.S. 858 (1976).

4. The Rule Enables Gamesmanship

As Justice Enoch of Texas observed, "courts acknowledge that undue gamesmanship often occurs within the rules of procedure. Arguably, much of the gamesmanship appears to involve not

the violation of, but rather the strategic use of, court rules." Craig Enoch, Incivility in the Legal System-Maybe it's the Rules, 47 S.M.U.L. REV. 199, 207-08 (1994) (footnote omitted) (citing *Photovest*, supra).

5. EDCR 7.27 was violated when Plaintiff submitted ex-parte briefs after trial began

Under EDCR 7.27, all ex-parte briefs are to be filed prior to the commencement of trial. EDCR 7.27. Plaintiff filed an initial brief (signed the day trial began) and then submitted several supplemental briefs, all of which were signed and submitted after trial began. This is in stark contrast to Defendants briefs, which were all submitted in open court and served upon Plaintiff prior to argument.

Specifically, in every motion made by Defendant or Plaintiff during trial, Plaintiff submitted arguments to the court ex-parte and without providing opposing counsel the list of arguments, and any case citations to such arguments. This is especially important where, as here, the rulings of the court could have been different had Defendant been placed on notice of the erroneous arguments made by Plaintiff.

As an example, while plaintiff's motion in limine argued only to exclude expert testimony regarding "minor impact" and photographs, ONLY IN THEIR SECRET EDCR 7.27 BRIEF did they argue that any evidence whatsoever that went to a "minor impact" theory should be excluded. As explained above, the legal position that plaintiffs were arguing was preposterous and incorrect. There was no legal support for the proposition that the facts of the accident were not to be discussed at trial. Furthermore, if the communications weren't secret, the Court's mistake could have been addressed before it was too late.

This is not simply a matter of whether EDCR 7.27 ex-parte briefs are allowed at all. Plaintiff took clear advantage of the rules by submitting supplemental briefs, after trial had already begun. This is in clear violation of EDCR 7.27, and to the detriment of Defendants.

C. <u>Defendant's right to voir dire was unreasonably restricted in violation of NRS 16.030</u>

NRS 16.030 states:

> The judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted.

Where a trial judge unreasonably restricts or denies supplemental attorney voir dire, she commits reversible error. *Leone v. Goodman*, 105 Nev. 221, 773 P.2d 342 (1989).

This court unreasonably denied Defendant's right to voir dire jurors for cause before their dismissal. The right to voir dire by a Defendant is required by NRS 16.030 and it's legislative history:

A review of the legislative history "convinces us that there was no mistake by the Legislature as to the language used in the statute: it gives attorneys a right to conduct supplemental examination of prospective jurors." *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988). Sister states likewise hold that excusing jurors for cause without allowing inquiry by Defendants is reversible error. See Sanders v. State, 707 So.2d 664 (Fla. 1998); *People v. Lefebre* 981 P.2d 650 (Colo App. 1998); *O'Connell v. State*, 480 So.2d 1284 (Fla. 1986); *State v. Anderson*, 4 P.3d 369 (Ariz. 2000).

Nine jurors were excused under this method. Defendant was unfairly and irrevocably prejudiced. A new trial is the only remedy.

D. <u>This court failed to properly restrict Plaintiff's voir dire</u>

While each side has a right to voir dire, unreasonable voir dire can and must be restricted by the trial court. The trial judge has the duty to restrict attorney-conducted voir dire to its permissible scope: obtaining an impartial jury. "NRS 16.030(6) clearly contemplates that the trial judge will supervise the process and that he may reasonably restrict supplemental examination of prospective jurors by the litigant's counsel." Whitlock v. Salmon, 104 Nev. 24 (1988). See also Lamb v. State, 127 Nev. Adv. Op. 3 (March 3, 2011 Nev. 2011) (Proper to exclude voir dire "aimed more at indoctrination than acquisition of information concerning bias or ability to apply the law".)

Plaintiff has irrevocably tainted the jury pool with an improper voir dire. Plaintiff took the better part of four days to improperly influence the jury pool, asking questions designed to "indoctrinate" the jurors rather than determine bias or prejudice. In addition, the jury pool was improperly advised on the burden of proof. Plaintiff has advised the jury the parties are "equal", yet the Plaintiff has burden of proof on negligence. See Joynt v. California Hotel & Casino, 108 Nev. 539 (1992).

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E. **Defendant was unfairly prejudiced by Plaintiff's failure to disclose the necessity of future surgery, to provide timely computation of damages as required by NRCP 16 (A)(1)C), and to deny a request for mistrial or continuance to obtain expert testimony to rebut undisclosed expert opinions**

NRCP 16.1(a)(1)(c) required Plaintiff to provide a computation of damages:

> A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.

NRCP 26(e) requires a party to supplement the disclosures made under NRCP 16.1(a). The sanction for failing to disclose evidence according to the rules is exclusion at trial. Rule 37 makes clear that if a party fails to disclose information required under Rule 16.1 or 26(e), the party "is not permitted to use the evidence at trial," unless the failure is justified or harmless. Plaintiff failed to comply with these rules.

At the hearing on the motion in limine, Plaintiff specifically stated that there were no "undisclosed, hidden opinions". (Motion transcript, February 15, 2011, pp 39). The court denied Defendant's motion, on the basis that there was no new opinions:

> Well, here's the thing, this motion is denied, but let me say why it's denied, it's because the way it's drafted, new/undisclosed medical treatment and opinions. It's denied because it's my understanding there aren't any new or undisclosed medical treatment and opinions that have not yet been turned over to the Defense.

(Motion transcript, February 15, 2011, pg. 42)

Dr. McNulty's opinion regarding the necessity of future treatment was never provided to the Defense. Nor did the required computation of damages include information regarding the future care (a spinal cord stimulator). Defendant requested a mistrial or a continuance in order to obtain additional expert testimony to counter the necessity and cost of future surgery. This court denied Defendants any relief. Had Defendants been able, they would have presented additional expert testimony from Dr. Joseph Schifini re: the cost and necessity of future surgery. (See expert report attached as Exhibit "1").

Dr. Schifini's testimony was required, as the available experts (California experts Dr. Fish and Wang) were not familiar with the costs of surgery outlined by Dr. McNulty, and thus could not rebut

this opinion.

1. Justice required that Defendants be provided all medical opinions and documentary evidence, along with computation of damages, prior to trial

Our system of civil justice is founded on the premise that a party be given sufficient notice of evidence to be presented at trial. The discovery rules are designed "to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial." *Washoe County Bd. of Sch. Trustees v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968).

"Gamesmanship' and actions designed to minimize adequate notice to one's adversary have no place within the principles of professionalism governing the conduct of participants in litigation." *Collins v. CSX Transp., Inc.*, 441 S.E.2d 150, 153-54 (N.C. Ct. App. 1994). The discovery rules are designed to make trials "fair contest[s] with the basic issues and facts disclosed to the fullest practicable extent." *U.S. v. Proctor & Gamble*, 356 U.S. 677, 682 (1958) (internal quotation marks omitted).

Supplemental expert material is regularly excluded where the supplement "comes too late to be 'seasonable,'" and would compromise the other party's pretrial preparation. See, e.g., *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 20 (1st Cir. 2001). In *Leiper v. Margolis*, for example, the plaintiff was not entitled to introduce testimony from one of her physicians concerning plaintiff's ailments that were not disclosed until shortly before trial. 111 Nev. 1012, 1014-1015, 899 P.2d 574, 575 (1995). "All parties have an interest in reaching finality with respect to discovery so that they can assess the strengths and weaknesses of their position, as well as their adversary's position" with sufficient time before trial to plan accordingly. *Fed. Deposit Ins. Corp. v. Wrapwell Corp.*, 2000 WL 1576889, *3 (S.D.N.Y. 2000). Providing a medical report on the eve of trial is of no value to a defendant in preparation for trial.

Even though an medical expert is also a treating physician, a report is still required whenever the doctor's treatment is procured in connection with the litigation. 10 FED. PROC. § 26.50 ("Identity and Report of Treating Physician"). The question is "whether the treating physician developed his relationship with plaintiff-and his opinions-close in time to the litigation or at the request of counsel."

Kirkham v. Societe Air France, 236 F.R.D. 9 (D.D.C. 2006).

2. Testimony regarding future surgery must be disclosed pre-trial

Testimony regarding causation, prognosis and future treatment must be disclosed in a pre-trial report. See, e.g., *Griffith v. Northeastern Illinois Regional Commuter Railroad Corp.*, 233 F.R.D. 513 (N.D. Ill. 2006); *Kirkham*, 236 F.R.D. 9. The reason for this is well-founded, the treating physician's treatment and impressions aside from the investigative question of causation or the predictive issue of future treatment would already be included in the medical records:

> When a treating physician's testimony is limited to his observation, diagnosis and treatment, the medical records provide a significant amount of information about the physician's likely testimony. However, the medical records alone provide little or no information about any opinions the physician may render regarding what caused the injury, or whether the plaintiff will be unable to work in the future.

Griffith, 233 F.R.D. at 518. In this case, the opinion that future surgery would be necessary was precisely the type of prediction of potential future treatment that required disclosure.

"If the defendant is going to be exposed to a claim for surgery or expenses associated with surgery, there should be some advanced warning given the defendant with respect to the fact that he is going to be facing such a claim." *Fahey v. SafecoInsurance Co.*, 714 A.2d 686, 693 (Conn. App. 1998) (the Connecticut appellate court found the trial court properly excluded expert testimony regarding future surgery). It is only proper to impose the consequences of plaintiff's failure to disclose upon the plaintiff, rather than the defendant. Id.

Dr. McNulty, a treating provider, last saw the patient over one year prior to trial. Therefore, Dr. McNulty had no understanding, from a treating provider's standpoint, of the Plaintiff's current medical condition. Instead, Dr. McNulty offered expert opinions regarding the necessity of future surgery, and the cost thereof.

Dr. McNulty never wrote an expert report and never complied with NRCP 26's requirements for expert testimony. As a treating provider, Dr. McNulty was asked about future surgery during his deposition, but he did not provide any opinions at that time. When Dr. McNulty offered opinions which did not relate to his actual care and treatment of Plaintiff, he became an expert witness. As these opinions were never properly disclosed as an opinion for trial, his opinion should have been excluded. Because it was not, Defendant requested a continuance or a mistrial to obtain counter

evidence. Both requests were denied.

Defendant now presents the affidavit of Dr. Joseph Schifini as evidence as to what Defendant would have attempted to present if it had been allowed the opportunity. (Exhibit "1").

3. Justice required that Defendants be provided with the changes to Dr. Arita's testimony prior to trial.

Dr. Arita substantially changed the substance of his testimony, including his opinion testimony, from his deposition to trial. Prior to trial, Dr. Arita had view Plaintiff's injuries with some skepticism. In fact, it was Dr. Arita who believed that Plaintiff had some issues with secondary gain. Defendant was precluded from raising such issues with the doctor due to a pre-trial motions in limine. This was error.

But following his deposition, and sometime before trial, Dr. Arita's opinions changed. Dr. Arita now agrees with Plaintiff's other physicians as to the cause of Plaintiff's injuries and need for future care. Plaintiff's counsel met with Dr, Arita between these two events, and were on notice of the change in testimony. Plaintiff was required to disclose the material changes:

> Where, as here, an attorney has knowledge that his client or a material witness intends to deviate from his deposition testimony in a crucial way, we believe that the attorney has an ethical obligation to convey that fact to his adversary.

McKenney v. Jersey City Medical Center, 771 A.2d 1153, 1159 (N.J. 2001). Under these circumstances, a mistrial is warranted for the failure to disclose the change in testimony:

Under the circumstances presented in this close case, we cannot view with confidence the jury's determination that Dr. Hu's negligence did not deprive McKenney of the opportunity to terminate her pregnancy during the second trimester. For Plaintiffs to proceed to trial without being informed of the surprise testimony created a 'make believe' scenario [for plaintiffs], the legal equivalent of half a deck." (Citation omitted). Plaintiffs went to trial misled by false information. Hence, the failure to grant a mistrial was an abuse of discretion. Id. at 1163. See also *Paulk v. Central Laboratory Associates, P.C.*, 636 N.W. 2d 170 (Neb. 2001) (mistrial granted when party unfairly surprised by new opinion testimony); *Clayton v. County of Cook*, 805 N.E. 2d 222 (Ill. App. 1st Dist. 2004).

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In the present case, had Defendant been on notice of the changed testimony, Defendant would have attempted to subpoena other witnesses who could have challenged Dr. Arita's new opinions, such as the care received at Southwest Medical Associates, including calling physician's assistant Britt Hill, or obtained additional expert testimony in the form of Dr. Schifini to counter Dr. Arita's changed opinions. (Exhibit "1").

4. A mistrial should have been granted, or a continuance to present Dr. Schifini's testimony should have been allowed.

Dr. Schifini's affidavit sets forth several opinions which Defendant would have presented at trial if allowed. Significantly, Dr. Schifini states that the cost estimate provided by Dr. McNulty are excessive, that there was no sufficient foundation pre-trial for an opinion that future surgery was necessary, that the Plaintiff was not a candidate for any future spinal cord stimulator, and that such a procedure would likely fail to reduce the Plaintiff's pain. (Affidavit). These opinions should have been allowed due to the introduction of Dr. McNulty's new opinions at trial.

Had Defendant been able to present this testimony, it is obvious that the presentation of the defense would have been different. This is important, as the court granted an excessive amount of general damages, 10 times the amount of special damages, which shows it is clear the court took the future medical specials into account in its verdict. Defendant should have been granted a mistrial, or a continuance of the trial, to present this testimony.

F. <u>The court did improperly award future medical specials veiled as general damages, as the award of future pain and suffering is excessive</u>

The judgment does not award future medical damages as such, but it is clear from an examination of the award that they are included. The judgments award pain and suffering at 10 times the compensatory damages, where a normal award is considered 2 to 3 times such expenses. This is strikingly obvious when the Plaintiff testifies, as he did at trial, that he does not have any current medical limitations, he is gainfully employed, and there is no activity besides riding motorcycles that he cannot perform. (Tr...)

It is clear that plaintiff's counsel was inviting the Court to hide the future damages in the general damages. During the hearing on damages, Defendant specifically addressed whether Plaintiff

was requesting future medical specials. Defendant asserted the claim was not withdrawn. This statement by Mr. Rogers that we abandoned, or he even used the word "waived," certain future medical treatments is incorrect. (Trial transcript, April 1, 2011, pg. 22) Plaintiff then goes on to blame Defendant for having the answer stricken, such that Dr. Wang could not return to "justify" future surgery. (Id.)

However, this argument clearly ignores Dr. McNulty. In truth, Dr. McNulty did testify regarding the need for future medical treatment, and the costs thereof. It was this exact testimony upon which Defendant moved for a mistrial, or a continuance in order to obtain additional expert opinions.

G. **A new trial should beheld in front of a new judge**

The plaintiff's actions in the present case, and the circumstances of the trial, have shown that this trial cannot proceed fairly in front of this court. Even Plaintiff admits that these proceedings are likely to taint a judge's decision making:

> MR. WALL: I admit that for some who have sat where you sit that it may be difficult to disregard the conduct of one party during the course of a case when it comes time to do that. I'm confident the Court can do that.

Defendant, however, is not confident. And so, Defendant requests a new trial, and the court recuse itself from conducting the new trial.

III. CONCLUSION

For the reasons outlined above, the Court should grant a mistrial, and re-assign the case to a different judge.

DATED this 16th day of May, 2011.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiff, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I - V; and ROE CORPORATIONS I - V, inclusive, Defendants.	CASE NO. A539455 DEPT. NO X

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of ROGERS, MASTRANGELO, CARVALHO & MITCHELL, and on the 17th day of May, 2011, a true and correct copy of **DEFENDANT'S MOTION FOR NEW TRIAL** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

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David T. Wall, Esq.
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Attorneys for Plaintiffs

An Employee of
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EXHIBIT H
TO
DOCKETING
STATEMENT

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 3 1 2011
BY, TERI BRAEGELMANN, DEPUTY

SODW
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Attorneys for Defendants James and Linda Rish

DISTRICT COURT

CLARK COUNTY, NEVADA

****

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, **Plaintiffs** **vs.** **JENNY RISH, JAMES RISH, LINDA RISH and DOES I through V and ROE CORPORATIONS I through V, inclusive,** **Defendants.**	**CASE NO.: A539455** **DEPT. NO.: X**

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STIPULATION AND ORDER FOR DISMISSAL, WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between counsel for their respective parties, that Plaintiffs' claims against Defendants JAMES RISH and LINDA RISH only be dismissed with prejudice, each party is to bear their own costs and attorneys' fees.

Plaintiffs' claims against Defendant JENNY RISH shall continue unaffected by this stipulation.

...

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SODW
Stipulation and Order for Dismissal With Pr
1336926

DATED this 31 day of Mar., 2011. DATED this 31 day of March, 2011.

LEWIS & ASSOCIATES, LLC

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MAINOR EGLET

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Attorneys for Plaintiffs

DATED this ____ day of _____, 2011.

ORDER FOR DISMISSAL

IT IS SO ORDERED that Plaintiffs' claims against Defendants JAMES AND LINDA RISH only be dismissed with prejudice, each party is to bear their own costs and attorneys' fees. Plaintiffs' clams against Defendant JENNY RISH shall continue unaffected by this stipulation.

DATED this 31st day of Mar, 2011.

DISTRICT COURT JUDGE

...

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Respectfully submitted by:

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EXHIBIT I
TO
DOCKETING
STATEMENT

ORIGINAL

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CLERK OF THE COURT

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FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife,

Plaintiffs,

vs.

JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive.

Defendants.

Case No.: A539455

Dept. No.: X

COMPLAINT FOR PERSONAL INJURIES

COMES NOW, Plaintiffs, WILLIAM JAY SIMAO and CHERYL ANN SIMAO, by and through their attorney Matthew E. Aaron, Esq., of the law firm of AARON & PATERNOSTER, LTD., and for their claims against the Defendants, and each of them, alleges as follows:

BACKGROUND FACTS

1. Upon information and belief, at all times relevant to this action, Plaintiffs, WILLIAM JAY SIMAO and CHERYL ANN SIMAO were and are residents of the County of Clark, State of Nevada and are legally married.

2. Upon information and belief, at all times relevant to this action, Defendant, JENNY RISH, was and is a resident of Gilbert, State of Arizona.

3. Upon information and belief, at all times relevant to this action, Defendants, JAMES RISH and LINDA RISH, were and are residents of Hill AFB, State of Utah.

4. That the true names or capacities, whether individual, corporate, associate or otherwise of Defendants DOES I through V and ROE CORPORATIONS I through V are unknown to Plaintiffs who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe and thereon alleges that each of the Defendants designated herein as DOE and ROE CORPORATION are responsible in some manner for the events and happenings herein referred to and caused damage proximately to Plaintiffs as herein alleged; and Plaintiffs will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through V and ROE CORPORATIONS I through V, when the same have been ascertained and to join such Defendants in this action.

5. Upon information and belief, at all times mentioned herein, Plaintiff, WILLIAM JAY SIMAO, was the owner and operator of a certain 1994 Ford Econoline van bearing Nevada license plate 573NHG herein after referred to as Plaintiff's vehicle.

6. Upon information and belief, at all times mentioned herein, Defendant, JENNY RISH was the operator of a certain 2001 Chevrolet automobile bearing Utah license plate 886VDX, hereinafter referred to as Defendants' vehicle.

7. Upon information and belief, at all times mentioned herein, Defendants, JAMES RISH and LINDA RISH, were the owners of a certain 2001 Chevrolet automobile bearing Utah license plate 886VDX, hereinafter referred to as Defendants' vehicle.

8. Upon information and belief, at all times mentioned herein, Defendant, JENNY RISH, was the operator of Defendants' vehicle and was doing so with consent, knowledge and permission of it's owner.

9. At all times mentioned herein, IR-15 near the Cheyenne interchange, runs in a generally north/south direction. IR-15 and Cheyenne are generally traveled public streets or highways within the County of Clark, State of Nevada.

FIRST CLAIM FOR RELIEF
(Negligence of JENNY RISH, Negligence of JAMES RISH, Negligence of LINDA RISH)

10. Plaintiffs repeat and reallege paragraphs 1 through 9, and incorporates the same herein by reference as though fully set forth herein.

11. On or about the 15th day of April, 2005, Defendant's vehicle was traveling southbound on IR-15 north of the Cheyenne interchange. Plaintiff's vehicle was traveling southbound on IR-15 directly in front of Defendants' vehicle. Defendant's vehicle struck the rear end of Plaintiff's vehicle.

12. At the time of the collision herein complained of and immediately prior thereto, Defendant, JENNY RISH, was negligent and careless in the following particulars:

a. In failing to maintain a proper lookout for other vehicles on the roadway and more particularly the Plaintiff's vehicle;

b. In operating the Defendant's vehicle without due caution and with disregard for the rights of Plaintiff herein;

c. In failing to maintain a safe distance behind Plaintiff's vehicle;

d. In failing to keep Defendant's vehicle under proper control; and

e. In operating Defendant's vehicle without paying full time and attention to said operation.

13. At the time of the collision herein complained of and immediately prior thereto, Defendants, JAMES RISH and LINDA RISH were negligent and careless in allowing a person to operate a vehicle who is not qualified to do so.

(General Damages)

14. By reason of the premises and as a direct and proximate result of the collision complained of, Plaintiff, WILLIAM JAY SIMAO, was injured in and about his head, neck, body, limbs, organs and systems and was otherwise injured and caused to suffer great pain of body and mind, all or some of which conditions may be permanent and disabling nature, all to his general damages in an amount in excess of TEN THOUSAND DOLLARS ($10,000.00).

(Medical Special Damages)

15. By reason of the premises and as a direct and proximate result of the collision complained of, Plaintiff, WILLIAM JAY SIMAO has incurred expenses for medical care and treatment and expenses incidental thereto, all to his damages, in a presently unascertainable amount. Plaintiff is informed and believes and thereon alleges that the above-stated expenses will continue in the future, all to his damages in a presently unascertainable amount. In this regard, Plaintiff prays leave of this Court to insert the exact amount of said damages herein, when the same have been fully ascertained.

(Property Damage)

16. By reason of the premises and as a direct and proximate result of the aforesaid negligence and carelessness of Defendants, and each of them, Plaintiff, WILLIAM JAY SIMAO, sustained damages to Plaintiff's Vehicle in a presently unascertainable amount. In this regard, Plaintiff prays leave of this Court to insert all said damages herein when the same have been fully ascertained.

(Loss of Use Damages)

17. By reason of the premises and as a direct and proximate result of the aforesaid negligence and carelessness of Defendants, and each of them, Plaintiff, WILLIAM JAY SIMAO, sustained damage for rental expense in a presently unascertainable amount. In this regard, Plaintiff prays leave of this Court to insert all said damages herein when the same have been fully ascertained.

(Loss of Income Damages)

18. Prior to the injuries complained of herein, Plaintiff, WILLIAM JAY SIMAO, was an able-bodied male regularly and gainfully employed and physically capable of engaging in all other activities for which he was otherwise suited. By reason of the premises and as a direct and proximate result therefore, Plaintiff was required to and did lose time from his employment, continues to and shall continue to be limited in his activities and occupations which has caused and shall continue to cause to Plaintiff a loss of earning and earning capacity to his damages in a presently unascertainable amount, the allegations of which Plaintiff prays leave of this Court to insert herein.

19. Plaintiff has been required to retain the services of an attorney to prosecute this action and is entitled to an award of reasonable attorneys' fees.

SECOND CLAIM FOR RELIEF
(Negligence Per Se of JENNY RISH)

20. Plaintiffs repeat and reallege Paragraphs 1 through 19 and incorporate the same by reference as though fully set forth herein.

21. Defendant, JENNY RISH, in operating the Defendants' vehicle on April 15th 2005, violated one or more of the Nevada Revised Statutes, including N.R.S. 484.363, which regulates the duty of a driver to decrease speed under adverse circumstances, and use due care. The violations of said Statutes were the direct and proximate cause of the injuries previously alleged to have been suffered by Plaintiff.

22. Defendant, JENNY RISH, in operating Defendants' vehicle on April 15th, 2005, violated one or more of the Clark County Codes. The violations of said Codes were the direct and proximate cause of the injuries previously alleged to have been suffered by Plaintiff.

23. The Plaintiff is a member of the class of persons these Statutes and/or Codes were intended to protect and the injuries the Plaintiff suffered were of the type theses Statutes and/or Codes were intended to prevent.

24. Plaintiff has been required to retain the services of an attorney to prosecute this action and is entitled to an award of reasonable attorneys' fees.

THIRD CLAIM FOR RELIEF
(Negligence of JAMES RISH and LINDA RISH)

25. Plaintiff repeats and realleges Paragraphs 1 through 24 and incorporates the same herein by reference as though fully set forth herein.

26. Defendant, JENNY RISH, was operating the subject vehicle with the permission of Defendants, JAMES RISH and LINDA RISH.

27. Defendants, JAMES RISH and LINDA RISH are liable for the negligent acts of Defendant, JENNY RISH, under N.R.S. 41.440 and 41.450.

28. Plaintiff has been required to retain the services of an attorney to prosecute this action and is entitled to an award of reasonable attorneys' fees.

FOURTH CLAIM FOR RELIEF
(Loss of Consortium)

29. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 28, as though fully set forth herein.

30. By reason of the premises and as a direct and proximate result thereof, Plaintiff, CHERYL ANN SIMAO, has been deprived of and has suffered the loss of services, companionship, society and consortium of her husband, Plaintiff, WILLIAM JAY SIMAO, all to her damage in an amount in excess of $10,000.00.

31. Plaintiffs have been required to retain the services of an attorney to prosecute this action and is entitled to an award of reasonable attorneys' fees.

WHEREFORE, Plaintiffs, WILLIAM JAY SIMAO and CHERYL ANN SIMAO, expressly reserving their right to amend this Complaint at the time of trial of this action to include all items of damages not yet ascertained, demands judgment against the Defendants, and each of them, as follows:

FIRST SECOND AND THIRD CLAIMS FOR RELIEF:

1. General damages in excess of TEN THOUSAND DOLLARS ($10,000.00);

2. Special damages for medical care and treatment and costs incidental thereto, when the same have been fully ascertained;

3. Property damage and costs incidental thereto, when the same have been fully ascertained;

4. Compensation for the loss of use of vehicle and its use and enjoyment thereto, when the same have been fully ascertained;

5. Damages for loss of earnings and earning capacity, when the same have been fully ascertained;

6. Prejudgment interest;

7. Reasonable attorney's fees;

8. Costs of suit herein; and

9. For such other and further relief as the Court may deem proper.

FOURTH CLAIM FOR RELIEF:

1. For damages for loss of services, companionship, society and consortium of her husband in an amount in excess of $10,000.00;

2. Reasonable attorney's fees;

3. Costs of suit herein; and

4. For such other and further relief as the Court may deem proper.

DATED this 17 day of April, 2007.

AARON & PATERNOSTER, LTD.

MATTHEW E. AARON, ESQ.
Nevada Bar No. 4900
2300 West Sahara Avenue, Suite 650
Las Vegas, Nevada 89102
Attorneys for Plaintiffs

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

JENNY RISH,

Appellant,

vs.

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually and as husband and wife,

Respondents.

No. 59423

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District County Eighth Department 10

County Clark Judge The Honorable Jessie Walsh

District Ct. Case No. A539455

2. Attorney filing this docketing statement:

Attorney Daniel F. Polsenberg Telephone 702-474-2616

Firm Lewis and Roca LLP

Address: 3993 Howard Hughes Parkway, Suite 600, Las Vegas, NV 89169

Client(s) Jenny Rish

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Robert T. Eglet Telephone 702-450-5400

Firm Mainor Eglet

Address: 400 South Fourth Street, Suite 600, Las Vegas, NV 89101

Client(s) William Jay Simao and Cheryl Ann Simao

Attorney _____ Telephone _____

Firm _____

Address

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. **Nature of disposition below (check all that apply):**

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☒ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify) _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. **Does this appeal raise issues concerning any of the following?** No.

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Rish v. Simao, Case No. 58504

Rish v. Simao, Case No. 59208

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This is a motor vehicle accident occurring on April 15, 2005. Plaintiff's complaint alleged negligence and loss of consortium. The case presented for a jury trial on March 14, 2011. On March 31, 2011, plaintiff made an oral motion to strike defendant's answer which was granted. After a prove-up hearing on April 1, 2011, judgment was entered on April 28, 2011, in favor of plaintiff in the amount of $3,493,983.45.

9. **Issues on appeal**. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether the district court erred in striking defendant's answer during trial, as a sanction for eliciting testimony about the facts of a low-impact automobile collision, where the court repeatedly refused to clarify the meaning of her pre-trial order on a motion in limine or otherwise make clear that such evidence was inadmissible.

2. Whether EDCR 7.27, the local rule that permits confidential, ex parte briefs, was abused in this case, and ought to be abolished.

3. Whether defendant's right voir dire of the jury was wrongfully curtailed.

4. Whether the district court erred in admitting previously undisclosed evidence of future medical expenses during trial.

5. Whether the district court erred in granting plaintiffs' attorney fees.

10. **Pending proceedings in this court raising the same or similar issues**. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: The district court's errors in this case, including it reliance on secret, ex parte briefing, constituted a deprivation of defendant's right to due process of law, guaranteed by the constitutions both of the United States and of the State of Nevada.

13. **Trial.** If this action proceeded to trial, how many days did the trial last? 15 days

Was it a bench or jury trial? Jury trial

14. **Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

15. **Date of entry of written judgment or order appealed from** 9/14/11 (Exhibit E), 9/23/11 (Exhibit F)

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. **Date written notice of entry of judgment or order was served** 9/15/11 (Exhibit E), 9/29/11 (Exhibit F)

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. _____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

18. Date notice of appeal filed 10/10/2011

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other NRAP 4 (a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☒ Other (specify) 3A(b)(8)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:

This appeal from a final judgment is amended to include an appeal from a post-judgment award of attorney fees.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff: William Jay Simao and Cheryl Ann Simao
Defendant: Jenny Rish; James Rish and Linda Rish

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

Defendants James Rish and Linda Rish	Dismissed March 31, 2011 (Exhibit H)

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiff's complaint alleged negligence and loss of consortium. Judgment was entered on April 28, 2011, in favor of plaintiffs in the amount of $3,493,983.45. (Exhibit I)

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, crossclaims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

Exhibit A - Notice of Entry of Order entered 4/26/11

Exhibit B - Notice of Entry of Judgment entered 5/3/11

Exhibit C - Notice of Entry of Judgment entered 6/2/11

Exhibit D - Notice of Entry of Order entered 8/25/11

Exhibit E - Notice of Entry of Order entered 9/15/11

Exhibit F - Notice of Entry of Final Judgment entered 9/30/11

Exhibit G - Defendants' Motion for New Trial

Exhibit H - Stipulation and Order of Dismissal with Prejudice of Defendants James and Linda Rish

Exhibit I - Complaint filed April 13, 2007

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Jenny Rish	Joel D. Henriod
11/7/2011	s/ Joel D. Henriod
Date	Signature of counsel of record
Clark County, Nevada	
State and county where signed	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 7th day of November, 2011, Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Robert T. Eglet
David T. Wall
Mainor Eglet
400 South Fourth Street
Las Vegas, NV 89101

Dated this 7th day of November, 2011

s/ Mary Kay Carlton
Signature

EXHIBIT A
TO
DOCKETING
STATEMENT

CLERK OF THE COURT

NEO
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
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Ph.: (702) 384-4111
Fx.: (702) 384-8222
Attorneys for Plaintiffs

MAINOR EGLET

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	CASE NO.: A539455 DEPT. NO.: X **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that a Decision and Order Regarding Plaintiffs' Motion to Strike Defendant's Answer was entered in the above-entitled matter on April 22, 2011 and is attached hereto.

DATED this 26 day of April, 2011.

MAINOR EGLET

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CERTIFIATE OF MAILING

The undersigned hereby certifies that on the 26 day of April, 2011, a copy of the above and foregoing NOTICE OF ENTRY OF ORDER was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
Attorneys for Defendants

An employee of MAINOR EGLET

MAINOR EGLET

EXHIBIT "1"

Electronically Filed
04/22/2011 03:40:20 PM

CLERK OF THE COURT

ORDR
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
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Fx.: (702) 384-8222
Attorneys for Plaintiffs

MAINOR EGLET

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH, Defendant.	CASE NO.: A539455 DEPT. NO.: X

DECISION AND ORDER REGARDING PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S ANSWER

This matter having come before the Court on March 31, 2011, on Plaintiffs' oral Motion to Strike Defendant's Answer, ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT M. ADAMS, ESQ. present for Plaintiffs, WILLIAM SIMAO and CHERYL SIMAO,

STEPHEN H. ROGERS, ESQ. and DANIEL F. POLSENBERG, ESQ. present for Defendant, JENNY RISH, and following the Court's oral pronouncement from the bench GRANTING Plaintiffs' Motion, the Court hereby enters the following written Decision and Order:

I. Factual and Procedural Background

This case involves a motor vehicle accident occurring on April 15, 2005. The Plaintiff, WILLIAM SIMAO, was driving southbound on Interstate 15 when he was rear-ended by a vehicle driven by the Defendant, JENNY RISH. Defendant did not deny causing the accident. Plaintiff WILLIAM SIMAO was injured in the accident and brought the instant action, which included a claim for loss of consortium by WILLIAM SIMAO's wife, Plaintiff CHERYL SIMAO.

This matter was presented for jury trial beginning on March 14, 2011, and the trial had nearly been completed before the instant Motion was made. However, the facts supporting the Motion and the grounds upon which to analyze the Motion include rulings made by this Court before the trial commenced. The Plaintiffs' oral motion to strike the Defendant's Answer is rooted primarily in the Defendant's repeated violations of this Court's Order granting the Plaintiffs' Motion in Limine to Preclude Defendant From Raising a Minor Impact Defense. However, this Court recognizes that Defendant violated other Orders of this Court during the trial, and the cumulative effect of such violations is material to the Court's analysis. Before itemizing and analyzing the violations of this Court's Order on "minor impact," it is necessary to consider the violations of other Court orders by the Defendant.

A. Violation of Order Precluding Evidence of Unrelated Accidents, Injuries or Medical Conditions

1. Plaintiffs' Motion in Limine

On January 7, 2011, Plaintiffs brought an Omnibus Motion in Limine, which included a

request to preclude the Defendant from introducing evidence of Prior and Subsequent Unrelated Accidents, Injuries and Medical Conditions and Prior and Subsequent Claims or Lawsuits. This portion of the Omnibus Motion in Limine specifically asked this Court to preclude evidence of an unrelated 2003 motorcycle accident involving the Plaintiff, since no medical provider had connected any of the minor injuries sustained by the Plaintiff in the 2003 motorcycle accident to any injuries suffered in the instant accident. In short, the evidence established that the motorcycle accident was irrelevant.

The Defendant filed an Opposition to Plaintiffs' Omnibus Motion in Limine, and the matter was heard by this Court on February 15, 2011, at which time this Court GRANTED Plaintiffs' request. On March 9, 2011, this Court entered a written Order which stated in pertinent part as follows:

> "**IT IS HEREBY ORDERED** that Plaintiffs' request to exclude prior and subsequent unrelated accidents, injuries and medical conditions, and prior and subsequent claims or lawsuits is GRANTED in all respects."

Following the entry of the foregoing Order, all parties were on notice that this Court had specifically precluded the Defendant from introducing evidence of unrelated accidents, including the 2003 motorcycle accident.

2. Defendant's Clear Violation in Opening Statement

In his Opening Statement, counsel for the Defendant presented to the jury a Power Point slide referencing William Simao's 2003 motorcycle accident. The Plaintiffs objected, asked that the slide be shielded from the jury, and approached for a sidebar conference.

The slide clearly and unambiguously violated the Order of this Court on the Plaintiffs' Omnibus Motion in Limine, which Motion specifically referenced the 2003 motorcycle accident as an accident *unrelated* to any issue in the instant case. The jury was directed to disregard the

slide and was further admonished that a pretrial ruling of the Court excluded evidence of the 2003 motorcycle accident.

The Plaintiffs' objection was sustained.

Following this admonition, this Court held a hearing outside the presence of the jury to allow the Defendant's counsel and the Plaintiffs' counsel to review the remaining slides accompanying the defense Opening Statement to determine if any of them violated court orders. Several of them violated orders and were removed (RTP, March 21, 2011, p. 75). Notably, the Plaintiffs' counsel made the following statement outside the presence of the jury:

> There were multiple other slides that had the same type of problems in them. Most of them Mr. Rogers agreed with and took those statements out of the slides, but again, if we hadn't done that, there would have been three to four more clear violations of ... this Court's pretrial orders.
>
> As Mr. Wall [Plaintiffs' co-counsel] said at the bench, I think it's clear – I think it's abundantly clear that Mr. Rogers is going to try to mistry this case. I think it is abundantly clear that that's what's going on.
>
> I told the Court at the last bench conference that that was two. If there were any additional ones, we were going to start asking for monetary sanctions *and other potential sanctions* in this case for this type of *systematic refusal to comply with pretrial court orders.*
>
> *I expect his experts are going to do it as well.* I can assure this Court that they are going to violate a number of the orders in their testimony, just like Mr. Rogers did up there....
>
> (RTP, March 21, 2011, p. 75) (emphasis supplied).

B. Violations of Order Precluding Evidence That This is a "Medical Build-up" Case

1. Plaintiffs' Motion in Limine

Within the afore-mentioned Omnibus Motion in Limine, the Plaintiffs also sought to preclude any evidence or argument that the case was "attorney driven" or a "medical build-up" case. This section of the Plaintiffs' Omnibus Motion in Limine was also heard by this Court on February 15, 2011, at which time this Court GRANTED the Plaintiffs' request. During the hearing on this Motion, counsel for the Defendant conceded he had no evidence of any kind suggesting that this case was "attorney driven" or a "medical build-up" case. This Court's written Order of March 9, 2011, also stated as follows:

> **"IT IS FURTHER ORDERED** that Plaintiffs' request to preclude argument that this case is 'attorney driven' or a 'medical build-up' case is GRANTED."

Following the entry of the foregoing Order, all parties were on notice that this Court had specifically precluded the Defendant from arguing or presenting evidence that the instant case was a "medical build-up" case, in large measure as a result of the Defendant having no such evidence to present.

2. Defendant's Clear Violation During Opening Statement

In his Opening Statement, counsel for the Defendant made the following statement when discussing the testimony of the Plaintiff's treating physicians:

> "And we are going to hear from various different kinds of doctors in this case. One of them are doctors who appear down here regularly in court, as often, if not more than trial lawyers. Doctors McNulty, and Grover..."
>
> (RTP March 21, 2011, p. 72).

Defense counsel's statement was interrupted by an objection from the Plaintiffs, who additionally asked that the Power Point slide that accompanied the defense's Opening Statement

be shielded from the jury. The slide referenced the Plaintiff's treating physicians as "Trial Doctors."

At the sidebar conference that followed, the Plaintiffs objected to the statements of counsel and the "Trial Doctors" slide as violating this Court's Order precluding any argument that the case was "attorney driven" or a "medical build-up" case. Since no other purpose for the statement or the slide was forthcoming from counsel for the Defendant at the sidebar, the jury was directed to disregard the slide.

The Plaintiffs' objection was sustained.

3. Defendant's Clear Violation During Cross-Examination of Dr. Patrick McNulty

Despite this Court's ruling during the Defendant's Opening Statement on the issue of medical build-up and "Trial Doctors," counsel for the Defendant asked the following question of Dr. McNulty, one of the Plaintiff's treating doctors:

> "Now, Doctor, yesterday there was a discussion about the testimony history of a doctor. I don't broach this topic with you to be insensitive, but I want to touch on it since that issue has been raised. You testified under oath, whether it be in trial or in deposition, somewhere around 100 times; is that right?"
>
> (RTP, March 25, 2011, pp. 21-22).

Counsel for the Plaintiffs immediately objected and approached the Court for a sidebar bench conference. There, the Court heard argument regarding the "discussion" "yesterday" which was the Plaintiffs' use of specific prior deposition testimony to impeach the Defendant's expert witness during cross-examination. Further, the Court heard argument that this line of questioning could only be presented to create an inference of "medical build-up." Counsel for the Defendant did not sufficiently explain to this Court how this line of questioning was not a violation of the pretrial order precluding evidence of "medical build-up," especially in light of

the fact that the Defendant admittedly had no evidence to support a "medical build-up" defense.

The Plaintiffs' objection was sustained.

C. Violations of Pretrial Order Precluding "Minor Impact" Defense

As set forth above, the Plaintiffs' ultimate motion to strike the Defendant's Answer was based primarily on repeated violations of this Court's pretrial Order on the issue of a "minor impact" defense.

1. Plaintiff's Motion in Limine

On February 17, 2011, Plaintiffs brought a Motion in Limine to: 1) Preclude Defendant from Raising a "Minor" or "Low Impact" Defense; 2) Limit the Trial Testimony of Defendant's Expert, David Fish, M.D.; and 3) Exclude Evidence of Property Damage. The Motion set out the fact that the Nevada Highway Patrol Trooper who completed the Accident Report referred to the vehicle damage as "moderate." Specifically, the Motion asked the Court to preclude the Defendant from "arguing, suggesting or insinuating at trial that the crash was a 'minor impact' or 'low impact' collision, and not significant enough to cause Plaintiff's injuries." The Motion was primarily based on *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008), coupled with the fact that Defendant did not have any expert qualified to testify whether the impact in the instant collision was sufficient to cause the injuries complained of. Conversely, the Plaintiffs had disclosed a biomechanical expert who was prepared to testify that the accident was of the type to have proximately caused injury to the Plaintiff. The Motion further sought to limit Defendant's pain management expert, Dr. David Fish, from testifying to opinions rooted in biomechanical science, as he lacks the qualifications to testify to such opinions under the standard announced in *Hallmark*.

On February 25, 2011, Defendant filed an Opposition to the Motion and the matter was heard by this Court on March 1, 2011, at which time the Court GRANTED Plaintiffs' Motion in

its entirety. Defendants provided no evidence or information to correlate the amount of damage to a vehicle in a collision to the severity of the injury suffered by a passenger. Defendants had no expert witness on biomechanics to support an argument or inference that this accident was too minor to cause the injuries alleged to have been suffered by the Plaintiff. Based on the Nevada Supreme Court's rulings in *Hallmark, supra, Levine v. Remolif*, 80 Nev. 168 (1964) and *Choat v. McDorman*, 86 Nev. 332 (1970), this Court found that issues of accident reconstruction and biomechanics are not within the common knowledge of laypersons and require expert witness testimony. As such, this Court found no evidentiary or factual foundation upon which the Defendant could argue or infer that the accident was too minor to cause the Plaintiff's injuries.

On March 8, 2011, this Court entered a written Order which stated in pertinent part as follows:

> **"IT IS HEREBY ORDERED** that Plaintiffs' request to preclude Defendant from Raising a "Minor" or "Low Impact" Defense is **GRANTED.**
>
> **IT IS FURTHER ORDERED** that Plaintiffs' request to limit the trial testimony of Defendant's expert, David Fish, M.D., to those areas of expertise that he is qualified to testify in regards to is **GRANTED.** Neither Dr. Fish nor any other defense expert shall opine regarding biomechanics or the nature of the impact of the subject crash at trial.
>
> **IT IS FURTHER ORDERED** that Plaintiffs' request to exclude the property damage photos and repair invoice(s) is **GRANTED."**

Following the entry of the foregoing Order, all parties were on notice that this Court had specifically precluded a defense (or even an argument) that the accident was too minor to cause the injuries for which Plaintiff sought to recover damages.

Despite a clear and unambiguous Order precluding the Defendant from raising as a defense that the impact of the accident was too minor to cause the Plaintiff's injuries, counsel for

the Defendant persisted in violating this Court's order, ultimately leading to the sanction imposed herein. There can be no question or argument that the Defendant was on notice of this Court's Order, based on the following:

a) Hearing Outside the Presence of the Jury on March 18, 2011

After jury selection had been completed and before Opening Statements, this Court held a hearing outside the presence of the jury to discuss, among other things, the issue of a minor impact defense. The discussion on the record was extensive and comprises seventeen (17) pages of the transcript (See, RTP, March 18, 2011, pp. 112-129).

During this hearing, the Plaintiffs' counsel brought to this Court's attention the fact that counsel for the Defendant, in his Opening Statement, might broach the subject of minor impact by referring to the Defendant's deposition testimony that the impact of the accident was merely "a tap." Counsel for the Defendant conceded that it was his impression that this Court had not precluded such an argument:

> "What happened was, there was a motion to exclude a defense that a minor impact cannot cause injury. The Plaintiffs' argument in the motion was because the defense did not retain a biomechanical engineer they would not be able to argue the general proposition that minor impacts cannot cause injury.
>
> The defense appeared at the hearing and said, 'This is not a biomechanical case. The defense is not going to argue that no minor impact can cause injury. *The defense is that this minor impact did not cause injury.*"
>
> (RTP, March 18, 2011, p. 114)(emphasis supplied).

It became clear to this Court that the Defendant intended to present a minor impact defense, despite the Order of this Court to the contrary. Plaintiffs' counsel was allowed to once again state on the record their position on the original Motion in Limine, outlining that the

Defendant had no expert witness to opine that the accident was too minor to cause the claimed injuries, and further that the Order of this Court on the Motion in Limine precluded a "minor impact" defense at trial.

By the conclusion of the hearing outside the presence of the jury, this Court reiterated its ruling on the Motion in Limine precluding a "minor impact" defense (RTP March 18, 2011, p. 125-26). Likewise, this Court precluded counsel for the Defendant from referencing in his Opening Statement that it was a minor impact, or simply "a tap," for the purpose of raising an inference that the accident was too minor to cause the Plaintiff's injuries (RTP March 18, 2011, pp. 127-28). This Court further reminded counsel for the Defendant to review the Order entered on this issue to avoid violating it in the future (RTP March 18, 2011, p. 126, 127).

b) Hearing Outside the Presence of the Jury on March 21, 2011

On the first court day following the hearing set forth above, the issue of "minor impact" was again raised outside the presence of the jury immediately following the Plaintiffs' Opening Statement. At this hearing, the Defendant sought permission to claim a "minor impact" defense based on the door allegedly being opened by the Plaintiffs in their Opening Statement when counsel referred to the accident as a "motor vehicle crash." This Court noted that the Plaintiffs in their Opening Statement did not refer to the nature of the impact, the severity of the impact, the fact that the impact was significant enough to cause the Plaintiff's injuries nor any violence associated with the impact. In fact, this Court noted that Plaintiffs' counsel did not describe the impact of the vehicles in any way.

Based on that finding, the Court denied the Defendant's renewed request to be able to raise a "minor impact" defense. Again, the Defendant was clearly and unequivocally on notice that such a defense was precluded.

2. Reference to Minor Impact during Defendant's Opening Statement

Immediately following the foregoing discussion outside the presence of the jury, counsel for the Defendant delivered his Opening Statement. He described the stop and go traffic the Defendant encountered before the accident, and stated that the Defendant was nearly stopped before the impact (RTP, March 21, 2011, p. 63). Plaintiffs did not object to this statement, although it arguably raises an inference of a minor impact.

Thereafter, counsel for the Defendant proceeded to attempt to play selected portions of his client's videotaped deposition regarding the nature of the accident, which drew an objection from the Plaintiffs. After a bench conference, this Court determined that not only was the Defendant's deposition hearsay when offered on her own behalf, but also that testimony regarding the nature of the accident, if offered to show it was a minor impact, would be in violation of this Court's pretrial Order.

The Plaintiffs' objection was sustained.

3. Clear Violation of Order During Cross-Examination of Dr. Jorg Rosler

During the testimony of Dr. Rosler, one of the Plaintiff's treating pain management physicians, counsel for the Defendant asked the following question:

> "Do you know anything about what happened to [Defendant] Jenny Rish and her passengers in this accident?"
>
> (RPT, March 22, 2011, p. 84)

Before the witness could answer, the Plaintiffs objected, citing this Court's pretrial motion ruling.

The only potential relevance of such an inquiry would be to raise an inference that since the Defendant or her passengers were not injured (or that the Plaintiff's treating physician was unaware of any injury), the accident must not have been significant enough to injure the Plaintiff.

There is no other potential purpose in obtaining an answer from this witness to that question. Such an inference would be directly contrary to this Court's Order precluding a "minor impact" defense.

The Plaintiffs' objection was sustained.

4. Clear Violation During Cross-Examination of Dr. Patrick McNulty

Despite the fact that the Court sustained the Plaintiffs' objection to the improper question of Dr. Rosler, counsel for Defendant asked an almost identical question of the next treating physician to testify for Plaintiff. Within the first two minutes of the Defendant's cross-examination of Dr. McNulty, the following questions were asked:

> [Defense Counsel] And you don't know anything about the car accident other than what [Plaintiff] told you?
>
> [Dr. McNulty] It was simply he said he had a car accident and that's when he – his problems started.
>
> [Defense Counsel] Okay. But did you discuss with him whether he was able to drive from the scene of the accident?
>
> [Dr. McNulty] No, I really didn't go into the other – into the other details. No, I did not discuss that.
>
> [Defense Counsel] *Do you know anything about the folks in Jenny Rish's car?* (RTP 3/25/11, p. 4) (Emphasis supplied).

Counsel for the Plaintiffs immediately objected and a bench conference ensued. At the bench conference, counsel for the Defendant indicated his position on the relevance of the question:

> [Defense Counsel] The relevance is that if one of them were injured or were not, that would be relevant or probative to whether the others were injured.

(RTP 3/25/11, p. 5).

In fact, based on this Court's prior rulings, such a position is untenable. As stated in the authority supporting the grant of the Plaintiffs' pretrial Motion in Limine, there is no correlation between the size of the impact and the potential for injury to the Plaintiff. There is no correlation between whether the Defendant or one of her passengers was injured and the potential for injury to the Plaintiff. The Defendant had no credible or admissible evidence suggesting such a correlation and no expert testimony to support such a proposition.

Further, since the question asked on cross-examination of Dr. McNulty was exactly the same question precluded during the cross-examination of Dr. Rosler, the Defendant was clearly on notice that this area of inquiry was improper.

The Plaintiffs' objection was sustained.

5. Clear Violation During Cross-Examination of Dr. Jaswinder Grover

On the very same afternoon as Dr. McNulty's cross-examination, the Defendant had the opportunity to cross-examine Dr. Grover, another of the Plaintiff's treating physicians. During that cross-examination, counsel for the Defendant *again* asked the very same type of question precluded during the cross-examination of Drs. Rosler and McNulty:

> [Defense Counsel] You know the Plaintiff wasn't transported by ambulance.
>
> [Dr. Grover] Yes, sir.
>
> [Defense Counsel] *You know [whether] Jenny Rish –*
>
> [Plaintiff's Counsel] Objection, Your Honor.
>
> [Defense Counsel] – *was lifted from the scene?*

(RTP 3/25/11, p. 141).

After all of the previous hearings on the issue of a "minor impact" defense, and after the objections to the same type of question were sustained by this Court, such a question of Dr.

Grover is simply inexplicable. Again, there is no potential relevance to a question asked of one of the Plaintiff's treating doctors (who didn't treat the Plaintiff until almost three years after the accident) about any injuries to the Defendant, other than to attempt to infer that the accident was too minor to injure the Plaintiff if the Defendant was not injured. That inference is precluded, based on the fact that the Defendant had no expert witness or admissible evidence to support that inference.

The Plaintiffs' objection was sustained and the jury was directed to disregard the last question.

6. Hearing Outside the Presence of the Jury on March 25, 2011

Following the testimony of Dr. Grover, at a hearing outside the presence of the jury, counsel for the Plaintiffs made the following record regarding the pervasive and continuous violations of this Court's Orders on pretrial Motions by counsel for the Defendant:

> [Plaintiffs' Counsel] Despite the ruling of the Court, despite the arguments we've had outside the presence on the issue of minor impact, in Opening Statement and with each and every witness so far, there's been a question which leads to a conclusion or an argument about minor impact, whether the Defendant was injured in – whether the doctor knows whether the Defendant was injured in the accident, which could only potentially be relevant to some argument that the accident was too minor to have caused injury, because she wasn't injured.
>
> Each time we've objected. Each time the Court has sustained the objection. I would look for, frankly, some guidance from the Court on what we can do from here out, because it – I can only assume that it will continue to occur. And so, *I don't know whether a progressive sanction that we'd ask for,* that there should be a warning from the Court before this should happen again. But those are my concerns, and I don't know

what other potential relevance there could be to asking a treating physician whether he's aware of whether or not the Defendant was injured in the accident.

(RTP 3/25/11, pp. 164-65) (emphasis supplied).

Thereafter, a discussion ensued on the record regarding the Court's pretrial ruling and the fact that the Defendant had repeatedly violated it. At the conclusion of the hearing outside the presence of the jury, this Court attempted, once again, to make it clear that the violations were continuous and that the Court would take necessary measures if the violations occurred again. To the Plaintiffs' counsel's suggestion of a progressive sanction, the Court responded thusly:

> [Court] I think you're right, and I think that *the defense is on notice. I think the Order is very clear. I think it clearly has been violated.* I was really surprised to hear a question posed of [Dr. Grover] regarding Ms. Rish when the Court sustained a previous question regarding Ms. Rish of another witness and ruled that that was not relevant. So I was really surprised to hear that very same question posed as to Ms. Rish.
>
> ...
>
> So I don't know. *It does seem to be at this point to be deliberate, Mr. Rogers. And so, I'm inclined to agree that you're on notice. The Court will consider progressive sanctions.* I don't know what they will be. I hope there won't have to be any assessed. *But I don't know what else to do to try to get you to comply with the Court's previous Orders.*
>
> (RTP 3/25/11, pp. 166-67) (emphasis supplied).

7. Testimony of Defendant's Expert Witness, Dr. David Fish

a) Voir Dire Examination Prior to Direct Examination

Defense expert Dr. Fish testified out of order during the Plaintiffs' case-in-chief as an accommodation by the Plaintiff to the Defendant and her expert. At request of the Plaintiffs'

counsel immediately prior to Dr. Fish's testimony to the jury, this Court held a hearing outside the presence of the jury to allow the Plaintiffs' counsel to take Dr. Fish on *voir dire* to ensure he was aware of the Court's previous rulings (including an Order granting the Plaintiffs' Motion in Limine to Limit the Testimony of Dr. Fish). Dr. Fish's testimony outside the presence of the jury comprises eighteen pages of the record (See, RTP March 24, 2011, pp. 12-30).

This questioning of Dr. Fish revealed that he was unaware of virtually every pretrial Order entered by this Court, including the Order limiting his testimony. He was unaware of this Court's Order precluding:

1) Plaintiff's unrelated 2003 motorcycle accident;

2) Plaintiff's unrelated 2008 motor vehicle accident;

3) Plaintiff's unrelated medical conditions;

4) Any suggestion of secondary gain, symptom magnification or malingering;

5) Sub rosa video surveillance of Plaintiff (ruling deferred until the conclusion of Plaintiff's direct examination);

6) Dr. Fish's testimony regarding biomechanical opinions related to the accident.

Of obvious concern to this Court was the fact that despite the voluminous pretrial motions, the thorough and even repetitious hearings and arguments entertained by this Court on the issues and the consistency of the enforcement of those rulings by this Court, the Defendant had not properly prepared her expert witness. When Dr. Fish volunteered that he thought some of the impediments to his testimony were "strange," the Court responded:

> [Court] You know what seems strange to me? That this witness obviously doesn't have any idea what the Court has ruled prior to these motions in limine.
>
> (RTP March 24, 2011, p. 24).

The Court unambiguously placed Dr. Fish and the Defendant on notice that violations of

the Court's pretrial Orders carried the possibility of sanctions, including striking the testimony of Dr. Fish in its entirety (RTP March 24, 2011, p. 15).

b) Violation During Cross-Examination

Nevertheless, during cross-examination, Dr. Fish persisted in failing to respond to pertinent questions from the Plaintiffs' counsel and on more than one occasion responded to questions by stating, inferring or insinuating that he was unfairly prohibited from answering the questions based on this Court's prior rulings (RTP March 24, 2011, p. 106, 133).

Despite the repeated and systematic violations of the pretrial Orders in this case and the Court's efforts to cure and prevent the same, Dr. Fish violated rulings on "minor impact" during cross-examination.

When presented with contrary testimony on issues of medicine in prior depositions from other cases, Dr. Fish responded by suggesting that the instant accident was not a "significant accident." The Plaintiffs' oral Motion to Strike was Granted by this Court (RTP March 28, 2011, p.71-72).

c) Violation During Redirect Examination

At the end of the Defendant's redirect examination of Dr. Fish, counsel for the Defendant in a conclusory fashion asked Dr. Fish to summarize his opinions on causation.

> [Defense Counsel] ...Doctor, how is it that you can reach an opinion to a medical probability that this accident didn't cause the pain that [the Plaintiff] complained of following this accident?
>
> [Dr. Fish] Well, it's based on multiple factors. It's based on the actual – looking at the images of the MRI. It's looking at the discogram and the results of the discogram. It's looking at the pattern of pain. It's looking at the notes that were taken of the events that happened *and it's knowing about the accident itself.*

(RTP March 28, 2011, p.87) (Emphasis supplied).

Based on this Court's observation of Dr. Fish's testimony, there is no question that Dr. Fish's response, clearly in violation of this Court's Order, was deliberate. The Plaintiff's objection was sustained, and the jury was admonished to disregard the final statement in Dr. Fish's response.

D. Irrebuttable Presumption Instruction to the Jury

1. Plaintiffs' Request for a Special Instruction to the Jury

Following the testimony of Dr. Fish, the Court conducted a hearing outside the presence of the jury at the request of counsel for the Plaintiffs to consider a progressive sanction against the Defendant for the continuous and systematic violations of this Court's Orders on pretrial motions. The Plaintiff offered, as an alternative to striking Defendant's Answer, a special instruction to the jury directing them to presume that the accident in question was of a sufficient quality to have caused the injuries of which Plaintiff complained. The entire hearing on this issue outside the jury's presence comprises twenty-three (23) pages of transcript, which includes a recess by the Court to consider the appropriate language of an adverse inference instruction (See, RTP March 28, 2011, pp. 89-112).

During the hearing, the Plaintiffs' counsel correctly identified the factual and procedural history of the issue of a "minor impact" defense in this case (much of which is set forth above), including the rulings on pretrial motions, the numerous hearings outside the presence of the jury on this issue, the repeated violations of this Court's Order on "minor impact" and the records made establishing notice to the Defendant of possible progressive sanctions for any further violations (RTP March 28, 2011, pp. 89-93).

Counsel for the Plaintiffs then made a further record outlining the proper standard for consideration by this Court under *Young v. Ribeiro Building, Inc.*, 106 Nev. 88 (1990).

2. This Court's Consideration of the *Young* Factors

In *Young*, the Nevada Supreme Court reiterated that trial courts have inherent equitable powers to issue sanctions for abusive litigation practices. *Id.* at 92. Before issuing such sanctions, a trial court should carefully consider the factors announced in *Young*, although no single factor is necessarily dispositive and each of the non-exhaustive factors should be examined in the light of the case before the trial court. *Id.* As outlined during the hearing by counsel for the Plaintiffs, this Court considered the following factors set forth in *Young* before addressing the language of the special instruction to the jury.[1]

a) Degree of willfulness of the violations

The violations of this Court's pretrial Orders were continuous and systematic. As set forth above, the Defendant was clearly on notice of the Court's Order regarding this "minor impact" defense yet the Defendant violated this particular Order on numerous occasions. Based on the sheer number of violations of the same order in the same fashion, this Court can only conclude that such violations were willful in nature.

b) The extent to which the non-offending party would be prejudiced by a lesser sanction

To date, no lesser sanction had been successful in precluding future violations. This Court has consistently sustained the Plaintiffs' objections and stricken offending questions and answers. At some point, simply directing jurors to disregard continuous violations of pretrial Orders is insufficient.

Counsel for the Plaintiffs indicated that the violations to this point were sufficient to

[1] **In considering non-case concluding sanctions, a trial court shall hold such hearing as it reasonably deems necessary to consider matters that are pertinent to the imposition of appropriate sanctions *Bahena v. Goodyear Tire & Rubber Co.*, 245 P.3d 1182, 1185 (Nev. 2010) This court heard extensive arguments from the Plaintiffs and the Defendant before granting the Plaintiffs' request for a progressive sanction. While an "express, careful and preferably written" order is required by the Nevada Supreme Court for case concluding sanctions only, *Young, supra at 93; Foster v. Dingwall*, 227 P.3d 1042, 1048-49 (Nev. 2010), this Court outlines herein its analysis of the *Young* factors that supported the imposition of the non-case concluding sanction of an irrebuttable presumption instruction.**

warrant a request that this Court impose a case concluding sanction of striking the Defendant's Answer, but that in harmonizing this particular factor from *Young* it might be necessary for this Court to consider a lesser sanction of a presumption instruction.

c) The severity of a sanction of dismissal relative to the severity of the abuse

This Court considered, at the time of imposing the sanction of an irrebuttable presumption instruction to the jury, whether the alternative request of striking Defendant's Answer would be an appropriate response to Defendant's continuous violations of this Court's pretrial Orders. While the abuse to this point was systematic and severe, this Court determined that a progressive sanction would be appropriate before consideration of a case concluding sanction.

d) The feasibility and fairness of an alternative, lesser sanction

Again, against the backdrop of the Plaintiffs' alternative request to strike Defendant's Answer, this Court considered the feasibility and fairness of a lesser sanction and determined that the irrebuttable presumption instruction requested by Plaintiff appropriately addressed the nature of the violations of the Court's Order precluding evidence to support a "minor impact" defense.

An irrebuttable presumption is a presumption that cannot be overcome by any additional evidence or argument. *Employers Insurance Co. of Nevada v. Daniels*, 122 Nev. 1009, 1015-16, fn. 15 (2006), quoting *Black's Law Dictionary* 1223 (8th ed. 2004). As this Court noted during the sanction hearing, the Order granting the Motion in Limine was based on the Defendant's complete lack of evidence bearing on a "minor impact" defense:

> [Court] But the point of the matter was that Defense had no witness who could testify that this was a minor impact and no witness who could testify that this was a minor impact that could not have caused the injuries to Plaintiff, that Plaintiff sustained.

Defense simply didn't have any witnesses to so testify. That's why the motion in limine was granted.

(RTP March 28, 2011, p. 104).

Given that the Defendant had no admissible, credible evidence to offer to support this "minor impact" defense, an irrebuttable presumption instruction was appropriate to communicate to the jury what the Defendant failed to comprehend throughout the trial: namely, that there is no evidence to suggest that the impact in this accident was too minor to cause the injuries the Plaintiff claims to have suffered. An alternative adverse inference instruction or a rebuttable presumption instruction would have given the Defendant exactly what was precluded in the Order on the pretrial motions: namely, an opportunity to rebut the contention that the accident was of sufficient character to have caused injury. Again, the Defendant had no evidence with which to rebut that contention.

e) The policy favoring adjudication on the merits

Mindful of this policy, the Court declined at this point to grant the Plaintiffs' request to strike the Defendant's Answer and instead issued the irrebuttable presumption instruction.

Given the Defendant's concession of responsibility for the accident, the "merits" of this case for the trier of fact to adjudicate were limited to the amount of damages suffered as a result of the accident. Since the Defendant had no evidence to support a contention that the nature of the impact in the accident was relevant to the amount of damages, the issues for the trier of fact were not materially affected by the irrebuttable presumption instruction.

f) Whether sanctions unfairly penalize a party for the misconduct of her attorney

In this Court's view, the key to this factor from *Young* is whether the Defendant is **unfairly** penalized for her attorney's misconduct. However, the irrebuttable presumption instruction imposed as a sanction by the Court did not unfairly penalize the Defendant. It simply

allowed the jury to irrebuttably presume the very fact that Defendant had no admissible evidence to rebut – that the motor vehicle accident was sufficient in character and quality to have caused the injuries suffered by the Plaintiff.

Additionally, as set forth below, it must be noted that the special instruction to the jury still allowed them to consider whether the accident in question actually and proximately caused Plaintiff's injuries. The only presumption was that the accident was sufficient in character and quality to have potentially done so. The only issue eliminated or restricted by the irrebuttable presumption instruction was the "minor impact" defense for which Defendant had no evidence to support.

g) The need to deter parties and future litigants

As set forth in great detail above, the sanctions employed by the Court to deter this conduct had proven unsuccessful. Although this particular factor was not the overriding factor in determining that the special instruction to the jury was warranted, this Court hoped that this progressive sanction would at least deter the Defendant from continuing to violate the Orders of this Court.

3. The Irrebuttable Presumption Instruction

This Court took a recess to allow the Plaintiffs' counsel to draft a proposed instruction and then heard argument from both sides regarding the exact language of the instruction. After considering the proposed language and making some amendments thereto, as well as considering the necessity of instructing the jury immediately as a curative measure, the Court read the following instruction to the jury:

> [Court] Furthermore, ladies and gentlemen of the jury, the Defendant has, on numerous occasions, attempted to introduce evidence that the accident of April 15, 2005, was too minor to cause the injuries complained of. This type of evidence has previously

been precluded by this Court.

In view of that, this Court instructs the members of the jury that there is an irrebuttable presumption that the motor vehicle accident of April 15, 2005, was sufficient to cause the type of injuries sustained by the Plaintiff. Whether it proximately caused those injuries remains a question for the jury to determine.

(RTP March 28, 2011, p. 113, 149-50).

Before making the discretionary ruling to issue that curative instruction to the jury, this Court examined the relevant facts, applied a proper standard of law and used a demonstratively rational process to reach a reasonable conclusion. *See, Bass-Davis v. Davis*, 122 Nev. 442, 447-48 (2006).

E. Plaintiffs' Request to Strike Defendant's Answer Based on Repeated Violations of This Court's Pretrial Orders

During the hearing on March 28, 2011, wherein this Court considered the above-quoted special instruction in lieu of the Plaintiffs' request to strike Defendant's Answer, counsel for the Plaintiffs made clear that a further violation of this Court's Orders would be met with the Plaintiffs' renewed request of the Court to strike the Defendant's Answer (RTP March 28, 2011, p. 97).

1. Cross-Examination of Plaintiff, William Simao

During the Defendant's cross-examination of Plaintiff WILLIAM SIMAO, counsel asked about circumstances surrounding the accident, including questions regarding the stop-and-go nature of traffic on the freeway before the accident took place. The Plaintiffs objected, and a bench conference ensued.

At the bench conference, the Plaintiffs asked for an offer of proof of what potential relevance the speed of the vehicles would have, other than to suggest an inference that the

impact of the collision was insufficient to cause the Plaintiff's injuries (RTP March 28, 2011, pp. 92-95). Counsel for the Defendant failed to offer during the bench conference a sufficient explanation of how the speed of the vehicles prior to the collision has a tendency to make the existence of any fact of consequence more or less probable, *see,* NRS 48.015, other than to suggest a minor impact (RTP March 28, 2011, p. 94-96).

The Plaintiffs' objection was sustained.

What then followed can only be described by this Court as an intentional attempt to further violate this Court's clear and unambiguous Order.

Regarding the post-accident response by law enforcement and medical personnel, counsel for the Defendant asked the following questions of Mr. Simao:

> [Defense Counsel] Now, we've heard several times through this trial that an ambulance came to the scene.
>
> [Mr. Simao] Yes.
>
> [Defense Counsel] And that you declined treatment.
>
> [Mr. Simao] I did.
>
> [Defense Counsel] *And the paramedics didn't transport anyone from Mrs. Rish's car?*

(RTP March 28, 2011, p. 98) (Emphasis supplied).

An immediate objection was interposed by Plaintiffs' counsel and a brief bench conference was convened before this Court excused the jury and addressed the matter on the record outside their presence.

2. Plaintiff's Request to Strike Defendant's Answer

During the hearing outside the jury's presence, counsel for the Plaintiffs again made an exhaustive record of all of the occasions this Court had to direct and admonish Defendant not to

address "minor impact" issues as a result of this Court's previous Orders. A significant record was made of the notice provided to the Defendants that not only was the conduct violative of this Court's Order, but further that the Plaintiffs would be asking the Court to strike the Defendant's Answer as a sanction therefore (RTP March 28, 2011, pp. 101-05).

The response from the Defendant was essentially that she should not be precluded from any discussion of the accident in question. Such an argument, this Court noted, misses the point and unfairly and incorrectly broadens the scope of the pretrial Order. An incorrect summary of the Court's Order that any and all discussion of the accident in question is precluded is vastly different from questioning four separate witnesses as to whether anyone from the Defendant's vehicle was injured in the crash. On this issue, the Court's prior pronouncements could not have been clearer.

While inclined to grant the Plaintiffs' motion to strike the Defendant's Answer at the conclusion of the hearing outside the presence of the jury, this Court instead took the opportunity to recess to again review the appropriate law, including the Nevada Supreme Court's opinion in *Young v. Ribeiro Building, Inc.*, on the issue of case concluding sanctions for abusive litigation practices and continuous violations of Orders of the Court.

3. <u>This Court's Consideration of the Law as Applied to the Facts of This Case</u>

As set forth above, the Nevada Supreme Court in *Young* reiterated that trial courts have inherent equitable powers to issue sanctions for abusive litigation practices, including case concluding sanctions such as dismissal or the striking of pleadings. *Young, supra* at 92. Case concluding sanctions are subject to a "somewhat heightened standard of review," *Id.; Foster v. Dingwall*, 227 P.3d 1042, 1048 (Nev. 2010), to determine if the sanctions are just and relate to the claims at issue.

Before issuing such sanctions, a trial court should carefully consider the factors

announced in *Young*, although no single factor is necessarily dispositive and each of the non-exhaustive factors should be examined in the light of the case before the trial court. *Young, supra* at 92. Additionally, case concluding sanctions shall be supported by an express, careful and preferably written explanation of the trial court's analysis of the *Young* factors. *Id.* at 93; *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 598 (Nev. 2010), *rehearing denied*, 245 P.3d 1182 (2010).

This Court carefully considered the plethora of violations of Court Orders before granting the Plaintiffs' request to strike the Defendant's Answer. The hearing outside the presence of the jury encompasses fifteen pages (15), which does not include the independent research and analysis conducted by this Court during a lengthy recess in the proceedings. The Court's consideration of the *Young* factors, although similar in many respects to the consideration of the same factors three days earlier at the time of the irrebuttable presumption sanction, includes the following:

a) Degree of willfulness of the violations

A violation of an Order on a motion in limine may serve as a basis for some type of sanction if the Order is specific in its prohibition and the violation is clear. *BMW v. Roth*, 127 Nev.Ad.Op. 11, p.12, citing to *Black v. Schultz*, 530 F.3d 702, 706 (8th Cir. 2008). As set forth previously, the violations of this Court's clear and unambiguous Orders were continuous, systematic and pervasive. Such violations include, but are not limited to, the following:

i. Violation of Order precluding evidence of "medical build-up" during Opening Statement;

ii. Violation of Order precluding evidence of "medical build-up" during the testimony of Dr. Patrick McNulty;

iii. Violation of Order precluding evidence of unrelated accidents during Opening

Statement;

iv. Violation of Order precluding evidence or argument in support of "minor impact" defense during Opening Statement;

v. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. Jorg Rosler (question regarding injuries to the Defendant or her passengers);

vi. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. Patrick McNulty (question regarding injuries to Defendant or her passengers);

vii. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. Jaswinder Grover (question regarding injuries to Defendant or her passengers);

viii. Defendant's abject failure to apprise defense expert Dr. David Fish of court's rulings on all motions in limine;

ix. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Dr. David Fish (question and answer regarding the nature of the accident);

x. Violation of Order precluding evidence or argument in support of "minor impact" defense during testimony of Plaintiff William Simao (question regarding injuries to the Defendant or her passengers);

These violations of the Court's Order precluding the "minor impact" defense are considered by this Court to be even more egregious given the numerous hearings outside the presence of the jury wherein this Court repeatedly and unequivocally prohibited the areas of inquiry subsequently broached by counsel for Defendant. Those hearings include:

i. Hearing on the Plaintiffs' Motion in Limine, March 1, 2011;

ii. Hearing outside the presence of jury to discuss "minor impact," March 18, 2011;

iii. Hearing outside the presence of jury to discuss whether the Plaintiffs opened the door to "minor impact" defense during Opening Statement, March 21, 2011;

iv. Objection sustained to counsel for the Defendant's question of Dr. Rosler regarding injuries to occupants of the Defendant's vehicle, March 22, 2011;

v. Objection sustained to counsel for the Defendant's question of Dr. McNulty regarding injuries to occupants of the Defendant's vehicle, March 25, 2011;

vi. Objection sustained to counsel for the Defendant's question of Dr. Grover regarding injuries to occupants of the Defendant's vehicle, March 25, 2011;

vii. Hearing outside the presence of the jury to discuss "minor impact" defense and the Plaintiffs' notice of seeking progressive sanctions, March 25, 2011;

viii. Objection sustained to counsel for the Defendant's question of Dr. Fish which resulted in response citing to the nature of the impact, March 28, 2011;

ix. Hearing outside the presence of the jury to discuss "minor impact" defense and the Plaintiffs' request for irrebuttable presumption instruction for the Defendant's continued violations of Court's Order, March 28, 2011;

x. Objection sustained to counsel for the Defendant's question of Plaintiff William Simao regarding injuries to occupants of the Defendant's vehicle, March 31, 2011;

At the hearing on the Plaintiffs' oral motion to strike the Defendant's Answer, this Court characterized the continuing violations as having been "willfull, deliberate, [and] abusive," (RTP March 31, 2011, pp. 111-12), based on the fact that counsel for Defendant "refuses to comply

with this Court's rulings" (RTP March 31, 2011, p. 112). Particularly disturbing was counsel for Defendant's systematic insistence upon asking the Plaintiff and three separate treating doctors whether they were aware of any injuries to passengers in the Defendant's vehicle, despite this Court's clear preclusion of that inquiry after each instance of misconduct.

b) The extent to which the non-offending party would be prejudiced by a lesser sanction

As set forth previously, the imposition of lesser sanctions did not act to curb the Defendant's violations of this Court's pretrial Orders. An attorney's violation of an Order on a motion in limine is misconduct which justifies evidentiary sanctions or even a new trial. *See, BMW v. Roth*, 127 Nev.Ad.Op. 11, p.12; *Lioce v. Cohen*, 124 Nev. 1 (2008). Although Nevada precedent does not follow the federal model of requiring progressive sanctions before imposing a case concluding sanction, *see, Bahena v. Goodyear Tire & Rubber, supra*, 245 P.3d at 1184-85, this Court nevertheless imposed progressive sanctions against the Defendant including the irrebuttable presumption instruction to no avail. Nothing this Court could fashion, short of a case concluding sanction, was successful to halt violations of this Court's pretrial Orders.

Given the frequency of the Defendant's violations of this Court's Order precluding a "minor impact" defense, all of which occurred in front of the jury, the Plaintiffs were prejudiced by having this issue repeatedly brought to the jury's attention. In the eyes of the jury, the Plaintiffs were repeatedly preventing the jury from hearing about the significance of the impact, when in fact this Court had determined that a "minor impact" defense was unavailable to the Defendants given the lack of evidence (and expert testimony) to support such a defense. In reliance upon this Court's Order granting the Plaintiffs' Motion in Limine, the Plaintiffs had released their biomechanical expert and had neither mentioned his name nor offered his opinions in Opening Statement. The Plaintiffs had relied on this Court's Order that no "minor impact" defense would be presented to the jury. The Plaintiffs had further relied on the fact that such a

ruling would be upheld by this Court during the course of trial. The unfair prejudice to the Plaintiffs was clearly shown. *See, Roth, supra.*

This Court also recognizes the prejudice to the Plaintiffs in making objection after objection to the Defendant's inappropriate questions. "[W]hen...an attorney must continuously object to repeated or persistent misconduct, the non-offending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point." *Lioce v. Cohen,* 174 P3d 970, 981 (Nev. 2008).

As such, it is the finding of this Court that the Plaintiffs would be unfairly prejudiced by the continuous introduction of questions, evidence and argument designed to create an inference that the subject motor vehicle accident was too minor to cause the Plaintiff's injuries.

c) The severity of a sanction of striking Defendant's Answer relative to the severity of the abuse

Again, the pervasive and continuous nature of these violations warrants the sanction ultimately imposed. Every litigant has the right to disagree with any ruling made or Order entered by a trial court. His remedy is with an appellate court, based upon reasonable grounds as the law requires. His remedy is never to just continue violating the Orders unchecked.

d) The feasibility and fairness of an alternative, lesser sanction

As set forth above, alternative lesser sanctions were apparently rejected by the Defendant in favor of continuing to violate the Orders of the Court. When the Plaintiffs first asked this Court to strike the Defendant's Answer on March 28, 2011, the Court considered this factor from the *Young* decision to impose an alternative sanction of an irrebuttable presumption instruction.

As this Court indicated at the hearing on the Plaintiffs' second oral request to the strike Defendant's Answer:

[Court] Regarding the feasibility and fairness of an alternative, lesser sanction, you know, the only thing I can say is less severe sanctions were imposed to no avail.

(RPT March 31, 2011, p. 113).

This analysis is bolstered by the fact that the Plaintiffs requested that the Court strike the Defendant's Answer three days earlier and put the Defendant on notice that they would seek to strike the Defendant's Answer should any future violations occur.

e) The policy favoring adjudication on the merits

As set forth above, this Court opted for less severe sanctions for all of the violations prior to March 31, 2011, in large measure because of the policy favoring adjudication on the merits. Even the irrebuttable presumption instruction given as a lesser, alternative sanction did not prevent the Defendant from presenting any defense that they actually had evidence to present. It is also worth noting that the Defendant had already agreed on the record not to challenge liability for the accident.

Further, this Court recognizes that the Nevada Supreme Court has upheld the striking of pleadings for a party's failure to attend his deposition, *Foster v. Dingwall, supra*; for repetitive, abusive and recalcitrant conduct during discovery, *Young, supra; Hamlett v. Reynolds*, 114 Nev. 863 (1998) (upholding the trial court's strike order where the defaulting party's constant failure to follow the court's orders was unexplained and unwarranted); for a party's continued failure to appear at scheduled court proceedings, *Durango Fire Protection, Inc. v. Troncoso*, 120 Nev. 658, 662 (2004); and for the failure to abide by rulings of the Discovery Commissioner, *Bahena v. Goodyear Tire & Rubber, supra.* Additionally, the Nevada Supreme Court has approved consideration of the *Young* factors as a guide to trial courts for sanctions grounded in violations of court orders at trial. *See, Romo v. Keplinger*, 115 Nev. 94, 97 (1999).

The willful and deliberate violations of this Court's Orders are equally as egregious as

any discovery violation, especially given the fact that the repeated violations in the instant case occurred in front of the jury.

f) The need to deter parties and future litigants

Given its inherent powers derived from the Nevada Constitution and strong case precedent, this Court simply cannot allow litigants to openly and deliberately abuse the litigation process by disregarding Orders of the Court when convenient or tactically advantageous to do so, especially when unfair prejudice to the non-offending party results. Such an allowance would render courts of justice meaningless in the State of Nevada.

In the final analysis, after review and consideration of all of the various factors announced in Young, it is the determination of this Court that the intentional, deliberate, abusive and unfairly prejudicial conduct of the Defendant in repeatedly violating clear Orders of this Court warrants the ultimate sanction of striking the Defendant's Answer.

It is immaterial whether, as the Plaintiffs suggested several times during the trial, it was the true intention of the Defendant to force or goad the Plaintiffs to seek a mistrial. What is material is that the deliberate conduct of counsel for the Defendant in disregarding and violating Court Orders could not be halted by this Court with any other sanction.

Neither sustained objections, a multitude of hearings outside the presence of the jury, nor progressive sanctions deterred the Defendant's ignorance of Orders of this Court.

Having carefully and thoughtfully considered the available remedies, it is the decision of this Court, for all of the reasons set forth above, that striking the Defendant's Answer is appropriate under the particular circumstances presented herein.

II. Plaintiffs' Request for a Prove-Up Hearing to Establish Damages

By the time of the last violation of this Court's Orders by the Defendant, most of the Plaintiffs' evidence had been presented to the Court over the first ten (10) days of testimony.

Counsel for the Plaintiffs requested a hearing the following day for essentially a prove-up hearing similar to the entry of a default judgment under NRCP 55b.

Counsel for the Defendant then requested the ability to be heard at the argument on damages, pursuant to *Hamlett v. Reynolds*, 114 Nev. 863 (1998). In *Hamlett*, the Nevada Supreme Court struck Hamlett's Answer as a sanction for his continued failure to comply with discovery orders pursuant to *Young v. Ribeiro Building, supra*. Hamlett claimed the trial court erred in restricting his participation in the prove-up hearing to cross-examining Reynolds' witnesses. In analyzing this issue under NRCP 55(b)(2), the Court stated:

> The language of NRCP 55(b)(2) that the "court may conduct such hearings or order such references as it deems necessary and proper" suggests to us an intent to give trial courts broad discretion in determining how prove-up hearings should be conducted. Thus, we conclude that the extent to which a defaulting party will participate in prove-up is a decision properly delegated to the trial courts. The trial courts should make this determination on a case-by-case basis and not according to static rules implemented by this court.
>
> In deciding the extent to which a defaulted party will be permitted to participate in prove-up, if at all, trial courts should remember that the purpose of conducting a hearing after default, according to NRCP 55(b)(2), is to determine the amount of damages and establish the truth of any averment. To that end, trial courts should determine the extent to which full participation by the defaulted party will facilitate the truth-seeking process.

Hamlett, supra at 866-67.

In *Foster v. Dingwall, supra*, the Nevada Supreme Court clearly stated the standard for proving up damages after a default is entered as a sanction. During the prove-up hearing, this Court shall consider the allegations deemed admitted by the fact of the default to determine if the Plaintiff has established a *prima facie* case for liability. *Foster, supra*, 227 P.3d at 1049-50. A *prima facie* case is defined as sufficiency of evidence in order to send the question to the jury. *Id.* at 1050. In the instant case, Defendant Rish admitted responsibility for the accident and stipulated to liability. What was left was a determination of the Plaintiffs' damages, and the Plaintiffs requested that this Court take notice of the evidence that had been presented in the

preceding ten (10) days of testimony. Even though allegations in the pleadings are deemed admitted as a result of the entry of default, the admission does not relieve the non-offending party's obligation to present substantial evidence of the amount of damages suffered by both of the Plaintiffs. *Id.* Having reviewed the evidence and concluding that a *prima facie* case had been established by both Plaintiffs, this Court determined that the Plaintiffs are entitled to damages for the harms proximately caused by the motor vehicle accident.

In determining the level of participation of the Defendant in the prove-up hearing, this Court was mindful of the Nevada Supreme Court's pronouncement in *Foster* and *Young* that because the default was entered as a result of the Defendant's abusive litigation practices, the Defendant "forfeited his right to object to all but the most patent and fundamental defects" in the prove-up. *Foster, supra* at 1050; *Young, supra* at 95.

Nevertheless, in an exercise of discretion authorized by *Hamlett*, this Court determined that the Defendant would be allowed to address the Plaintiffs' brief final argument on damages in an argument of her own, to be followed by a brief rebuttal argument on behalf of the Plaintiffs.

Based on all of the foregoing, **THIS COURT HEREBY ORDERS** that Plaintiffs' oral Motion to Strike Defendant's Answer is **GRANTED**.

This matter stands submitted following the arguments of counsel and the prove-up hearing of April 1, 2011, pending further Order of this Court.

DATED this 21st day of April, 2011.

DISTRICT COURT JUDGE

Submitted by:

DAVID T. WALL, ESQ.
Nevada Bar No. 2805
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101

MAINOR EGLET

EXHIBIT B
TO
DOCKETING
STATEMENT

NJUD
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
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Attorneys for Plaintiffs

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	CASE NO.: A539455 DEPT. NO.: X

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that the Judgment, was entered with the above entitled

. . .

Court on the 28th day of April, 2011, a copy of which is attached hereto.

DATED this 2nd day of May, 2011.

MAINOR EGLET

By:
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing file stamped **NOTICE OF ENTRY OF JUDGMENT** in the matter of **SIMAO v. RISH, et al** is hereby acknowledged:

Date: 5/2/11 Time: 2:19

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL, LTD.
300 S. Fourth Street, #710
Las Vegas, NV 89101
Attorneys for Defendants

Date: 5/2/11 Time: 3:24pm

Daniel F. Polsenberg, Esq.
Jowl D. Henriod, Esq.
LEWIS AND ROCA, LLP.
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89129
Attorneys for Defendants

MAINOR EGLET

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO; and CHERYL ANN SIMAO, Plaintiffs, v. JENNY RISH, Defendant.	CASE NO.: A539455 DEPT. NO.: X **JUDGMENT**

WHEREAS, a hearing for Default Judgment having come before the Court on April 1, 2011. IT IS ORDERED, ADJUDGED AND DECREED, that Judgment is hereby entered in favor of Plaintiffs and against Defendant, Jenny Rish as follows:

William Simao's past medical and related expenses	$194,390.96
William Simao's pain and suffering:	
- Past pain and suffering	$473,640.
- Future pain and suffering	$1,140,552.
- Loss of Enjoyment of Life	$ 905,169.
Cheryl Simao's loss of consortium (Society and Relationship)	$ 181,286.
Attorneys' fees	$ TBD
Litigation costs	$ 99,555.49
TOTAL	$3,493,983.45

...

...

IT IS FURTHER ORDERED that Judgment against Defendant, Jenny Rish, shall bear interest in accordance with N.R.S. 17.130 and Lee v. Ball, 116 P.3d 64 (2005).

Dated this 27th day of April, 2011.

Jessie Walsh
DISTRICT COURT JUDGE

EXHIBIT C
TO
DOCKETING
STATEMENT

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CLERK OF THE COURT

NJUD
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
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Attorneys for Plaintiffs

MAINOR EGLET

DISTRICT COURT
CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	CASE NO.: A539455 DEPT. NO.: X

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that the Judgment, was entered with the above entitled Court on the 1st day of June, 2011, a copy of which is attached hereto.

DATED this 1st day of June, 2011.

MAINOR EGLET

By: _____
DAVID T. WALL, ESQ.

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing file stamped **NOTICE OF ENTRY OF JUDGMENT** in the matter of **SIMAO v. RISH, et al** is hereby acknowledged:

Date: 6/1/11 Time: 4:40pm

Stephen H. Rogers, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL, LTD.
300 S. Fourth Street, #710
Las Vegas, NV 89101
Attorneys for Defendants

Date: 6/2/11 Time: 11:07a.m.

Daniel F. Polsenberg, Esq.
Jowl D. Henriod, Esq.
LEWIS AND ROCA, LLP.
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89129
Attorneys for Defendants

MAINOR EGLET

EXHIBIT "1"

ORIGINAL

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CLERK OF THE COURT

JUDG

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO, individually and CHERYL ANN SIMAO, individually, and as husband and wife, Plaintiffs, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive, Defendants.	CASE NO.: A539455 DEPT. NO.: X

JUDGMENT

WHEREAS, a hearing for Default Judgment having come before the Court on April 1, 2011.

MAINOR EGLET

IT IS ORDERED, ADJUDGED AND DECREED, that Judgment was hereby entered in favor of Plaintiffs and against Defendant, Jenny Rish as follows:[1]

IT IS ORDERED AND ADJUDGED that Plaintiff, WILLIAM SIMAO, have and recover of the Defendant, JENNY RISH, the following sums:

PAST DAMAGES:	
Past Medical and Related Expenses	$ 194,390.96
Past Pain, Suffering, Disability and Loss of Enjoyment of Life	$ 1,378,209.00
Total Past Damages:	**$ 1,572,599.96**
FUTURE DAMAGES:	
Future Pain, Suffering, Disability and Loss of Enjoyment of Life	$ 1,140,552.00
Total Future Damages:	**$ 1,140,552.00**
TOTAL DAMAGES:	**$ 2,713,151.96**

IT IS ORDERED AND ADJUDGED that Plaintiff, CHERYL SIMAO, have and recover of the Defendant, JENNY RISH, the following sums:

PAST DAMAGES:	
Loss of Consortium:	$ 681,286.00
Total Past Damages:	**$ 681,286.00**
TOTAL DAMAGES:	**$ 681,286.00**

IT WAS FURTHER ORDERED that Plaintiffs be awarded and entitled to costs in the amount of $99,555.49.

[1] Exhibit 1 - Judgment

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' past damages in the amount of Two Million Two Hundred Fifty Three Thousand Eight Hundred Eighty-Five and 96/100 Dollars ($2,253,885.96), shall bear pre-judgment interest in accordance with *Lee v. Ball*, 116 P.3d 64, (2005) at the rate of 5.25% per annum[2] from the date of service of the Summons and Complaint, on July 23, 2007 through May 18, 2011 as follows:[3]

PRE-JUDGMENT INTEREST:

07/23/07 THROUGH 05/18/11 = $ 452,231.10

(1395 days x $324.18 per day)

NOW, THEREFORE, Judgment in favor of Plaintiffs, WILLIAM SIMAO and CHERYL SIMAO, is hereby given for Three Million Nine Hundred Forty Six Thousand Two Hundred Twenty-Four and 55/100 Dollars ($3,946,224.55) against Defendant which shall bear post-judgment interest at the current rate of 5.25% or $567.60 per day, until satisfied.

DATED this 31st day of May, 2011.

DISTRICT COURT JUDGE

Prepared & Submitted by:
MAINOR EGLET

By: _____
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

[2] Exhibit *Lee v. Ball*
[3] Exhibit Affidavit of Service

EXHIBIT "1"

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM JAY SIMAO; and CHERYL ANN SIMAO, Plaintiffs, v. JENNY RISH, Defendant.	CASE NO.: A539455 DEPT. NO.: X **JUDGMENT**

WHEREAS, a hearing for Default Judgment having come before the Court on April 1, 2011. IT IS ORDERED, ADJUDGED AND DECREED, that Judgment is hereby entered in favor of Plaintiffs and against Defendant, Jenny Rish as follows:

William Simao's past medical and related expenses	$194,390.96
William Simao's pain and suffering:	
- Past pain and suffering	$473,640.
- Future pain and suffering	$1,140,552.
- Loss of Enjoyment of Life	$ 905,169.
Cheryl Simao's loss of consortium (Society and Relationship)	$ 681,286.
Attorneys' fees	$ TBD
Litigation costs	$ 99,555.49
TOTAL	$3,493,983.45

...

...

IT IS FURTHER ORDERED that Judgment against Defendant, Jenny Rish, shall bear interest in accordance with N.R.S. 17.130 and Lee v. Ball, 116 P.3d 64 (2005).

Dated this 27th day of April, 2011.

Jessie Walsh
DISTRICT COURT JUDGE

EXHIBIT "2"

BARRY J. LEE, Appellant, vs. CHRISTOPHER G. BALL, Respondent.

No. 41686

SUPREME COURT OF NEVADA

121 Nev. 391; 116 P.3d 64; 2005 Nev. LEXIS 43; 121 Nev. Adv. Rep. 38

July 28, 2005, Decided

PRIOR HISTORY: [***1] Appeal from a district court judgment granting additur and denying attorney fees and costs. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

DISPOSITION: Reversed and remanded.

COUNSEL: Ronald M. Petr, Las Vegas, for Appellant.

Piazza & Associates and Carl F. Piazza and David H. Putney, Las Vegas, for Respondent.

JUDGES: BEFORE MAUPIN, DOUGLAS and PARRAGUIRRE, JJ. DOUGLAS and PARRAGUIRRE, JJ., concur.

OPINION BY: MAUPIN

OPINION

[*393] [**65] *OPINION*

By the Court, MAUPIN, J.:

In this appeal, we clarify that a district court's grant of additur is only appropriate when presented to the defendant as an alternative to a new trial on damages.

FACTS AND PROCEDURAL HISTORY

The litigation below arose from a car accident in which the passenger in a vehicle, respondent Christopher Ball, sustained injuries after the driver, appellant Barry Lee, negligently turned into oncoming traffic. Ball sued Lee, alleging general and special damages. Unhappy with the results of court-annexed arbitration, Lee requested a trial de novo. Before trial, Lee served Ball with an offer of judgment for $ 8,011.46. After [**66] a two-day trial, the jury awarded Ball $ 1,300. Lee subsequently moved for costs and attorney fees because [***2] Ball failed to recover an amount in excess of the offer of judgment. Ball opposed this motion, requesting a new trial or, in the alternative, additur. After an unfranscribed hearing, the district court granted an $ 8,200 additur and awarded Ball prejudgment interest but did not offer Lee the option of a new trial. The district court further calculated prejudgment interest using a pro-rata formula based on the differing statutory rates of interest in effect before the entry of final judgment. Lee appeals, arguing that the district court erred by granting an additur, failing to offer a new trial, and erroneously calculating prejudgment interest. As a result, Lee argues he is entitled to attorney fees and costs.

DISCUSSION

Additur

Under *Drummond v. Mid-West Growers*, [1] Nevada courts have the power to condition an order for a new trial on acceptance of an additur. [2] In line with *Drummond*, our subsequent decisions have confirmed [*394] a "two-prong test for additur: (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." [3] If both prongs are met, then the district court has [***3] discretion to grant a new trial, unless the defendant consents to the court's additur. [4] 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. [5] However, granting additur in the absence of a demonstrable ground for a new trial is an abuse of discretion.

1 91 Nev. 698, 708-11, 542 P.2d 198, 205-08 (1975).

2 *Id.* at 708, 542 P.2d at 205.

3 *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 616, 5 P.3d 1043, 1054 (2000) (citing *Drummond*, 91 Nev. at 705, 542 P.2d at 203).

4 *Drummond*, 91 Nev. at 712, 542 P.2d at 208.

5 *Donaldson v. Anderson*, 109 Nev. 1039, 1041, 862 P.2d 1204, 1206 (1993).

We conclude that Lee has failed to demonstrate that the district court abused its discretion in determining that additur was warranted. First, the hearing during which the district court [***4] orally granted additur was not reported, the parties have not provided a trial transcript in the record on appeal, and the parties have not otherwise favored us with the district court's oral explanation for granting Bail such relief. [6] Second, because the award was substantially less than the conceded proofs of special damages, there is at least some indication that the jury award was "clearly inadequate" in violation of the district court's instructions. Although the jury, acting reasonably, could have disbelieved Bail's evidence concerning alleged pain and suffering and reasonably inferred that he was not injured as severely as claimed, [7] and although the jury was not bound to assign any particular probative value to any evidence presented, [8] it is incumbent upon Lee to demonstrate that the additur, in and of itself, constitutes an abuse of discretion. [9] He has failed to do so.

6 *See Stover v. Las Vegas Int'l Country Club*, 95 Nev. 66, 68, 589 P.2d 671, 672 (1979) (stating "when evidence on which a district court's judgment rests is not properly included in the record on appeal, it is assumed that the record supports the lower court's findings"). We further note that the district court's written order granting additur is silent as to the reasons for this award.

[***5]

7 *See Quintero v. McDonald*, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000).

8 *Id.*

9 *See Wallace v. Haddock*, 77 Conn. App. 634, 825 A.2d 148, 151-52 (Conn. App. Ct. 2003) (declining to upset an award of additur when the appellant failed to provide transcripts and "failed to seek any further articulation of the court's reasoning for granting the motion for an additur").

We conclude, however, that the district court abused its discretion in failing to offer Lee the option of a new trial or acceptance of the additur. We clarify that, under *Drummond*, additur may not [*395] stand alone as a discrete remedy; rather, it is only appropriate [**67] when presented to the defendant as an alternative to a new trial on damages. [10]

10 *See Drummond*, 91 Nev. at 712, 542 P.2d at 208; *see also Donaldson*, 109 Nev. at 1043, 862 P.2d at 1207 (reversing a district court order and remanding with instructions to grant a new trial limited to damages, unless the defendant agreed to additur); *ITT Hartford Ins. Co. of the S.E. v. Owens*, 816 So. 2d 572, 575-76 (Fla. 2002) (holding the relevant Florida statute requires a trial court to give the defendant the option of a new trial when additur is granted); *Wallace*, 825 A.2d at 153 (finding the relevant Connecticut statute requires parties have the option of accepting additur or receive a new trial on the issue of damages); *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 50 (Minn. 1989) ("[A] new trial may be granted for excessive or inadequate damages and made conditional upon the party against whom the motion is directed consenting to a reduction or an increase of the verdict. Consent of the non-moving party continues to be required."); *Tucci v. Moore*, 875 S.W.2d 115, 116 (Mo. 1994) ("Additur requires that the party against whom the new trial would be granted have, instead, the option of agreeing to additur."); *Belanger by Belanger v. Teague*, 126 N.H. 110, 490 A.2d 772, 772 (N.H. 1985) (mem.) (holding "a jury verdict supplemented with an additur may go to judgment only if the defendant waives a new trial").

[***6] *Prejudgment interest*

Lee argues that the district court erred in calculating both the rate and period of prejudgment interest. We agree and conclude that the district court's calculation was plainly erroneous. [11]

11 *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. Such is the case where a statute which is clearly controlling was not applied by the trial court." (citation omitted)).

Under NRS 17.130(2), [12] a judgment accrues interest from the date of the service of the summons and complaint until the date the judgment is satisfied. Unless provided for by contract or otherwise by law, the applicable rate for prejudgment interest is statutorily determined. [13] In determining what rate applies, NRS 17.130(2) [*396] instructs courts to use the base prime rate percentage "as ascertained by the Commissioner [***7] of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent."

12 NRS 17.130(2) provides:

> When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

13 NRS 17.130(2); *see also Gibellini v. Klindt*, 110 Nev. 1201, 1208, 885 P.2d 540, 544-45 (1994) (holding that the "or specified in the judgment" language does not permit a judge to vary an interest rate outside of the statutory rate).

[***8] The district court calculated the rate of prejudgment interest using periodic biannual legal rates of interest in effect between May 27, 1999, and March 24, 2003. This was error. Under the plain language of NRS 17.130(2), the district court should have calculated prejudgment interest at the single rate in effect on the date of judgment.

The district court further determined that prejudgment interest accrued from May 27, 1999, to March 24, 2003. NRS 17.130(2) explicitly provides that "the judgment draws interest from the time of service of the summons and complaint until satisfied." Bell completed service of process on June 9, 1999, and the district court entered final judgment on March 29, 2003. Therefore, prejudgment interest accrued beginning June 9, 1999, not May 27, 1999. Accordingly, the district court also erred in calculating the period prejudgment interest accrued.

CONCLUSION

We hold that the district court erred in granting an additur without providing Lee the option of accepting the additur or a new trial on damages and in calculating prejudgment interest. Accordingly, we reverse the district court's judgment and [***9] remand this [**68] matter for proceedings consistent with this opinion.

DOUGLAS and PARRAGUIRRE, JJ., concur.

EXHIBIT "3"

SUM

District Court

CLARK COUNTY, NEVADA

CLERK OF THE COURT

AUG 10 12 07 PM '07

FILED

WILLIAM JAY SIMAO, individually, and CHERYL ANN SIMAO, individually, and as husband and wife,

Plaintiffs,

vs.

JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,

Defendants.

SUMMONS

CASE NO. A539455

Dept. NO. X

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT. A Civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

JENNY RISH
223 NORTH COTTONWOOD DRIVE
GILBERT, ARIZONA 85234

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
   b. Serve a copy of your response upon the attorney whose name and address is shown below

2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

AARON & PATERNOSTER, LTD.

By: _____
Matthew E. Aaron, Esq.
Nevada Bar No. 4900
AARON & PATERNOSTER
2300 West Sahara, Suite 650
Attorneys for Plaintiffs

CHARLES J. SHORT, CLERK OF COURT

By: _____ APR 13 2007
Deputy Clerk PATRICIA BOGGESS
County Courthouse
200 South Third Street
Las Vegas, NV 89155

CLARK COUNTY DISTRICT COURT

In And For The County Of Maricopa, State Of Arizona

WILLIAM JAY SIMAO AND CHERYL ANN SIMAO

Plaintiff(s), Represented By THE PLAINTIFF

vs.

JENN RISH, JAMES RISH, LINDA RISH

Defendant(s), In Proprie Persona

A 539455

Declaration Of Service

I, TYLER TREECE, being qualified under ARCP, 4(d) and 4(e), to serve legal process within the State of Arizona and having been so appointed by Maricopa County Superior Court, did receive on July 12, 2007 from THE PLAINTIFF, Attorney For The Plaintiff, the following Court issued documents:

SUMMONS AND COMPLAINT

On Monday, July 23, 2007 at 7:10 PM, I personally served true copies of these documents as follows:

JENNY RISH BY LEAVIN COPIES WITH HER DAUGHTER, ARLENE VILLA AN OCCUPANT OF SUITABLE AGE AND DISCRETION WHO RESIDES THEREIN.

Description of Person Served:	H	F	30-40	5'6	160	BRN	
	Race	Sex	DOB or Approx Age	Height	Weight	Hair	Eyes

Documents Were Served At The Place Of at the place of abode Located at: **223 N COTTONWOOD DR GILBERT, AZ 85234**

SECURED

I declare under penalty of perjury th the foregoing is true and correct an was executed on this date.

July 24, 2007

TYLER TREECE, Declarant
An Officer Of Maricopa County Superior Court

AAA Landlord Services, Inc.

www.aaalandlord.com

AAA Landlord Services