As this Court knows the purpose of voir dire is to facilitate the identification and removal of potential jurors "who, because of bias or prejudice, cannot serve as fair and impartial jurors." *Silver State v. Shelley,* 105 Nev. 309, 774 P.2d 1044 (1989). Logically, if a trial starts where a juror already favors one party over the other, the goal of impaneling a fair and impartial jury has been defeated. Thus, it is imperative that voir dire is allowed to ensure that the parties are starting on an equal footing as far as the presentation of evidence is concerned. This concept has nothing to do with Plaintiffs' burden of proof as Plaintiffs have never denied the elementary principle that a plaintiff bears the burden of proof in a negligence action such as this. Considering the vital importance of empanelling and impartial jury, courts have consistently held that "[t]he voir dire examination of jurors . . . [is] to enable counsel to exercise intelligently the peremptory challenges allowed by the law." *State v. Brown*, 53 N.C. App. 82, 280 S.E. 2d 31, Cert Denied, 304 N.C. 197, 285 S.E. 2d 102 (1981). Therefore, the purpose of voir dire is for counsel to gather information for peremptory as well as for cause challenges. However, "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." *Id.* at 27, citing *United States v. Ible*, 630 F.2d 389, 395 (5th Cir. 1980).

Moreover, the United States Supreme Court has recognized the fundamental importance of empanelling a fair and impartial jury, stating: "[i]t is difficult to conceive of a more effective obstruction to the judicial process than a juror who has prejudged the case." *In re Michael*, 326, U.S. 224, 228, (1945). "The test for evaluating whether a juror should [be] removed for cause is 'whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'" *Weber v. State*, 121 Nev. Adv. Rep. 57, 119 P.3d 107, 125 (2005), citing *Leonard v. State*, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001); See also *Wainwright v. Witt*, 496 U.S. 412 (1985).

The United States Supreme Court in *Wainwright* held that prospective jurors must be excused if their views could substantially impair their ability to perform their function as jurors, and the impairment need not be shown with unmistakable clarity. The Supreme Court of Nevada has provided guidance for the District Court and trial counsel in determining whether a juror should be removed for cause. The Court explained, "[i]t is not enough to be able to point to detached language which, alone considered, would seem to meet the statute requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict." *Thompson vs. State of Nevada*, 111 Nev. 439, 443, 894 P.2d 375, 377 (1995), citing *Bryant v. State*, 72 Nev. 330, 305 P.2d 360 (1956); *see also Weber v. The State of Nevada*, 119 P.3d 107, 126, 121 Nev. Adv. Rep. 57 (2005), citing *Thompson, supra.*

Moreover, a juror's impairment does not need to be shown with "unmistakable clarity." *Wainwright, supra.* **Any doubt should be weighed in favor of being excused in order to remove even the possibility of bias or prejudice infecting the deliberations.** *See Walls v. Kim*, 549 S.E.2d 797, 250 Ga.App. 259 (Ga. 2001).

The Nevada Supreme Court emphasized this point in *Thompson*, and found that, "...[s]imply because the district court was able to point to detached language that prospective juror eighty-nine could be impartial does not eradicate the fact that he previously demonstrated partial beliefs, capped by an unequivocal statement that [the Defendant] was guilty." *Thompson, supra* at 443. The Court further explained: "[i]t may be true that on examination [the prospective juror's] answers tended to contradict his previous statements, but we believe that his very self-contradictions do not increase his fitness as a juryman." *Id.* citing *Bryant*, 72 Nev. at 334. The *Thompson* court ultimately concluded that ". . . it was prejudicial error that [the] prospective juror was not excused for cause.

This principle is echoed in Courts throughout our country. Notably, the Georgia Court of Appeals in *Walls, supra* discussed the fallacy of the "rehabilitation question" justify retention of biased jurors. The *Walls* Court discussed the fact that in too many cases, judges confronted with clearly biased jurors use their significant discretion by asking a version of the following question, which the *Walls* Court characterized as a "loaded question":

> After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?

Id. at 799. The *Walls* Court further explained, "[n]ot so remarkably, jurors confronted with this question from the bench almost inevitably say, 'yes.'"

The *Walls* case is a classic example of the misuse of the "rehabilitation question." The Georgia Court of Appeals found that the Judge erred in not dismissing the juror for cause and reversed the judgment and remanded for a new trial. *Id.* The Court explained that the mere fact the juror told the court she could decide the case on the law and facts did not eliminate the reality of her potential bias. **The Court further explained that a trial judge should err on the side of caution by dismissing biased jurors, rather than trying to rehabilitate them, because in reality, the judge is the only person in the courtroom whose primary concern, and primary duty, is to ensure the selection of a fair and impartial jury.** *Id.* at 799. [Emphasis Added].

A decision from the Supreme Court of Appeals of West Virginia is also illustrative of the commonplace fallacy of attempts to rehabilitate jurors who already demonstrate potential bias and prejudice. See *O'Dell v. Miller*, 565 S.E.2d 407, 211 W.Va. 285 (Va. 2002). The trial judge refused to strike a prospective juror for cause who made statements that cast doubt on his ability to be fair and impartial, and the plaintiff was forced to use a preemptory strike to remove the challenged juror. *Id.*

The *O'Dell* Court reiterated what the *Walls* Court and what the majority of Courts have

stated, namely, that "[t]rial judges must resist the temptation to 'rehabilitate' prospective jurors simply by asking the 'magic question' to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could reasonably be questioned." *Id.* at 412. The court explained that "[o]nce a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." *Id.* The Court held that the trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror. *Id.* at 413.

As this Court is aware, and as was proven during voir dire, there are a number of common troubling beliefs, or attitudes, held by prospective jurors in personal injury cases which "substantially impair" their ability to follow the law. The beliefs and attitudes of several potential jurors were discovered during voir dire and this Court properly dismissed these jurors for cause as it was made clear that these jurors could not be fair or impartial in rendering a verdict in this matter.

Additionally, Defendant's reliance on *Whitlock v. Salmon*, 104 Nev. 24 (1988) is misplaced as that case concerned the issue of a trial judge disallowing *voir dire* altogether, not prohibiting counsel from supplemental examination after it was made clear to the court that a prospective juror could not be fair and impartial. *See also Leone v. Goodman,* 105 Nev. 221 (1989). In fact, the *Whitlock* Court acknowledges that a trial judge is vested with the authority to supervise *voir dire* and reasonably restrict supplemental examination of prospective jurors. "Both the scope of *voir dire* and the method by which voir dire is pursued remain within the discretion of the district court. The trial judge has a duty to restrict attorney-conducted *voir dire* to its permissible scope, that is, obtaining an impartial jury." *Id.* at 28. Here, the Court properly

exercised its sound discretion by excluded the prospective jurors who were clearly unsuitable to serve as a member of the venire.

Lastly, there is nothing in Defendant's Motion that even remotely explains how this Court failed to properly restrict Plaintiffs' *voir dire* but for one lone contention that Plaintiffs' counsel improperly advised the jury of the burden of proof, a contention that is wholly without merit as set forth above. Despite the fact that Plainitiffs' *voir dire* took place over the course of several **half judicial days**, the defense has not detailed in any manner that Plaintiffs' *voir dire* was improper. Defendant's blanket assertion that Plaintiffs' question were designed to "indoctrinate" the jurors is unsupported by anything in the record. Defendant could have cited to the specific instances where said "indoctrinization" supposedly occurred, but did not.

D. <u>All Medical Evidence was Properly Presented at Trial; Notwithstanding, Defendant's Argument Concerning the Purported Late Disclosure of Medical Evidence, has Been Rendered Moot as Plaintiffs did Not Request, nor Receive, any Damages for Future Medical Treatment.</u>

The contention asserted by the defense that it was prejudiced by evidence of William's recommendation for a spinal cord stimulator is without merit as the defense was put on notice well in advance of trial of this future treatment. Notwithstanding, even of this evidence was improperly introduced, which it was not, Plaintiffs' ultimately did not request damages for any future medical care, nor were any damages awarded by this Court for future medical and related expenses. (*See* **Exhibit "4"**). Accordingly, Defendant's contention on the matter of "late disclosed' medical evidence lacks merit as it has been rendered moot.

Notwithstanding, there is no doubt that the defense was aware of the spinal cord stimulator opinions well in advance of trial. In fact, during the discovery phase of this case, the defense took several depositions. Many of these depositions were of Mr. Simao's treating

physicians.[3] Dr. Ross Seibel is one of the Pain Management Specialists that treated Mr. Simao during the early stages of his treatment, and then again during the later stages of his treatment.

Dr. Seibel was deposed on August 20, 2010. At the time of Dr. Seibel's deposition, he was providing ongoing medical treatment (pain management) to Mr. Simao. During the deposition, Dr. Seibel was asked several questions regarding the medical treatment of William Simao. Moreover, defense counsel questioned Dr. Seibel regarding future medical treatment that Mr. Simao would require. In response, Dr. Seibel responded, that he did not have a plan not right now.

Q. Let me shift gears here. Do you have a future treatment plan for the Plaintiff?
A. I don't **right now** in front of me.

(*See* Seibel Deposition, at **Exhibit "16,"** p. 53, lines 20-22.) [Emphasis Added].

Later in his deposition, Dr. Seibel was asked more refined questions regarding Mr. Simao's future medical treatment. Specifically, Dr. Seibel was asked what treatment that Mr. Simao should next undergo, so that the future treatment plan of Mr. Simao could be determined.

Q. What treatment plan would you recommend to Mr. Simao at this point in time to more definitely diagnose and his condition and also to treat his condition?
A. It seems like there is two questions. One is - -
Q. Well, lets break it down to - -
Q. Therapuetic. Let's talk about diagnostic first.
A. From a diagnostic standpoint, based on the last time I saw him, I would pursue again a selective nerve root block at C4 level.
Q. What would be the purpose of that? Would you explain?
A. To see if he's having C4 nerve-root mediated pain caused by compression of the nerve root.

(*See* **Exhibit "16,"** p. 67, lines 17-25 thru p. 68, lines 1-14.)

As testified by Dr. Seibel on August 20, 2010, he could not diagnose Mr. Simao's current condition, without first performing an additional diagnostic pain management procedure. Dr. Seibel goes on to testify that this additional procedure would provide him with the critical

[3] Moreover, the defense deposed some of the treating physicians twice. (i.e. Dr. McNulty).

diagnostic information that he would need before being able to formulate the future medical plan of Mr. Simao.

> Q. Okay. And what -- **assuming that that has a positive outcome**, what would be your treatment options for -- or your treatment recommendations for him?
> A. Again, from my perspective, I'm not the spine surgeon. But my job is to provide some diagnostics, but also some therapeutic interventions, which range from the modalities we mentioned before. Would it be a medication management or a repeat steroid injection? Or consider re-referral back to the surgeon to see if he felt there was any other surgical interventions that could help alleviate this based on those diagnostic results.

(*See* **Exhibit "16,"** p. 68, lines 17-25 thru p. 69, lines 1-3.*)*

In other words, Dr. Seibel testified that **if Mr. Simao had a positive** outcome to the diagnostic pain management procedure, then there would be a range of future treatment options available to him.

Next, Dr. Seibel was asked what the treatment options would be if the results of the pain management diagnostic procedure was **negative**.

> Q. And assuming the result was negative, what would be your next step?
> A. If the result was negative, I'd probably to do myofascial treatments for him, medication management. He may not have any further interventional or surgical modalities that are available to him.

(*See* **Exhibit "16,"** p. 69, lines 4-9.)

In other words, Dr. Seibel testified that if there was a negative result, then the only future treatment available would be medications and physical therapy.

In an effort to understand what Dr. Seibel meant by the term "modalities," he was questioned with regard to various types of treatment options. Specifically, he was asked about two specific options, a spinal cord stimulator and a morphine pump. The testimony is as follows:

> Q. At that point in time, is it foreseeable to you that he would be recommended for, say, an implant of an electronic stimulator or other type of pain-relief modality, such as the Morphine pump for –
> A. I could see where some might consider that an option. I don't consider a Morphine pump or any intrathecal device **right now** a likely option for

that.

(*See* **Exhibit "16,"** p. 69, lines 10-16.)

Clearly, Dr. Seibel testified that an implant of a spinal cord stimulator would be a viable treatment option. Moreover, he felt that it was a treatment option that other physicians might also recommend. However, "right now" (April 20, 2010), Dr. Seibel could not recommend a spinal cord stimulator, since Mr. Simao required an additional diagnostic procedure. This is confirmed by Dr. Seibel's additional deposition testimony.

> Q. No, I understand right now. But I'm saying --and I understand that there still has to be further workup with Mr. Simao; is that fair?
> A. Yes.
> ...
> A. I could see where somebody would think that's a reasonable option. I don't particularly think that's an option for him. But, yes, those are treatment modalities that somebody would feel is appropriate.

(*See* **Exhibit "16,"** p. 69, lines 4-9.)

In sum, on August 20, 2010, Dr. Seibel was asked several questions regarding Mr. Simao's future treatment options. He informed the attorneys that he did not have a future treatment plan at that time because he needed to perform an additional diagnostic procedure. He testified regarding the range of future treatment options available, but that he first would need to know if Mr. Simao had a either positive or a negative result from the diagnostic test. Lastly, Dr. Seibel testified that two of these modalities could include an intrathecal morphine pump or a spinal cord stimulator. (Each of these are pain management devices). According to Dr. Seibel, some physicians might believe that Mr. Simao is a candidate for one of these two options right now. However, at the time of his deposition, Dr. Seibel could not state whether a spinal cord stimulator was a viable future treatment option until he first determined if Mr. Simao had a **positive** outcome from the diagnostic procedure.

On November 11, 2010, Dr. Seibel performed the diagnostic injection that he discussed

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in his deposition.[4] Shortly after the injection, Mr. Simao followed up with Southwest Medical Associates. The chart note for the follow up visit indicates that Mr. Simao had a 75-80% reduction in his left sided extremity and neck pain as a result of the pain management injection which is clearly a **positive** outcome.[5] More importantly, based on this positive outcome, there is now a diagnostic basis in which to form future treatment options. Specifically, Dr. Seibel testified that if Mr. Simao had a positive outcome from the diagnostic procedure then one of then Mr. Simao would be a candidate for future treatment modalities, i.e. a spinal cord stimulator.

While the defense has argued that they were surprised by the fact that a spinal cord stimulator is a viable future treatment option for Mr. Simao, the evidence shows that this is not true. The defense was put on notice at the time of Dr. Seibel's deposition. Moreover, if the defense would have simply read the Southwest Medical record of November 23, 2010, (the follow up note immediately after the diagnostic procedure performed by Dr Seibel) they would have known that Mr. Simao had a positive outcome from the diagnostic procedure, thus affording Mr. Simao a range of treatment options such as a spinal cord stimulator. Simply put, the positive outcome from the diagnostic procedure provided the diagnostic basis for Mr. Simao's treating physician(s) to formulate future treatment recommendations. Once Mr. Simao had a positive outcome from the diagnostic procedure, a spinal cord stimulator (pain management device) was now an appropriate treatment recommendation and not just a viable option. This is further confirmed by Dr. Daniel Lee, who is one of the spine surgeons who treated Mr. Simao. On February 24, 2011, Dr. Lee examined Mr. Simao and noted that he recommended future pain management for Mr. Simao.[6] As discussed above, a spinal cord stimulator is a pain management device.

By it's very nature, a surprise is something that you could not anticipate, or something

[4] *See* **Exhibit "17,"** (Trial Exhibit 18, p. 263-264).
[5] *See* **Exhibit "18,"** (Trial Exhibit 18, p. 265-266).
[6] *See* **Exhibit "19,"** Chart Note of Dr. Lee, dated February 24, 2011 (Trial Exhibit 22, p. 79)

that you were not expecting. Here, the defense cannot claim surprise with regard to a spinal cord stimulator being a future medical treatment option for Plaintiff, since their expert offered an opinion on the same.

The defense retained Dr. David Fish as an expert. Dr. Fish is a Board Certified Pain Management Specialist. Dr. Fish examined Plaintiff, conducted a records review (of all of Plaintiff's medical records), read all of the depositions and drafted at least (4) four expert reports. On February 9, 2011, approximately one (1) month before the start of the trial, Dr. Fish authored a report outlining his opinions regarding Plaintiff's future medical treatment. At page seven (7) of his report, Dr Fish states:

> "There is no indication based on the MVA, a dorsal column stimulator, cervical degenerative arthritis, and need for revision surgery to the cervical spine is necessary."[7]

The fact that Dr. Fish authored a report containing opinions regarding a spinal column stimulator is evidence of the fact that the defense was put on notice of this future treatment option. Clearly, Dr. Fish understood that a spinal cord stimulator was a treatment option discussed by Plaintiff's treating physicians; otherwise, he would not have rendered an opinion on the subject. Moreover, the fact that Dr. Fish rendered opinions regarding a spinal cord stimulator is evidence that he anticipates evidence of the same, and is prepared to address the issue at trial. Based upon all of the evidence presented, Defendant's claim that she should have been made known that a future spinal cord stimulator procedure would be claimed at trial cannot be maintained considering the facts that Defendant was made aware prior to trial by not only Plaintiffs' treating physicians' opinions and records, but more importantly through their own medical expert witness.

With respect to Dr. Schifini, this Court should disregard any argument made regarding

[7] *See* **Exhibit "20"**, Dr. Fish Report, dated February 9, 2011.

this late and improperly disclosed expert, including the opinions expressed in his Affidavit. Dr. Schifini was never named as an expert, and was not disclosed in any fashion until after the trial. The time to disclose experts has long since expired and Defendant's request to express a new medical expert was specifically denied by the Court. (*See* RDT, March 30, 2011, at **Exhibit "21,** pp.1-16) Further, Dr. Schifini's opinions are entirely irrelevant given the fact that he was purportedly retained to rebut the opinions expressed by Dr. McNulty regarding future medical treatment and costs, which were not an element of damages requested, or awarded, at the default judgment hearing.

With respect to Dr. Arita, the defense has failed to demonstrate to the Court how Dr. Arita's trial testimony is a cause for a new trial and has failed to set forth what "changes" in Dr. Arita's deposition testimony versus his trial testimony exist. Further, although Plaintiffs' counsel did meet with Dr. Arita prior to his trial testimony, which is entirely appropriate, there is no evidence anywhere that Dr. Arita's opinions "changed" as consequence to meeting with Plaintiffs' counsel. Defendant had an opportunity to cross-examine Dr. Arita at trial, although said examination was never completed because Defendant's Answer was stricken due to abusive litigation practices. During said cross-examination, Defendant's counsel published Dr. Arita's deposition, presumably attempting to point out inconsistencies in his trial testimony. However, because Dr. Arita's cross-examination was not completed, Plaintiffs did not have an opportunity to re-direct Dr. Arita and provide him the opportunity to explain to the jury the alleged differences between his testimony at deposition versus trial and the reasons for said differences.

The fact of the matter is that because Dr. Arita's trial testimony was not completed, especially a re-direct examination, it is impossible to know what "changes," if any, to his deposition testimony actually exists and the reasons for said "changes." Further, it is pure speculation on the part of the defense to presume that Dr. Arita "changed" his deposition

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testimony, when in actuality, his deposition testimony was, in all likelihood, taken out of context and/or was based upon incomplete information, as Dr. Arita expressed during cross-examination on at least one (1) occasion, without having the benefit to explain the reasons why on re-direct. (*See* **Exhibit "21,"** p. 88).

Lastly, Defendant argues that Plaintiffs had a duty to disclose Dr. Arita's "change in testimony" but fails to specify what "changes" should have been disclosed. Without knowing the "changes" that purportedly should have been disclosed prior to Dr. Arita's trial testimony, Plaintiffs are unable to adequately respond to the allegations against them.

E. Defendant's Assertion that Any Award of General Damages is a "Veiled" Award of Special Damages Lacks Even the Smallest Indicia of Merit.

Defendant's argument concerning "veiled" general damages is nonsensical and is supported by nothing but sheer speculation, especially the notion that pain and suffering awards are "normally" 2 to 3 times the compensatory damages. Such an assertion has no basis in law or fact and is wholly unsupported in Defendant's brief.

As this Court is aware, unlike special damages, there is no definite standard or method of calculation prescribed by law by which to fix reasonable compensation for pain and suffering. Nevada Pattern Civil Jury Instructions, Civil 10.05. Nor is the opinion of any witness required as to the amount of such reasonable compensation, although this jurisdiction recognizes that expert economists, such as Stan Smith, Ph.D., who testified on behalf of Plaintiffs' at trial, are permitted to be utilized to present hedonic damages evidence, which is a component of pain and suffering. *See Banks v. Sunrise Hosp.*, 120 Nev. 822, 839 (Nev. 2004). As was presented at trial, Dr. Smith's hedonic loss calculations for William were presented to a reasonable degree of economic certainty to fall within a range of $603,454 for a 15% reduction in loss of enjoyment of life (hedonic loss) and $1,206,884 for a 30% reduction in the loss of life's enjoyment. (*See* **Exhibit "21,"** p. 132). Plaintiff only requested $905,169 of that amount, which is the median

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amount and is more than reasonable considering that this equates to only a 22.5% reduction in William's loss of enjoyment of life.

Further, in addition to this item of pain and suffering, Plaintiff also asked for both past and future pain and suffering based on a *per diem* amount of $0.15 per minute of past pain and suffering (about $9.00 an hour) and $0.07 per minute for William's 31 years of future pain and suffering. *Per diem* requests for pain and suffering have been allowed in Nevada. *Johnson, v. Brown,* 75 Nev. 437 (1959). In *Johnson*, the defendant was sued after causing a motor vehicle collision which resulted in injury to the plaintiff. At trial, the lower court permitted plaintiff's counsel to suggest a mathematical basis for fixing damages for pain and suffering. *Id.* at 446. Plaintiff's counsel suggested the following:

> The argument I am going to make is obviously distasteful to defendants' attorney, but it is the only way I can possibly aid you and give you a guide. If you think I am being unfair, you go into the jury room and say so and come to your own conclusion. It is the only way I know how to argue pain and suffering, and I am frank to say that, ladies and gentlemen. As I stated, what is it worth to have your femur violently driven into your pelvis? What is it worth to have your doctor save your life by a tube tapped into your chest? I suggest $5,000 for the initial blow and injury. He was in the hospital for 75 days, but for only 67, approximately, he was in traction and cast?
>
> You have seen the traction and you heard the doctor describe the cast. Now, what is it worth, what is it worth to have the traction pin pushed through your leg? What is it worth to have a cast around your body? What is it worth to be in prison for 67 days? Would ten cents a minute be unfair? That would be $6 an hour. Consider it yourselves. I will give that ten cents a minute, $6 an hour. You can make up your minds whether you feel that is unfair or not. That would be $144 a day or counsel can correct me if I am wrong, $9,648 for 67 days.

Id.

The *Johnson* jury returned a verdict in favor of the plaintiff; the defendant, of course, appealed. On appeal, the defense asserted, among other things, that the trial court erred by

allowing plaintiff's counsel to suggest a mathematical basis for fixing pain and suffering damages, alleging that such an argument is improper. The Nevada Supreme Court, however, was unconvinced and affirmed the lower court's ruling. *Id.* at 447. The *Johnson* Court ultimately held that **the lower court did not err in permitting the argument to the jury.** *Id.*

Here, Plaintiffs, in abiding by the precepts of *Johnson*, utilized a *per diem* approach in their request for past and future pain and suffering damages. There is nothing buried in this request relating to special damages of any sort and Defendant's speculative argument suggesting otherwise is simply unfounded.

F. There is No Reason in Law or Fact for the Court to Recuse itself and Defendant has Failed to Set Forth any Authority or Precedent in Support of this Outlandish Request.

Lastly, as to Defendant's request that this Court recuse itself because Defendant is not "confident" that this case can proceed fairly in the instant department, said argument has been presented without any justification whatsoever and lacks merit. Defendant's argument is unsubstantiated by any sort of authority or precedent which even remotely provides this sort of remedy to the Defendant. Moreover, even had any authority been cited by the defense for its notion that this case cannot proceed fairly before this Court, there has been absolutely no showing, anywhere, that the Court has acted in a biased or unfair manner towards either of the parties. As has been set forth above, the pretrial rulings, and the sanctions imposed for violating said pretrial rulings, were all well reasoned and issued in accordance to the law of this jurisdiction as well as the Court's broad discretion in these matters. Although the Defendant disagrees with some of the Court's pretrial rulings, and certainly disagrees with the Court's issuance of sanctions against her, this does not mean that the Court is biased against the defense. In short, Defendant's argument on recusal should be summarily disregarded.

IV.

CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that Defendant Rish's instant Motion for New Trial be summarily **DENIED.**

DATED this 24 day of June, 2011.

MAINOR EGLET

DAVID T. WALL, ESQ.

CERTIFIATE OF MAILING

The undersigned hereby certifies that on the 24th day of ~~May~~ June, 2011, a copy of the above and foregoing PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL was served by enclosing same in an envelope with postage prepaid thereon, address and mailed as follows:

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EXHIBIT "1"

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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

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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

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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.

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(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

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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

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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.

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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

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EXHIBIT "2"

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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	$473,040.
- 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

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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 21st day of April, 2011.

Jessie Walsh
DISTRICT COURT JUDGE

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EXHIBIT "3"

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

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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: 3:24 p.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

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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

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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

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EXHIBIT "4"

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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.

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

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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)	$ 681,296.
Attorneys' fees	$ TBD
Litigation costs	$ 99,555.49
TOTAL	$3,493,983.45

...

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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

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EXHIBIT "2"

LexisNexis

8 of 8 DOCUMENTS

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. Pehr, 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 untranscribed 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, 708-13, 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 Ball such relief. [4] 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 Ball's evidence concerning alleged pain and suffering and reasonably inferred that he was not injured as severely as claimed, [5] and although the jury was not bound to assign any particular probative value to any evidence presented, [6] it is incumbent upon Lee to demonstrate that the additur, in and of itself, constitutes an abuse of discretion. [7] 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. [8]

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."); *Tweel 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. [9]

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), [10] 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. [11] 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." Ball 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.

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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,	)	SUMMONS
vs.	)	CASE NO.
JENNY RISH; JAMES RISH; LINDA RISH; DOES I through V; and ROE CORPORATIONS I through V, inclusive,	)	Dept. NO. A539455
Defendants.	)	

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 Propria 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

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EXHIBIT "5"

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CLERK OF THE COURT

ORDR
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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 **ORDER REGARDING PLAINTIFFS' OMNIBUS MOTION IN LIMINE**

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

Plaintiffs' Omnibus Motion in Limine, the parties appearing before the Court on February 15, 2011 for hearing, DAVID T WALL, ESQ. and Mainor Eglet appearing for Plaintiffs, STEVE ROGERS, ESQ. and Rogers, Mastrangelo, Carvalho and Mitchell appearing for Defendants, and good cause appearing therefore, the Court rules upon the Plaintiffs' Motion 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;

IT IS FURTHER ORDERED that Plaintiffs' request to preclude reference to William being a malingerer, magnifying symptoms or manifesting secondary gain motives is GRANTED, such that medical witnesses may testify to medical inconsistencies, but references to Plaintiff being a malingerer, magnifying symptoms or manifesting secondary gain motives are excluded.

IT IS FURTHER ORDERED that treating physicians do not need to prepare expert reports separate from and in addition to their medical records and dictated reports.

IT IS FURTHER ORDERED that Plaintiffs' request to preclude reference to defense medical examiners as "independent" is GRANTED.

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

IT IS FURTHER ORDERED that Plaintiffs' request to preclude references to collateral sources of payment or medical bills and all other expenses, including health insurance, liens and/or Medicare is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' request to exclude evidence of when Plaintiffs retained counsels is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' request to preclude Defendants from

arguing that Plaintiffs are asking the jury for an amount greater than they anticipate receiving is GRANTED.

DATED this 9th day of ~~February~~ Mar, 2011.

DISTRICT COURT JUDGE

MAINOR EGLET

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

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EXHIBIT "6"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM SIMAO, Plaintiff, v. JENNY RISH, Defendant.	CASE NO. A-539445 DEPT. X

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MONDAY, MARCH 21, 2011

REPORTER'S TRANSCRIPT
TRIAL BY JURY
DAY 1 - VOLUME I

APPEARANCES:

For the Plaintiff: DAVID T. WALL, ESQ.
ROBERT M. ADAMS, ESQ.
ROBERT T. EGLET, ESQ.
Mainor Eglet, LLP

For the Defendant: STEVEN M. ROGERS, ESQ.
Hutchison & Steffen, LLC

RECORDED BY: VICTORIA BOYD, COURT RECORDER

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 these -- this Court's pretrial orders.

As Mr. Wall 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 say oh, I -- I didn't realize that that was a, you know, I didn't realize that was the Court's order. I was confused, I guess.

So additionally, there are some other slides. Can I have your young man over there put the slides --

MR. ROGERS: Yeah, Dan.

THE COURT: -- that we were talking about one at a time.

MR. ROGERS: Which ones -- now just so --

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EXHIBIT "7"

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

CHERYL A. SIMAO and WILLIAM J. SIMAO, Plaintiffs,	)	CASE NO. A-539455
v.	)	DEPT. X
JAMES RISH, LINDA RISH and JENNY RISH, Defendants.	)	

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

FRIDAY, MARCH 25, 2011

REPORTER'S TRANSCRIPT
TRIAL TO THE JURY
DAY 5 - VOLUME 1

APPEARANCES:

For the Plaintiffs:	DAVID T. WALL, ESQ. ROBERT M. ADAMS, ESQ. ROBERT T. EGLET, ESQ. Mainor Eglet
For the Defendants James and Linda Rish:	BRYAN W. LEWIS, ESQ. Lewis and Associates, LLC
For the Defendant Jenny Rish:	STEVEN M. ROGERS, ESQ. CHARLES A. MICHALEK, ESQ. Hutchison & Steffen, LLC

RECORDED BY: VICTORIA BOYD, COURT RECORDER

and all that stuff.

A If it's okay, I'll just make the simple statement -- I just want to make sure nothing else is wrong. So I would hypothetically repeat the MRI, repeat the CT, take the x-rays, talk to the patient, examine the patient, and all that would be a pertinent part to getting to the point of deciding that the patient has a high likelihood of neuropathic pain and considering a spinal cord stimulator trial.

Q Okay. Because it's possible that it isn't neuropathic pain, it could be related to the hardware, for example?

MR. EGLET: Objection, Your Honor, speculation, possibility.

THE COURT: Sustained. Ask you to rephrase the question.

MR. ROGERS: Sure.

BY MR. ROGERS:

Q The point of these ruling out tests that you've just describe to the jury is that you need to rule out whether there is an alternate problem that wouldn't be necessarily repaired by a stimulator?

A Correct. Yes.

Q 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

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it be in trial or in deposition, somewhere around 100 times; is that right?

MR. EGLET: May we approach, Your Honor?

THE COURT: Sure.

THE WITNESS: So I'm to wait?

THE COURT: Yes, please.

[Begin Bench Conference]

MR. EGLET: If he has a deposition of prior testimony of this Doctor that he wants to impeach with him, or show that he's testified inconsistently with, that's fine, but just to throw out there this -- what he's asking for is an opinion out of a treating physician that oh, well sometimes doctors testify differently at different depositions, you know, without having any foundation for it, without having an example of another deposition where that has occurred is improper. There's no foundation for that.

MR. WALL: Excuse me, trial doctors, like in the opening, this is medical buildup.

MR. EGLET: You know -- yeah, this is medical buildup. It's -- this is like a trial doctor, like the slide he put up there.

MR. WALL: You sustained the objection during the opening of referring to him as a trial doctor, because it really reflects medical buildup, which was kept out.

MR. EGLET: Okay. And there's no foundation for this --

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EXHIBIT "8"

ORDR

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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 REGARDING PLAINTIFFS' 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 AND PLAINTIFFS' MOTION TO EXCLUDE SUB ROSA VIDEO**

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

Plaintiffs' 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 and Plaintiffs' Motion to Exclude Sub Rosa Video, the parties appearing before the Court on March 1, 2011 for hearing, and good cause appearing therefore, the Court rules upon the Plaintiffs' Motions 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 not 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.**

IT IS FURTHER ORDERED that Plaintiffs' request to exclude sub rosa video ~~she~~ is deferred until after Plaintiff's direct testimony, so that Defendant can establish how it impeaches the Plaintiff. Defendant is precluded from showing the sub rosa video or referring to it until that time.

DATED this 8th day of March, 2011.

DISTRICT COURT JUDGE

MAINOR EGLET

DAVID T. WALL, ESQ.

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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

JUDGMENT

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

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

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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

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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)	$ 681,296.
Attorneys' fees	$ TBD
Litigation costs	$ 99,555.49
TOTAL	$3,493,983.45

...

...

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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

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EXHIBIT "2"

LexisNexis

8 of 8 DOCUMENTS

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. Pehr, Las Vegas, for Appellant.

Plazza & Associates and Carl F. Plazza 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 untranscribed 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, 708-13, 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 Ball 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 Ball'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." Ball 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.

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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.

Dept. NO. A539455

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
County Courthouse
200 South Third Street
Las Vegas, NV 89155

PATRICIA BOGGESS

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 Propria 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
P.O. Box 31804 Mesa, AZ 85275
480.855.5753 480.464.7415 Fax

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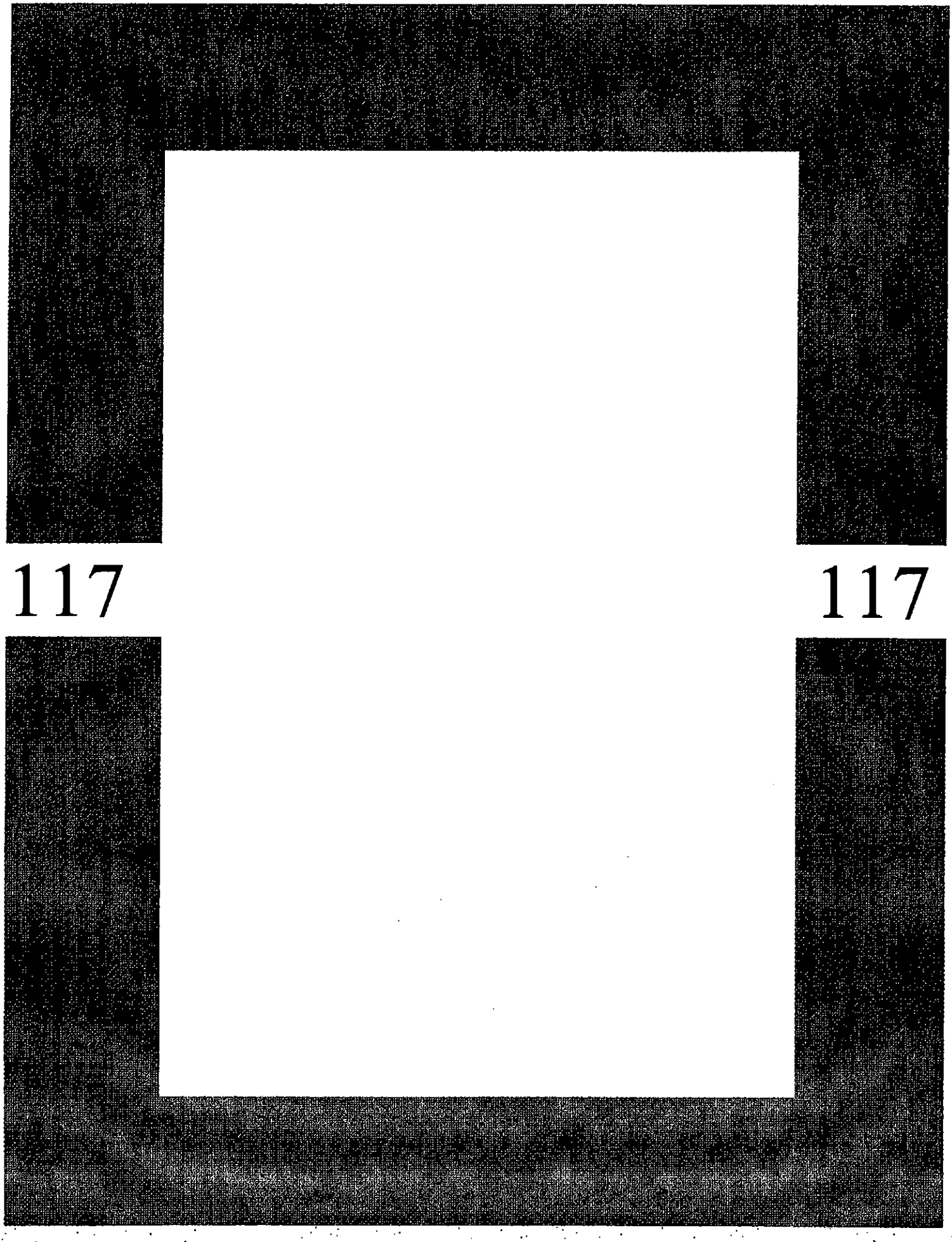

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CLERK OF THE COURT

RPLY
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
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Ph.: (702) 384-4111
Fx.: (702) 384-8222
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 **PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO QUASH DEFENDANTS' SUBPOENA DUCES TECUM TO JANS-JORG ROSLER, M.D. AT NEVADA SPINE INSTITUTE ON ORDER SHORTENING TIME**

COME NOW, Plaintiffs, WILLIAM and CHERYL SIMAO, by and through their attorneys of record, ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT M.

ADAMS, ESQ. of the law firm of MAINOR EGLET, and hereby submits their Reply to Defendant's Opposition to Motion to Quash Defendants' Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute on Order Shortening Time.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

ARGUMENT

Defendant's instant Opposition contains several inaccuracies that must be clarified here:

First and foremost, as the Court may recall, prior to Dr. Rosler taking the stand at trial, Plaintiff was not in possession of the subject fluoroscopy image. Dr. Rosler brought the image with him to Court on the day he took the stand, which was the first time Plaintiffs' counsel saw the image. During Dr. Rosler's testimony, he referenced the fluoroscopy in his chart, which was subsequently shown to the jury by use of the ELMO. This was the only time Plaintiffs' counsel used the ELMO as trial, which use was necessitated by the fact that Plaintiffs did not possess the film prior and was not able to digitize it for use as an electronic exhibit as per Plaintiff's counsel's usual trial custom. Thereafter, a copy of the fluoroscopy image brought by Dr. Rosler **was** produced to Defendant during trial, on April 15, 2011, according to the Court's instructions. This is evidence by the Receipt of Copy attached to Plaintiffs' Motion to Quash at Exhibit "2" as well as by Correspondence dated April 15, 2011 sent to defense counsel, which has attached the subject diagnostic imaging study. (*See **Exhibit "1"***). Interestingly, rather than acknowledge the undoubted production of the requested item, Defendant still persists in her denial of receipt, claiming that the "original film" has not been produced. Notwithstanding, while the original has not been produced given the fact that Mr. Simao still receives medical treatment under the care of Dr. Rosler and the film cannot leave his facility, for purposes of the trial, a copy of the subject image was sufficient to satisfy Defendant's needs. Frankly, the issue regarding the inferiority of

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a copy versus the original film is presently moot considering the fact that the trial has concluded as a result of Defendant's blatant violations of pretrial orders, which ultimately led to the striking of her Answer and entry of a Default Judgment after a prove-up hearing was conducted. Until either a New Trial is granted by this Court and/or the Nevada Supreme Court, which is **highly** unlikely considering the fact that this Court was well within its discretion to issue the pretrial orders at issue as well as the sanctions that were imposed, Defendant has absolutely no right whatsoever to conduct any sort of discovery in this matter.

Second, with respect to Defendant's mention of Dr. Schifini, he was not ever identified as one of Defendant's trial witnesses. As such, Plaintiff is at a loss as to why Defendant's are even bringing Dr. Schifini into this discussion as his subsequent involvement in this matter is wholly irrelevant. Defendant's apparent retention of Dr. Schifini, post-trial, is yet another example of the improper discovery that is being conducted by the defense after the trial of this matter has already concluded.

Finally, as to Defendant's contention that a new trial is warranted based upon the fluoroscopy image, which in Defendant's view constitutes "new evidence," this blanket, bare-bones contention is an irrelevant argument to the instant discussion and should not be considered at this time. The instant Motion to Quash has no bearing on whether or not a new trial is warranted on any matter, let alone the fact that a copy rather than an original film was produced during trial. This argument is a red herring and must be disregarded as the central issue is whether or not the post-trial discovery sought by the defense is permissible, not whether or not a new trial is warranted. Based upon the facts and law of this case, there is absolutely no reason to permit the request discovery to be had as trial has already concluded, not to mention the fact that the defense is already in possession of a copy of the requested imaging study.

II.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant their Motion to Quash Defendants' Subpoena Duces Tecum to Jans-Jorg Rosler, M.D. at Nevada Spine Institute.

DATED this 3 day of June, 2011.

MAINOR EGLET

DAVID T. WALL, ESQ.

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EXHIBIT "1"

W. Randall Mainor
(1941-2007)

MAINOR EGLET
TRIAL ATTORNEYS

Robert T. Eglet
Hon. David T. Wall, Ret.
Tracy A. Eglet †
Robert M. Adams
Bradley S. Mainor
Artemus W. Ham
Bradley J. Myers ♦
Erica D. Entsminger ▪
G. Asa Ginapp
Joseph J. Wirth
Brice J. Crafton
Danielle A. Tarmu

† Also admitted in Ohio
♦ Also admitted in Arizona
▪ Also admitted in Colorado

April 15, 2011

Via Hand Delivery

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

Re: ***Simao v. Rish***
Case No. A539455

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Dear Mr. Rogers:

Attached please find a copy of the fluoroscopy image Dr. Rosler addressed during trial in the above-reference case.

Should you have any questions or concerns, feel free to contact me.

Very truly yours,

MAINOR EGLET

Robert A. Adams, Esq.

RMA/amg

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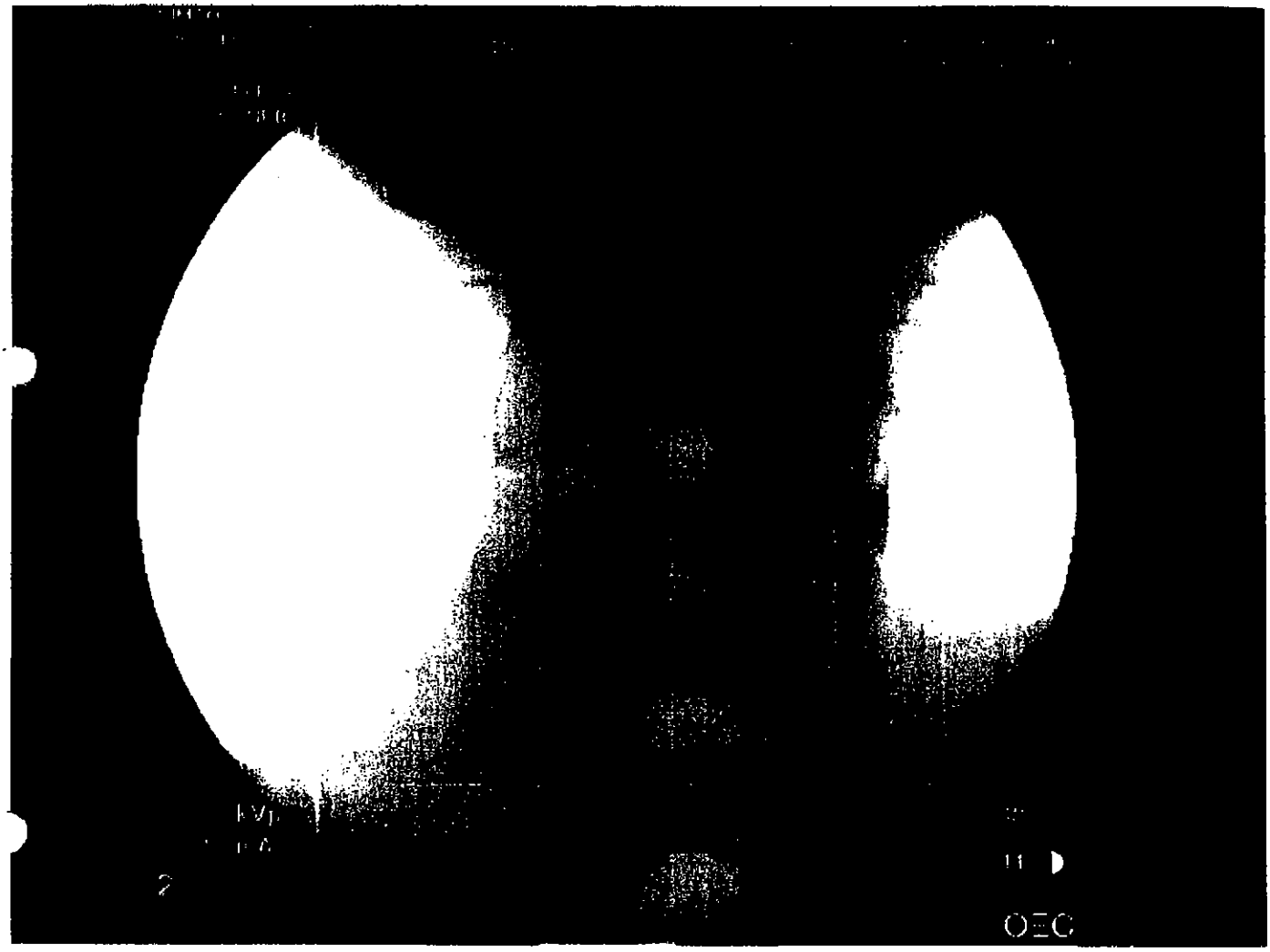

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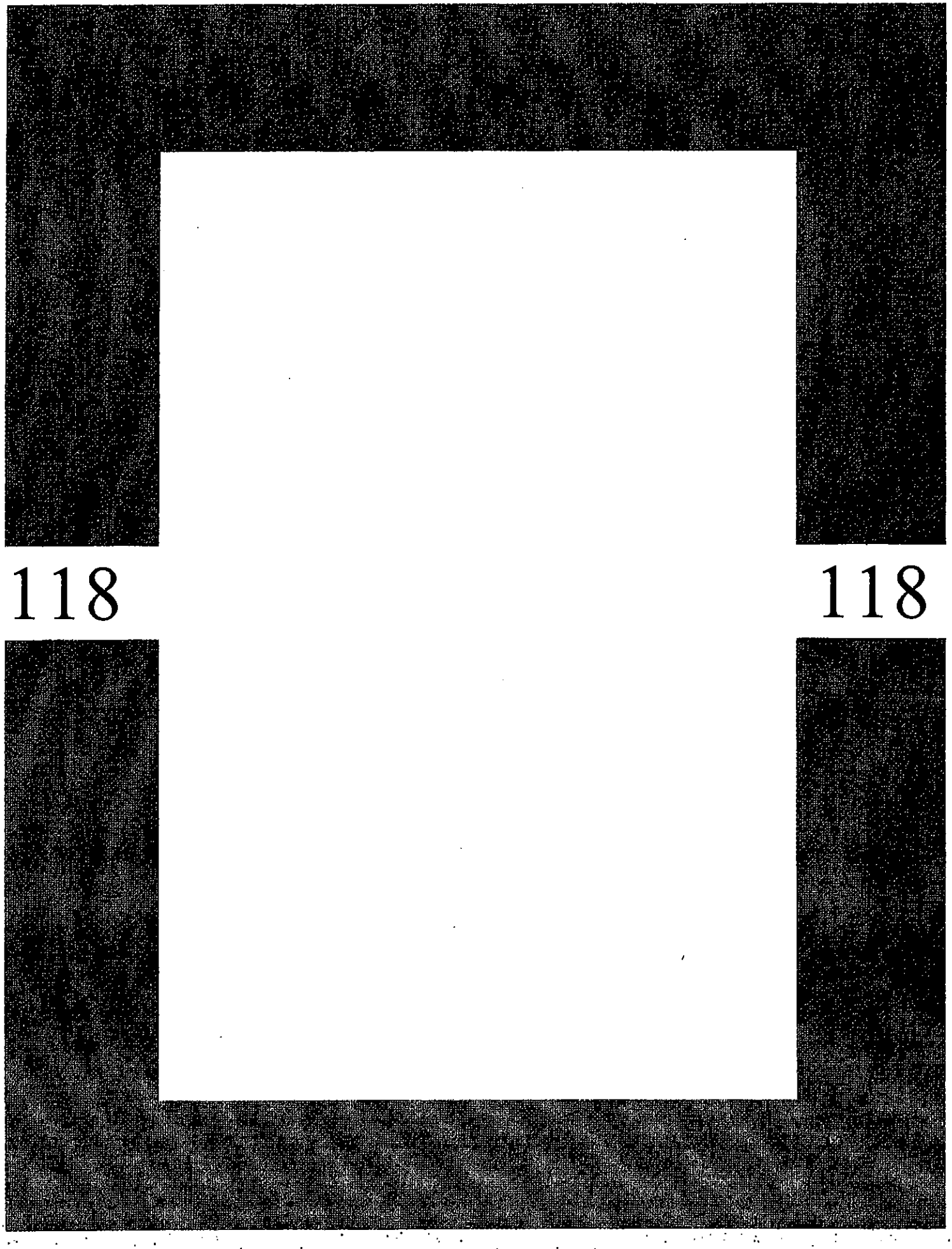

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ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

WILLIAM SIMAO and CHERYL SIMAO, Plaintiffs, vs. JENNY RISH, JAMES RISH, et al., Defendants.	CASE NO. A-539455 DEPT. NO. X **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

PLAINTIFFS' MOTION TO QUASH SUBPOENA DUCES TECUM TO JANS-JORG ROSLER, M.D.

TUESDAY, JUNE 7, 2011

APPEARANCES:

FOR THE PLAINTIFFS: DAVID T. WALL, ESQ.

FOR THE DEFENDANTS: STEPHEN ROGERS, ESQ.

COURT RECORDER:
VICTORIA BOYD
District Court

TRANSCRIPTION BY:
VERBATIM DIGITAL REPORTING, LLC
Englewood, CO 80110
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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LAS VEGAS, NEVADA, TUESDAY, JUNE 7, 2011, 9:07 A.M.

(Court called to order)

THE COURT: Let's call the matter of Simao vs. Rish, Case No. A-539455.

MR. ROGERS: Good morning, Your Honor. Steve Rogers for the defendant.

THE COURT: Good morning, Mr. Rogers.

MR. WALL: David Wall on behalf of the plaintiff, Your Honor.

THE COURT: Good morning, Mr. Wall.

This was Plaintiffs' Motion to Quash Defendants' Subpoena Duces Tecum to Hans-Jorg Rosler and the Nevada Spine Institute.

Mr. Wall?

MR. WALL: Judge, I know you're painfully aware of the procedural posture of this case. I mean, discovery is closed. The trial has been completed. There is no grounds for a subpoena for the original fluoroscopy image. We provided a copy, I think it was right at the close of trial, if memory serves, that -- I don't know if it was Mr. Rogers, or Mr. Polsenberg actually requested a copy.

We provided a copy on April 15th. The original is with Dr. Rosler, who continues to treat Mr. Simao. I just don't see any grounds upon which the defense has a right to continue to try to get the original fluoroscopy image based on

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the procedural posture of the case.

THE COURT: Very well. Mr. Rogers?

MR. ROGERS: Thank you, Your Honor. The Court ordered the plaintiff to produce a duplicate of the fluoroscopy image. And the duplicate that was produced is actually the same as the one that Your Honor has seen and it is indiscernible. It's -- it appears to be a photocopy image of a film.

Perhaps a scanned image would suffice. But we're simply seeking production of the document that Your Honor already ordered, and a legible copy. That's all I have.

THE COURT: Thank you. Mr. Wall?

MR. WALL: Judge, again, I'd stand on the grounds that there's no -- there's no discovery at this point. There's not continued discovery. The case is done. I understand that the allegation is somehow that it's relevant to some motion for new trial.

Number one, it isn't. Number two, it still doesn't place them in a position where they can obtain the image. The original is -- it was brought here. It was used on the ELMO and that's -- that's what it is. I mean, we did our best to provide a copy. There is no more discovery.

So, I'd submit it on the motion.

THE COURT: You know, it's interesting. I know of no legal authority that allows counsel to conduct discovery

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post-trial, and defense didn't provide me with any such authority, nor did they argue this issue in their motion for the new trial.

The motion is denied. I'll ask you -- or actually, the motion to quash the subpoena is granted. I'll ask you to prepare an order based on the Court's ruling. Please run the order past Mr. Rogers before you submit it to me, Mr. Wall.

MR. WALL: I will.

THE COURT: Thank you.

MR. WALL: Thank you, Your Honor.

MR. ROGERS: Could we simply couch this then, rather than as a subpoena, as a -- as a continuance of that order to produce a legible copy. That's -- we're not asking for anything new. We're simply asking for what the Court already ordered production of, just a legible copy.

THE COURT: The Court's made its ruling, Mr. Rogers.

MR. ROGERS: Okay.

MR. WALL: Thank you, Your Honor.

THE COURT: You're welcome.

(Proceeding concluded at 9:11 a.m.)

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

Verbatim Digital Reporting, LLC
Englewood, CO 80110
303-798-0890

Julie Lord

JULIE LORD, TRANSCRIBER DATE

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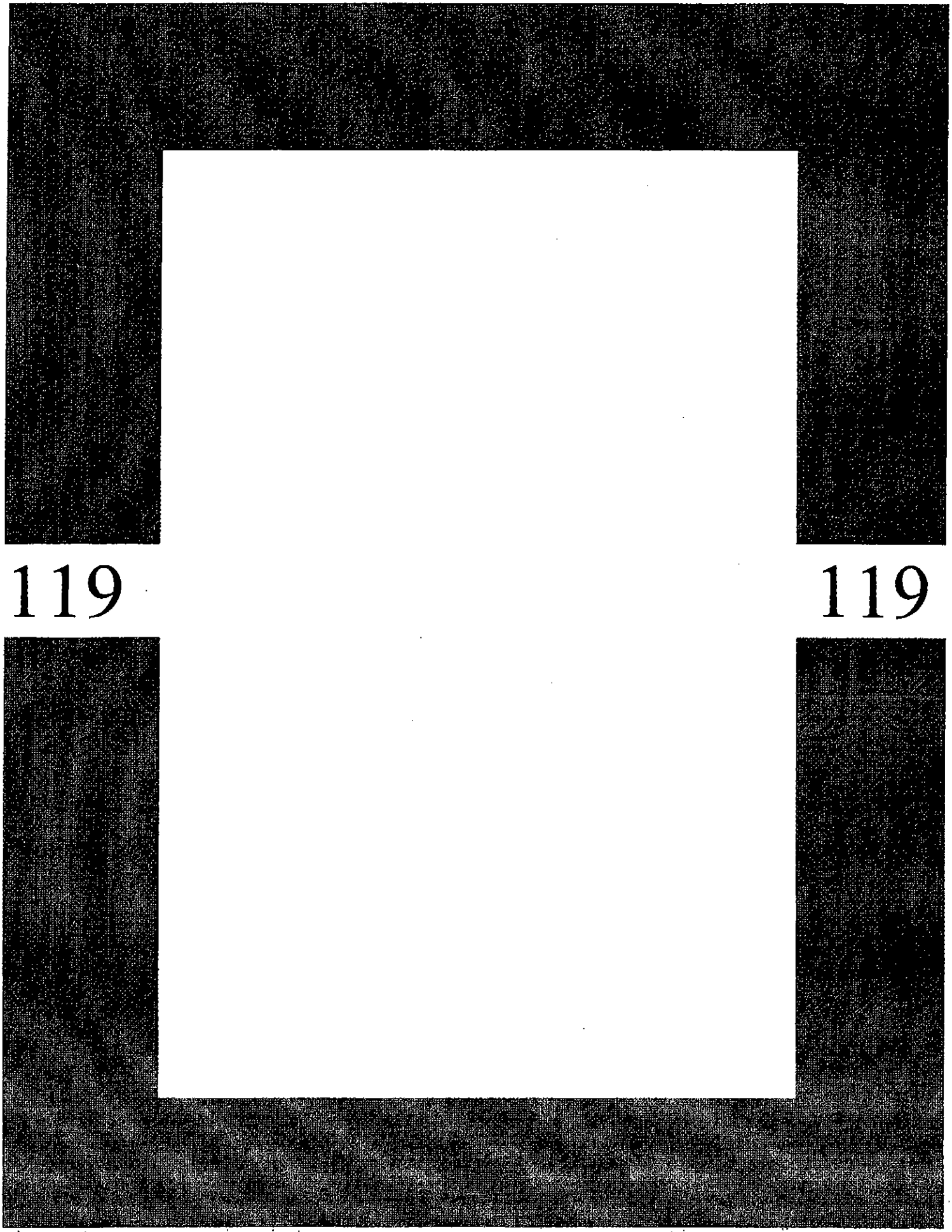

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CLERK OF THE COURT

OPPS
STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
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300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
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 OPPOSITION TO MOTION FOR ATTORNEY FEES

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits this Opposition to Motion for Attorney Fees.

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This Opposition 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 17th day of June, 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

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

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.

Plaintiffs now seek attorney fees and "punitive interest". Plaintiffs seek an excessive amount of fees, and have no legal basis for punitive interest, and so their request for fees and interest should be denied, or significantly limited.

A. Plaintiffs request for fees is excessive.

The decision "whether to award attorney fees, pursuant to NRCP 68 and NRS 17.115 lies within the discretion of the district court." *Thomas v. City of North Las Vegas*, 122 Nev. 82, 127 P.3d 1057, 1063 (2006). The award of attorney fees must be reasonable both in light of the hours and hourly rate claimed and the determination of the reasonableness must involve the exercise of

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discretion "tempered by reason and fairness". *University of Nevada v. Tarkanian*, 110 Nev. 581, 594, 879 P.2d 1180 (1994). Failure to exercise is discretion when awarding fees is an abuse of discretion. *Massey v. Sunrise Hospital*, 102 Nev. 367, (1986).

An award of fees must include an analysis of (1) whether the Plaintiff's claim was brought in good faith, (2) whether the offer of judgment was reasonable and served in good faith; (3) whether the Defendant's rejection of the offer was grossly unreasonable or in bad faith, and (4) whether the fees sought by the offeror are reasonable and justified in amount. *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268 (1983).

1. Whether Plaintiffs claims were brought in good faith.

Plaintiff sought a multi-million dollar award for an auto accident in which there was, quite simply, a minor impact. Though Defendant was precluded from raising this issue, the claims of the Plaintiff in seeking this award were not in good faith. Plaintiff cites to the hiring of Defense experts as evidence that Defendant refuses to "accept responsibility" for her negligence, when the substance of the expert testimony was the Plaintiff was not as injured as he alleged. Defendant has evidence that Plaintiff has issues of secondary gain, yet were precluded from raising such issues at trial. In short, there is substantial evidence that Plaintiff did not bring the claim in good faith.

2. The reasonableness of the offer of judgment.

In determining if an offer was made in good faith, the question to be considered is whether the offer or proposal bears a reasonable relationship to the amount of damages suffered and was a realistic assessment of liability. See *Evans v. Piotraczk*, 724 So.2d 1210 (Fla. 5th DCA 1998).

Plaintiff submitted a $799,999 offer of judgment on February 5, 2009. (Plaintiff's exhibit "1"). At the time the offer was made, the medical bills of Plaintiff were, as Plaintiff himself admits, only $63,000. Thus, Plaintiff asserts an offer of judgment, seeking well over **10 times** the actual medical expenses, is reasonable, when the reasonable amount attorneys expect to receive in such cases is two to three time medical expenses.

It was only **after** the offer of judgment expired that Plaintiff set forth additional medical expenses (totaling over $170,000) and submitted evidence of Stan Smith's loss of value of life calculations. In essence, Plaintiff cites to evidence **submitted after** the offer of judgment expired,

in order to justify the reasonableness of the offer. Plaintiff improperly rely upon evidence submitted after the offer expired to show that the offer was reasonable at the time the offer was made. In reality, Defendant was fully justified in rejecting the offer, given its request for over 10 times the current medical damages known to Defendant.

3. Defendant's decision to refuse the offer and proceed to trial.

As shown above, Defendant's rejection of the offer was proper. Given the knowledge and amount of damages presented to Defendant at the time the offer was made, Defendant was fully justified in rejecting the offer. Proceeding to trial was reasonable, given the significant amount of legal issues involved in the case, none of which were resolved at the time the offer was made. Defendant did not know that the court would rule against her on the various motions in limine, precluding significant evidence, at the time the offer was rejected. There were serious legal and factual issues that needed to be argued and heard prior to the time of trial, and were not resolved until shortly before trial. Given the significant issues, the unprecedented rulings of the court on the motions, and the unreasonableness of the timing of the offer without first resolving these issues, Defendant was justified in rejecting the offer.

4. The fees are unreasonable in amount.

Plaintiff seeks a 40% contingency fee in the amount of $1,397,593.38. This amount cannot be awarded under NRS 17.115 or NRCP 68. These provisions only apply to attorney fees incurred after an offer of judgment was made. Under NRCP 68 and NRS 17.115, a Plaintiff can only obtain:

> ...reasonable attorney's fees incurred by the party who made the offer for the period from the date of the offer to the date of entry of the judgment.

Plaintiff's request for recovery of the contingency fee necessarily seeks recovery of the entire of the attorney fee incurred. This is improper. An award of attorney fees undet the provisions cited cannot be made for fees that were incurred throughout the course of the litigation. Instead, only those fees reasonably incurred following the offer of judgment may be recovered. A contingency fee award must therefore be rejected.

Plaintiff also alternatively seeks an award of fees based upon a rate of $750 per hour. Plaintiff's request for this amount must likewise be rejected. Plaintiff's motion contains significant

boasting of his trial record, as justification for the substantial hourly fee he is demanding. But absent from the motion is any substantiation of the hourly claim. The affidavits simply state the hours were worked, with no documentation as to what the hours were for. No documentation of the actual hours worked by the attorneys were provided, nor was there any indication of the agreement between Plaintiff and counsel as to the "hourly" rate. There is no detailed breakdown of work performed, no time logs, no billing statements and no documentation of the claimed hours of any sort, referenced either in the motion or in the affidavits. The form declarations provided are simply insufficient to justify the reasonableness fo the fees sought. Therefore, as no actual fee has been substantiated, Plaintiff's motion for fees should be summarily denied.

Moreover, Plaintiff seeks an unjustified multiple of 2.5 times the attorney fee hourly rate, based upon the contingent risk involved in the case. After spending paragraphs stating how skilled trial counsel is (and no doubt trial counsel has skill), Plaintiff requests the excessive multiplier due to the risk that Plaintiff would not succeed at trial. Yet, the whole justification for the hourkly rate of $750 an hour was that trial counsel's skill was unmatched and that trial preparation was thourough and complete. Plaintiff cannot have it both ways.

Either Plaintiff is justified in having an excessive hourly rate at $750, due to counsel's "unmatched" skills, or Plaintiff should be compensated for the extra "risk" that a contingency fee case presents to the average case. But Plaintiff cannot have both an "unmatched" counsel with a high rate, and a multiplier based upon average counsel and average results.

B. <u>Punitive interest is not allowed under Nevada law</u>.

Plaintiff seeks punitive penalty interest, calling it "applicable interest". This request must be rejected, as no pre-judgment interest is allowed for future damage awards. See NRS 17.130. Plaintiff argues that *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995) allows for such interest, but Plaintiff is mistaken. Plaintiff fails to acknowledge that the provisions of NRS 17.115 and NRCP 68 have been revised to clarify that no such interest is warranted. The revisions make it clear that an offeree is only obligated to pay interest that has been made "applicable" by a statute, rule or contract. Not a separate amount of interest as a punitive measure.

The notion that Plaintiff is entitled to "punitive" interest has been rejected by the provisions cited above. Plaintiff si limited to pre-judgment interest on the portion of past damages, and any punitive interest must be disallowed.

II. CONCLUSION

For the reasons outlined above, the Court should deny Plaintiff's motion for fees and interest.

DATED this 13th day of June, 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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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 13TH day of June, 2011, a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO MOTION FOR ATTORNEY FEES** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

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MAINOR EGLET
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Las Vegas, Nevada 89101
Telephone: (702) 450-5400
Facsimile: (702) 450-5451
Attorneys for Plaintiffs

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

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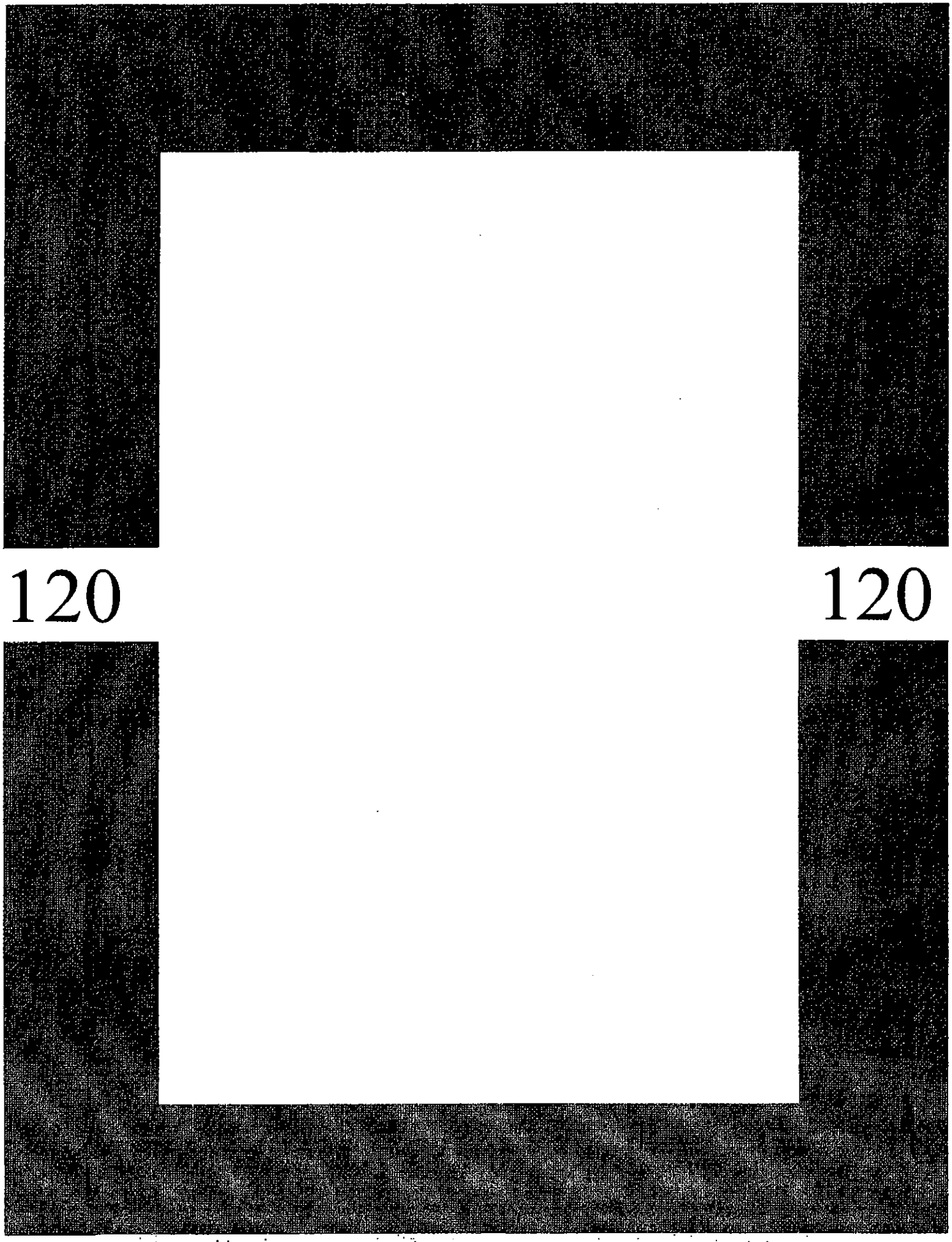

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CLERK OF THE COURT

ORDR

ROBERT T. EGLET, ESQ.
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Attorneys for Plaintiffs

004421

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 TO RETAX COSTS**

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

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Defendant's Motion to Retax Costs, the matter being heard in Chambers on June 2, 2011 for hearing, and good cause appearing therefore, hereby rules that Defendant's Motion to Retax Costs is **DENIED.**

IT IS SO ORDERED.

DATED this 14 day of June, 2011.

DISTRICT COURT JUDGE

Respectfully submitted by:

MAINOR EGLET

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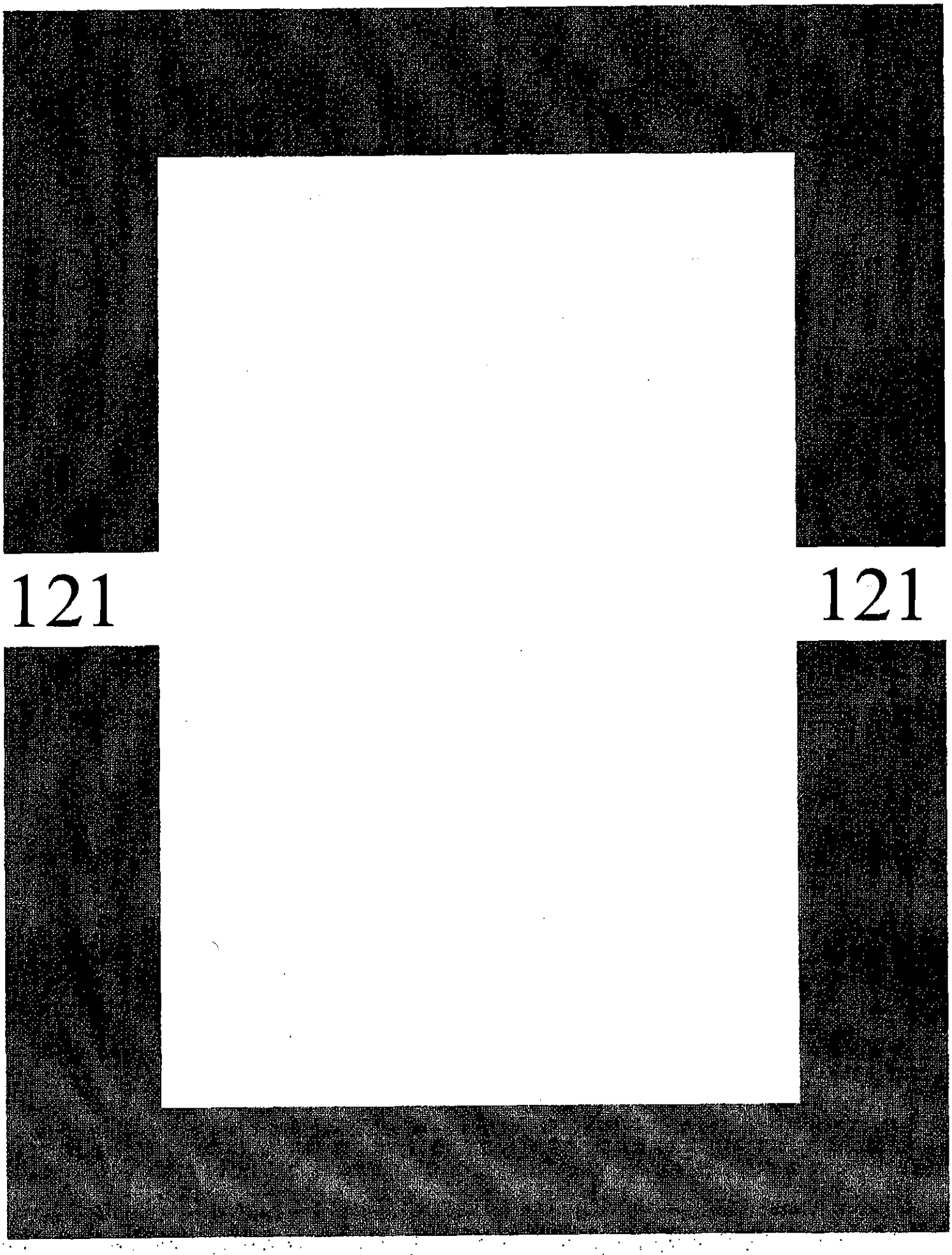

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CLERK OF THE COURT

NEO

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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 ORDER**

PLEASE TAKE NOTICE that an Order Denying Defendant's Motion to Retax Costs was entered in the above-entitled matter on June 16, 2011 and is attached hereto as Exhibit "1".

DATED this 16th day of June, 2011.

MAINOR EGLET

#11727

ROBERT T. EGLET, ESQ.
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Attorneys for Plaintiffs

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 17th day of June, 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

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EXHIBIT "1"

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CLERK OF THE COURT

ORDR
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004428

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 TO RETAX COSTS**

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

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Defendant's Motion to Retax Costs, the matter being heard in Chambers on June 2, 2011 for hearing, and good cause appearing therefore, hereby rules that Defendant's Motion to Retax Costs is **DENIED.**

IT IS SO ORDERED.

DATED this 14 day of June, 2011.

DISTRICT COURT JUDGE

Respectfully submitted by:

MAINOR EGLET

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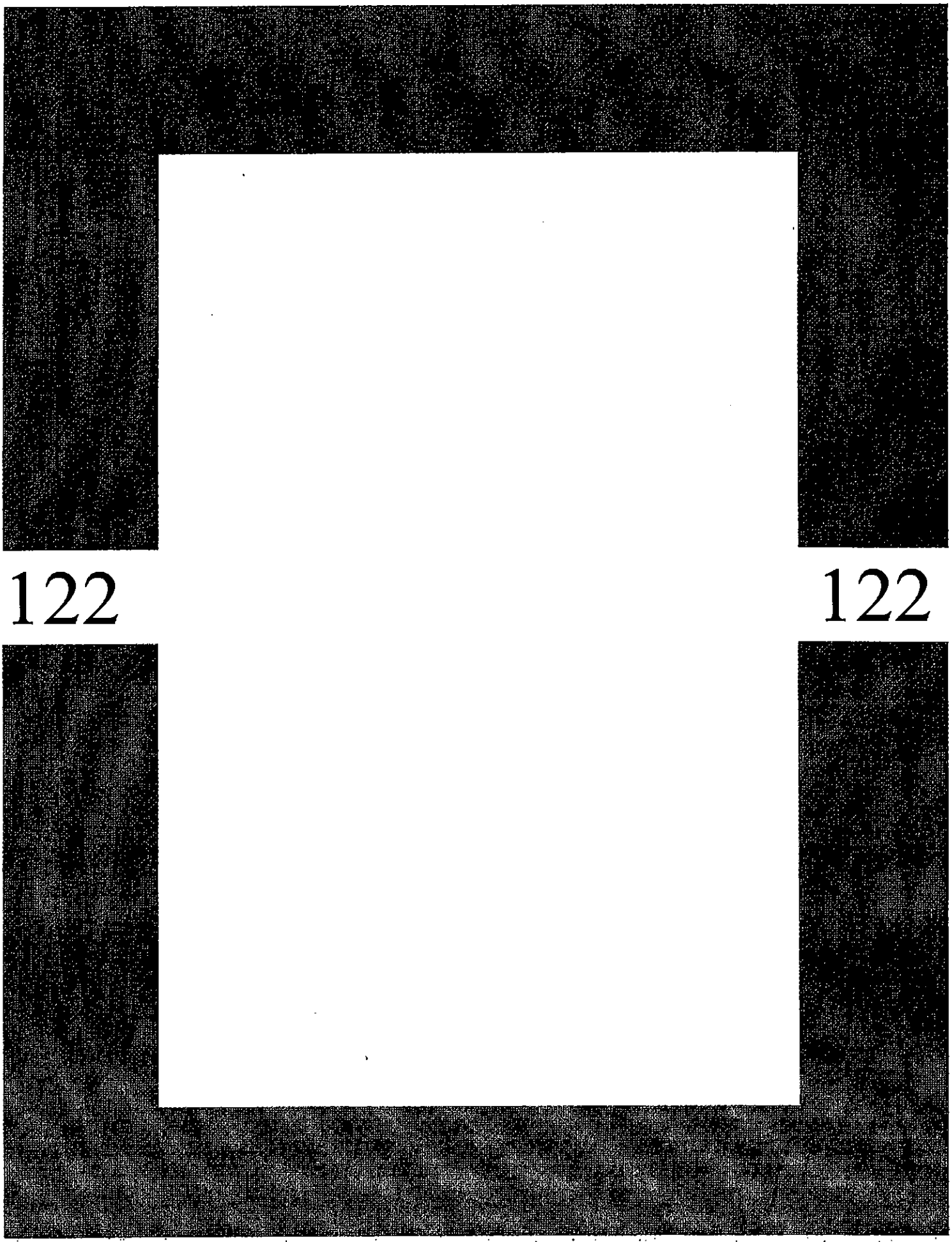

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CLERK OF THE COURT

OPP
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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 **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL**

COME NOW, Plaintiffs, WILLIAM and CHERYL SIMAO, by and through their attorneys of record, ROBERT T. EGLET, ESQ., DAVID T. WALL, ESQ. and ROBERT M.

ADAMS, ESQ. of the law firm of MAINOR EGLET, and hereby submits their Opposition to Defendant's Motion for New Trial.

This Opposition is made and based upon the pleadings and papers on file herein and the attached Points and Authorities.

DATED this 24 day of June, 2011.

MAINOR EGLET

DAVID T. WALL, ESQ.
Nevada Bar No. 2805
Attorney for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I.
STATEMENT OF FACTS

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 when, due to numerous violations of several of this Court's pre-trial rulings, including Plaintiff's Motion regarding Defendant's "minor impact" defense, which is most central to Defendant's instant Motion, Defendant's Answer was stricken. Ultimately, the Court was forced to strike Defendant's Answer because progressive sanctions up to that point had failed and had not deterred Defendant's counsel in the least from disobeying the law of the case as was prescribed by the pre-trial rulings and the Court's instructions, warnings, and

admonitions during trial. (*See* Order Striking the Answer, attached hereto as **Exhibit "1"**).

While Plaintiffs' oral motion to strike Defendant's Answer was rooted primarily in the Defendant's repeated violations of the Court's Order granting the Plaintiffs' Motion in Limine regarding a "minor impact defense", Defendant violated other Orders of this Court during the trial, and the cumulative effect of such violations was material to the Court's analysis. These other violations included violations of this Court's pre-trial orders excluding prior and subsequent accidents and injuries and medical build-up/attorney driven litigation arguments. (*See* **Exhibit "1"**).

Due to all of these violations, and only after progressive sanctions had been issued against the Defendant to no avail, the Court granted Plaintiff's Motion to Strike Defendant's Answer, converting this litigation into a default judgment under NRCP 55. The case proceeded to a prove-up hearing on damages only, which took place on Friday, April 1, 2011. On April 28, 2011, a Judgment by the Court was filed, awarding Plaintiffs $3,493,983.45, inclusive of past medical expenses, past and future pain and suffering, loss of consortium on behalf of Plaintiff, Cheryl Simao, and litigation costs. (*See* Judgment at **Exhibit "2"**). The Judgment was subsequently entered on May 3, 2011 (*See* Entry of Judgment at **Exhibit "3"**). Thereafter, on June 1, 2011, a modified Judgment was filed, inclusive of pre-judgment interest. (*See* **Exhibit "4"**).

Defendant now alleges that the Court abused its discretion by striking her Answer and seeks a new trial based primarily upon this sanction imposed against her. However, based upon the following law and argument, Defendant's Motion must be summarily **DENIED** as this Court was well within its discretion to strike Defendant's Answer considering the blatant and repeated acts of misconduct that occurred at trial.

Among Defendant's other claims of error purportedly warranting a new trial are that

Plaintiff abused EDCR 7.27 by submitting *ex parte* briefs after trial began, that Defendant's right to voir dire was unreasonably restricted in violation of NRS 16.030, that the Court failed to properly restrict Plaintiff's voir dire, that Defendant was unfairly prejudiced because Plaintiff purportedly failed to disclose certain medical evidence as required by NRCP 16.1(A)(1)(C) and that a mistrial or a continuance should have been granted to rebut the "undisclosed" evidence. Defendant also argues that the Court improperly awarded future medical special damages "veiled" as general damages. Moreover, the Defendant not only requests that a new trial be granted based upon all of the claims of error and abuse of discretion but also has the audacity to request that this Court recuse itself because, in Defendant's view, this case cannot proceed fairly in the present Department.

For the reasons set forth below, none of the claims of error argued by the defense are meritorious, and Plaintiffs respectfully request that the entirety of Defendant's Motion be **DENIED**.

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II.

LEGAL AUTHORITY

First, it must be noted that despite the correctness of the Court's pre-trial rulings, Defendant was compelled to follow the law of the case as was determined by the Court's pre-trial rulings, preserving her right to appeal those decisions after trial had concluded. However, because the Defendant instead chose to ignore many of the pre-trial rulings, especially concerning "minor impact," and attempted time and time again to circumvent the crystal clear boundaries of how she could proceed in presenting the facts of the case, the Court had no other option but to strike the Defendant's Answer. This is evidenced by the fact that progressive sanctions were issued, to no avail, during the course of the trial from literally opening statements forward. As a consequence, it only makes logical sense that Defendant's lone purported error

that can now be complained of is the striking of her Answer as any other issue(s) have been rendered moot by Defendant's choice to disobey the Court's pre-trial rulings, thereby necessitating the severe sanctions imposed against her.

However, even if Defendant's other points of contention in favor of a new trial have not been rendered moot, none of these warrant a new trial as there has been no demonstration of reversible and plain error, or even an abuse of discretion, on any of the issues complained of by the defense.

With respect to the grounds for a new trial, NRCP 59 provides, in pertinent part:

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

NRCP 59(a)

In short, Rule 59 allows for a new trial only in a few narrow circumstances, including where there has been irregularity in the proceedings and where the court's abuse of discretion has prevented defendants from receiving a fair trial; as well as misconduct of counsel and error in law occurring at trial to which timely and proper objections were made.

The Defendant would have this court believe that the various alleged errors that they insist occurred at the trial are sufficient to reverse the judgment. This is not the case. As noted

above, there are only a limited number of grounds, seven to be precise, upon which a new trial may be granted. See NRCP 59(a). However, the Defendant points out errors in fact and disagreements with the trial judge over matters within the judge's discretion, such as evidentiary rulings. Certainly these alleged errors or irregularities do not rise to the level of granting a new trial. There was overwhelming evidence to sustain the judgment in this case, and a new trial is not warranted. See *Brechan v. Masonry*, 92 Nev. 633 (1976).

In Nevada, where there is a conflict in the evidence, the verdict or decision will not be disturbed. However, there is an exception to this rule where there is plain error in the records, or if there is a showing of manifest injustice. *Frances v. Plaza Pac Equities*, 109 Nev. 91, 847 P.2d 722 (1993) (citing *Price v. Sinnott*, 85 Nev. 600, 460 P.2d 837 (1969)). Further, a district court's decision to admit or exclude evidence rests within its sound discretion. *See Vallery v. State*, 118 Nev. 357. 371 (2002). The decision will not be disturbed unless it is manifestly wrong. *Id. See also, Jackson v. State*, 117 Nev. 116, 120 (2001). (The district court has broad discretion to decide evidentiary issues).

Moreover, even in situations where error has occurred, NRCP 61, the "harmless error" rule, prevents the granting of a new trial unless the error has affected a "substantial right" of the parties. The Rule reads as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

N.R.C.P. 61

Errors not affecting substantial rights are disregarded. Under this rule, "which prohibits the disturbance of a judgment for sundry errors of the trial court" unless such errors appear to be

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inconsistent with substantial justice, the Court must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. *United Tungsten Corp. v. Corporation Serv., Inc.*, 76 Nev. 329, 353 P.2d 452 (1960). Questions as to whether error in the exclusion [or inclusion] of evidence in jury cases is harmless or prejudicial must be solved by determining whether substantial rights of the parties have been violated, which in turn depends upon the circumstances of each case. Unless a party can demonstrate that the inclusion of evidence has affected its substantial rights, the error will be regarded as "harmless." *See Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 915 (Nev. 1995).

None of the Defendant's contentions about the Trial Court's exclusion of evidence constitute an abuse of the Court's broad discretion. Moreover, the Defendant fails to offer any competent analysis of the facts of this case with a view toward satisfying the governing standards for a New Trial.

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III.

ARGUMENT IN OPPOSITION

A. The Sanctions Issued by This Court Due to Defendant's Repeated and Continuous Violations of Pre-trial Orders Were More than Warranted and Were Not an Abuse of Discretion.[1]

1. Multiple Pre-Trial Orders Were Blatantly Violated During the Pendency of Trial.

As a brief history, and to fully demonstrate the breadth of the continuous misconduct that occurred during trial, 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. Plaintiffs specifically asked the Court to preclude evidence of an unrelated

[1] Plaintiffs refer the Court to its Order striking Defendant's Answer, attached to this Brief at **Exhibit "1,"** as the procedural history regarding Defendant's numerous violations of Pretrial Orders as well as the legal reasoning for issuing sanctions, up to and including striking the Answer, is fully set forth therein. Plaintiffs reiterate some of those points in the instant Brief.

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2003 motorcycle accident involving Plaintiff, William Simao (hereinafter William), as no medical provider had opined that any of the minor injuries sustained by William in the motorcycle accident were related and relevant to any injuries suffered in the instant accident. On February 15, 2011, the Court GRANTED Plaintiffs' request. The Order on Plaintiffs' Motion reads 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.

(*See* **Exhibit "5"**).

Accordingly, there is no question that all parties were on notice that this Court had specifically precluded the Defendant from introducing evidence of unrelated accidents, including the 2003 motorcycle accident. However, in his Opening Statement, Defendant presented the jury a Power Point slide referencing William Simao's 2003 motorcycle accident. Upon Plaintiffs' objection, the jury was directed to disregard the slide because the Court had excluded evidence of the 2003 motorcycle accident.

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. Upon seeing multiple slides that clearly violated the Court's pretrial orders, 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....

(*See* RTP, March 21, 2011, attached hereto as **Exhibit "6"** at p. 75) (Emphasis Added).

Further, also before trial, Plaintiffs 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 the Court GRANTED the Plaintiffs' request and an Order was entered regarding the same. (*See* **Exhibit "5"**).

However, as with the Order excluding William's prior motorcycle accident, defense counsel violated this pre-trial Order when he stated in his Opening Statement:

> 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...

(*See* **Exhibit "6"** at p. 72).

Plaintiffs' counsel objected to this remark and asked that a slide entitled "Trial Doctors" be removed from the jury's sight. Plaintiffs' objection was sustained and the jury was directed to disregard the slide as Defendant's counsel's statements and slide were in violation of yet another pretrial Order.

Later in the trial, Plaintiffs called Patrick McNulty, M.D., William's spine surgeon, to take the stand and offer medical witness testimony regarding William's injuries and medical treatment. 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 Dr. McNulty:

> 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?

(*See* RTP, March 25, 2011, attached hereto as **Exhibit "7"** at pp. 21-22).

Counsel for the Plaintiffs immediately objected, which objected was sustained as the defense was unable to explain why, other than to establish a "medical build-up defense," which had been excluded, it was relevant to pursue this line of questioning with Dr. McNulty.

2. Defendant's Repeated Violations of the "Minor Impact" Defense Pre-Trial Order.

As set forth above, Plaintiffs' Motion to Strike Defendant's Answer was based primarily on Defendant's repeated violations of this Court's pretrial Order on the issue of a "minor impact" defense after progressive sanctions had failed to deter defense counsel's misconduct.

On February 17, 2011, Plaintiffs brought a Motion in Limine to Preclude Defendant from Raising a "Minor" or "Low Impact" Defense. 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 based on *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008), and the important 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. Plaintiffs, on the other hand, had disclosed a biomechanical expert who was prepared to testify that the accident was of the type to cause injury. The Motion further sought to preclude Defendant's pain management expert, David Fish, M.D., from testifying to biomechanical engineering opinions, as he lacks the qualifications to testify to such opinions under the standard announced in *Hallmark*.

On March 1, 2011, the Court GRANTED Plaintiffs' Motion in its entirety and the defense was put on notice that it was not to present any evidence at trial that the impact at issue was "minor" or not significant enough to cause William's injuries. Based upon *Hallmark, supra*, *Levine v. Remolif*, 80 Nev. 168 (1964) and *Choat v. McDorman*, 86 Nev. 332 (1970), issues of

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accident reconstruction and biomechanics are not within the common knowledge of laypersons and require expert witness testimony. (*See also,* NRS 50.275. The Order specifically states 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**.

(*See* Order, attached hereto as **Exhibit "8"**).

Notwithstanding the Court's pretrial order, Defendant persisted in her attempts to interject the notion that the collision was too minor to cause William's injuries, thereby violating the law of this case. These violations caused the Court to sanction Defendant on several occasions and ultimately strike the Answer.

Defendant now alleges that a new trial is warranted because she should not have been sanctioned for "violating an ambiguous, changing order." However, there is no question that Defendant was on notice of the unambiguous Order, as well as the lines her counsel was forbidden to cross.

For example, before Opening Statements, a hearing outside the presence of the jury was held where the issue of "minor impact defense" was discussed on the record. (See, RTP, March 18, 2011, attached hereto as **Exhibit "9"** at pp. 112-129).

During this hearing, Plaintiffs' counsel brought to the Court's attention the fact that counsel for the Defendant, in his Opening Statement, might mention 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.**

(*See* **Exhibit "9"** at p. 114)(Emphasis Added).

Thus, it was evident that the Defendant intended to present a minor impact defense, despite the Court's Order to the contrary. Therefore, after further argument by counsel, the Court reiterated its ruling on the Motion in Limine precluding a "minor impact" defense and precluded any references in Opening Statement or otherwise that the impact was minor in order to imply that the accident was too minor to cause William's injuries. (*See* **Exhibit "9"** at p. 125-28).

Unfortunately, in spite of the Court's March 18, 2011 instructions, the defense still persisted in arguing a "minor impact defense." In fact, on March 21, 2011, 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 Plaintiffs' Opening Statement. Once again, the Defendant sought permission to claim a "minor impact" defense arguing that the "door was opened" because Plaintiffs' counsel referred to the accident as a "motor vehicle crash" during Opening Statement. Notwithstanding this feeble attempt, it was noted that the Plaintiffs 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, it was noted that Plaintiffs' counsel did not describe the impact of the vehicles in any way. (*See* **Exhibit "1"**). Once again, the defense was put on notice that a "minor impact defense"

should not be mentioned in front of the jury.

Immediately thereafter, however, counsel for the Defendant presented his Opening Statement and proceeded to attempt to play selected portions of his Defendant's videotaped deposition regarding the nature of the accident. Upon Plaintiffs' objection, a bench conference was held, during which the Court determined, among other things, that the 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. (*See* **Exhibit "1"**).

Despite the numerous and consistent instruction from the Court that a "minor impact defense" was not allowed, the defense still persisted in its attempts to imply to the jury that the impact was not severe enough to cause William's injuries. For example, during Defendant's cross-examination of Dr. Jorg Rosler, one of the Plaintiff's treating pain management physicians, defense counsel asked the following question:

> Do you know anything about what happened to [Defendant] Jenny Rish and her passengers in this accident?

(*See* RPT, March 22, 2011 at **Exhibit "10,"** p. 84).

Before the witness could answer, the Plaintiffs objected, citing this Court's pretrial motion ruling on "minor impact" as the only potential relevance of defense counsel's inquiry would be to raise an inference that the collision could not have been severe enough to cause William's injuries since the Defendant or her passengers were not injured. Such an inference would be directly contrary to this Court's Order precluding a "minor impact" defense. The Plaintiffs' objection was sustained.

Moreover, despite the Court's preclusion of the above referenced question to Dr. Rosler, counsel for Defendant asked an almost identical question of the next treating physician to testify for Plaintiff, Dr. Patrick McNulty. 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?**

(*See* RTP 3/25/11 at **Exhibit "11,"** p. 4) (Emphasis Added).

Plaintiffs' counsel, of course, objected and counsel for the parties approached the bench. At the bench conference, defense counsel argued that the inquiry to Dr. McNulty is relevant because if one were injured in a motor vehicle accident or not, it would be probative of whether others were injured. (*See* **Exhibit "11"** at p.5. Based upon the Court's prior rulings, such a position is without merit and was a clear attempt by the defense to circumvent the Court's prior ruling in spite of multiple clear instructions to stay away from "minor impact" arguments in front of the jury. As was argued *ad nauseam,* 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, which is **required** under the evidentiary rules of this jurisdiction. *See* NRS 50.275; *see also See Hallmark v. Eldridge,* 189 P.3d 646 (Nev. 2008); *Levine v. Remolif,* 80 Nev. 168, 390 P.2d 718 (1964) and *Choat v. McDorman,* 86 Nev. 332, 468 P.2d 354 (1970) (expert testimony cannot be based upon speculation; rather such testimony must come from a qualified expert and must be based upon hard data, such as the speed of the vehicles, the depth of the crush damage based upon a visual inspection of the vehicles, and the weight and height of the vehicles, to name a few).

Further, the questions asked on cross-examination of Dr. McNulty are especially

egregious considering that the exact same type of questioning was precluded during the cross-examination of Dr. Rosler and the Defendant was clearly on notice that this area of inquiry was improper; nevertheless, defense counsel persisted in his blatant disregard and disrespect of the Court's Order on this matter. In fact, on the same afternoon as Dr. McNulty's cross-examination, defense counsel cross-examined Dr. Jaswinder Grover, yet another of William's treating physicians. To Plaintiffs' counsel dismay, during that cross-examination, defense counsel posed a question of the exact same type that had been precluded by the Court during the cross-examinations 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?*

(*See* **Exhibit "11"** at p. 141).

Defense counsel's deliberate choice to pose this question to Dr. Grover, considering all that took place beforehand including Plaintiffs' pretrial motion on "minor impact," Opening Statements, as well as the cross-examinations of Drs. Rosler and McNulty, is simply inexplicable and evidence of intentional misconduct. Again, the inference that the defense was clearly trying to communicate to the jury, that the impact was not significant enough to cause William's injuries, had been precluded because the Defendant had no expert witness or admissible evidence to support that inference. *See* NRS 50.275; *see also Hallmark, Levine, and Choat, supra.* Plaintiffs' objection was, once again, sustained.

Following the testimony of Dr. Grover, outside the presence of the jury, Plaintiffs' argued to the Court that after all the violations that had transpired against the Court's pretrial Order, as well as the clear instructions to the defense given during trial, progressive sanctions should be issued for any further violations of the Order excluding the "minor impact defense.

(*See* **Exhibit "11"** at pp. 164-65).

At the conclusion of the hearing outside the presence of the jury, the Court made it clear to the defense that the subject violations were continuous and that the Court would take necessary measures if the violations persisted. The Court specifically stated:

> 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.*

(*See* **Exhibit "11"** at pp. 166-167) (Emphasis Added).

Next, due to certain scheduling conflicts and in the spirit of cooperation, Plaintiffs agreed to allow the defense to call one of her medical expert witnesses, Dr. David Fish, to testify out of order during Plaintiffs' case-in-chief. Plaintiffs' counsel requested, and the Court permitted, to *voir dire* Dr. Fish to ensure he was aware of the Court's previous rulings, especially the Order granting the Plaintiffs' Motion in Limine to Limit the Testimony of Dr. Fish. (*See* RTP March 24, 2011 at **Exhibit "12,"** pp. 12-30).

It was discovered during *voir dire* that Dr. Fish was unaware of practically every pretrial Order entered by this Court, including:

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.

(*See Id.; see also* **Exhibit "1"**).

The Court, therefore, 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. (*See* **Exhibit "12"** at p. 15).

Nevertheless, 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." (*See* RTP March 28, 2011 at **Exhibit "13,"** p.71-72).

As if this violation was not enough, at the end of the Defendant's redirect examination, Dr. Fish was asked by the defense 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.**

(*See* **Exhibit "13,"** p.87) (Emphasis Added).

The Court noted that based on its observation of Dr. Fish's testimony, there is no question that Dr. Fish's response, which clearly violated the Court's Order, was deliberate. (*See* **Exhibit "1"**). Plaintiff's objection to Dr. Fish's testimony was sustained, and the jury was admonished to disregard the final statement in Dr. Fish's response. (*See* **Exhibit "13"** at p. 88).

3. The Court's Irrebuttable Instruction to the Jury was an Appropriate Sanction.

Given Dr. Fish's violation of the Court's Order in spite of the clear instruction and warning provided by the Court, a hearing outside the presence of the jury was subsequently held

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in order to consider a progressive sanction against the Defendant, just as was warned would occur following Defendant's counsel's continuous and systematic violations during the cross-examination of William's treating physicians. Although Plaintiff's counsel believed that striking the Defendant's Answer was within the Court's discretion based upon the numerous and blatant violations, the Plaintiff offered as an alternative 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. (*See* **Exhibit "9"** RTP at pp. 89-112). Plaintiffs' request was granted and an irrebuttable presumption instruction was read to the jury as a curative instruction, the need for which was caused by the above referenced violations.

The Court did not err in granting the curative instruction request based upon *Young v. Ribeiro Building, Inc.*, 106 Nev. 88 (1990). 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, as well as in the Order signed by the Court, each of the *Young* factors were considered in addressing the subject sanction. (*See* **Exhibit "1"**). The Court's consideration was as follows:

a) Degree of willfulness of the violations

The trial court correctly found that the violations of the 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, the Court could only conclude that such violations were willful in nature. (*See* **Exhibit**

"1"). Rather than comply with the Court's orders, the Defendant intentionally disregarded them.

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

As was evidenced by the record of the events in question, no lesser sanction had been successful in precluding future violations by Defendant despite being instructed on numerous occasions to not present a "minor impact defense." The Court consistently sustained Plaintiffs' objections, striking improper questions and answers. As this Court recognized in its Order, "[a]t some point, simply directing jurors to disregard continuous violations of pretrial Orders is insufficient." (*See* **Exhibit "1"**).

Notwithstanding Plaintiffs' counsel's belief that the violations to that point were sufficient to warrant the case concluding sanction of striking the Defendant's Answer, the Court instead considered the lesser sanction of the presumption instruction as a curative measure. (*See* **Exhibit "1"**).

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

Again, at the time of imposing the irrebuttable presumption instruction sanction, the alternative request of whether striking Defendant's Answer would be an appropriate response to Defendant's continuous violations of this Court's pretrial Orders was contemplated. While the abuse to that point was systematic and severe, the Court, in its discretion, determined that a progressive sanction would be appropriate before consideration of a case concluding sanction. (*See* **Exhibit "1"**).

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

Despite Plaintiffs' requests, the Court, at that time, considered the feasibility and fairness of a lesser sanction and determined that the irrebuttable presumption instruction requested by Plaintiffs appropriately addressed the nature of the violations of the Court's Order precluding evidence to support a "minor impact" defense. (*See* **Exhibit "1"**).

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).

Importantly, the 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.

(*See* **Exhibit "13"**, p. 104).

In short, the Defendant had no admissible, credible evidence to offer to support a "minor impact" defense, and the irrebuttable presumption instruction was appropriate to communicate to the jury what the Defendant failed to comprehend throughout the trial: 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. (*See* **Exhibit "1"**).

e) The policy favoring adjudication on the merits

Mindful of this policy, the Court initially declined to grant Plaintiffs' request to strike the Defendant's Answer and instead issued the irrebuttable presumption instruction. (*See* **Exhibit "1"**).

Notably, since the Defendant conceded 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. (*See* **Exhibit "1"**).

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

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. (*See* **Exhibit "1"**).

Additionally, the special instruction to the jury still allowed it to consider whether the accident in question actually and proximately caused William'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. (*See* **Exhibit "1"**).

g) The need to deter parties and future litigants

As demonstrated, the sanctions issued by the Court prior to the irrebuttable presumption, meant to deter Defendant's defiant conduct, were proven unsuccessful. Although this particular factor was not dispositive in determining that the special instruction to the jury was warranted, the Court hoped that this progressive sanction would at least deter the Defendant from continuing to violate the Orders of this Court; it did not, however. (*See* **Exhibit "1"**).

As set forth above, before making the discretionary ruling to issue the curative instruction to the jury, the 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). (*See* **Exhibit "1"**).

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4. The Court's Order Striking Defendant's Answer Based on Repeated Violations of This Court's Pretrial Orders was an Appropriate Exercise of Discretion and Not Error.

During the hearing on March 28, 2011, that led to the special instruction in *lieu* of the Plaintiffs' request to strike Defendant's Answer, counsel for the Plaintiffs argued that any further violation of Orders should result in striking the Defendant's Answer (*See* **Exhibit "13"** at p. 97).

This, however, did not seem to deter Defendant in the least given the fact that defense counsel, once again, violated the "minor impact" defense Order the first moment that an opportunity presented itself. As the Court stated in its Decision and Order:

> During the Defendant's cross-examination of William, 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 31, 2011 at 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 at p. 94-96).

See **Exhibit "1,"** pp. 23-24.

Defense counsel then proceeded to intentionally violate the Court's clear and unambiguous order to refrain from arguing a "minor impact" defense. The questioning went as follows:

> [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?**

(*See* RTP March 31, 2011 at **Exhibit "14,"** p. 98) (Emphasis Added).

As this was the same type of question that the defense had been continuously ordered to refrain from during the cross-examinations of Drs. Rosler, McNulty, and Grover, as well as Dr. Fish, 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. As the court stated in it's Order striking the 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 at pp.101-105).
>
> The response from the Defendantwas 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.

See **Exhibit "1,"** p.24-25.

The trial Court then analyzed the appropriate legal authority in its Order granting the Motion to Strike the Answer.

> 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).

See **Exhibit "1,"** pp. 25-26.

Accordingly, the Court carefully considered the multitude of violations that had transpired from the outset of trial before granting Plaintiffs' request to strike the Defendant's Answer. 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, as quoted by trial Court in its Order:

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);

See **Exhibit "1".**

The Court considered these violations of the Court's Order precluding the "minor impact" defense to be even more egregious given the numerous hearings outside the presence of the jury during which the Court repeatedly and unequivocally prohibited the areas of inquiry subsequently broached by counsel for Defendant. Those hearings as found by the Court, 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.

See **Exhibit "1"**.

In its Order, the Court clearly identified its basis for determining that the violations were willful and deliberate:

> 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.

See **Exhibit "1,"** p.28-29.

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

As has been made clear given the history of this matter, the imposition of lesser sanctions did not act to curb the Defendant's violations of the 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, the trial Court nevertheless imposed progressive sanctions against the Defendant including the irrebuttable presumption instruction, although to no avail. The defense literally forced the Court to issue case concluding sanctions as it was shown time and time again that nothing the Court could fashion, short of a case concluding sanction, would be successful to halt Defendant's violations of pretrial Orders. (*See* **Exhibit "1"**).

As set forth in the Court's Order, the frequency of the Defendant's violations, all of which occurred in front of the jury, severely prejudiced Plaintiffs by having this issue repeatedly brought to the jury's attention. Certainly in the eyes of the jury, the Plaintiffs were 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. (*See* **Exhibit "1"**). In reliance upon the 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 the Court during the course of trial. The unfair prejudice to the Plaintiffs was clearly shown. *See, Roth, supra.* (*See* **Exhibit "1"**). The trial court recognized the prejudice to the plaintiffs in its Order:

> 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 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.

See **Exhibit "1,"** p.30.

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

The Court appropriately considered this prong of the *Young* test, as reflected by the Court's Order:

> Again, the pervasive and continuous nature of these violations warranted 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.

See **Exhibit "1,"** p.30.

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

Unfortunately, alternative lesser sanctions were rejected by the Defendant in favor of continuing to violate the Orders of the Court. Although the defense will likely disagree, Plaintiffs' counsel always suspected that the multiple violations of the Court's pretrial Orders were an attempt by Defendant to obtain a mistrial. 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 lesser 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.

(RTP March 31, 2011 at 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.

See **Exhibit "1,"** pp. 30-31.

e) The policy favoring adjudication on the merits

It was clearly the Court's intention to have this matter adjudicated on its merits which is evidence by the Court opting for less severe sanctions for all of the violations prior to March 31, 2011. However, 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. (*See* **Exhibit "1"**).

As the Court stated in its Order:

> 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.

See **Exhibit "1,"** p.31-32.

Therefore, a trial court can only do so much in allowing cases to be adjudicated on their merits. However, when a party blatantly disregards order upon order, in front of the jury, and no lesser sanction has proven to deter such conduct, a court has no other option but to issue case concluding sanctions as a result. Furthermore, when a case spins out of control due to a party's refusal to abide by the law of the case as dictated by the court's rulings, as is the case here, adjudication on the merits is impossible given the severity of prejudice that is bestowed upon the

non-offending party. The trial Court appropriately sanctioned Defendant by striking her Answer.

f) The need to deter parties and future litigants

Given its inherent powers derived from the Nevada Constitution and strong case precedent, it would have been an utter disgrace for the Court to allow litigants to openly and deliberately abuse the litigation process by disregarding Court Orders when convenient or tactically advantageous to do so, especially when unfair prejudice to the non-offending party results. (*See* **Exhibit "1"**).

After the Court's review and consideration of all of the various factors set forth *supra*, each and every one of the sanctions employed by the Court for Defendant's intentional, deliberate, abusive and unfairly prejudicial conduct are more than warranted, including the employment of the ultimate sanction of striking the Defendant's Answer. (*See* **Exhibit "1"**).

As the Court noted, "[i]t 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 disregard to Orders of this Court." (*See* **Exhibit "1"**).

5. It Was Not Error to Dismiss the Jury and Hold Default Judgment Proceedings after Defendant's Answer was Stricken.

While Plaintiffs do not dispute that a jury, under normal circumstances, is the trier of fact who is to render a verdict on the evidence presented to it, under the circumstances of this case the Court was well within its discretion to enter default after Defendant's Answer was stricken due to the abusive litigation practices that took place at trial.

Ample authority exists setting forth a court's discretion to enter default after an Answer

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has been stricken for abusive litigation practices. *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*; *see also Durango Fire Protection, Inc., supra, Bahena, supra.*, and *Romo, supra.*

As the Court clearly outlined:

> 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 considers 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.* The Court, having reviewed the evidence and concluding that a *prima facie* case had been established by both Plaintiffs, it was determined that the Plaintiffs are entitled to damages for the harms proximately caused by the motor vehicle accident.

See **Exhibit "1,"** p.33-34.

Defendant's argument that the jury was entitled to determine that the accident did not cause Plaintiffs' injuries is based, as always, on the exclusion of the "minor impact" defense, arguing that because the doctors did not do an accident reconstruction analysis, "it was within the province of the jury to conclude that it is unlikely that THIS minor impact was the event that genuinely caused the plaintiff's pain complaints." (*See* Defendant's Motion at p. 18)(Emphasis Original). Again, Defendant is missing the vital point in the Court's exclusion of the "minor impact" defense which is, a lay person, notwithstanding all the common sense in the world, is uneducated, untrained, and not knowledgeable in accident dynamics and the effect a motor vehicle collision, even a minor one, can have on a particular human body; therefore, a **qualified**

expert witness is required to present this sort of evidence to the jury. *See* NRS 50.275. Without a **qualified** expert witness to present such evidence, it is inadmissible because unqualified testimony from a lay witness/party is simply unreliable and will lead to confusion of the issues and misleading of the jury. *See* NRS 48.035; *see also Hallmark, Levine* and *Choat, supra.*

Defendant's citation to out-of-jurisdiction cases such as *Brenman v. Demello,* 921 A.2d 1110 (N.J. 2007); *Fronabarger v. Burns,* 385 Ill.App.3d 560, 895 N.E.2d 1125 (Ill.App.Ct. 2008); or, *Ferro v. Griffiths,* 361 Ill.App.3d 738, 742, 297 Ill. Dec. 194, 836 N.E.2d 925 (2005), are unavailing to this discussion:

First and foremost, the law in Nevada, which is the only binding authority upon this Court, holds that a qualified expert witness, who possesses the skill, experience, training or education, is required for all topics that involve scientific, technical, or specialized knowledge. *See* NRS 50.275; *see also Hallmark, supra.* Furthermore, a lay witness is only permitted to testify to matters **rationally** based upon perception and helpful to a **clear** understanding of the testimony or the determination of a fact in issue. *See* NRS 50.265. With regard to matters involving scientific, technical, or specialized knowledge, a lay witness would not be able to give **rationally** based and offer helpful information to a **clear** understanding because the lay witness will simply not know or understand the complexity of the issue and therefore not be able to present the evidence in a reliable manner beyond speculation. NRS 48.035(1) excludes all evidence, even if relevant, if that evidence has the tendency to confuse the issues and mislead the jury. Lay witness testimony on matters that are scientific, technical, and/or specialized, such as whether William was or could have been injured in a minor impact collision, would certainly confuse and mislead the jury. Moreover, as the underlying issue is directly related to medical causation, the Supreme Court of Nevada's holding in *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 158 (Nev. 2005), unequivocally requires that testimony related to causation of injury

must be stated to a reasonable degree of medical probability. For a lay witness to state or suggest that the injuries complained of by a plaintiff could not have been caused by a collision because the forces were not significant completely undermines the well-established principles requiring expert testimony on matters outside of the ordinary knowledge of lay persons, such as medical causation. Accordingly, this Court properly excluded the "minor impact" defense, which logically includes any attempt to imply to the jury, directly or indirectly, that William could not have been hurt in the subject motor vehicle collision.

Further, if laypersons were permitted to testify regarding incident dynamics and their personal opinions regarding whether an injury can arise from a particular event, there would be no need for an expert of any type at trial and the resulting consequence would be a chaotic free-for-all of speculation, conjecture, and guesswork, which in turn would result in absurd and inequitable jury verdicts. Clearly, Nevada's evidentiary rules are designed to only permit reliable testimony and evidence in order to avoid jury verdicts based upon speculation. Here, the Court's exclusion of the "minor impact" defense was based upon the fundamental evidentiary principles to only allow reliable evidence to reach the jury. Because the Defendant was relentless in arguing "minor-impact" regardless of the Court's clear Order and admonishments to the contrary, the Court had no other choice but to strike Defendant's Answer, enter default according to NRCP 55, and render a judgment based upon the evidence that had been presented over the course of ten (10) trial days, plus Plaintiffs' presentation at the default proceedings.

The authority cited to by the defense is simply not the law in Nevada. Although the Supreme Court of New Jersey in *Brenman* held that "the fundamental relationship between the force of impact in an automobile accident and the existence of extent of any resulting injuries does not necessarily require "scientific, technical, or other specialized knowledge," (*Id.* at 1120), it did recognize that other jurisdiction have a different outlook on the matter. *Id.* at 1116). In

fact, one of the New Jersey Supreme Court Justices disagreed with the majority of that Court, stating:

> To be sure, it is common nature for a fact-finder to conclude from a photograph depicting minor vehicle damage that the resulting injuries were also minor. However, that inclination should not influence the admissibility of the photographs. I agree with the Appellate Division that "photographs depicting slight vehicular damage, although conceivably serving other valid purposes, simply do not support, without corroborative expert proof, the inference that the accident could not have caused the serious injury of which a plaintiff complains." *Brenman v. Demello*, 383 N.J. Super. 521, 533, 892 A.2d 741 (App. Div. 2006).
>
> In this case, the issue was causation of plaintiff's injuries. Because the parties failed to present expert proof demonstrating that the slight damage to the vehicle could not have caused plaintiff's serious injuries, the photographs should not have been admitted without restrictions on their use. In my view, the Appellate Division struck the proper balance in holding that: photographic evidence is neither automatically admissible nor excludable, but rather subject to the sound exercise of the trial court's discretion. Whether an expert foundation is required depends, of course, on the particular issue in the case to which the photographic evidence relates. Here, that issue was causation and because no expert proof of correlation was produced, we hold that the introduction of the photographs without restriction on their use and the use actually made of them by the defense constitute reversible error.

Id. at 1121-1122.

Importantly, *Davis v. Maute*, 770 A.2d 36 (Del. 2001), cited to by *Brenman*, is more akin to the laws of Nevada. In *Davis*, the trial Court erred in allowing the Defendant to improperly argue that the insignificance of that motor vehicle collision is suggestive that any resultant injury would also be minor. In reversing and remanding for a new trial, the Supreme Court of Delaware held:

> We hold that, in general, counsel may not argue that there is a correlation between the extent of the damage to the automobiles in an accident and the extent of the occupants' personal injuries caused by the accident in the absence of expert testimony on the issue. Although counsel in the present case made this argument by implication rather than directly, we conclude that the argument was improper. We also conclude that it was error to admit the photographs of the plaintiff's car without a specific instruction limiting the jury's use of the photographs. Because the trial court failed to provide a

> curative instruction to mitigate the effects of the defendant's improper argument, the trial court abused its discretion and a new trial on damages is required.

Id. at 38.

The Court further reasoned:

> As a general rule, a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony on the issue. Absent such expert testimony, any inference by the jury that minimal damage to the plaintiff's car translates into minimal personal injuries to the plaintiff would necessarily amount to unguided speculation. Since Maute presented no expert testimony on this issue, the trial court properly prohibited Maute from making this argument directly.

Id. at 40.

This Court's pretrial ruling on the issue of "minor impact" is consistent with the *Davis* and *Brenman* dissent, but more importantly, is consistent with Nevada law which also precludes an inference to be drawn between the severity of a collision and the severity of an injury without competent and qualified expert opinion. *Brenman,* therefore, must be disregarded as it promotes an application of law that is inconsistent with Nevada's evidentiary rules and case law.

As for the *Fronabarger* and *Ferro* decisions cited to by the defense, both of these decisions are focused upon a trial court's broad discretion over evidentiary matters. In fact, the *Ferro* court 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." *Ferro*, 361 Ill. App. 3d at 742. This is an evidentiary question that is left to the discretion of the trial court. *Ferro*, 361 Ill. App. 3d at 742. Neither *Fronabarger* or *Ferro* held that it was an abuse of discretion to allow or to disallow vehicular damage in relation to injury with or without expert testimony; these two (2) courts simply left it to the discretion of the trial judge.

Applying this to the instant matter, even if it were appropriate for the defense to argue "minor impact" to the jury based upon the vehicle's damage of the force of impact (which it is not in Nevada as set forth above), it certainly cannot be argued that the Court's exclusion of "minor impact" evidence was an abuse of discretion and/or plain error warranting a new trial. Moreover, regardless of the appropriateness of the Court's exclusion of a "minor impact" defense, the Defendant was still obliged to follow the Court's order and then, if she disagreed, take it up on appeal. The Defendant instead chose to ignore the Court and to continuously and systematically interject her "minor impact" defense into the minds of the jurors, thereby violating the Court's Order on numerous occasions. This rebellious behavior resulted in progressive sanctions up to the point of striking the Answer and entering Default, all of which were within this Court's sound discretion.

B. <u>Defendant's Argument Concerning the EDCR 7.27 Trial Briefs is Misplaced as There was No Abuse Warranting a New Trial that Occurred.</u>

EDCR 7.27 reads:

> Unless otherwise ordered by the court, an attorney may elect to submit to the court in any civil case, a trial memoranda of points and authorities prior to the commencement of trial by delivering one unfiled copy to the court, without serving opposing counsel or filing the same, provided that the original trial memoranda of points and authorities must be filed and a copy must be served upon opposing counsel at or before the close of trial.

Prior to the commencement of trial, as the defense concedes (*See* Defendant's Motion at p. 21), Plaintiffs' served their EDCR 7.27 brief to the Court. Subsequently, throughout the course of trial as the need surfaced, Plaintiffs' filed several supplemental trial briefs in order to provide the Court with the facts and law pertaining to issues that Plaintiffs anticipated would arise during trial. Despite Defendants' arguments, the supplementation of Plaintiffs' EDCR 7.27 trial brief is not prohibited by the Rule and Defendant's complaints of abuse and resulting prejudice are simply misplaced.

Moroever, *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), cited to by the defense, is inapposite to this discussion because that case did not involve the supplementation of trial briefs, rather trial briefs in general. However, it should be noted that the *Photovest* Court acknowledges that the "delayed exchange of briefs" is not a *per se* violation of due process protections, although the 7th Circuit stated it prefers that trial briefs are exchanged at the time filed with the Court. *Id.* at 710. Moreover, the Court further held that reversal would not be warranted because "Fotomat did not cite any prejudice from the delay in service. Indeed, in all of its briefs and arguments in this appeal, Fotomat has failed to demonstrate any specific instance of prejudice resulting from the trial brief procedure." *Id.* at 711.

Similarly, in *Whitaker-Merrell Co., v. Profit Counselors, Inc.*, 748 F.2d 354 (6th Cir. 1984), the 6th Circuit held that the exchange of *ex parte* briefs was improper, **in that Circuit** but that because Whitaker-Merrell pointed to no specific prejudice arising from the court's use of the brief and the court considered the error to be harmless. *Id.* at 359. The exchange of Trial Brief in this jurisdiction, however, has never been proclaimed to be invalid. Indeed, EDCR 7.27 expressly permits these sort of briefs to be submitted to the Court until the close of trial. Moreover, even if Plaintiffs' supplementation of their Trial Brief is improper, the error was harmless as this Court's rulings were a proper exercise of the Court's discretion and are not contradictory to the law of this jurisdiction.

Defendant here bears the burden to prove that an alleged error is prejudicial. *Miller v. State*, 121 Nev. 92, 99 (Nev. 2005). Merely asserting that an error has occurred without demonstrating that the error was prejudicial fails. *Id.* Here, the defense has failed to provide this Court any rational basis to justify a New Trial on any basis, let alone the "supplemental trial brief" argument asserted. Except for the issue of "minor impact," the defense has failed to specifically mention any other ruling that potential caused her prejudice warranting a New Trial

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based upon Plaintiffs' supplemental trial briefs.

As for the "minor impact" argument, the facts and law set forth in the sections above clearly demonstrate that the Court's exclusion of the "minor impact" defense was appropriate considering Nevada's stance on the issue. Unless the defense can demonstrate that the supplementation of Plaintiffs' trial brief on this issue has affected her substantial rights, the error will be regarded as "harmless." *See* NRCP 61; *see also Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 915 (Nev. 1995).

Here, Defendant has failed to establish that 1) the supplementation of Plaintiffs' trial brief was improper or, 2) that the supplementation, if improper, was more than just harmless error. Accordingly, this item of contention must be disregarded.

As to Defendant's blanket claim that "in every motion made by Defendant or Plaintiff during trial, Plaintiff submitted arguments to the court ex-parte...," arguing that the Court's rulings might have been different otherwise, such an overbroad assertion is improper in any sort of discussion, let alone on a Motion for New Trial. As has been cautioned by many courts in this, and other jurisdictions, it behooves litigants, particularly in a case with a record of great magnitude, to resist the temptation to treat judges as if they were pigs sniffing for truffles. *See Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1007 n.1 (9th Cir. 2000) (citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)); *Dzung Chu v. Oracle Corp. (In re Oracle Corp. Secs. Litig.)*, 627 F.3d 376, 386 (9th Cir. Cal. 2010).

If Defendant had specific arguments regarding Plaintiffs' supplemental trial briefs and could point to specific instances where the Court's rulings would have differed but for the supplemental trial briefs, these contentions should have been spelled out for this Court. Because there is no specific argument concerning which of the rulings and which of the issues Defendant is contending was incorrect due to the supplemental trial briefs, besides "minor impact," any

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future argument in Reply by the defense which was not raised in her original Motion, must be disregarded. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 (2006) (noting that appellants bear the responsibility to present cogent arguments and relevant authority in support of their appellate concerns); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (pointing out that the court need not consider arguments raised for the first time in the reply brief). *Dickinson v. Am. Med. Response*, 186 P.3d 878 (Nev. 2008); *See also Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276 (Nev. 2009)(refusing to consider new arguments that should have been raised beforehand).

C. <u>All Arguments Concerning Voir Dire Have Been Rendered Moot; But if Not, Nothing Improper Took Place During Voir Dire Which Would Warrant a New Trial.</u>

Defendant's arguments concerning *voir dire* have been rendered moot considering the fact that this case never reached the jury for deliberation due to the abusive litigation practices that occurred at trial. *See Binakonsky v. Ford Motor Co.*, 4 Fed. Appx. 161, 165 (4th Cir. Md. 2001)[2](holding that because Judgment as a Matter of Law was granted prior to the case going to the jury, issues pertaining to the manner in which voir dire was conducted is rendered moot).

However, even if not rendered moot, there was nothing regarding the manner in which voir dire was conducted which can even remotely constitute reversible error.

First, it must be noted, again, that Defendant bears the burden to prove that an alleged error is prejudicial. *See Miller, supra.* Defendant has failed to set forth her basis that the striking of certain jurors was prejudicial and/or reversible other than arguing in very broad strokes that it was entitled to supplemental examination of the stricken jurors. Such a vague argument cannot meet Defendant's burden to show that reversible error has occurred.

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[2]See a true and correct copy of *Binakonsky* attached at **Exhibit "15"**). Pursuant to FRAP 32.1(b) the use of unpublished opinions issued prior to January 1, 2007 is permitted providing that a copy of the opinion is attached and that there is no published opinion that would serve as well.

In the Supreme Court of Nevada

Case Nos. 58504, 59208 and 59423

JENNY RISH,

Appellant,

vs.

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

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSIE WALSH, District Judge
District Court Case No. A539455

APPELLANT'S APPENDIX
VOLUME 19
PAGES 4306-4556

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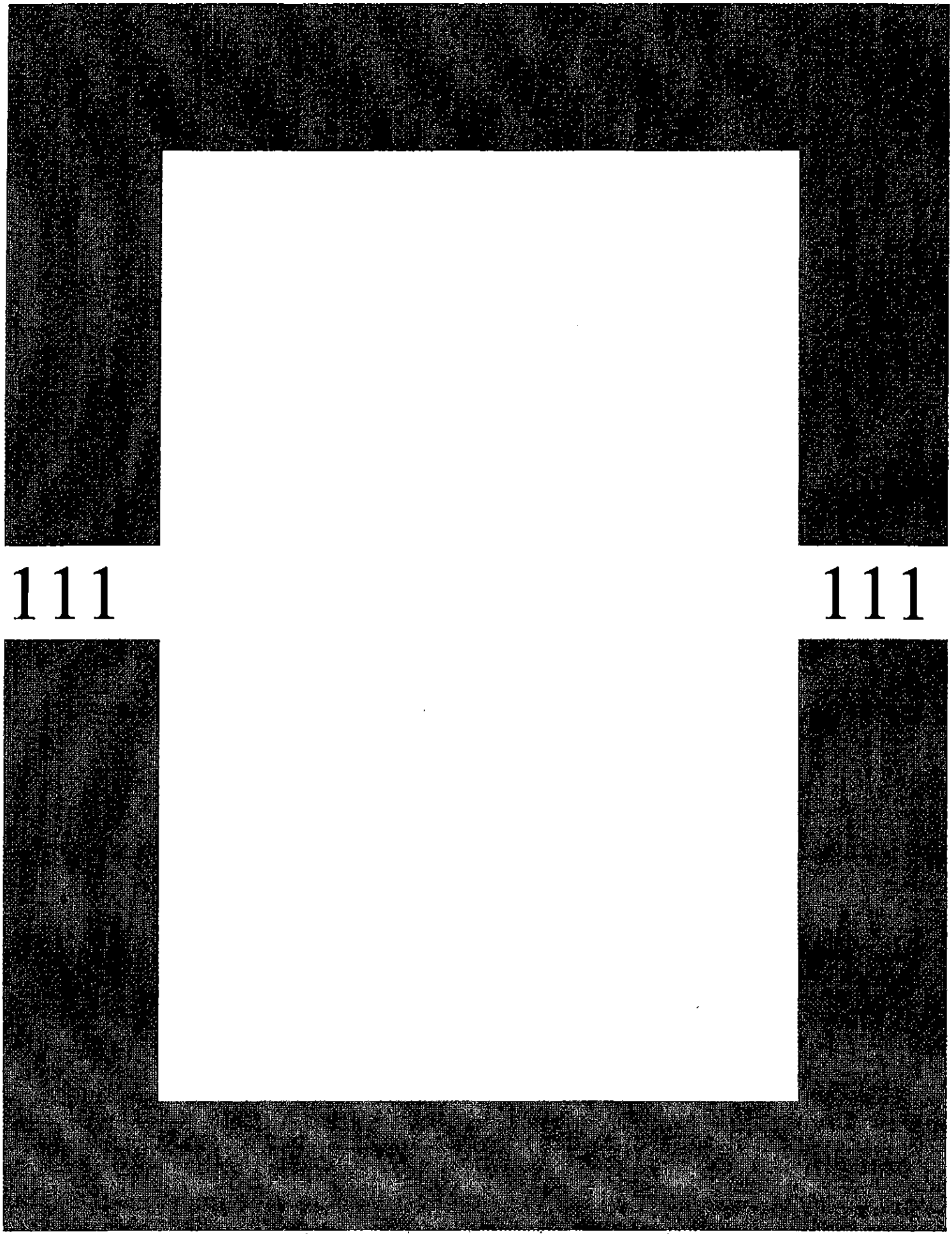
TABLE OF CONTENTS TO APPENDIX



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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. XX

NOTICE OF APPEAL

Please take notice that defendant JENNY RISH hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;
2. "Decision and Order Regarding Plaintiffs' Motion to Strike Defendant's Answer, filed April 22, 2011";
3. Judgment, filed April 28, 2011, notice of entry of which was served via hand delivery on May 2, 2011; and

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4. All rulings and interlocutory orders made appealable by any of the foregoing.

DATED this 31st day of May 2011.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I HEREBY CERTIFY that on the 31st day of May, 2011, I served the foregoing NOTICE OF APPEAL by depositing a copy for mailing, first-class mail, postage prepaid, at Las Vegas, Nevada, to the following:

ROBERT T. EGLET
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s/ Mary Kay Carlton
An Employee of Lewis and Roca LLP

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EXHIBIT A

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EXHIBIT A

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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

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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:

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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.

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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

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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

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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.

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(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. This Court's Consideration of the Law as Applied to the Facts of This Case

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:

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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.

Jessie Walsh
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

EXHIBIT B

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EXHIBIT B

NEOJ
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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 JUDGMENT

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

...

Court on the 27th 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

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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: _____ Time:_____

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: 3:24 p.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

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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)	$ 1681,296.
Attorneys' fees	$ TBD
Litigation costs	$ 99,555.49
TOTAL	$3,493,983.45

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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

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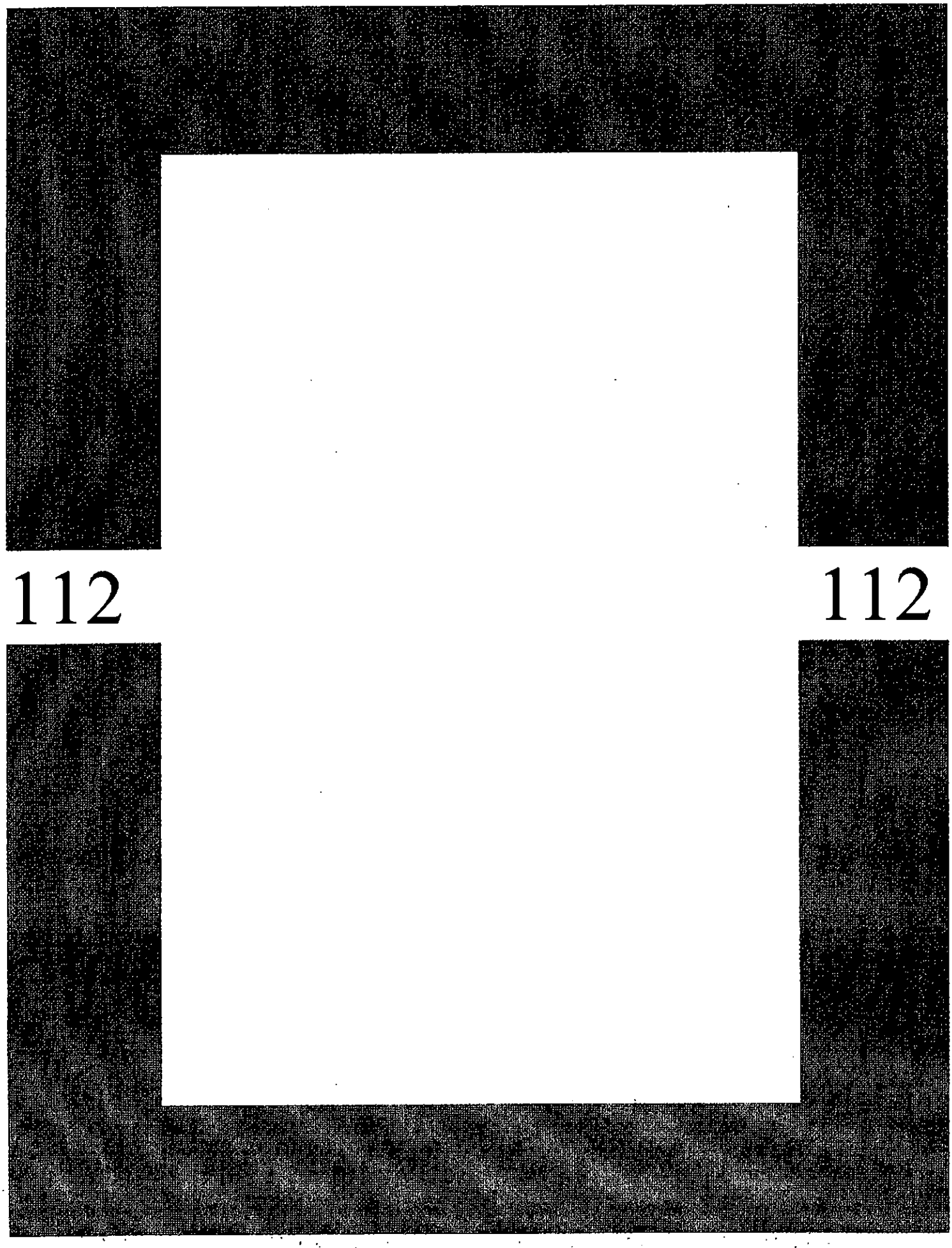

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CLERK OF THE COURT

ASTA
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Attorneys for Defendant Jenny 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; DOES I through V; and ROE Corporations I through V, inclusive, Defendants.	Case No. A539455 Dept. No. XX

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CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

   Defendant JENNY RISH

2. Identify the judge issuing the decision, judgment, or order appealed from:

   THE HONORABLE JESSIE WALSH

3. Identify each appellant and the name and address of counsel for each appellant:

   DANIEL F. POLSENBERG
   Nevada Bar No. 2376
   LEWIS AND ROCA LLP
   3993 Howard Hughes Parkway, Suite 600
   Las Vegas, Nevada 89169
   (702) 474-2616

004356

STEPHEN H. ROGERS
ROGERS MASTRANGELO CARVALHO & MITCHELL
300 South Fourth Street, Suite 170
Las Vegas, Nevada 89101
(702) 383-3400

Attorneys for Appellant

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

ROBERT T. EGLET
DAVID T. WALL
ROBERT M. ADAMS
MAINOR EGLET
400 South Fourth Street
Sixth Floor
Las Vegas, NV 89101
(702) 450-5400

Attorney for Respondents
William Jay Simao and *Cheryl Ann Simao,*

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

N/A

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court, e.g., date complaint, indictment, information, or petition was filed:

Complaint filed April 13, 2007.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

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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.

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

N/A

12. Indicate whether this appeal involves child custody or visitation:

N/A

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

No.

DATED this 31st day of May 2011.

LEWIS AND ROCA LLP

By: s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG (SBN 2376)
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 474-2616

Attorneys for Defendant Jenny Rish

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I HEREBY CERTIFY that on the 31st day of May, 2011, I served the foregoing CASE APPEAL STATEMENT by depositing a copy for mailing, first-class mail, postage prepaid, at Las Vegas, Nevada, to the following:

ROBERT T. EGLET
DAVID T. WALL
ROBERT M. ADAMS
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, NV 89101

s/ Mary Kay Carlton
An Employee of Lewis and Roca LLP

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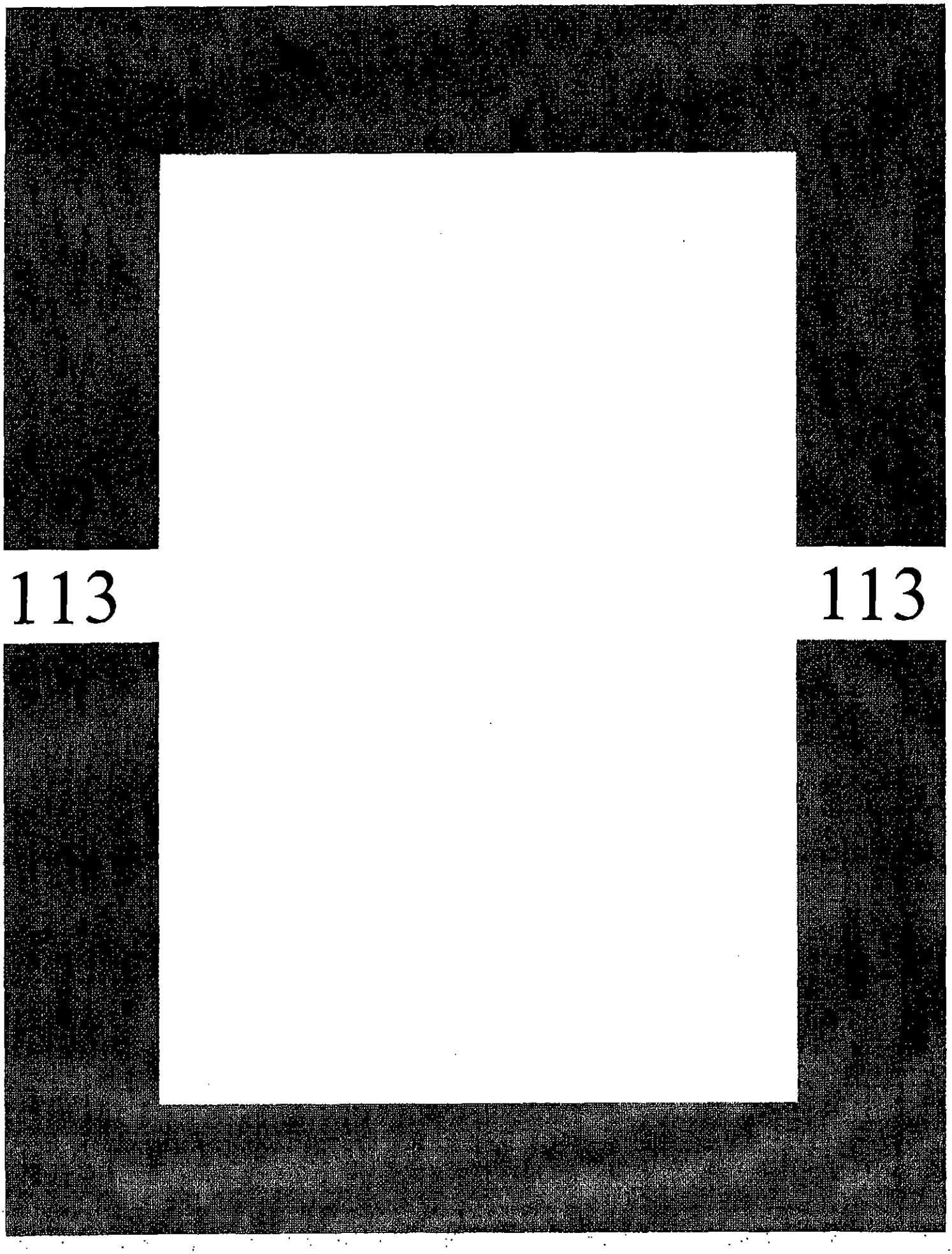

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CLERK OF THE COURT

JUDG
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph.: (702) 450-5400
Fx.: (702) 450-5451
reglet@mainorlawyers.com
dwall@mainorlawyers.com
badams@mainorlawyers.com
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.

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

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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)	$ 681,296.
Attorneys' fees	$ TBD
Litigation costs	$ 99,555.49
TOTAL	$3,493,983.45

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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

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EXHIBIT "2"

LexisNexis

8 of 8 DOCUMENTS

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. Pehr, 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 untranscribed 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, 708-13, 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 Ball 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 Ball'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), " 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. " 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." Ball 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.

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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.

Dept. NO.

A539455

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 Propria Persona

A 539455

Declaration Of Service

AAA Landlord Services
P.O. Box 30904 Mesa, AZ 85275
480.668.5953 480.668.7425 Fax

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**

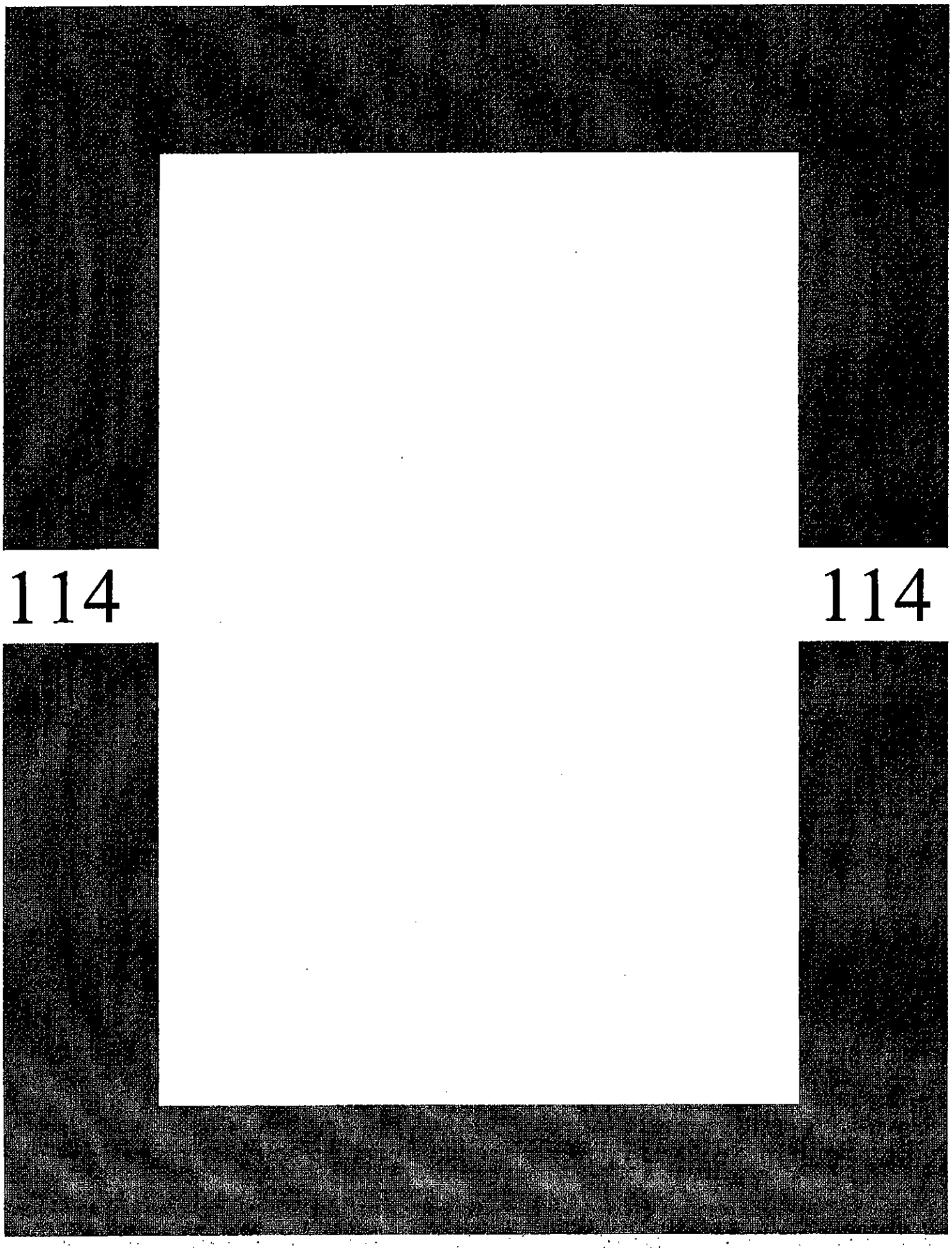
SECURED

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



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CLERK OF THE COURT

OPPS
STEPHEN H. ROGERS, ESQ.
Nevada Bar No. 5755
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
300 South Fourth Street, Suite 710
Las Vegas, Nevada 89101
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, Plaintiff, v. JENNY RISH; JAMES RISH; LINDA RISH; DOES I - V; and ROE CORPORATIONS I - V, inclusive, Defendants.	CASE NO. A539455 DEPT. NO X

DEFENDANT'S OPPOSITION TO MOTION TO QUASH

COMES NOW Defendant JENNY RISH, by and through her attorney, STEPHEN H. ROGERS, ESQ., and hereby submits this Opposition to Motion to Quash.

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This Opposition 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 14th day of June, 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

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

A. Plaintiffs motion to quash should be denied.

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.

During trial, Plaintiff provided expert witness testimony regarding future surgery and future damages which were never disclosed to the Defense prior to trial. Therefore, Defendant attempted several avenues to counter this evidence, including a subpoena to obtain the original fluoroscopy images taken by Jorg Rosler. Defendant needed the original images so that her experts, Dr. Wang, Dr. Fish and Dr. Winkler (the latter was not allowed to testify) and Joseph Schifini, could state their opinions regarding the images. Unfortunately, the original images were not produced for inspection before or even at trial, and Plaintiff objects to the subpoena of the records now.

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A new trial is allowed due to new evidence which the party could not produce at trial under NRCP 59(a)(4). The original films, and the opinions of Dr. Winkler and Dr. Schifini regarding them, is certainly new evidence that Defendant could not produce at trial.

While Plaintiff objects and questions the validity of the subpoena, Plaintiff cites no case law that holds such a subpoena is ineffective. Moreover, the need for the subpoena is due to Plaintiff's and/or Dr. Rosler's unwillingness to produce the actual images for inspection. While Plaintiff may still be treating with Dr. Rosler, this treatment is not on a daily basis such that the images cannot be released for a few days for a proper inspection.

II. CONCLUSION

For the reasons outlined above, the Court should deny Plaintiff's motion to quash.

DATED this 1st day of June, 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

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 15 day of June, 2011, a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO MOTION TO QUASH** was served via First Class, U.S. Mail, postage prepaid, addressed as follows, upon the following counsel of record:

David T. Wall, Esq.
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Telephone: (702) 450-5400
Facsimile: (702) 450-5451
Attorneys for Plaintiffs

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell

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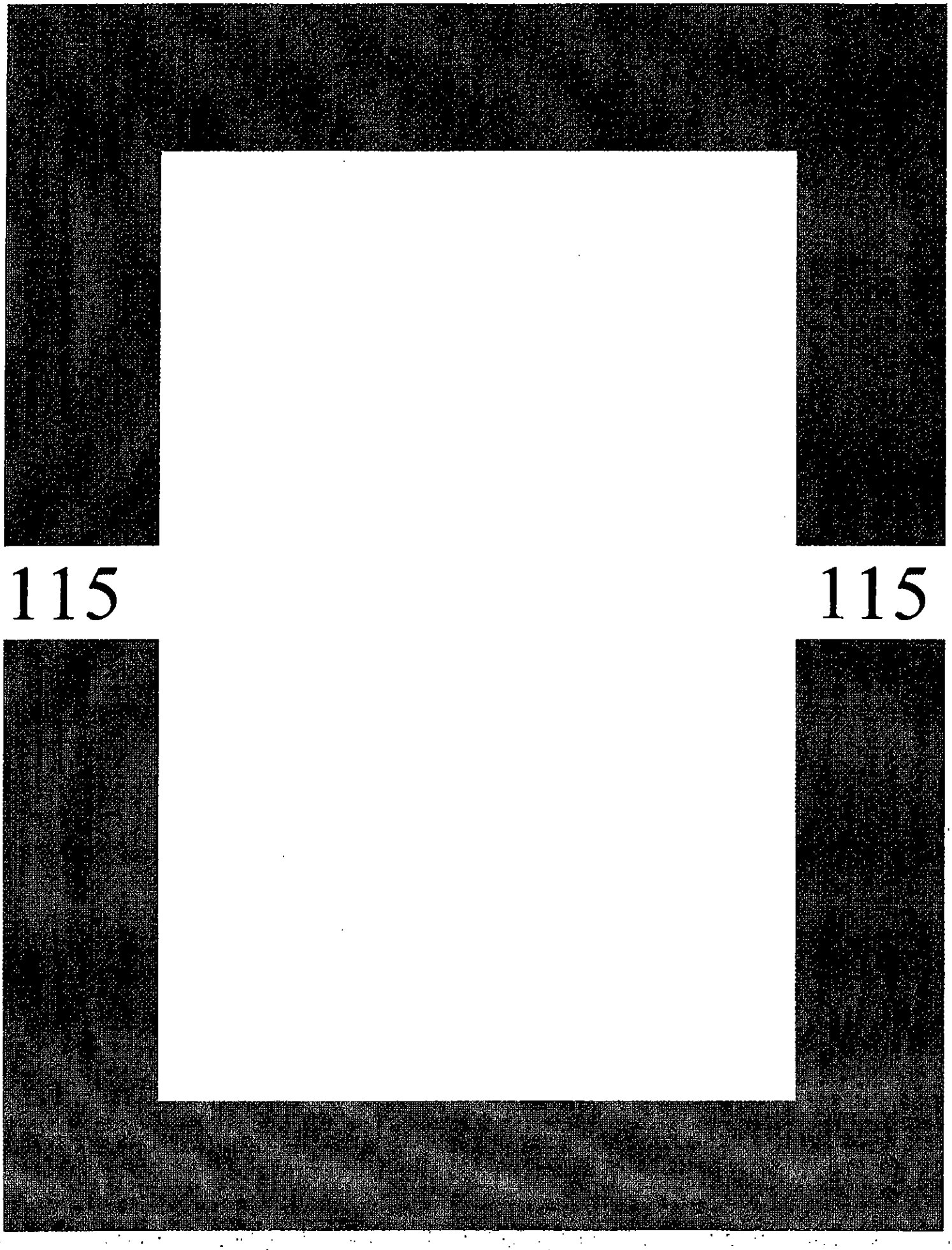

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REGISTER OF ACTIONS
CASE NO. 07A539455

William Simao, Cheryl Simao vs Jenny Rish

Case Type:	**Negligence - Auto**
Date Filed:	**04/13/2007**
Location:	**Department 10**
Conversion Case Number:	**A539455**
Supreme Court No.:	**58504**
	59208
	59423

PARTY INFORMATION

		Lead Attorneys
Defendant	**Rish, Jenny**	**Stephen H Rogers** *Retained* 702-383-3400(W)
Plaintiff	**Simao, Cheryl A**	**David T Wall** *Retained* 702-450-5400(W)
Plaintiff	**Simao, William J**	**David T Wall** *Retained* 702-450-5400(W)

EVENTS & ORDERS OF THE COURT

06/02/2011 **Motion to Retax** (3:00 AM) (Judicial Officer Walsh, Jessie)
Defendant Rish's Motion to Retax Costs

Minutes
06/02/2011 3:00 AM
- Following review of the papers and pleadings on file herein, COURT ORDERED motion DENIED. Defendant's provide absolutely no analysis. They do not argue that plaintiff's expert fees were not reasonable, necessary or actually incurred. Defendant's simply argue that the fees must be retaxed because they exceed the 1500 threshold. Given the plain language of NRS 18.005 (5), which authorizes an award beyond the 1500 for good cause shown, Defendant's argument is unavailing. Defendant's correctly point out that it is plaintiff's burden to establish the reasonableness and necessity of these costs, however, plaintiff's pleadings do just that.

Return to Register of Actions

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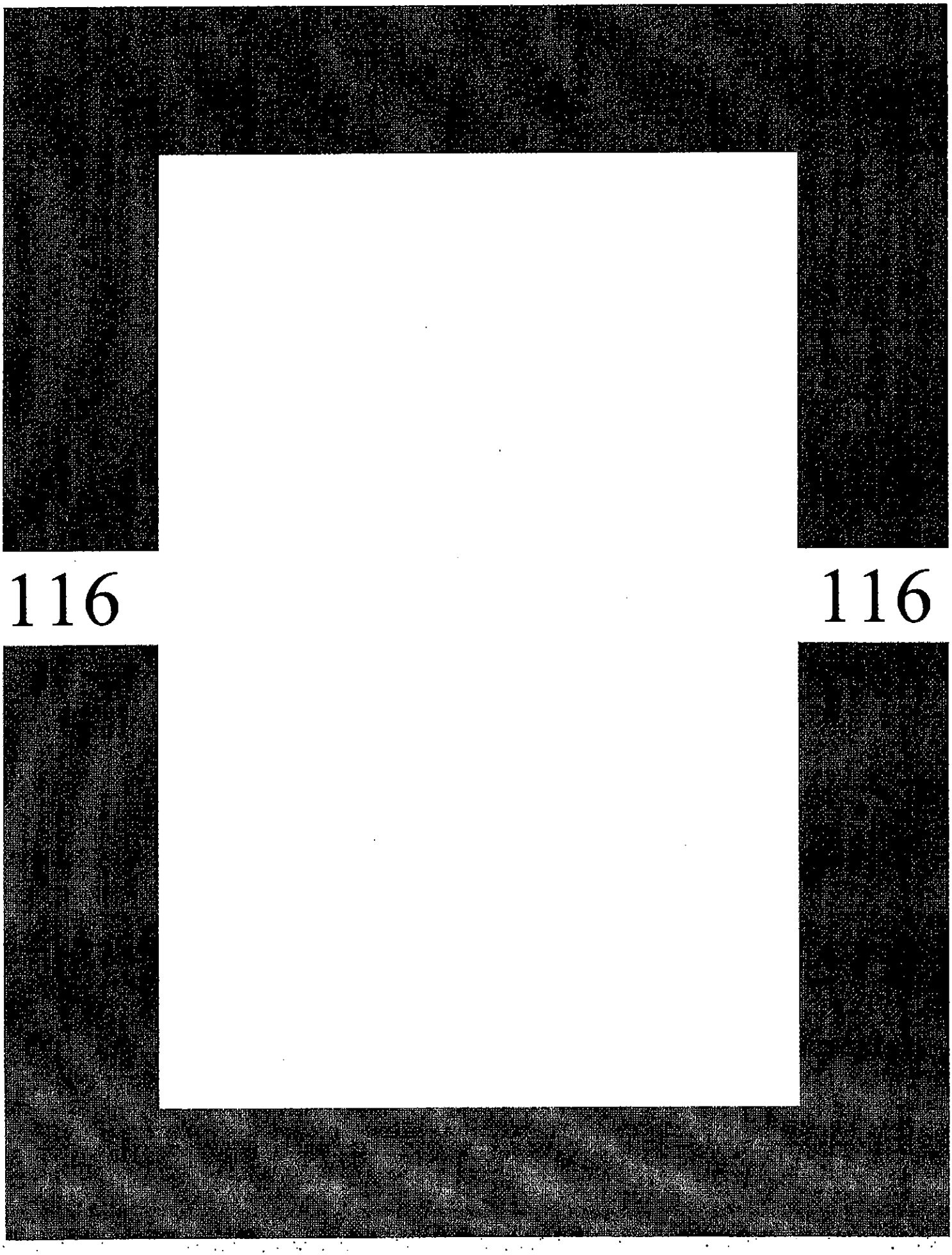

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CLERK OF THE COURT

NJUD
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
DAVID T. WALL, ESQ.
Nevada Bar No. 2805
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, Nevada 89101
Ph.: (702) 450-5400
Fx.: (702) 450-5451
badams@mainorlawyers.com
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 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

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