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IN THE SUPREME COURT OF THE STATE OF IDAHO

DANA R. MCCANDLESS and MABEL
ROBIN BLACKEAGLE,

Plaintiff/Appellant,

vs.

MAX E. PEASE,

Defendant/Respondent.

Supreme Court Case No. 46936-2019

Ada County Case No. CV OC 1500127

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District for Nez Perce County

The Honorable Jeff M. Brudie, Presiding

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I.

STATEMENT OF THE CASE

A. Nature Of The Case.

On June 30, 2011, Plaintiffs Dana McCandless and Mabel Blackeagle (collectively “Plaintiffs” individually “McCandless” and “Blackeagle”) were involved in an automobile collision with Defendant Max Pease (“Defendant”) and Defendant Brent Weddle (“Weddle”).¹ Plaintiffs filed an action against Defendant alleging he negligently operated his vehicle and caused Plaintiffs to suffer personal injuries and damages as a result.

B. Course Of Proceedings.

The case was tried before a jury from December 17 through December 19, 2018. At the conclusion of trial on December 19, the jury returned a verdict in Plaintiffs’ favor, apportioning 75% of the liability to Defendant and 25% of the liability to Weddle. Record (“R”), pp. 162-163. The jury awarded Plaintiffs property damages of \$15,500, special damages of \$4,900 to McCandless and \$10,200 to Blackeagle, and general damages of \$5,000 to McCandless and \$1,000 to Blackeagle. *Id.*

On January 2, 2019, Plaintiffs filed a Motion for New Trial pursuant to Idaho Rule of Civil Procedure 59(a)(1)(A)(C)(F)(G) and 59(d)(2), which was supported by the Memorandum of Plaintiffs in Support of New Trial and the Affidavit/Declaration of Robin D. Dunn (“Dunn Affidavit”). R., pp. 190-202. The Memorandum in Support of New Trial contained two sections entitled “LIABILITY/COMPARATIVE NEGLIGENCE” and “DAMAGES”. *Id.* at pp. 198-202. Under the liability/comparative negligence section, Plaintiffs argued that the evidence did not support the jury’s determination of liability and that the “jury was obviously under some passion or

¹ Defendant Brent Weddle and his father, Defendant Charles Weddle, the owner of the vehicle operated by Brent at the time of the collision were dismissed from the action before trial pursuant to a settlement agreement with Plaintiffs.

prejudice to make a finding that Weddle had any negligence in the collision.” *Id.* at pp. 198-199. Plaintiffs did not provide any legal support and provided limited factual support in the record for their arguments regarding liability/comparative negligence. *Id.* Under the damages section, Plaintiffs argued that the damages awarded to by the jury for property damages, actual expenses, and general damages were not supported by the evidence, that Blackeagle was denied the right to a jury of her peers, and that Plaintiffs were denied the right to question a defense expert witness at trial. *Id.* at pp. 199-201. Plaintiffs did not provide any legal analysis and provided limited factual support in the record for their arguments. *Id.*

The Dunn Affidavit used to support Plaintiffs’ Motion for a New Trial included headings entitled “I.R.C.P. Rule 59(a)(1)(A)(C)”, “I.R.C.P. Rule 59(a)(1)(F)”, “I.R.C.P. Rule 59(a)(1)(G)”, and “I.R.C.P. Rule 59(d)(2)”. R., pp. 190-197. However, the arguments contained under each heading provided limited support from the record and no legal analysis regarding the application of Idaho Rule of Civil Procedure 59(a)(1)(A)(C)(F)(G) and 59 (d)(2) to the facts of Plaintiffs’ case. *Id.*

On January 16, 2019, Defendant served its Response in Opposition to Plaintiffs’ Motion for New Trial. R., pp. 205-219. On March 28, 2019, after briefing and oral argument, the trial court entered an Opinion and Order on Motion for New Trial conditionally granting Plaintiffs’ Motion for a New Trial, subject to the acceptance by Defendant of a proposed additur of \$4,000 to Blackeagle’s general damages. R., pp. 223-224. In its Opinion and Order on Motion for New Trial, the trial court addressed three issues raised by Plaintiffs: whether the trial court should grant Plaintiffs a new trial based on the jury’s damage awards; whether the prohibition of the mention of insurance is unconstitutional; and whether Plaintiffs were denied due process when they were not allowed to subpoena a defense expert. *Id.* The trial court ultimately held that the jury’s damage awards for property damages and actual expenses

were supported by the evidence and not rendered under passion or prejudice. R., pp. 222-223. However, the trial court found that the jury's award of general damages to Blackeagle was so disparate from the court's own to suggest the award had been given under the influence of passion or prejudice. *Id.* The trial court also held that Plaintiffs failed to provide any rational argument regarding their claim that not being able to talk about insurance at trial was unconstitutional and denied the Motion. *Id.* at p. 224. The trial court further held that Plaintiffs failed to establish they were denied due process by not being able to require the defense expert's live testimony. *Id.* at pp. 224-225.

On April 1, 2019, Defendant accepted the additur proposed by the trial court. R., pp. 227-228. Plaintiffs appealed to this Court after the entry of the Opinion and Order on Motion for New Trial and Second Amended Judgment. *Id.* at p. 229. Plaintiff identified two issues on appeal: (1) "[t]he Idaho Rules of Civil Procedure, Rule 59, outline the information for the request for a new trial and the necessary factual assertions for the court to apply the law"; and (2) "[t]he inability to discuss insurance and the relationship in a jury trial of Idaho Rule of Evidence, Rule 411 added to the prevention of a fair trial and does not bear the truth to the jury and is misleading and is prejudicial as the same fiction." *Appellants' Brief*, p. 2.

C. Statement Of Facts.

This case stems from an automobile collision that occurred on U.S. Highway 12 in Idaho County, Idaho on June 30, 2011. The collision involved three vehicles: a 2005 Dodge Ram one-ton truck driven by McCandless with Blackeagle in the front passenger seat, a 1998 Toyota truck driven by Weddle, and a 2011 Chevy Silverado truck driven by Defendant. Trial Transcript ("T. Tr."), pp. 14-15. Defendant was traveling west on Highway 12 when Weddle passed Defendant and slowed suddenly to make a left turn. T. Tr., pp. 56-57. Defendant attempted to stop before rear-ending Weddle, but Defendant was unable and

the Silverado collided with the Toyota operated by Weddle. *Id.* The force from the collision caused the Toyota to cross the center line into the eastbound lane of travel where the Toyota collided with the Dodge operated by McCandless. Tr. T., pp. 206-207. On June 27, 2013, McCandless and Blackeagle brought this action against Defendant alleging he negligently caused a motor vehicle accident resulting in Plaintiffs suffering personal injury and damages.

This case was tried to a jury of 12 Nez Perce County citizens. The trial started on December 17 and concluded on December 19, 2019. The witnesses who testified at the trial included: Defendant, Weddle, Charles Weddle, McCandless, Blackeagle, and chiropractor Irwin Mulnick. *See* Tr. T., pp. 1-315. Through these witnesses, the parties presented evidence regarding liability, property damages, medical treatment and expenses, lost profits, and general damages claimed by Plaintiffs. Relevant portions of the testimony concerning liability, special damages, and general damages is discussed below.

As it relates to liability, the testimony given regarding the cause of the accident was disputed. For instance, Defendant's testimony on direct-examination by Plaintiffs' counsel established that Defendant was driving his Silverado approximately 40-45 miles per hour on Highway 12 on his way to the grocery store, when Weddle sped around and stopped in front of Defendant. Tr. T. , pp. 29-30; 39; 47:19-25; 48-49. Similarly, on cross-examination, Defendant stated the following regarding the accident:

Q. Okay. So tell us what happened.

A. Well, basically ride a dead horse to death, we were going down 12, and my wife was looking at the fliers for the food and stuff on sale, and I was driving down the road, and suddenly this black pickup truck come by. And I couldn't fathom what he was going to do, I didn't know what he was going to do, he just come zipping by. And then the next thing I realize, he wasn't moving, he was stationary; and that's when I tried to swerve and tried to avoid him. And if I would have had another four inches, I could have missed him completely but I didn't have it, there was no place else to go except the ditch about seven feet deep, so I took the ditch.

Q. Did you see a signal from that vehicle?

A. No.

Q. Did you see stop lights?

A. No.

Tr. T. pp. 56-57. These facts support the jury's verdict that Defendant was not the sole cause of the collision and that Weddle was comparatively negligent in causing the collision.

As it relates to the property damages claimed by Plaintiffs, there was insufficient testimony and evidence to support the property damages claimed by Plaintiffs. McCandless testified on direct examination by his counsel that McCandless looked up 19 trucks of comparable value the Dodge and that he estimated the value of the Dodge at the time of the collision was "approximately \$35,000." Tr. T., p. 224. The specifics regarding the "comparables", however, were not discussed, including the date, value, or condition of the comparable trucks and no documents were introduced into evidence to that effect. *Id.* at pp. 223-224; 236-237. McCandless also testified that he added anywhere from \$11,000 to \$14,000 in add-ons to the Dodge, but the only add-ons that were discussed were a new clutch and exhaust work. *Id.* at p. 236:1-15 McCandless testified that the value of the clutch was "\$1,197.50 plus \$302.50 in labor and \$71.85 in tax" but did not testify as to the value of the exhaust work. *Id.* at p. 237:1-14. McCandless did not testify specifically regarding the value of any of the other alleged add-ons and receipts of the alleged work were not introduced into evidence. *Id.* p. 223-224; 236-237.

On cross-examination by Defendant's counsel, McCandless testified that he purchased the Dodge brand new in 2005 for approximately \$42,396. Tr. T., p. 237. In making that purchase, McCandless testified that he traded in his 1996 Dodge Ram and that he received \$9,000 for the trade-in of the 1996 Dodge. *Id.* at p. 234:13-21. McCandless's testimony regarding the trade-in value of his 1996 Dodge

highlighted the depreciation of vehicles over time. *Id.* Defense counsel mentioned in his closing argument, the common sense notion of the depreciation of vehicles over time and that it was within the jury's common sense to determine the value of the property damage to the Dodge. *Id.* at pp. 299:20-25; 300. In sum, the testimony at trial did not establish a set value for the Dodge at the time of the accident, and that was a decision left up to the jury based on the evidence presented, or lack thereof.

As to the medical damages claimed by Plaintiffs, there was conflicting evidence regarding the injuries Plaintiffs sustained in the accident. Defendant's expert orthopedist, Dr. McCormack, conducted independent medical examinations ("IMEs") of McCandless and Blackeagle and her corresponding IME reports questioned the full extent of the medical treatment received and expenses incurred by McCandless and Blackeagle. R., Ex. 13, pp. 56-57; 59; Ex. 14, pp. 60-81. For instance, in Dr. McCormack's IME report for McCandless, Dr. McCormack opined that McCandless reached maximum medical improvement by January 2012, and that: (1) his "[c]omplaints of diminished vision in right eye, [were] of unclear relationship to the motor vehicle collision of June 30, 2011"; (2) "evidence of brawny Type edema and multiple scabs and changes in the skin of left leg, not felt to be related to the motor vehicle collision of June 30, 2011"; and (3) his "workup regarding nutritional assessments would certainly not be related to the accident . . ." *Id.* at pp. 56-57; 59. Similarly, in Dr. McCormack's IME report for Blackeagle, Dr. McCormack opined that Blackeagle had reached maximum medical improvement by January 2012, which means any medical expenses incurred after the January 2012 may have not have been considered by the jury. *Id.* at pp. 60-81.

As it relates to Plaintiffs' claimed lost wages from a lost roofing job and the inability to fish, Plaintiffs produced little evidence substantiating their claims and their credibility was called into question. Tr. T., pp. 189-190; 221-222; 229; 237-238. As to the claimed lost roofing wages, McCandless testified

on direct examination by his counsel that he was going to help his friend put on a new roof for up to a maximum of \$5,000, but that he could not do the job because of the accident. *Id.* at pp. 221-222. McCandless admitted that he never gave his friend a bid for the roof job. *Id.* at p. 222:9-13. Additionally, McCandless never called his friend to substantiate their agreement and did not testify regarding the value of any prior roofing jobs that he had completed. *Id.*

On cross-examination by Defense counsel, McCandless testified as follows regarding the lost roofing job:

Q. Okay. You also talked about [how you] missed out on a roofing job. In your deposition you called it a potential roofing job. You are saying that you had reduced it to an agreement?

A. He asked me how much we would do it for, and I told him, well if we worked together, we could do it in less than two hundred hours and I'd charge him \$25 an hour.

Q. How big of a roof was it?

A. His house was approximately 32 by 32, pretty square.

Q. So 200 hours at \$25 an hour?

A. Yeah, he was a friend of mine.

Q. That's 25 days of 8 hours a day. Was it a 25-day roof?

A. Probably.

Tr. T., p. 237-238. This testimony attacked the credibility of McCandless because he testified it would take him 25 days to roof a 1024 square foot home.

As it relates to lost profits from the Plaintiffs' alleged inability to fish, Blackeagle testified on cross-examination by defense counsel that "in the year of the accident, we probably lost half of our normal revenue which would have been around \$5,000." Tr. T. p. 229. However, Blackeagle was unable

to provide any records from her alleged loss of income and there was evidence presented that Blackeagle quit fishing because she was concerned the fish had been subject to radiation. *Id.* at pp. 189 -190. Further, McCandless testified that his ability to participate in the fishing enterprise was not affected by the accident. *Id.* at p. 221:10-18.

The entire 12-member jury was present during all testimony, and attentive throughout the course of the trial. Tr. T., p. 297. After the conclusion of evidence and deliberations, the jury reached a verdict in favor of Plaintiffs finding that 75% of the responsibility for the collision was attributable to Defendant and 25% of the responsibility was attributable to Weddle. R., pp. 162-163. The jury also awarded Plaintiffs property damages of \$15,500, McCandless actual expenses of \$4,900 and general damages of \$5,000, and Blackeagle actual expenses of \$10,200 and general damages of \$1,000. *Id.* It is noteworthy that the Special Verdict form combined Plaintiffs' medical damages and lost wages into one category entitled "Actual Expenses". *Id.* Specifically, Paragraph 6 of the Special Verdict asked whether Plaintiffs suffered "monetary damages for actual expenses as a result of injuries . . . proximately caused by the collision." *Id.* at p. 222, ¶ 3; 223, ¶ 1. The record does not reflect that either party objected to the Special Verdict form at trial. Tr. T., pp. 269 – 271.

II. ISSUES PRESENTED ON APPEAL

Issues On Appeal.

A.

The following issues are presented by Defendant on appeal:

- (1) Whether Plaintiffs' general attack on the findings and conclusions of the trial court, without reference to evidentiary or legal errors, is sufficient to preserve their issues on appeal;
- (2) Whether the trial court erred in conditionally granting Plaintiffs' Motion for a New Trial subject to Defendant's acceptance of an additur;

- (3) Whether the trial court erred in precluding Plaintiffs from introducing evidence regarding Defendant's insurance;
- (4) Whether the trial court erred in its denial of Plaintiffs' Motion for a New Trial based on the violation of Plaintiffs' due process rights;
- (5) Whether the trial court erred in ruling on Plaintiffs' Motion for a New Trial pursuant to Idaho Rule of Civil Procedure 59(a)(1)(A)(C)(F)(G);
- (6) Whether Defendant is entitled to attorney fees and costs on appeal.

B. Costs And Fees On Appeal.

Pursuant to Idaho Appellate Rules 35(b)(5), 40, and 41(a), Idaho Rule of Civil Procedure 54(e)(2), and Idaho Code § 12-121, Defendant contends that he is entitled to an award of the costs and attorney fees incurred on appeal. These contentions are supported by Idaho Rule of Civil Procedure 54(e)(1). *See* Argument, *infra*, at Section III, sub-paragraph G.

**III.
ARGUMENTS AND AUTHORITY**

Standard Of Review.

A.

A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *Burggraf v. Chaffin*, 121 Idaho 171, 123, 823 P.2d 777, 777 (1991). The decision by a trial court to grant or deny a motion for a new trial is within the discretion of the trial court and such decision will not be set aside unless a clear and manifest abuse of discretion is established. *Barnett v. Eagle Helicopters Inc.*, 123 Idaho 361, 363, 848 P.2d 419, 421 (1992). In reviewing a trial court's decision to grant or deny a new trial, the Supreme Court of Idaho considers: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether

the trial court reached its decision by an exercise of reason.” *Litke v. Munkhoff*, 163 Idaho 627, 632, 417 P.3d 224, 229 (2018).

When reviewing instructions given to the jury, the applicable standard of review requires the Court “to determine whether the jury instruction as a whole, and not individually, fully, and accurately reflects the applicable law.” *Leazer v. Kiefer*, 120 Idaho 902, 904, 821 P.2d 957, 959 (1991). If the jury instructions adequately present the issues and state the applicable law, no error is committed. *McBride v. Ford Motor Co.*, 105 Idaho 753, 760, 673 P.2d 55, 62 (1983). To be considered reversible error, an instruction must have misled the jury or prejudiced the complaining party. *Salinas v. Vierstra*, 107 Idaho 984, 991, 695 P.2d 369, 376 (1985).

Evidentiary rulings of the trial court are reviewed under an abuse of discretion standard. *Hall v. v. Rocky Mtn. Emergency Physicians*, 155 Idaho 322, 312 P.3d 313, 317 (2013). A three-part inquiry is applied when reviewing for an abuse of discretion: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Samples v. Hanson*, 161 Idaho 179, 182, 384 P.3d 943, 946 (2015); *see also McDaniel v. Inland Nw. Renal Care Grp.–Idaho, LLC*, 144 Idaho 219, 221–22, 159 P.3d 856, 858–59 (2007).

B. Plaintiffs Failed to Preserve Their Issues on Appeal.

Idaho Appellate Rule 35(a) sets forth the requirements of an Appellant’s Brief and requires that the Appellant’s argument “shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and record relied upon.” I.A.R. 35(a)(6). The Supreme Court of Idaho will not

consider an issue if is not “supported by argument and authority in an opening brief.” *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (quoting *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008)). “A general attack on the findings and conclusions of the trial court, without reference to evidentiary or legal errors, is insufficient to preserve an issue.” *Jeffcoat v. Idaho Department of Corrections*, 161 Idaho 594, 596, 389 P.3d 139, 141 (2016) (internal quotations and citation omitted).

In other words, the Supreme Court of Idaho will not address issues presented on appeal that are not supported by the facts in the record and the applicable law. It follows that the Court will not address an issue that is simply mentioned by an appellant and not supported with cogent argument or authority. *Inama v. Boise County ex rel. Bd. Of Comm’rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (overruled on other grounds by *Verska v. St. Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011)). For instance, a one sentence statement that an award of punitive damages violates due process and fails to cite authority is not sufficient to constitute an addressable argument. *Highland Enters. v. Barker*, 133 Idaho 330, 350, 986 P.2d 996, 1016 (1999). Likewise, where an appellant set forth 11 assignments of error without any argument to support them, the Court refused to consider the appellant’s arguments unsupported by authority. *Suits v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Further, a general statement attempting to incorporate all arguments and authority cited for each issue into a request for relief under Idaho Rule of Civil Procedure 60(b) was not sufficient to preserve an issue on appeal. *Litke*, 163 Idaho at 637, 417 P.3d at 234. In *Litke*, the appellants’ request for relief under Rule 60(b)(6) stated:

[We] were denied relief from judgment pursuant to I.R.C.P. 60(b). All of the foregoing reasons justify relief from final judgment. The excessive damages assessed against Mark and Robyn Munkoff and the fact that the damages were awarded based on grossly insufficient evidence to support the Munkhoffs' culpability are more than sufficient to justify relief in this case. The trial court abused its discretion in denying the Munkhoffs relief from final judgment.

Id. The Court held that the appellants had not presented any case law, statutes, or evidence necessary to allow the Court to determine how relief would be supported under Rule 60(b), and treated the issue as waived. *Id.*

In this case, the Court should not consider the issues presented by Plaintiffs on appeal because they are not supported by cogent argument or authority. The first issue presented by Plaintiffs is that “[t]he Idaho Rules of Civil Procedure, Rule 59, outline the information for the request for a new trial and the necessary factual assertions for the court to apply the law.” *Appellants’ Brief*, p. 2. In support of this issue, Plaintiffs rely on Idaho Rule of Civil Procedure 59(a)(1)(A)(C)(F)(G) and 59(d)(2); however, Plaintiffs’ fail to identify the applicable language of each subsection of Rule 59 and have not provided any legal authority to support their arguments under each subsection. *Id.* at pp. 9-24. Additionally, Plaintiffs attempt to support their arguments under Rule 59 with assertions that contain few references to the record. *Id.* The arguments set forth by Plaintiffs under Rule 59 are very similar to the blanket statement in *Litke* attempting to incorporate all arguments and authority into a request for relief under I.R.C.P. 60(b)(6). Further, allowing Plaintiffs’ arguments under Rule 59 to stand would violate this Court’s rule prohibiting the Court from searching the record for error on appeal because Plaintiffs have not set forth a sufficient factual and legal basis for their arguments. Simply put, this Court does not have the time to do Plaintiffs’ job for them.

It is worth noting that Plaintiffs’ arguments under Idaho Rule of Civil Procedure 59(a)(1)(A)(C)(F)(G) and Rule 59(d)(2) do not specifically assert that the trial court erred, but

instead, engage in a general attack on the findings and conclusions of the jury. *Appellants' Brief*, pp. 9-24. Plaintiffs' generalized arguments are similar to those in *Highland* where Court refused to address the issues presented by the appellant because he relied on a one sentence statement and failed to cite authority for this argument. Further, even where Plaintiffs' arguments are "supported by" case law or statute, the authority is simply mentioned in passing and not supported by any cogent argument, and therefore, cannot be considered by the Court.

For instance, Plaintiffs raise the issue that Blackeagle was denied a jury of her peers in violation of the Idaho and United States Constitutions. However, much like in *Highland* where a one sentence statement that an award of punitive damages violated due process was not sufficient to constitute an addressable argument, the argument raised by Plaintiffs that Blackeagle was denied a jury of her peers without support from legal authority was insufficient to constitute an addressable argument. This logic applies to each of Plaintiffs' arguments under Rule 59(d)(2). Therefore, this Court should find that Plaintiffs' have waived their arguments under Rule 59(a)(1)(A)(C)(F)(G) and Rule 59(d)(2) because Plaintiffs have not provided an sufficient factual and legal basis for those arguments.

The second issue raised by Plaintiffs addresses their inability to discuss liability insurance. Similar to the arguments set forth above, Plaintiffs' arguments under this issue are not supported by cogent argument or any substantive legal authority. *Appellants' Brief*, pp. 22-23. Plaintiffs' arguments do not cite to the record to show where they raised this issue before the trial court and only cite one case in support of their arguments without providing any legal analysis. *Id.* Therefore, the Court should find that Plaintiffs have waived their arguments regarding the admissibility of insurance because Plaintiffs have not provided sufficient factual and legal basis for those arguments.

C. The Trial Court Did Not Abuse Its Discretion In Conditionally Granting Plaintiffs' Motion For A New Trial Subject To The Refusal By Defendant Of A Proposed Additur.

Idaho Rule of Civil Procedure 59.1 applies to a trial court's conditional grant or denial of a new trial subject to an additur or remittitur. I.R.C.P. 59.1. A trial court can only grant an additur or remittitur if a new trial is offered as an alternative to the additur or remittitur. *Howes v. Fultz*, 115 Idaho 681, 686, 769 P.2d 558, 563 (1989). Pursuant to I.R.C.P. 59.1, a trial court may grant a new trial conditioned upon the acceptance or rejection of an additur where the trial court believes the jury award was based on substantial and competent evidence, but the damage award was based on passion or prejudice. *Collins v. Jones*, 131 Idaho 556, 558, 961 P.2d 647, 649 (1998). In other words, a trial court can grant an additur or remittitur where it determines that the disparity between the court's evaluation of damages and the jury's award is sufficient to suggest the jury's award was the result of passion or prejudice. *Howes*, 115 Idaho at 686, 769 P.2d at 563. A trial court, however, does not have the power to peremptorily grant a remittitur or additur over the objection of the party adversely affected by the by additur or remitter. *Young v. Scott*, 108 Idaho 506, 510, 700 P.2d 128, 132 (1985).

In *Howes*, the Supreme Court of Idaho made clear the process that a trial court is required to follow in granting an additur or remittitur. 115 Idaho at 686, 769 P.2d at 563. A trial court is first required to first weigh the evidence to determine if the evidence supports the verdict. *Id.* If the verdict is supported by substantial evidence, but the trial court finds that the jury reached an unjust result, the court must then determine if the jury acted under passion or prejudice. *Id.* If the trial court finds that the jury award was given under passion or prejudice, it may then grant an additur or remittitur by offering a new trial as an alternative. *Id.* In *Howes*, the trial court's grant of an additur was reversed on appeal because it did not find that the jury's award was the result of passion or prejudice. *Id.*

The Idaho Court of Appeals in *Young* addressed the issue of which party has the right to accept an adjustment in the damage award. *Young*, 108 Idaho at 510, 700 P.2d at 132. In *Young*, the trial court adjusted a jury's damage award by offering tenants a remittitur reducing the tenants' compensatory damages by \$25,000 and an additur increasing the tenants' punitive damages award by \$4,000. *Id.* at 108 Idaho at 509, 700 P.2d at 131. The tenants accepted the adjustment to the damages award to avoid a new trial and the landlords appealed. *Id.* On appeal, the landlords argued that they should have been granted a new trial unconditionally. *Id.* In upholding the trial court's decision, the Court of Appeals noted that the trial court was allowed to suggest an adjustment to the damage award subject to the acceptance of the adjustment by the adverse party, which is exactly what the trial court did. *Id.* Therefore, a new trial was not warranted because the tenants were the party adversely affected by the adjustment to the damage award and the tenants accepted the net remittitur. *Id.*

In this case, the trial court properly conditioned the grant of a new trial on the acceptance of an additur by Defendant. Initially, the trial court properly weighed the evidence supporting the jury's award of general damages to McCandless and Blackeagle. R. at p. 223, ¶ 2. In doing so, the trial court found that the jury's general damage award of \$1,000 to Blackeagle in comparison to the \$5,000 general damage award to McCandless was unusual because the evidence presented at trial did not suggest McCandless suffered "a proportionally greater degree of general damages as . . . Blackeagle." *Id.* The trial court then stated that if it were acting as the 13th juror it would have awarded approximately equal amounts of general damages to Blackeagle and McCandless. *Id.* As a result, the trial court found the jury's general damage award of \$1,000 to Blackeagle was given under passion or prejudice. *Id.* The trial court recognized that it had the option to grant a new trial on this basis, but determined that the ends of justice were better served by granting an additur of

\$4,000 to the general damages awarded to Blackeagle. *Id.* at p. 224. The trial court then correctly gave Defendant—the party adversely affected by the additur—the option to accept the additur or to proceed with a new trial.

The argument raised by Plaintiffs that they were the party adversely affected by the additur lacks any legal foundation. Plaintiffs cite *Howes* in support of this contention, but it is unclear exactly how *Howes* supports Plaintiffs' argument. The trial court in *Howes* was overruled on appeal because the trial court did not properly find that the jury's award of damages had been given under passion or prejudice. *Howes*, 115 Idaho at 686, 769 P.2d at 563. Plaintiffs' arguments that they "were never granted any option for a new trial" are just like the landlords' arguments in *Young* that they should have been given an unconditional grant of a new trial instead of the net remittitur accepted by the tenants. Plaintiffs were not given an option for a new trial because they were not the party adversely affected by the additur. Defendant was the party adversely affected by the additur and thus, it was Defendant's decision whether to accept the additur or proceed to a new trial. Defendant accepted the additur to avoid a new trial. Therefore, the trial court properly weighed the evidence, determined the general damages awarded to Blackeagle were given under passion or prejudice, and conditioned its grant of a new trial to Defendant on Defendant's acceptance of a \$4,000 additur to Blackeagle's general damages.

D. The Trial Court Did Not Abuse Its Discretion In Precluding Evidence Of Insurance.

Idaho Rule of Evidence 411 prohibits the introduction of evidence regarding insurance to prove that a person was negligent:

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Id. Idaho Rule of Evidence 411 does not act as a complete bar to the admission of liability insurance. *Id.*; *see also Brown v. Jerry's Welding & Constr. Co.*, 104 Idaho 893, 896, 665 P.2d 657, 660 (1983). In fact, evidence of insurance is admissible under various circumstances, such as the proof of agency, ownership, or control, or bias or prejudice of a witness. *Loza v. Arroyo Dairy*, 137 Idaho 764, 767, 53 P.3d 347, 350 (Ct. App. 2002). In other words, Rule 411 does not apply in circumstances where the relevance of the evidence is premised on something other than negligence. *Id.* However, just because evidence of insurance coverage is not barred in all circumstances by Idaho Rule of Evidence 411, does not mean that it is admissible under other applicable rules of evidence.

Specifically, the admission of evidence regarding liability insurance is subject to scrutiny under Idaho Rules of Evidence 402 and 403. In most circumstances, liability insurance is not relevant to the issues of the case and the probative value of allowing such evidence is outweighed by the prejudicial effect. *Lopez v. Allen*, 96 Idaho 866, 871-72, 538 P.2d 1170, 1175-76 (1975). For instance, the Supreme Court of Idaho held that a trial court properly excluded evidence of liability insurance under Idaho Rule of Evidence 403 where a farmer stated to an injured employee, “that he was sorry about what happened and not to worry, that his insurance was supposed to take care of the bill.” *Id.* In *Lopez*, the Court indicated that “the answer given sheds no light upon the issue of negligence other than the implications which could be drawn from his statement that this insurance would probably pay the hospital bill.” *Id.* The Court held the farmer’s statement was inadmissible pursuant to Idaho Rule of Evidence 403 because the “possible prejudicial impact of informing the jury that [farmer] had insurance coverage far exceeded the probative value of the statement.” *Id.* Similarly, evidence of an employer’s statement that his employee would receive a “big check” from the employer’s insurance company after being injured on the job was properly excluded because it was irrelevant and was not an admission of liability. *Loza*, 137 Idaho at 767, 53 P.3d at 350. Therefore, evidence of liability insurance is not admissible where the moving party is

attempting to use the evidence with some ulterior motive that is irrelevant and unfairly prejudicial to the other party.

In this case, Defendant is not sure whether Plaintiffs assert that the trial court erred in denying Plaintiffs' the ability to present evidence regarding Defendant's liability insurance or health insurance, whether the trial court erred in instructing the jury on Jury Instruction No. 12, whether Plaintiffs are asking the Court to overrule Idaho Rule of Evidence 411, or exactly what Plaintiffs mean by "[t]he reason for presentation of this argument is 'other factors' justify a new trial." *Appellants' Brief*, pp. 22-23. As a result, Defendant will address each argument in turn.

Initially, Defendant cannot find any support in the record showing that Plaintiffs argued before or during trial that they should be able to present evidence regarding liability insurance or health insurance. It is a general rule that an issue cannot be raised for the first time on appeal. *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 430, 283 P.3d 742, 747 (2012) (Holding the Supreme Court of Idaho "will not consider arguments raised for the first time on appeal.")). Even if such support were to exist in the record, the trial court stated that Plaintiffs provided no rational argument in support of their argument regarding insurance and the trial court acted within its discretion in denying Plaintiffs' Motion on that basis. *See, e.g., O'Dell v. Basabe*, 119 Idaho 796, 809, 810 P.2d 1082, 1095 (1991) (A trial court should deny a motion for a new trial where the motion for a new trial fails to allege the grounds with sufficient particularity.). Therefore, this Court should find that Plaintiffs have waived their right to assert this issue on appeal because Plaintiffs did not raise these issues before or during trial, and failed to provide sufficient factual and legal basis for their arguments.

Next, Plaintiffs argument that "jury instruction no. 12 which prohibits the mention of insurance and informs the jury not to consider the issue of any insurance causes an injustice and is a 'legal fiction'" is likewise raised for the first time on appeal. *Appellants' Brief*, p. 22, ¶ 2. "To preserve an objection to

a jury instruction given or refused, a party must timely object to the instruction on the record and state the grounds of the objection.” *Chapman v. Chapman*, 147 Idaho 756, 761-62, 215 P.3d 476, 481-82 (2009). Therefore, this Court should hold that Plaintiffs have waived their right to assert this issue for the first time on appeal.

Plaintiffs argue that “Rule 411 should be expanded to allow the court to give instructions on health issues related to such factors as age, medications, limitations or other unusual circumstances and allow the mention of the real party in interest, to-wit: insurance. *Appellants’ Brief*, p. 23, ¶ 3 (emphasis added). Initially, the health issues Plaintiffs reference are not something that the court needs to instruct the jury. These are issues that can be addressed by a party during direct and cross-examination and have no bearing on legal instruction. The purpose of jury instruction is to “present general principles of law that are accurate, uniform, and understandable.” *I.D.J.I., Introduction, sub-paragraph B*. This is merely an attempt by Plaintiffs to cover up their real argument that they should be able to reference liability insurance. Allowing the parties to a lawsuit to use liability insurance as a sword would eliminate the right to a fair trial and inject unfair prejudice against the insured party tainting the actual issues before the jury. This is exactly the type of harm that Idaho Rules of Evidence 402, 403, and 411 were enacted to prevent. Upholding Plaintiffs’ arguments regarding insurance would deny any defendant with liability insurance the opportunity to a fair trial. This Court should not let Plaintiffs’ “perceived injustice” from an unfavorable jury verdict change the Idaho Rules of Evidence to give Plaintiffs an upper hand.

E. The Trial Court Did Not Abuse Its Discretion In Denying Plaintiffs’ Motion For A New Trial Because Plaintiffs Failed To Provide Sufficient Factual And Legal Basis To Establish Plaintiffs Were Denied Due Process.

A trial court should deny a motion for a new trial where the “motion for a new trial fails to allege the grounds with sufficient particularity.” *O’Dell*, 119 Idaho at 809, 810 P.2d at 1095 (quoting *Luther v. Howland*, 101 Idaho 373, 375, 613 P.2d 666, 668 (1980)). This standard exists because when a trial court

is ruling on a motion for a new trial, the trial court is required to state both the factual basis and legal basis for its decision and the particular rule of the Idaho Rules of Civil Procedure under which the trial court is acting. *Id.* As a result, the Supreme Court of Idaho emphasized that “trial court should require the same particularity of the party seeking relief pursuant to a motion for a new trial.” *Id.* Accordingly, “[t]rial judges should not be required to attempt to guess at the applicable rule governing each charge of error claimed by the moving party” and “[i]t is incumbent upon counsel to set out the legal basis for each motion, set forth the factual basis in the record upon which the motion rests, and specify the applicable Rule of Civil Procedure.” *Id.* Therefore, a trial court does not abuse its discretion by denying a motion for a new trial that fails to set out a sufficient factual and legal basis in support of the motion.

In this case, the trial court denied Plaintiffs’ Motion for a New Trial, in part, because Plaintiffs failed to set out sufficient factual and legal basis to establish that Plaintiffs’ due process rights were violated. *R.*, pp. 224-225. In the Memorandum of the Plaintiffs in Support of New Trial, Plaintiffs argued “Plaintiffs were denied due process” because they were “not allowed to subpoena” Dr. McCormack to court. *R.*, p. 200, ¶ 1 (emphasis added). Plaintiffs argued “this manifest injustice hampered the ability to ask questions as [to] maximum medical improvement (MMI) or why an orthopedic surgeon has an opinion on eye problems when McCandless hit the window frame with his eye.” *Id.* However, as the trial court stated, Plaintiffs stipulated to the admission of Dr. McCormack’s IME reports into evidence and Defendant was under no obligation to call Dr. McCormack to testify at trial. *Id.* at p. 224-225. The trial court noted that Plaintiff could have retained their own expert to rebut the testimony of Dr. McCormack, but Plaintiffs chose not to retain such an expert. *Id.* at p. 225, ¶ 1. Ultimately, the trial court correctly found that “Plaintiffs present no case law in support of their assertions, nor do they adequately show how the absence of a defense witness fundamentally impacted their due process rights.” *Id.* Therefore, the trial properly addressed the issues raised by Plaintiffs’ Motion regarding Dr. McCormack and properly denied

Plaintiffs’ Motion for a New Trial because Plaintiffs failed to set out sufficient legal basis for their Motion.

Additionally, in support of Plaintiffs’ claim that they were denied their due process rights, Plaintiffs argue in *Appellants’ Brief* that a “motion in limine was propounded with response from plaintiffs” and the “same was never heard by the court.” *Id.* at p. 20, ¶ 1. However, the documents that Plaintiffs reference are not a part of the record and therefore, such argument should not be considered by the Court on appeal. *See, e.g., McClean v. Cheyovich Family Trust*, 153 Idaho 425, 431, 283 P.3d 742, 748 (2012) (“This Court is bound by the record and cannot consider matters or materials not part of or contained therein.”) (Internal quotation marks omitted)). Therefore, Plaintiffs’ arguments addressing motions in limine not contained in the record should not be considered by the Court.

F. The Trial Court Did Not Abuse Its Discretion In Ruling On Plaintiffs’ Motion For A New Trial Under Idaho Rule Of Civil Procedure 59(a)(1)(A)(C)(F)(G) and 59(d)(2).

The grounds for granting a new trial are set forth in Idaho Rule of Civil Procedure 59(a)(1), which provides in relevant part:

(1) Grounds for a new trial. The court may, on motion, grant a new trial on all or some of the issues, and to any party, for any of the following reasons:

(A) irregularity in the proceedings of the court, jury or adverse party;

...

(C) misconduct of the jury;

...

(F) excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice;

...

(G) insufficiency of the evidence to justify the verdict or other decision, or that it is against the law[.]

I.R.C.P. 59(a)(1)(A)(C)(F)(G). Different standards are applied to each factor and the legal analysis required by a trial court as to each factor is addressed separately below.

1. **The Trial Court Did Not Abuse Its Discretion In Denying Plaintiffs' A New Trial Under Idaho Rule Of Civil Procedure 59(a)(1)(A).**

I.R.C.P. 59(a)(1)(A) allows a court to grant a new trial on all or some of the issues where it is established that “irregularity in the proceedings of the court, jury or adverse party” prevented a fair trial. In making a decision under this section, a trial court considers “whether the irregularity had any effect on the jury’s decision” and whether there is a probability that a different result would occur upon the completion of a new trial. *Schmechel v. Dille, M.D.*, 148 Idaho 176, 180, 219 P.3d 1192, 1196 (2009); *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 608, 726 P.2d 706, 720 (1986)). It must also be noted that a new trial is not necessary merely because a jury does not award all of the special damages supported by the testimony, even though this testimony was not contradicted by other testimony. *Stewart v. Rice*, 120 Idaho 504, 505, 817 P.2d 170, 171 (1991).

Initially, it is important to note that most, if not all, of the arguments presented by Plaintiffs’ under Rule 59(a)(1)(A) are out of context because the arguments do not relate to irregularity in the proceedings of the court, jury, or adverse party. *Appellant’s Brief*, pp. 9-13. For example, Plaintiffs’ primary arguments are that the verdict the jury reached regarding liability and damages was not supported by the evidence. *Id.* These arguments do not address any “irregularity in the proceedings” but rather, address issues of inadequate damages appearing to have been given under passion or prejudice, which should be analyzed under Rule 59(a)(1)(F), and insufficiency of the evidence to justify the verdict, which should be analyzed under Rule 59(a)(1)(G). Regardless, Defendant will address Plaintiffs’ arguments.

First, Defendant will address Plaintiffs’ arguments regarding the insufficiency of the evidence to support the verdict. Plaintiffs’ argue that “no defense was presented by the defendant/respondent on any area of evidence presented by plaintiffs/appellants” and that “no experts of the defendant were presented

to contest any special damages.” *Appellants’ Brief*, p. 9, ¶ 1, 2. These arguments fail to consider the testimony elicited by Defendant’s counsel regarding liability and damages. *See Statement of Facts, supra*, pp. 10-14. For instance, regarding liability, Defendant established that Weddle sped around Defendant and stopped suddenly in front of Defendant contributing the accident. Tr. T., pp. 56-57. Likewise, regarding property damages, Defendant called into question the value of the Dodge at the time of the accident based on the common sense notion of depreciation. *Id.* at p. 234:13-25; 235-237. Regarding medical damages, the IME reports for Plaintiffs challenged the duration of treatment necessitated by the accident and the injuries causally related to the accident. R., Ex. 13, p. 56-57, 59. Regarding lost roofing wages, McCandless’s testified that he did not have a contract for the roofing job and his credibility was called into question when he testified that it would have taken him 25 8-hour days to roof a friend’s house that was 1024 square feet. Tr. T., p. 237-238. Regarding lost fishing wages, Blackeagle did not produce any records to prove her lost wages from fishing and stated that she did not fish in 2013 because she was concerned the fish were subject to radiation. *Id.* at p. 189-190. Ultimately, the record is full of evidence that calls into question liability and Plaintiffs’ claimed damages. Even if the evidence was not contradicted, a new trial is not warranted because a jury does not award all of the special damages supported by the testimony. *See Stewart, supra*.

Second, Defendant will address Plaintiffs’ arguments that Defense counsel’s arguments were “not accurate nor based upon evidence before the jury” and “had an actual bias upon the jury . . .” *Appellant’s Brief*, p. 11, ¶ 3; p. 12, ¶ 3. In Idaho, where a party fails to object when an improper comment is made, the argument is waived. *Quick v. Crane*, 111 Idaho 759, 782, 727 P.2d 1187, 1210 (1986); *see also Slack v. Kelleher*, 140 Idaho 916, 921, 104 P.3d 958, 963 (2004) (“Generally, the [Supreme Court of Idaho] will not consider an alleged error on appeal unless a timely objection to the alleged error was made at trial”).

Here, Plaintiffs' counsel did not object during Defense counsel's closing argument regarding the value of the Dodge, so any arguments to that effect were waived by Plaintiffs.

Additionally, Plaintiffs' argument that Defense counsel improperly objected to "the \$5,000.0 roofing income offered to Mr. McCandless as not disclosed" and that "this had an actual bias upon the jury because the jury ignored this evidence" is not supported by the record because Defense counsel never made that objection. Tr. T., pp. 203-238. Defense counsel objected to McCandless's testimony regarding the loss of fishing income because Defense counsel did not believe that information was previously disclosed. Tr. T., p. 226:14-25; 227-229. Defense counsel, however, did not object to McCandless's testimony regarding his alleged loss of roofing income as alleged by Plaintiffs. *Id.* Therefore, Plaintiffs did not establish that there were any irregularities that had any effect on the jury's decision.

2. The Trial Court Did Not Abuse Its Discretion In Denying Plaintiffs' A New Trial Under Idaho Rule Of Civil Procedure 59(a)(1)(C).

Idaho Rule of Civil Procedure 59(a)(1)(C) applies to motions for new trial based on juror misconduct. In analyzing whether a motion for new trial should be granted based on juror misconduct, a trial court "must determine whether there has been a showing that prejudice reasonably could have occurred." *Levinger v. Mercy Med. Ctr.*, 139 Idaho 192, 196, 75 P.3d 1202, 1206 (2003) (internal citation marks omitted) (quoting *Leavitt v. Swain*, 133 Idaho 624, 629, 991 P.3d 349, 354 (1999)). However, before a trial court is required to make such a determination, "the party seeking a new trial must demonstrate that juror misconduct occurred." *Id.* In meeting this requirement, counsel for the party seeking a new trial must set out the legal basis for its motion, factual basis for its motion, and the applicable Rule of Civil Procedure, because a trial court "should not be required to attempt to guess at the applicable rule governing each charge of error claimed by a moving party." *Id.* at 197, 75 P.3d at 197.

For instance, in *Levinger*, a plaintiff moved for a new trial based on juror misconduct by filing an affidavit of one of the jurors who claimed that another juror was biased against the plaintiff. *Id.* at 195,

75 P. 3d. at 1205. The trial court denied the plaintiff's motion for a new trial because the affidavit used to support the motion was inadmissible pursuant to Idaho Rule of Evidence 606(b). *Id.* On appeal, the Supreme Court of Idaho found that the plaintiff's motion for new trial based on jury misconduct was properly denied because the plaintiff failed to state with particularity the legal basis for the motion and failed to state the basis in the record upon which he was making his motion. *Id.* at 198, 75 P.3d at 1208. With regard to the insufficient factual basis, the plaintiff's briefing did not inform the court that he alleged that a juror had lied during voir dire, which was the basis for the motion. *Id.* The Court held that the trial court properly denied the motion because the factual basis was not set forth in the plaintiff's motion and this failed give the trial court and opposing counsel sufficient notice. *Id.*

In this case, Plaintiffs' Motion for a New Trial based on juror misconduct was properly denied by the trial court because Plaintiffs' Motion did not identify with particularity the juror misconduct that was the basis for their motion and it did not state with particularity the legal basis for the motion. R. pp. 198-202. Plaintiffs' allegations relating to juror misconduct were not set forth in the Memorandum of the Plaintiffs in Support of New Trial, but rather included in the Dunn Affidavit. R. pp. 189-197. And the only jury misconduct asserted in the Dunn Affidavit was that "[t]he jury verdict is an impossibility because the jury used round numbers which were totally devoid in the evidence presented and were totally unrebutted by the defendant in any manner." R. p. 191, ¶ 4. This claim of "jury misconduct" is based on pure speculation and not supported by any reference to the record. *Id.*

Not only did Plaintiffs fail to establish sufficient factual basis for juror misconduct through sworn statement or otherwise, Plaintiffs also failed to set forth with particularity the legal basis for their juror misconduct claim. *Id.* For instance, the Memorandum of the Plaintiffs in Support of New Trial contains no support for or reference to the legal basis for juror misconduct claims under I.R.C.P. 59(a)(1)(C). R. pp. 198-202. The only reference to the legal basis for juror misconduct claims is contained in the Dunn

Affidavit in the form of a heading that reads, “I.R.C.P. Rule 59(a)(1)(A)(C)”. R. p. 191. There is no legal authority contained under the heading, only factual assertions made by Plaintiffs’ counsel. *Id.* at pp. 191-192, ¶¶ 1-7. Therefore, the trial court properly denied Plaintiffs’ Motion because Plaintiffs failed to provide a sufficient factual and legal basis to notify Defendant and the trial court of the jury misconduct justifying their Motion for New Trial.

3. The Trial Court Did Not Abuse Its Discretion In Ruling On Plaintiffs’ Motion For A New Trial Under Idaho Rule Of Civil Procedure 59(a)(1)(F).

Idaho Rule of Civil Procedure 59(a)(1)(F) applies to motions for a new trial on the issue of damages based upon excessive or inadequate damages. *Pratton v. Gage*, 122 Idaho 848, 851, 840 P.2d 392, 395 (1992) (citing *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (1987)). A new trial is warranted where the damages awarded by a jury appear to have resulted from passion, prejudice, or unjust behavior. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 248, 245 P.3d 992, 1000 (2010); *see also Collins v. Jones*, 131 Idaho 556, 558, 961 P.2d 647, 649 (1998) (Holding that a new trial or additur should be granted where the substantial difference between a court’s award and a jury award can only be explained by unjust behavior)). A trial court properly upholds a jury’s damages award where it is evident that the court: “(1) contemplated what it would have awarded if it had been the finder of fact[;] and (2) determined that any difference between the jury award and what the court would have awarded is not so great as to show a verdict based on passion or prejudice.” *Litke v. Munckhoff*, 163 Idaho 627, 634-635, 417 P.3d 224, 231-232 (2018).

A trial court provides sufficient explanation under Idaho Rule of Civil Procedure 59(a)(1)(F) for granting or denying a motion for new trial if there is “adequate explanation to allow the reviewing court to understand the basis upon which the action was taken[;]” which includes the factual basis and the Idaho Rule of Civil Procedure under which the court is acting. *Pratton*, 122 Idaho at 851, 840 P.2d at 395 (1992) (citing *O’Dell*, 119 Idaho at 809, 810 P.2d at 1095. For instance, a trial court sufficiently stated the basis

for its decision where the court weighed the evidence, determined the credibility of witnesses, considered the nature of a plaintiff's injuries, and found that a jury award was reasonable and similar to what the court would have awarded. *Litke*, 163 Idaho at 635, 417 P.3d at 232. In contrast, a trial court did not give an adequate explanation to allow the reviewing court to understand the basis for its decision when it failed to identify the statute that it was acting and merely stated "that the jury awarded inadequate damages and their verdict appears to have been given under the influence of passion or prejudice." *Pratton*, 122 Idaho at 853, 840 P.2d at 397.

It is important to note that in making its determination under Rule 59(a)(1)(F), a trial court must respect the "collective wisdom of the jury and the function entrusted to it under our constitution" because it is the job of the jury to award damages based on its sense of fairness and justice. *Quick v. Crane*, 111 Idaho 759, 768, 727 P.2d 1187, 1196 (1986). A trial court should defer to the damages awarded by a jury that are found to be the "product of two separate entities valuing the proof of the plaintiff's injuries in two equally fair ways[,]" even if the difference between the jury award and what the court would have awarded is significant. *Id.* at 769, 727 P. 2d. at 1197.

(a) Property Damages.

In this case, the trial court properly upheld the jury's property damage award of \$15,500 because the court contemplated what it would have awarded based on the evidence presented and found that disparity between the jury's valuation and the court's valuation was not so different as to show a verdict based on passion, prejudice, or unjust behavior. R. pp. 220-226. Although the trial court did not state specifically what it would have awarded to Plaintiffs for the damage to the Dodge, a court is not required to do so. *Pratton*, 122 Idaho at 852, 840 P.2d at 397. It must also be noted that the trial court stated that its decision was based on Idaho Rule of Civil Procedure 59(a), but did not specify the subsection 59(a)(1)(F). However, the Court should find this to be harmless error because Plaintiff did not sufficiently

state the legal basis for its arguments for new trial and trial judges are not required to attempt to guess at the applicable rule governing each charge of error claimed by the moving party. *See Levinger, supra*.

Plaintiffs' argument that the jury must have been acting under passion or prejudice because Defendant "presented zero evidence on property value", overlooks the fact that the only evidence Plaintiffs presented in support of their property damage claim was the opinion testimony of McCandless. R. pp. 223-224; 235-236. In summary, McCandless's testified that: he purchased the Dodge brand new in 2005 and paid \$42,396 for the Dodge; he spent anywhere from \$11,000-\$14,000 in add-ons for the Dodge; and he looked up 19 comparable vehicles to the Dodge and estimated that the Dodge was worth "approximately \$35,000" plus add-ons. *Id.* at pp. 224; 234:13-25; 237:12-14; 236:1-15. McCandless testimony lacked any specifics about the Dodge for which the jury likely had questions. *Id.* For instance, McCandless did not produce any evidence regarding the likely depreciation of the Dodge, did not introduce into evidence any receipts demonstrating the value of the add-ons, and did not discuss the specifics of the "comparables" such as the year, mileage, condition, or specific value of each comparable. *Id.* The jury was not required to accept the Plaintiffs' valuation of the Dodge simply because Defendant did not produce evidence on the value of the Dodge. *See Stewart, supra*. Moreover, it is Plaintiffs' burden of proof and the jury is not required to accept McCandless's opinions as to the value.

The trial court and the jury heard the same testimony and observed the same witnesses, and the trial court acted within its discretion in holding that the jury's property damage award of \$15,500 was not so disparate from its own to establish that the award was influenced by passion or prejudice. R. p. 222. The trial court is in the best position to weigh testimony, observe witnesses, and determine whether evidence supports the damages awarded, and this is reflected in the trial court's holding regarding the property damages awarded by the jury. Therefore, the trial court did not abuse its discretion when it denied Plaintiffs' a new trial on the property damages awarded by the jury.

(b) Medical Damages and Lost Wages

The trial court analyzed the jury's award for medical damages and lost wages together because the Special Verdict form made no distinction between medical damages and lost wages. R., p. 223. Instead, the Special Verdict termed Plaintiffs' medical damages and lost wages as "actual expenses". *Id.* at pp. 222-223. The jury awarded "actual expenses" to McCandless in the amount of \$4,900 and \$10,200 to Blackeagle. *Id.* at p. 222, ¶ 3. The trial court properly weighed the evidence presented regarding Plaintiffs' medical damages and lost wages, and determined the disparity between what it would have awarded and the jury's award was not so great as to establish the award was influenced by passion, prejudice, or unjust behavior. R. pp. 222-223.

In support of its opinion, the trial court relied on the fact that the accuracy and validity of Plaintiffs' total claimed medical bills and lost wages were challenged by Defendant. R. p. 223, ¶ 1. The trial court also explained that "[it] is unclear what portion if any of the jury's valuation of damages included the claimed medical bills or the claimed lost wages" because the "verdict form, as agreed on by the parties, made no distinction between medical damages and lost wages." *Id.* The fact that Plaintiffs' medical damages and lost wages were combined as "actual expenses" on the special verdict form was important to the trial court because Plaintiffs argued that the round numbers awarded by the jury did not match the evidence presented. *Id.* The trial court, however, found Plaintiffs arguments in that regard to be unpersuasive because there was no way for the court to determine the specific amounts awarded to Plaintiffs for their medical damages or lost wages. *Id.* The trial court properly recognized the decision as one of discretion and determined that the actual expenses awarded to each McCandless and Blackeagle were consistent with evidence presented and were not given under passion or prejudice. *Id.*

Plaintiffs argue that the medical damages awarded by the jury are not supported by the evidence because "the IME, prepared by the defendant's expert, introduced into evidence by plaintiff indicated the

medical treatment was fair and reasonable and more likely than not to a reasonable degree of medical certainty.” *Appellant’s Brief*, pp. 14; 15, ¶ 3. However, as the trial court noted, this is simply not true. R. p. 223, ¶ 1. The IME of McCandless opined that his diminished right eye vision, left leg edema, and nutritional assessments were not related to the accident. R. pp. 56-57, 59. Likewise, the IME of Blackeagle opined that Blackeagle had reached maximum medical improvement by January 2012, which means any medical expenses incurred after the January 2012 may have not have been considered by the jury. R., pp. 60-81. This evidence suggests that the jury may not have awarded Plaintiffs the total medical damages claimed.

Similarly, the evidence presented regarding Plaintiffs’ lost wages for the loss of a roofing job and the inability to fish was anything but concrete. With regard to the lost wages from the roofing job, McCandless testified that he lost out on a roofing job for his friend that he valued at \$5,000. Tr. T., pp. 222-223. McCandless, however, admitted that he never created a bid for the job or entered into a contract with his friend for the job, and McCandless never called his friend to testify on his behalf. *Id.* McCandless also testified that he thought the roofing job would have taken him 25 days at 8 hours per day to roof the 1024 square foot home. *Id.* at pp. 237-238. With regard to the lost wages from not being able to fish, Blackeagle testified that “they definitely had income” from fishing, but she was unable to produce any records in support. *Id.* at p. 164-65. Evidence was also presented that Blackeagle quit fishing because she was concerned the fish had been subject to radiation. *Id.* at pp. 189 -190. Further, McCandless testified that his ability to participate in the fishing enterprise was not affected by the accident. *Id.* at p. 221:10-18.

As the trial court stated in its Opinion and Order on Motion for New Trial, the testimony elicited regarding Plaintiffs’ claimed medical damages and lost wages was conflicting. R., pp. 222-223. The trial court’s decision demonstrates that the court weighed the evidence and properly reached a decision that

was within its discretion. Therefore, the trial court did not abuse its discretion when it denied Plaintiffs' a new trial on the actual expenses awarded by the jury.

4. The Trial Court Did Not Abuse Its Discretion In Ruling On Plaintiffs' Motion For A New Trial Under Idaho Rule Of Civil Procedure 59(a)(1)(G).

Idaho Rule of Civil Procedure 59(a)(1)(G) provides that a new trial may be granted in cases where there is insufficient evidence to justify the verdict or other decision, or where it is against the law. A two element test is used to determine whether there are sufficient grounds to grant or deny a new trial pursuant to Idaho Rule of Civil Procedure 59(a)(1)(G): (1) the court must find that the verdict is against the clear weight of the evidence and that the ends of justice would be served by vacating the verdict; and (2) the court must conclude that a retrial would produce a different result. *Litke*, 163 Idaho at 635, 417 P.3d at 232 (quoting *Lanham v. Idaho Power Co.*, 130 Idaho 486, 498, 943 P.2d 912, 924 (1997)). To satisfy this test, there must be a probability that a different result will be obtained in a new trial, and a mere possibility of a different result is insufficient to justify granting a new trial. *Id.* In making its determination whether there is insufficient evidence to support the verdict or other decision, the "court must weigh the evidence presented at trial and grant the motion only where the verdict is not in accord with its assessment of the clear weight of the evidence." *Id.* Therefore, a trial court properly denies a motion for a new trial under Idaho Rule of Civil Procedure 59(a)(1)(G) where the court weighs the evidence presented at trial, determines that the verdict was just, and determines that retrial would not produce a different result.

In this case, the trial court properly weighed the evidence and found that the evidence supported the property damages and actual expenses awarded to Plaintiffs, but determined the general damages awarded to Blackeagle were insufficient based on the evidence presented at trial. R., pp. 220-224. Specifically, the trial court determined that the property damages and actual expenses awarded to Plaintiffs by the jury were not so disparate from the court's own analysis to justify a new trial. *Id.* at p. 222-223; *See also supra*, Argument, Section F, sub-paragraph 3. However, the Court found that the based on its review

of the evidence, that the general damages awarded to Blackeagle in comparison to the general damages awarded to McCandless were unusual based on the proportional degree of injuries suffered by each as a result of the accident. R., pp. 223-224. Therefore, the Court acted within its discretion in granting Plaintiffs a new trial conditioned upon Defendant's acceptance of an additur of \$4,000 in general damages to Blackeagle.

G. Defendant Is Entitled To Costs And Fees On Appeal.

Defendant respectfully requests the Court award attorney fees and costs incurred for this appeal. This request is based on Idaho Appellate Rules 35(b)(5), 40, and 41(a), Idaho Rule of Civil Procedure 54(e)(2), and Idaho Code § 12-121.

Idaho Appellate Rule 40 states that costs "shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." Defendant is unaware of any other provision of law that would forbid his recovery of costs should he prevail on appeal. Therefore, Defendant respectfully requests this Court award his costs as the prevailing party.

Attorney fees may be awarded pursuant to Idaho Appellate Rule 41(a) and Idaho Code § 12-121 when an appeal is brought frivolously, unreasonably, or without foundation. *Durrant v. Christiansen*, 117 Idaho 70, 785 P.2d 634 (1990). For instance, in *Durrant*, an award of attorney fees was justified "where the plaintiffs presented no persuasive argument in support of the contention that the district court . . . abused its discretion or misapplied the law[.]" *Id.* The Court in this case should find that Defendant is entitled to an award of attorney fees because Plaintiffs' arguments were presented without legal foundation and without persuasive argument. Therefore, attorney fees should be awarded to Defendant pursuant to Idaho Appellate Rule 41(a) and Idaho Code § 12-121.

IV.

CONCLUSION

This issues presented by Plaintiffs on appeal should be considered waived because Plaintiffs failed to provide sufficient factual and legal basis for the issues presented. Plaintiffs did not provide any legal analysis in support of the application of the law to the relevant facts and this Court will not address arguments that are simply mentioned by a party without any cogent argument or legal authority. Further, the Court is not required to address Plaintiffs' general attack on the findings and conclusions of the trial court because Plaintiffs do not support their arguments with evidentiary and legal support required to preserve an issue for appeal. Therefore, the Court should treat the issues presented by Plaintiffs on appeal as waived.

The trial court did not abuse its discretion in granting a new trial conditioned upon Defendant's acceptance of a proposed additur. The trial court properly weighed the evidence and determined that the difference between its evaluation of Blackeagle's general damages and the jury's evaluation of Blackeagle's general damages was sufficient to suggest that the jury's evaluation of damages was the result of passion or prejudice. Therefore, the trial court acted within his discretion in providing an additur to Blackeagle's general damages as an alternative to granting Plaintiffs a new trial.

The trial court did not abuse its discretion in precluding evidence of insurance because Plaintiffs arguments were not supported by rational argument and amending the Idaho Rules of Evidence to allow the admission of liability insurance to prove negligence would deny parties with liability insurance the right to a fair trial. Additionally, Plaintiffs waived their right to assert their arguments regarding insurance on appeal because they failed to object to these issue during trial and are raising these issues for the first time on appeal. Therefore, the trial court properly denied Plaintiffs' Motion for a New Trial regarding the

mention of insurance because Plaintiffs' argument lacked the requisite particularity and this Court should not consider arguments raised by Plaintiffs for the first time on appeal.

The trial court did not abuse its discretion in holding Plaintiffs' due process rights were not violated. Plaintiffs failed to allege the grounds for their argument that they were denied due process with sufficient particularity. As a result, the trial court properly required Plaintiffs to provide the same particularity in supporting their Motion for a New Trial as the trial court was required to provide when ruling on their motion. Additionally, this Court should not consider arguments raised by Plaintiffs that are not supported by the record, namely, Plaintiffs' argument regarding a prior motion in limine. Therefore, Plaintiffs failed to establish that they were denied due process by not being able to question Dr McCormack at trial and the trial court acted within its discretion in denying Plaintiffs' Motion on that basis.

The trial court did not abuse its discretion in ruling on Plaintiffs' Motion for a New Trial under Idaho Rules of Civil Procedure 59(a)(1)(F)(G) because the trial court properly determined there was substantial and competent evidence to support the jury's award of property damages and actual expenses, and determined that the general damages awarded to Blackeagle were given under the influence of passion or prejudice. As it relates to Plaintiffs claim under Rule 59(a)(1)(A)(C), Plaintiffs failed to establish that there were any irregularities that had any effect on the jury's decision and did not provide sufficient factual and legal basis to establish a claim of juror misconduct. Therefore, the trial court properly ruled on the issues raised by Plaintiffs under Idaho Rule of Civil Procedure 59.

DATED this 27th day of August , 2019.

BRASSEY CRAWFORD, PLLC

By /s/ J. Nick Crawford
J. Nick Crawford, Of the Firm
Attorneys for Defendant/Respondent Max E. Pease

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August , 2019, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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