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**Attorney for Appellants**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| **DANA R. MCCANDLESS and MABEL, ROBIN BLACKEAGLE,** | ) | |
| | ) | **Docket No.: 46936-2019** |
| **Plaintiffs/Appellants,** | ) | **District Court: Case No. CV-2013-01332** |
| **vs.** | ) | |
| **MAX E. PEASE, Also; BRENT WEDDLE and CHARLES WEDDLE (released from lawsuit),** | ) | |
| **Defendant/Respondent.** | ) | |

# APPELLANTS' REPLY BRIEF

**Appeal from the District Court of the Second Judicial District for Nez Pearce County**
**Honorable Jeff M. Brudie, District Judge, Presiding**

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**RESPONDENT**

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## REPLY AND REBUTTAL

**1. A new trial should be granted to the appellants.**

**Most jury trials are unique from one another. Points of law remain similar for the judge to use and or apply with the assistance of the jury. However, every jury trial is different. At the conclusion of this jury trial in the case at bar, the plaintiffs/appellants requested a new trial based upon I.R.C.P. 59 and the factors contained therein. The case law is fairly standard indicating that a judge must exercise discretion based upon perceived errors of law, passion or prejudice from the jury and/or other irregularities.**

**The district judge ruled in his decision, on one of the issues involving general damages as follows:**

**" Accordingly, the court finds the disparate award of $1,000 to Blackeagle appears to be given under the influence of passion or prejudice". R. p. 236.**

**Passion or prejudice is a key element of any request for a new trial. The court found this element in a portion of its decision. Appellants have pointed to irregularities in the evidence that are very obvious upon an examination of the transcript, exhibits and record as cited in the opening brief. Those irregularities of fact on special damages (medical, vehicle, health care, lost income) were set forth in detail in the appellants' opening brief.**

**"Our prior cases of Sanchez v. Galey, 112 Idaho 609, 733 P.2d 1234 (1986), Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986), and Dinneen v. Finch, 100 Idaho 620, 603 P.2d 575 (1979), provide that an additur or a remittitur may only be granted as an alternative to the granting of a new trial. See also Smallwood v. Dick, 114 Idaho 860, 761 P.2d 1212 (1988)."**

*Howes v. Fultz*, 115 Idaho 681, 769 P.2d 558, (1989).

"In other words, the trial judge can grant an additur or remittitur only by offering a new trial as an alternative," Id. At 687.

**The respondent relies upon the 1985 case of *v. Scott,* 108 Idaho 506, 700 P.2d 128 (Idaho App. 1985) for the proposition that the "non-moving party" has total right for the acceptance or denial of an additur. The court in *Scott* gives that privilege to the non-moving party. In that case, the court of appeals granted a remitter on the compensatory damages and an additur on the punitive damages. The court granted a new trial subject to the non-moving party accepting the additur and remitter.**

**In the 1989 case by this court of *Howes v. Fultz*, 115 Idaho 681, 769 P.2d 558, (1989), this court found that the court did not found "passion or prejudice" and denied a new trial; but, held that an additur or remitter may only be granted "as an alternative to the granting of an new trial." It is clear that an additur is only an alternative and the primary remedy is a new trial.**

**Appellants urge this court to accept the language of *Howes* to the exclusion of *Scott.***

**The trial court did not allow the moving party, the appellants, the opportunity of accepting the additur to the exclusion of a new trial. Appellants desire a new trial. The court gave total control of the additur to the respondent.**

2. **Respondent is incorrect in asserting that the factual and legal issues are not preserved in the opening brief.**

**On each element of the lack of evidence or irregularities by the jury, there are cites in the opening brief to the record or transcript. It must be remembered that the respondent did not provide any defense or rebuttal to the non-contested evidence of the appellants. The only reliance by the respondents was cross-examination which did not impeach or discredit the monetary amounts testified or shown by exhibit of the appellants. This argument is a total "red herring" submitted by the respondent.**

**- Liability: opening brief pp. 10-11; footnotes 13-15.**

**-Unrebutted vehicle damages: Opening brief pp. 12, 13-14, 16: Footnote 17, 20, 21, 22, 28; see also, *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003).**

**-Income damages: Opening brief pp. 12, 15, 16; Footnote 23, 29**

**-Medical costs: Opening brief pp. 12-13, 14, 15, 16; Exhibit A, Exhibits 13, 14, 15, 16, 17 and 18; Footnote 24, 26**

**-General Damages: (discussed above).**

**-Depreciation: none should occur after 7.5 years. The value of the motor vehicle should have been at the date of the collision. Pp. 10-11; footnote 16.**

**For the respondent to say that the issues were not adequately preserved is a total fabrication and fallacy.**

3. **The issue regarding insurance.**

**In the opening brief of the appellants, it was never suggested that I.R.E. 411 be removed or done away with from usage. The respondent misinterprets the argument. What is urged upon this appellate court is there should be an addition to Rule 411 to the court during a jury trial of specific instances when insurance can be mentioned. At page 22 of the appellants opening brief it is suggested that the respondent was merely a "prop". His health and inability to understand the proceedings is alleged. Footnotes 45 and 46 were cited in the transcript and record to cite to the health and the jury instruction that prohibits the mention of insurance. The reasoning for this prohibition is understood as cited in the case law contained in the opening brief. However, the rule should be examined and allowances should be made to the judge to make rulings when insurance can be mentioned. This case is the perfect example of the appellants being given an injustice for the sympathy and health of the elderly respondent.**

**Actual bias is alleged to have existed by the inability to be truthful and honest of the real party in interest, to-wit: insurance. The appellants have not said do away with the rule but believe that actual and real bias was a by-product of a severely aged and non-ambulatory respondent. (See footnote 47 at page 49 of the transcript).**

**The appellants ask for reform. Nothing more.**

**This is another factor to be considered in the request for new trial in a collective manner and not standing alone.**

4. **The due process argument.**

**The appellants have set forth the inability to call the IME expert retained by the respondent. It was argued at trial that no contact can be made with the respondent's expert and that subpoena of this witness was out-of-state. Yet the appellants were forced to the I.M.E. in Spokane to complete discover. I.R.C.P. 26 does not make a provision for the subpoena of the other party's expert. A motion, filed by the defendant and replied to by the plaintiff was never considered by the court. The appellants/plaintiffs tried to bring this matter to the attention of the court and argued that they were denied due process.**

**This issue is fully discussed in the opening brief. Rule 26 needs to be corrected to allow the subpoena of evidentiary experts. An example is the I.M.E. states the work maximum medical improvement. That does not mean the patient is back to the pre-injury status. It means that is as good as the patient is going to get. Counsel for the defendant/respondent argued to the jury that the appellants were healthy. The appellants were prejudiced. This is another "factor" to be considered in the request for a new trial in a collective manner and not standing alone.**

5. **The appellants stand by their opening brief on I.R.C.P. 59 and the subdivisions.**

**The appellants have nothing to add that has not been stated in their opening brief and do not respond to the respondent's arguments.**

6. Attorney fees and costs.

Idaho follows the American Rule wherein there must exist a statutory or contractual basis in awarding fees. Respondent cites I.C. §12-121 for the proposition that appellants have filed the matter frivolously or without foundation. I.R.C.P. 54 (e ) (2) contains the language of pursued frivolously, unreasonably or without foundation.

The factual matters concerning the health care amounts, the vehicle cost, the lost wages, the general damages all indicate that the matter before this court is with proper foundation. The court even states on general damages that the jury acted under passion or prejudice. Appellant believes the factors, overall, entitle a new trial. Furthermore, the court cannot offset insurance proceeds received by the appellants for vehicle damages. In addition, the appellants request changes to I.R.E. 411 and I.R.C.P. 26. The appellants did not ask reversal on these rules but rather review and modification.

The respondent is not entitled to fees or costs.

## CONCLUSION

**The respondent's brief does not set forth any arguments that would change or excuse the requests of the appellants in their opening brief. As such, the appellants request a new trial and the denial of any requests of the respondent.**

**Dated this 16th day of September, 2019.**

**/s/ Robin D. Dunn**
**Robin D. Dunn**
**Attorney for Appellants**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY that on the 16th day of September, 2019, a true and correct copy of the foregoing was delivered, via the E-filing system of I-court as set forth in the Idaho Appellate Rules to the following:**

| | |
|---|---|
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