II. MAJOR ELEMENTS OF LOCAL PROCEDURE

A. DISCOVERY

Discovery includes various means of seeking information prior to trial. The most common discovery tools are interrogatories, requests for production of documents, depositions, requests for admission and requests for physical or mental examinations. A brief description of each follows below.

1. Interrogatories

Va. Supreme Court Rule 4:8 allows each party to submit not more than 30 interrogatories, including subparts. Rule 4:8 (g). The format requires that the answers to be inserted after restating the questions, following the word "Answer." The answers must be under oath. Rule 4:8(a). The interrogatories should be crafted only after thinking about facts of the case. It is important that an interrogatory request the amount of liability insurance available to pay any judgment against the defendant. Interrogatories should seek to learn the details of the party's version of the case and any claims or defenses asserted in the litigation.

Practice Pointer: Request that the Defendant provide the factual and legal basis for any affirmative defenses or any denials of your factual and legal assertions in the Complaint. *See: Ford Motor Co. v. Benitez*, 273 Va. 242 (2007) which held it is sanctionable to assert defenses without factual support.

You should request the identity of any expert who will testify, along with the opinions and underlying facts which support such opinions. The interrogatories should also inquire about the opponent's education, employment history and any criminal convictions. Other important subject matters include statements made by either party, paying fines or pleading guilty to a traffic charge from the collision and the identity of witnesses.

Each party is allotted 21 days within which to file any objections and within which to respond to the discovery. Objections may be considered waived if not noted within 21 days after receipt. Do not file the answers or objections with the court unless you are filing a motion to compel discovery. Rule 4:8(C).

A sample set of interrogatories is attached.

2. Requests For Production of Documents

Rule 4:9 allows a party to request documents or things. This rule also permits the inspection of tangible items and entry onto the land or property of a party to inspect. The requests should ask for copies of any liability insurance policies which might pay a judgment, photographs of the parties or anything at scene of the accident or incident, damage estimates or repair documents, written statements from parties or witnesses, and information about the motor vehicle or product which caused the injury. If improper operation or malfunctioning of a vehicle or product is alleged, you must request repair logs, repair schedules, inspections and other relevant information. Each party should request any document subpoenaed by the opponent where the subpoena is returnable to the party and not the clerk of court. This Request is made pursuant to Virginia Code §8.01-417(B). If the subpoena is returnable to the court, you will likely have to get the documents from the court.

The defense usually requests the plaintiff's medical records generated as a result of the incident at issue, as well as past medical records.

If the operating condition of a vehicle is at issue, you may also want to inspect the vehicle through a request under this rule.

A sample set of requests for production is attached.

3. Depositions

Virginia Supreme Court Rule 4:5 allows for depositions upon oral examination. Depositions are commonly used to secure needed information about the parties' claims and to develop the areas for cross examination and impeachment. Party depositions may be taken in the city or county where the suit is pending, in an adjacent city or county, where the parties agree, or where a court may designate after finding good cause. Rule 4:5(a)(a1)(i). Non-party depositions must be taken in the city or county where the non-party resides, is employed or has a principal place of business. Of course the non-party can agree to another location and for good cause, the court can always order a non-party to appear at another location. Rule 4:5(a)(a1)(ii). You will typically have to subpoena a non-party to appear for deposition.

Depositions taken out of state are controlled by Rule 4:5(a)(a1)(iii) and allow for depositions before a person authorized to administer an oath where the deposition will be held, or before a person appointed or commissioned by the court in which the action is

pending or pursuant to a letter rogatory. A letter rogatory will include a list of questions which are to be answered under oath.

The Uniform Interstate Depositions and Discovery Act states that depositions and related documentary production sought in Virginia pursuant to a subpoena issued under the authority of a foreign jurisdiction shall be subject to the provisions of the Uniform Interstate Depositions and Discovery Act. Virginia Code §§ 8.01-412.8 through 8.01-412.15. A subpoena issued by a clerk of court under this article shall be served in compliance with the applicable statutes of the Commonwealth for service of a subpoena. § 8.01-412.11. This use of this provision to facilitate discovery in foreign lawsuits is conditioned on reciprocal privileges granted attorneys needing discovery in the foreign jurisdiction. § 8.01-412.14.

Practice Pointer: A party should depose the opposing party's expert witness, subject to not doing so where the expert designation is not harmful to your case or is so limited in scope that a deposition would not be productive. If you depose an expert, you are required to pay the expert's fees and expenses. Rule 4:1(b)(4)(A)(ii). It has become common for some experts to charge outrageous fees, usually in an effort to discourage contact with the lawyers and avoid litigation. An expert's fees are always subject to review for reasonableness by the court. Nevertheless, fees of $1000.00 per hour for highly qualified medical specialists will likely be approved.

Rule 4:5(b)(6) allows a party to depose a corporation or partnership or governmental agency through the testimony of a representative designated to speak for and bind the entity. The notice of deposition for such designated representative shall set forth the topics to be questioned at deposition.

A sample Rule 4:5(b)(6) notice of deposition is attached.

Rule 4:5 also contains subparts. The subparts include how to require the production of documents at the deposition (use a subpoena duces tecum if a nonparty or list the documents if a party) -Rule 4:5 (b)(1), how to defend against oppressive or embarrassing conduct (seek a court order and where feasible, call for a judge during the deposition) -Rule 4:5(d), and how to change the transcript (make edits on the errata sheet within 21 days of receipt of the transcript) - Rule 4:5(e). There are also sanctions for failure to attend a deposition. Rule 4:5 (g).

Practice Pointer: If you fail to subpoena a non-party witness who you noticed for deposition, and such witness does not appear, you may be required to pay for the time

of your opponent. (Rule 4:5 (g)(2).

Rule 4:2 permits a deposition even before a lawsuit is filed, but only under limited circumstances. Such a deposition may be needed where a party or witness is expected to be unavailable at a later date due to illness, death or other exigent circumstance. Notice and service of the notice on the opposition are required, and if not feasible, a court order may be secured to further the ends of justice. Rule 4:2(a)(1)-(3).

Depositions of a party may be read into evidence at trial for the purpose of offering substantive evidence. Rule 4:7(a)(3). Depositions may also be used to impeach any witness who was deposed. Rule 4:7(a)(2).

4. Requests For Admissions

Rule 4:11 permits a party to formulate requests for admission that relate to statements or opinions of fact or the application of law to fact. Unlike the limit of 30 interrogatories, there is no limit to the number of requests for admission. Failure to admit or deny within 21 days may result in the requests being deemed admitted. Rule 4:11(a). A denial may be qualified if good faith requires that a party admit only part of an request. An answering party may not give lack of information or knowledge as a reason for failure to admit unless he also states that he has made a reasonable inquiry and the information known or readily obtainable is insufficient to enable him to admit or deny.

Practice Pointer: Requests for admission are invaluable to force an opponent to admit important facts prior to the trial. For example, the plaintiff may submit requests which establish liability through concessions about how the incident occurred and what roles each party played in the incident. Requests for admission are also very helpful in ensuring documents can be admitted as business records under the "shopbook rule." This rule requires establishing a foundation for admission including:

1. That the record is a "business record";
2. That the record was made in the regular course of business;
3. That the entry of data or information to create the record was made at or near time of transaction;
4. the entry of the data or information into the record was authorized (made by person having a duty to make entry)

See, *1924 Leonard Road, L.L.C. v. Roekel*, 272 Va. 543, 636 S.E.2d 378 (2006).

Virginia case law has severely limited the ability of a doctor to testify to findings in records of other medical providers on direct examination. *See: McMunn v. Tatum, 237*

Va. 558 (1989) and *Commonwealth v. Wynn*, 277 Va. 92 (2009). Requests for admissions can provide the foundation for the admission of the records of other providers, subject to redacting inadmissible opinions. Although this topic is beyond the scope of this presentation, parties could also issue a subpoena to the records custodian to establish that the records are "business records" and therefore admissible under the shopbook rule.

A sample set of requests for admission is attached.

5. Physical and Mental Examination of Persons

Rule 4:10 provides for medical evaluations of the plaintiff at the request of the defendant. Theoretically, for good cause, a plaintiff could request the defendant be evaluated. The examiner must be a health care provider as defined in Va. Code 8.01-581.1. [1] For good cause, the court may order the examination take place out-of-state, and where required, the court may waive the rule that the examiner be licensed by and have an office in Virginia. Rule 4:10(b). The examiner shall submit a report which must contain his findings, including the results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations for the same condition. Rule 4:10(c)(1). The report shall be served on counsel and filed with the court.

Practice Pointer: Only the party submitting to the examination (usually the plaintiff) may offer the report into evidence. Rule 4:10(c)(2).

Rule 4:10 provides that a court may limit the examination and may provide for other terms and conditions. Consider requesting such an order if you represent minors or persons under mental disability (such as a brain injured client), or where the subject matter involves psychiatric issues.

Practice Pointer: Consider requesting a court order to allow observers, such as other family members or a nurse, to attend the examination of a minor or brain injured

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[1] Virginia Code § 8.01-581.1 defines healthcare provider as any of the following: physician or hospital, dentist, pharmacist, registered nurse or licensed practical nurse or a person who holds a multistate privilege to practice such nursing under the Nurse Licensure Compact, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor, licensed marriage and family therapist, licensed dental hygienist, health maintenance organization, or emergency medical care attendant or technician who provides services on a fee basis.

client. Also consider leave of court to record or videotape the examination. The plaintiff should only agree to an order which states that there shall no obligation to complete questionnaires or respond to questions about liability or other matters collateral to the physical or mental condition of the party.

6. Duty to Supplement Discovery

A party who has responded to a request for discovery is under a duty to supplement or correct the disclosures or response to include information thereafter acquired in the following circumstances as set forth in Rule 4:1(e):

(1) A party is under a duty to supplement promptly its disclosures if the party learns that in some material respect the information disclosed is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty to amend promptly a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect, and if the additional information has not otherwise been made known to the other parties during the discovery process or in writing.

Rule 1:18 provides for entry of a Pretrial Scheduling Order. The Scheduling Order states that "[t]he parties have a duty to seasonably supplement and amend discovery responses pursuant to Rule 4:1(e). Seasonably means as soon as practical." By amendment effective January 1, 2001, the word "promptly" was substituted for "seasonably" in Rule 4:1(e)(1)&(2). This amendment suggests an intention to add a sense of urgency to the obligation to supplement. Furthermore, the Uniform Pretrial Order states that "[n]o provision of the Order supercedes the Rules of the Supreme Court of Virginia governing discovery." To the extent the Pretrial Order conflicts with Rule 4:1(e), the Rule will control.

7. Discovery In Federal Court

Although not the subject of this presentation, discovery procedures in federal court have recently been revised. In general, discovery will be more limited and more streamlined than in state court. Rule 26 of the Federal Rules of Civil Procedure requires that the parties disclose certain information without awaiting a discovery request. The mandatory disclosures include the identity of the person having knowledge of the claims

and defenses, a copy of all documents used to support the claims or defenses, a computation of all damages with a copy of the supporting documentation, any relevant insurance agreement and the opinions of any experts, both retained and not retained. Fed. R. Civ.P. 26 (a)(1)(i-iv) and (a)(2)(A)&(B). A recent change to the rules now protects both draft reports and communications from counsel as attorney work product, so long as the expert did not rely on the information in forming opinions. Despite this provision, disclosure is required for communications involving a retained expert's compensation, facts or data that the expert considered in forming the opinions to be expressed, and any assumptions provided by the attorney which the expert relied upon in forming the opinions to be expressed. Fed. R. Civ. P. 26 (b)(4)(B) & (C)(i-iii). Parties must also disclose the subject matter of the testimony of non-retained expert and a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26 (a)(2)(C)(i-ii). This provision would encompass a treating physician who was not retained by the party but who will testify as an expert.

Practice Pointer: Virginia courts have not set forth with clarity the nature of protection afforded counsel's communication with experts. It is arguable that similar protection is afforded litigants in state court, but the absence of controlling case law leaves the scope of protection unclear. A good resource for litigators is the two volume set by Thomas E. Spahn, entitled *The Work Product Doctrine* and *The Attorney-Client Privilege,* Virginia CLE Publications.

B. PRE-TRIAL MOTIONS AND PLEADINGS

1. Motions *In Limine*

Most pre-trial motions will be motions *in limine. In limine* is Latin for "at the outset." These motions are presented to the judge before or during trial. Motions *in limine* are usually filed to secure a pre-trial ruling to exclude or limit evidence. Such motions are as varied as are tort claims and the conduct of the actors involved. Some of the more common motions *in limine* are listed below.

a. Collateral Sources

Such a motion is filed to exclude reference to any sources of payment collateral to the tortfeasor. This may include reimbursement for medical bills such as payment by health insurance, medical expense coverage, medicaid, medicare or workers compensation. *Acuar v. Letourneau*, 260 Va. 180, 189, 531 S.E.2d 316 (2000) (quoting

Schickling v. Aspinall, 235 Va. 472, 474, 369 S.E.2d 172 (1988). It also may include reimbursement for loss of income, such as sick leave, vacation pay, and short or long term disability. *Va. Code* *8.01-35*.

b. Prior or Subsequent Accidents or Injuries

Where the plaintiff has the misfortune to be injured before or after the incident which is the subject of the litigation, and where the medical treatment is unrelated or irrelevant to the injuries at issue, counsel should move to exclude any mention of the prior or subsequent injuries. For example, where there exists no evidence that the plaintiff had ongoing complaints or treated with any physician for injuries after his recovery in the prior accident, evidence of a prior accident should be excluded because any probative value is substantially outweighed by danger of unfair prejudice, waste of time, confusion of the issues and needless presentation of misleading facts. *Smith v. Ellis*, 22 Va. Cir. 422 (Judge Ledbetter) (1991); *Seilheimer v. Melville*, 224 Va. 323 (1982).

Evidence of prior claims is inadmissible if not linked to evidence establishing relevance and probative value. *Carter v. Shoemaker*, 214 Va. 16, 197 S.E.2d 181 (1973).

c. Prior Drug Use

A motion to exclude such evidence is useful when bringing a brain injury claim. If no expert can testify, to a reasonable medical probability, that the prior drug use caused the brain injury, the evidence must be excluded. *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 266 Va. 188, 205, 585 S.E.2d 557, 566-67 (2003) (prohibiting cross-examination of plaintiff's expert witness on subject of plaintiff's prior drug use where there was no evidence that the prior drug use caused plaintiff's brain injury). This same argument should be used even more forcefully where the claim does not involve a brain injury, as any probative value is likely outweighed by the prejudice to the party.

d. Prior Depression or Disability

A party should move *in limine* to prohibit any reference to pre-injury depression or disability. Regarding depression, the plaintiff should so move where either there is no claim for depression, or where it is clear that the depression resolved prior to the injury at issue. For example, where the plaintiff had a two-year history of untreated depressive episodes, but where the evidence establishes that pre-injury depression was successfully treated and that the depression had resolved several years before the accident, the evidence would be excluded. Even if the evidence establishes that the party continued to

treat for depression, cross examination would be improper where evidence of depression is not elicited by the Plaintiff on direct examination. *Velocity Express Mid-Atlantic, Inc. v. Hugen,* 266 Va. 188, 205-06, 585 S.E.2d 557, 567 (2003).

Nor should the plaintiff be permitted to refer to the defendant's disability without linking the disability to the cause of action or some other matter relevant to the litigation.

e. Nature of Prior Felony Conviction

Felony convictions and misdemeanors involving moral turpitude (lying, stealing, fraud) are admissible to impeach the credibility of a party. But unless the conviction is for perjury, the court should prohibit any cross examination which elicits anything other than the fact there was a conviction. For purposes of impeachment, a prior felony conviction may be shown against a party-witness in a civil case. But, the nature of the felony, other than perjury, and the details thereof may not be shown. *Payne v Carroll*, 250 Va. 336, 340; 461 S.E.2d 837, 839 (1995).

f. Attorney Referral To Physician

Although there is scant case law in Virginia on the topic, a motion *in limine* should be filed to prohibit any reference to an attorney referral to a treating physician. Such evidence is irrelevant and may invade the attorney client privilege. The fact there was an attorney referral is usually elicited to suggest that the plaintiff, his attorney and the treating physician are engaged in misconduct or efforts to inflate an injury claim. The courts should not allow such argument or innuendo. In most instances of attorney referral, the client is uninsured and has requested help from his attorney. Counsel should argue the attorney would be remiss in not helping his client find a physician and that to defend his actions, he would have to testify and possibly withdraw as counsel.

g. Photographs Prove The Degree Of Injury

Where the property damage photographs fail to depict significant visible damage, defense counsel will invariably argue that the photographs "prove" the plaintiff was not injured. Despite the fact this argument is made in the absence of any expert testimony, and therefore represents little more than the opinion of counsel, Virginia circuit courts have routinely allowed such argument. While the plaintiff can hire an expert to review the property damage estimates and photographs to blunt such argument, it is advisable to file a motion *in limine* to exclude the photographs or at least limit such argument. This

issue is ripe for a ruling from the Virginia Supreme Court. The argument that the property damage correlates to the degree of bodily injury is without scientific support. Such an argument should be excluded in the absence of expert testimony about the transfer of energy and how it affected the party. Admissibility of such testimony should be conditioned on establishing a proper foundation. This requires consideration of a myriad of variables and it is unlikely an expert could account for each such variable. *See*, 8.01-401.1 & 8.01-401.3; *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co*., 250 Va. 161, 166, 458 S.E.2d 462, 465-466 (1995). *Gilbert v. Summers,* 240 Va. 155, 159-160, 393 S.E.2d 213, 215 (1990)]; *Swiney v. Overby,* 237 Va. 231, 233-34, 377 S.E.2d 372, 374 (1989). *Tittsworth v. Robinson*, 252 Va. 151, 475 S.E.2d 261 (1996). Unfortunately for plaintiffs, jurors frequently accept the invitation to speculate and frequently fail to return a reasonable verdict. The Supreme Court of Delaware held that in the absence of expert testimony, a party may not directly argue that there exists a correlation between the degree of personal injuries and the damage to the automobiles. *Davis v. Maute*, 770 A.2d 36, 40 (2001).

Likewise, the Plaintiff usually benefits from photographs which depict significant property damage. And likewise, there is little scientific support for the assumption that significant property damage correlates with a significant injury. The defendant would be wise to move *in limine* to prevent the Plaintiff from arguing "the photographs prove the injury."

2. Other Pre-Trial Pleadings

Other pre-trial pleadings include motions to increase the *ad damnum* clause, to consolidate or sever claims or parties, to take and compel discovery, to strike defenses or claims, to compel production of a recorded statement, to request a default as to liability, and to assert claims of immunity, including sovereign and charitable immunity.

C. SETTLEMENT PROCEDURE

Settlement procedure does not follow any set pattern in Virginia. The circuit courts seem reluctant to assist in the negotiation of a settlement. Therefore the parties are well advised to enter discussions about alternative dispute resolution early in the litigation. The two most popular forms of alternative dispute resolution are binding arbitration and mediation. The mediator and arbitrator will charge by the hour and the parties usually split the costs 50/50. Whether mediation or binding arbitration, the parties should prepare as if the hearing was a trial. The witnesses should be prepped and the exhibits and evidence should be available as if it were a trial.

1. Binding Arbitration

Binding arbitration will conclude the claim and the parties will be bound by the award, subject to any "high-low" agreement. To start binding arbitration the parties must agree on an arbitrator. Also, the form of alternative dispute resolution is usually accompanied by an agreement on the "high" and "low", meaning the ceiling and floor of the award. The high will (almost) always be within the limits of insurance coverage. The agreement to use binding arbitration should recite whether witnesses can be called live, whether the arbitrator will have the power to enforce subpoenas, whether hearsay is admissible, including the medical records, whether depositions will be used in lieu of live witnesses and when the award will be paid.

2. Mediation

Mediation differs from binding arbitration in that the mediator does not make an award. Instead, the mediator attempts to get the parties to reach a settlement by listening to witnesses, reviewing evidence and conferring with the lawyers. There are no hard and fast rules for mediation. The mediator usually requests a submission of the parties' claims and defenses prior to the hearing. The mediator cannot force the parties to accept a settlement and instead uses his power of persuasion to convince the parties that a sure thing is better than a roll of the dice with a jury. The parties should be clear about who is attending the mediation, as most plaintiffs want an adjuster with sufficient authority to be present, not just available by telephone. The parties to mediation should clarify before the mediation whether sufficient authority has been put on the case by the defense so that many hours of expensive mediation are not wasted in a futile effort to settle. The parties should also clarify before the mediation whether any terms need to be confidential, whether the release document will contain any provisions beyond the standard release terms, and how long it will take to put the settlement check in the hands of the plaintiff.

3. Negotiation with the Claims Adjuster or Defense Counsel

A settlement demand package should be prepared when the full extent of the treatment, damages and injuries are able to be quantified or predicted by the treating physicians and other experts. Where possible, prepare your settlement demand package well before the two (2) year statute of limitations will expire. Otherwise, suit must be filed. If suit is filed, service of process can be delayed for up to a year to allow more time to settle the claim. If the claim has not settled and a year post filing is about to expire, due diligence must be used to serve the suit papers on the defendant or the claim may be dismissed with prejudice. *Va. Supreme Court Rule 3:5(e).* If you miss the service

deadline, your only option will be to take a voluntary nonsuit.

A settlement demand letter which contains little more than a tally of the medical bills and wage loss, and then demands a large sum of money, is likely to be ineffective. This type of demand letter will usually tip the adjuster to fact you may not have read and digested the entire medical file, and it will leave you with little ammunition if the claims adjuster takes quotes and findings out of context in an effort to diminish the claim.

The settlement demand package should include a list of all the medical bills and other specials damages. The wage loss should be computed and supported by a letter from the employer and disability slips from the treating physician. The medical records should be summarized. Where future medical expenses are expected, the treating physician should prepare a report which describes the ongoing need for medical care and estimates the future medical costs. The same letter should comment on how the ongoing injuries will affect the plaintiff's employment. The demand letter should summarize the medical care and highlight the significant findings, such as muscle spasm or trigger points (considered "objective" findings) and positive films or scans or diagnostic tests like EMGs. Remember that the claims adjuster will likely send the medical records and bills to his insurance carrier's own medical experts prior to making any settlement offer. The more you know about your client's treatment and medical needs, the better position you are in to negotiate a fair and favorable settlement.

D. POST-TRIAL MOTIONS (New Trial, *Additur* & *Remittitur)*

A new trial may be granted on the ground the verdict is contrary to the evidence. A party may also request that the trial court grant a new trial because the award is either too low or excessive. *Va. Code* *8.01-383***.** The options available to the parties include asking for a new trial on liability and damages, damages only**,** or a motion that the trial court either add to the jury verdict (*additur)* or reduce the jury verdict (*remittitur*). The procedures for *additur* and *remittitur* are set forth in the Virginia Code 8.01-383.1.

1. New Trial on Liability and Damages

The trial court may grant a new trial where the verdict is plainly wrong or without credible evidence to support it. A judge is not permitted to substitute his judgment for that of the jury merely because he would have reached a different result. *Jenkins v Pyles, 269 Va. 383,388, 611 S.E.2d 404,407 (2005).* In determining whether an damage award claimed to be excessive requires a new trial on all issues, a new trial limited to damages, an order of *remittitur*, or a judgment confirming the award, a trial judge is vested with

broad discretion, and the Supreme Court will not reverse his ruling unless the record plainly shows an abuse of discretion. *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982). Before a new trial is granted and limited only to the amount of damages, it should be reasonably clear that the misconception of the jury has not extended to its determination of the question of liability as well as to its determination of the amount of damages. *Rutherford v. Zearfoss*, 221 Va. 685, 272 S.E.2d 225 (1980).

2. New Trial on Claim of Inadequate Verdict or *Additur*

A motion for a new trial on damages, or *additur* is founded on a claim that the jury verdict is inadequate as a matter of law. Where the evidence overwhelmingly favored the plaintiff on the issue of liability (fault), the sole issue before the court is whether to grant plaintiff a new trial on the issue of damages or order *additur*. *Glass v. Pender Grocery Company*, 147 Va. 196, 5 S.E.2d 478 (1940).

Unfortunately for the plaintiff, case law has made is very difficult to seek a new trail or *additur* unless the jury awards the exact amount of the special damages. A jury award of the exact amount of uncontroverted special damages (medical bills and wage loss) without anything for pain and suffering (non-economic damages) will result in granting a motion for a new trial on damages. *Jenkins v. Pyles*, 269 Va. 383, 390, 611 S.E. 2d 404, 408 (2005); *Bowers v. Sprouce*, 254 Va. 428, 492 S.E. 2d 637 (1997). Anything other than an award of the exact amount of the uncontroverted special damages will likely result in a denial of the claim for a new trial. *Hundley v. Osborne,* 256 Va. 173; 500 S.E.2d 810 (1998). (Osborne's evidence regarding future medical expenses and loss of wages was not uncontroverted and was not so complete that no rational fact-finder could disregard it. *Id.* at 487, 362 S.E.2d at 720*). See also: Walker v. Mason*, 257 Va. 65 (1999). (jury entitled to conclude that plaintiff not injured as severely as claimed based on conflicting testimony regarding impact "pretty hard" versus "light bump"). A jury verdict for less than the specials (and in exact amount of lost wages only) was upheld on appeal and trial court's *additur* was overturned. *Richardson v. Braxton-Bailey*, 257 Va. 61, 64 (1999). When the evidence permits a jury to conclude that only some of the damages claimed resulted from the accident, a verdict in an amount less than or approximating a portion of the special damages does not justify the conclusion that the jury failed to consider other damage elements such as pain, suffering, and inconvenience. *Id.*

A new trial on damages or *additur,* is available when the court finds as a matter of law that the damages awarded by the jury are inadequate. If either the plaintiff or the defendant declines to accept such additional award, the trial court shall award a new trial.

If *additur* is accepted by either party under protest, it may be reviewed on appeal. *Va. Code 8.01-383.1(B).*

3. New Trial on Claim of Excessive Verdict or *Remittitur*

A defendant may also seek a new trial on damages or request *remittitur.*

A new trial on the claim the damages are excessive is granted only where the award is so great as to shock the conscience of the court and to create the impression that the jury was motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law. *Shepard v Capitol Foundry of Va., Inc.,* 262 Va. 715, 720-21, 554 S.E.2d 72,75 (2001).

Should the trial court require a plaintiff to remit a part of his jury verdict, or else submit to a new trial, such plaintiff may remit and accept judgment for the reduced sum under protest. As with *additur*, if *remittitur* is accepted under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court upon an appeal. *Va. Code 8.01-383.1(A).*

E. USEFUL SAMPLE FORMS

The following forms are found in the appendix:

1. Interrogatories for the Plaintiff in a Motor Vehicle Case
2. Requests for Production of Documents for Plaintiff in a Motor Vehicle Case
3. Request for Admissions in a Motor Vehicle Case
4. Notice of Deposition of Corporate Designee in a Motor Vehicle Case
5. Motion in Limine to Bar Use of Photographs in Motor Vehicle Case
6. Motion to Amend the Ad Damnum Clause
7. Motion to Compel Production of Recorded Statement of Defendant
8. Sample Demand Letter With Claim for Punitive Damages Due to Drunk Driver

APPENDIX - FORMS

The following forms are found in the appendix:

1. Interrogatories for the Plaintiff in a Motor Vehicle Case
2. Requests for Production of Documents for Plaintiff in a Motor Vehicle Case
3. Request for Admissions for the Plaintiff in a Motor Vehicle Case
4. Notice of Deposition of Corporate Designee in a Motor Vehicle Case
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8. Sample Demand Letter With Claim for Punitive Damages Due to Drunk Driver

PLAINTIFF'S INTERROGATORIES TO DEFENDANT

INSTRUCTIONS

A. These Interrogatories are propounded to you in accordance with Rule 4:8 of the Supreme Court of Virginia. Each Interrogatory must be answered separately, fully, in writing, under oath, and a copy served upon counsel for Plaintiff within twenty-one (21) days from the date of receipt of these Interrogatories.

B. These Interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information before trial.

C. Where the name or "identity" of a person is requested, please state the full name, home address, and social security number and telephone number (home and work) also business address, if known.

D. Unless otherwise indicated, these Interrogatories refer to the time, place and circumstances of the occurrence mentioned or complained of in the pleadings.

E. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party's agents, representatives and unless privileged, his attorneys.

F. The pronoun "you" refers to the party to whom these Interrogatories are addressed and the persons mentioned above.

INTERROGATORIES

1. State your name, address, martial status, date of birth, social security number, age and occupation.

ANSWER:

2. Were you the operator of the motor vehicle described in plaintiff's Complaint at the time of the collision? If not, please "identify" the operator.

ANSWER:

3. Were you the owner of the motor vehicle which collided with plaintiff? If not, please "identify" the owner.

ANSWER:

4. Please set forth the year, make, weight (usually recorded on registration), model, and color of:

a. the motor vehicle you were operating at the time of the collision; and

b. any of any vehicle you owned at the time of the collision; and

c. any vehicle that was owned by a resident relative at the time of the collision

The weight of vehicles listed in response to b. or c. above need not be provided if said vehicle(s) was/were not involved in the collision.

ANSWER:

5. Were you at the time of the collision sick or ill in any way, or did you have any physical or mental illness or disability or impairment? If so, describe the sickness, illness or disability or impairment.

ANSWER:

6. Have you ever worn glasses or other corrective lenses prescribed for your use? If so, describe the condition requiring the glasses or corrective lenses. If so, were you wearing or using glasses or other corrective lenses at the time of the collision?

ANSWER:

7. On the date of this collision, how long did you have your driver's license, what was your driver's license number and state of issue?

ANSWER:

8. At the time of the collision, were your driving privileges restricted in any way? If so, state the reason for the restriction.

ANSWER:

9. a. What felonies or misdemeanors involving moral turpitude have you been convicted of (including guilty plea and nolo contendere) during your lifetime including approximate date of offense, nature of offense, name and address of court imposing judgment and approximate date court imposed judgment?

b. What charges are currently pending against you, and if any, provide the nature of the charge, date of alleged offense and name and address of court where the charges are pending?

ANSWER:

10. Have you as the operator of a motor vehicle been involved in other motor vehicle collisions or accidents one (1) year before or one (1) year after the collision described in the Complaint? If so, state how many and on what dates.

ANSWER:

11. Did you plead guilty or nolo contendere to any traffic charge or other criminal offense arising out of this collision? If so, what was charge or charges to which you pleaded? Regardless of any plea, please provide the name of the county or city courthouse which disposed of any such charges.

ANSWER:

12. Please set forth the time and place of your departure prior to the collision and your exact destination.

ANSWER:

13. Please explain the purpose or reason for your use of the motor vehicle at the time of the collision. (e.g., employment, personal errand, shopping, etc.) If you were in the scope of employment or on an errand for another person or entity, please identify that person or entity.

ANSWER:

14. Please set forth the time and place of any stops (except for traffic control devices) between commencement of the trip and the collision.

ANSWER:

15. Had you within twelve (12) hours before the collision occurred consumed or taken:

a) any narcotic drug,

b) any other drug,

c) any medical remedy of any type or

d) any alcoholic or intoxicating beverage of any type?

If so, please identify the substance consumed and state the quantity of substance consumed, the time or times of consumption, and the location where the consumption took place.

ANSWER:

16. Give names, ages, locations within the vehicle and the addresses of all persons riding in the vehicle from the beginning of the trip until the collision.

ANSWER:

17. Give the names and addresses of all witnesses to the collision known to you.

ANSWER:

18. Please identify by name, home address and business address each and every person who has any knowledge of either damages or liability as they pertain to the instant case, including the identity of anyone arriving at the scene while you were present at the scene.

ANSWER:

19. Give the names and addresses of all persons to whom the Defendant or any witness has provided a statement regarding the collision described in the Plaintiff's Complaint or any injuries or

property damages arising out of this collision. To whom was the statement made and on what date? Give name and address. Was it a written statement? If not written, was it recorded?

ANSWER:

20. Give the name and address of each person known to you to whom the Plaintiff has made a statement or statements (oral or written) about the collision or about the damages sustained by the Plaintiff in the accident.

ANSWER:

21. a. If you were the owner of the motor vehicle that was operated at the time of the collision described in plaintiff's Complaint, answer the following:

i) Was the motor vehicle you were operating covered by liability insurance? If so, give the name of the liability insurance company and the amount of insurance coverage provided for bodily injury.

ii) If someone else was operating your motor vehicle, provide the year, make and model of any motor vehicle owned by any resident relative, as well as the liability insurer and policy number for any policies covering resident relatives.

iii) Provide the same information about all policies in which you are a named insured.

b. If you were not the owner of the motor vehicle you were operating at the time of the collision, please identify by insurer and policy number and insured all other policies

issued to any resident relative.

ANSWER:

a)(i)

a(ii)

a(iii)

b)

22. At the time of the collision, were you covered by any umbrella policy or business policy? If so, please give the name of the company issuing the policy, the policy number, and the limits of coverage.

ANSWER:

23. Please state, in detail, how you contend the collision occurred.

ANSWER:

24. State the name, address and qualifications of each expert whom you expect to call as an expert witness at the trial of this case. Include in your answer the subject matter of his testimony the substance of the facts and opinions to which he is expected to testify and a summary of the grounds for

each such opinion. Please attach a copy of any report, including factual observations and opinions, which has been prepared by any such expert.

ANSWER:

25. State the name, address and phone number of the shop where your vehicle was repaired. If the vehicle was totaled, state this fact and attach copies of all paperwork relating to the total loss, including any estimates or appraisals.

ANSWER:

This is rarely used due to the limit of 30.

26. Do you contend that any of the plaintiff's medical bills or medical expenses are either medically unnecessary or not causally related to the claimed negligence? If the answer is yes, then for reach such bill or expense, please state:

(a) why you believe that the expense or bill is either not reasonable or not causally related to the claimed negligence;

(b) what evidence you intend to offer on either of these subjects; and

(C) if the evidence is in the form of expert testimony, what expert will so testify, giving a summary of the opinion, as well as the basis for that opinion.

ANSWER:

27. Please set forth whether there exist any measurements, drawings, photographs or

videotapes of plaintiff, defendant, plaintiff's vehicle, defendant's vehicle, the scene of the incident or any other matter relevant to the instant case. If the answer is yes, please identify the custodian and produce a color copy of each (Plaintiff will reimburse for the color copies).

ANSWER:

28. Please set forth the factual basis for your defenses of:

a) failure to state a claim;

b) statute of limitations;

c) assumption of risk;

d) sudden emergency;

e) unavoidable accident;

f) last clear chance;

g) contributory or sole negligence of plaintiff; and

h) negligence of persons over whom defendant had no control.

ANSWER:

Use this Interrog if you suspect Def was suffering from an illness or impairment

29. Please set forth the following for each illness, physical ailment or impairment you suffered or were under treatment for on the day of, or one (1) year prior to the collision:

a. The name or description of the illness, physical ailment or impairment;

b. The name and dosage of each medication you were taking for such illness, physical ailment or impairment;

c. The name and address of each physician or healthcare provider caring for any illness, physical ailment or impairment afflicting you on the date of, or 1 year prior to, the collision;

d. The name of the physician who prescribed the medications you took on the date of (insert date of collision), or 1 month before the date of the collision.

Answer:

note limit of 30 interrogatories including subparts

I swear and affirm that the foregoing answers are true and correct to the best of my knowledge.

_____
Defendant Signs Here

Respectfully Submitted,

By:_____
Law Offices of Jeremy Flachs
Jeremy Flachs, Esq.
Jeremy.Flachs@Flachslaw.com
Counsel for Plaintiff

PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT

TO:

Address to defendant and his attorney

A. This Request for Production of Documents is propounded to you in accordance with Rule 4:9 of the Supreme Court of Virginia. Each Request must be answered separately, fully, in writing, under oath, and a copy served upon counsel for Plaintiff within twenty-one (21) days from the date of receipt of these Requests.

B. Where the term document is used, document means, unless stated otherwise, the following: All original documents, and any non-identical copy thereof, of any kind of written or graphic matter, however, produced or reproduced, of any kind of description, whether sent or received, or neither, between the litigants or any agent, employee, servant or attorney thereof. The term document includes, but is not limited to the following: Papers, books letters, photographs, videotapes, correspondence, telegrams, cables, telex messages, memoranda, notes, notations, work papers, brochures, inter-office memoranda, notations, work sheets, drafts, notes on negotiations, intra-office communications, inter-departmental communications, transcripts, minutes of meetings, resolutions, reports, recordings of telephone and/or other conversations, or of interviews, conference meetings, affidavits, statements, opinions, court opinions, court pleadings, ledgers, leases, reports, studies, indices, analysis, evaluations contracts, sub-contracts, licenses, license agreements, statistical reports, questionnaires, answers to questionnaires, desk calendars, appointment books, diaries, telephone logs, lists, calendars, tabulations, charts, graphs, sound records, data sheets, computer tapes and disc, magnetic tapes, punch cards, computer programs, emails, computer disks, retrievable computer data, coding sheets, computer printouts, microfilm, receipts, canceled checks, and/or maintenance records.

REQUESTS

1. If you were the owner of the motor vehicle you were operating at the time of the collision, please attach a copy of the **complete policy** for:

a. the motor vehicle insurance policy for the motor vehicle you were operating on (date of collision) and

b. all other motor vehicles in which you were a named insured on said date.

RESPONSE:

2. If you were not the owner of said motor vehicle, please attach the **complete policy** for**:**

a. all motor vehicles you owned or were a named insured on (day of collision), and

b. all motor vehicles owned by a resident relative on said date.

RESPONSE:

3. Please attach the **complete policy** for all excess, business and/or umbrella policies which may provide coverage for this accident.

RESPONSE:

4. Please attach a copy of any statements, written or recorded, regarding the collision described in the plaintiff's Complaint or any injuries or property damage arising out of this collision. **This request includes any statements made by Plaintiff or Defendant.** If you or your counsel believe any such statements are privileged, please identify the statement and the privilege relied upon.

RESPONSE:

5. Please produce color copies or make available for inspection and copying the original of all photographs, drawings or measurements of anything or anyone at the scene of this collision or of any vehicle involved. Plaintiff will pay the cost of reproducing the photographs in color.

RESPONSE:

6. Please attach a copy of any reports, including factual observations and opinions,

which have been prepared by your expert. If you or your attorney believe any such documents are privileged, please identify the document (name the author and describe the document, i.e. medical report) and the privilege relied upon.

RESPONSE:

7. Please produce or make available a copy of document subpoenaed by Defendant , including but not limited any medical reports, notes, intake or new patient registration sheets, medical records, x-rays, telephone logs. subpoenaed from any of Plaintiff's healthcare providers or which otherwise reflect medical treatment rendered plaintiff. However, this request is not limited to medical records. (This Request is made pursuant to Virginia Code §8.01-417(B) and does not include those documents provided defendant by plaintiff.) Plaintiff will pay copying charges.

RESPONSE:

8. Please produce a copy of all estimates and appraisals of damage to each vehicle involved in the collision which are in your possession, custody or control.

RESPONSE:

9. Please attach a copy of each and every driver's license issued to Defendant on the date of the incident, and any licenses issued thereafter through the present time.

RESPONSE:

10. Please attach a copy of the registration for the motor vehicle

operated by Defendant at the time of the collision.

RESPONSE:

11. Please attach a copy of any videotape or other recording of the Plaintiff.

RESPONSE:

12. Please attach a copy of any document reflecting prepayment of a fine, or a plea of guilty or nolo contendere to any traffic charge arising out of the collision with Plaintiff.

RESPONSE:

13. Please attach a copy of any document in your possession which tends to establish that you were not at fault for this collision.

RESPONSE:

Respectfully Submitted,

By:_____

Law Offices of Jeremy Flachs
Jeremy.Flachs@Flachslaw.com
Jeremy Flachs, Esq.

PLAINTIFF'S REQUEST FOR ADMISSIONS TO DEFENDANT

COMES NOW, by counsel, and propounds the following Requests for Admissions to Defendant. Said Request for Admissions are hereby propounded pursuant to Rule 4:11 of the Supreme Court of Virginia. A response is required within twenty-one (21) days. All instructions set forth in that Rule are incorporated herein by reference in their entirety as if set forth verbatim. Plaintiff hereby requests Defendant to admit or deny the following:

INSTRUCTIONS

1. The terms "you" and/or "Defendant" refer to Defendant (name the Defendant).

2. The term "collision" refers to the 4/23/09 motor vehicle collision as described in the Complaint.

ADMISSIONS

1. On 4/23/09, Defendant was the driver of a vehicle involved in a three car motor vehicle collision with vehicles driven by (name and name).

Response:

2. At the time of the collision, Defendant was traveling westbound on Lorton Road in Fairfax County, Virginia.

Response:

3. Immediately prior to the collision, the vehicle driven by Plaintiff was at a complete stop on westbound Lorton Road in Fairfax County, Virginia.

Response:

4. Immediately prior to the collision, the vehicle driven by (third party behind Plaintiff's car) was at a complete stop on westbound Lorton Road in Fairfax County, Virginia.

Response:

5. At the time of the collision, Defendant rear-ended the vehicle driven by (third party).

Response:

6. Defendant caused the collision with (vehicle stopped behind Pl's vehicle).

Response:

7. No other person caused and/or contributed to the collision between Defendant and the vehicle driven by (third party stopped behind Plaintiff).

Response:

8. At the time of the collision, the force of the impact from Defendant's vehicle propelled (third part stopped behind plaintiff)'s vehicle into the rear of the vehicle driven by plaintiff.

Response:

9. Defendant caused the collision between the vehicle driven by (third party stopped behind plaintiff) and the vehicle driven by plaintiff.

Response:

10. No other person caused and/or contributed to the collision between the vehicle driven by third party and the vehicle driven by plaintiff.

Response:

11. The subject collision was caused by the sole negligence of Defendant.

Response:

12. You have no evidence that any act and/or omission of Plaintiff caused or contributed to the subject collision.

Response:

13. You have no evidence that any act and/or omission of the third party stopped behind the plaintiff caused or contributed to the subject collision.

Response:

14. Plaintiff was injured as a proximate result of the subject collision.

Response:

15. Defendant received a traffic citation for failure to pay full time and attention as a result of the collision.

Response:

16. Defendant had the opportunity to contest the traffic citation for failure to pay full time and attention, but voluntarily elected not to do so.

Response:

17. Defendant admitted guilt for the charge of failure to pay full time and attention arising out of the collision.

Response:

18. Defendant prepaid the traffic citation for failure to pay full time and attention on May 5, 2009 in lieu of appearing in court.

Response:

19. Defendant was aware that prepayment of the traffic citation would be deemed a waiver of court hearing and entry of guilty plea.

Response:

20. The traffic citation clearly stated that prepayment of the citation would be deemed a waiver of a court hearing and entry of guilty plea.

Response:

21. At the time of the collision, there were no unusual or emergency conditions on the road.

Response:

23a. The bill or invoice of Inova Health System for services rendered to Plaintiff on 4/23/09 for $370.00, a copy of which was previously produced, is an authentic, accurate statement of charges actually made by those who provided the treatment, service or product to Plaintiff.

Response:

23b. The bill or invoice of Inova Health System for services rendered to Plaintiff on 4/23/09 for $370.00, a copy of which was previously produced, is reasonable in amount, considering the prevailing cost of such treatment, service, or product in the community in which the services were rendered.

Response:

23c. The bill or invoice of Inova Health System for services rendered to Plaintiff on 4/23/09 for $370.00, a copy of which was previously produced, was medically necessary to treat Plaintiff for injuries sustained in the subject collision.

Response:

23d. The bill or invoice of Inova Health System for services rendered to Plaintiff on 4/23/09 for $370.00, a copy of which was previously produced, was prepared and kept in the ordinary course of Inova Health System's business.

Response:

24a. The bill or invoice of Best Practices, Inc. for services rendered to Plaintiff on 4/23/09 for $308.00, a copy of which was previously produced, is an authentic, accurate statement of charges actually made by those who provided the treatment, service or product to Plaintiff.

Response:

24b. The bill or invoice of Best Practices, Inc. for services rendered to Plaintiff on 4/23/09 for $308.00, a copy of which was previously produced, is reasonable in amount, considering the prevailing cost of such treatment, service, or product in the community in which the services were rendered.

Response:

24c. The bill or invoice of Best Practices, Inc. for services rendered to Plaintiff on 4/23/09 for $308.00, a copy of which was previously produced, was medically necessary to treat Plaintiff for injuries sustained in the subject collision.

Response:

24d. The bill or invoice of Best Practices, Inc. for services rendered to Plaintiff on 4/23/09 for $308.00, a copy of which was previously produced, was prepared and kept in the ordinary course of Best Practices, Inc.'s business.

Response:

25a. The bill or invoice of Eric G. Dawson, M.D. for services rendered to Plaintiff from 4/26/09 - 7/2/09 for $830.00, a copy of which was previously produced, is an authentic, accurate statement of charges actually made by those who provided the treatment, service or product to Plaintiff.

Response:

25b. The bill or invoice of Eric G. Dawson, M.D. for services rendered to Plaintiff from 4/26/09 - 7/2/09 for $830.00, a copy of which was previously produced, is reasonable in amount, considering the prevailing cost of such treatment, service, or product in the community in which the services were rendered.

Response:

25c. The bill or invoice of Eric G. Dawson, M.D. for services rendered to Plaintiff from 4/26/09 - 7/2/09 for $830.00, a copy of which was previously produced, was medically necessary to treat Plaintiff for injuries sustained in the subject collision.

Response:

25d. The bill or invoice of Eric G. Dawson, M.D. for services rendered to Plaintiff from 4/26/09 - 7/2/09 for $830.00, a copy of which was previously produced, was prepared and kept in the ordinary course of Eric G. Dawson, M.D., P.C.'s business.

Response:

26a. The bill or invoice of Alliance Rehab, LLC for services rendered to Plaintiff from 4/28/09 - 6/26/09 for $9,345.00, a copy of which was previously produced, is an authentic, accurate statement of charges actually made by those who provided the treatment, service or product to Plaintiff.

Response:

26b. The bill or invoice of Alliance Rehab, LLC for services rendered to Plaintiff from 4/28/09 - 6/26/09 for $9,345.00, a copy of which was previously produced, is reasonable in amount,

considering the prevailing cost of such treatment, service, or product in the community in which the services were rendered.

Response:

26c. The bill or invoice of Alliance Rehab, LLC for services rendered to Plaintiff from 4/28/09 - 6/26/09 for $9,345.00, a copy of which was previously produced, was medically necessary to treat Plaintiff for injuries sustained in the subject collision.

Response:

26d. The bill or invoice of Alliance Rehab, LLC for services rendered to Plaintiff from 4/28/09 - 6/26/09 for $9,345.00, a copy of which was previously produced, was prepared and kept in the ordinary course of Alliance Rehab, LLC's business.

Response:

27a. The bill or invoice of Hossein Okuiyan, M.D. for services rendered to Plaintiff on 4/5/09 for $110.00, a copy of which was previously produced, is an authentic, accurate statement of charges actually made by those who provided the treatment, service or product to Plaintiff.

Response:

27b. The bill or invoice of Hossein Okuiyan, M.D. for services rendered to Plaintiff on 4/5/09 for $110.00, a copy of which was previously produced, is reasonable in amount, considering the prevailing cost of such treatment, service, or product in the community in which the services were rendered.

Response:

27c. The bill or invoice of Hossein Okuiyan, M.D. for services rendered to Plaintiff on 4/5/09 for $110.00, a copy of which was previously produced, was medically necessary to treat Plaintiff for injuries sustained in the subject collision.

Response:

24d. The bill or invoice of Hossein Okuiyan, M.D. for services rendered to Plaintiff on 4/5/09 for $110.00, a copy of which was previously produced, was prepared and kept in the ordinary course of Hossein Okuiyan, M.D., P.C.'s business.

Response:

Respectfully Submitted,

By:_____

Law Offices of Jeremy Flachs
Jeremy.Flachs@Flachslaw.com
Jeremy Flachs, Esq., #19193

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff	:	
v.	:	Case No.
Defendants	:	

PLAINTIFF'S NOTICE OF DEPOSITIONS OF DRIVER AND CORPORATE REPRESENTATIVE

PLEASE TAKE NOTICE that the Plaintiff, by counsel, will take the following depositions **on March 3, 2010 starting at 11:30 AM** and continuing until they are concluded.

1. Defendant :11:30 AM

2. Designated Representative of Corporate Defendant : 12:30 PM

Said deposition will take place at the Law Offices of Jeremy Flachs, Esq., Evergreen Office Park, 7006 Little River Turnpike, Suite G, Annandale, Virginia 22003 before an authorized court reporter and notary public.

The deponents **and their counsel** are directed to bring with them all documents relating to this cause, including but not limited to:

a. original photographs of the scene of the collision and/or the vehicles involved in the collision;

b. any appraisals or estimates of repair for any vehicle involved in the collision;

c. A copy of Defendant's registration for the vehicle involved in the collision with Plaintiff;

d. If not previously produced, a copy of the declaration pages for any liability or umbrella insurance policies covering defendant at the time of the collision with Plaintiff; and

e. Defendant's driver's license.

The **Designated Representative of Corporate Defendant** shall be prepared to testify about the following matters:

a. The collision of May 22, 2007 involving the vehicles operated by Plaintiff and Defendant Driver, including the reason for Defendant Driver's use of a car on the day of the collision, observations at the scene, statements made by any party or witness, the identify of any witnesses and any photographs of any person or thing involved in the collision;

b. The employment relationship between Corporate Defendant and Defendant Driver, including but not limited to the manner in which Defendant Driver was hired and compensated, tax records pertaining to any compensation paid to Defendant Driver, Defendant Driver's employment duties, work schedule and hours, and supervision of Defendant Driver;

c. Liability insurance coverage, including any umbrella or business policies providing coverage for the car driver by Defendant Driver or otherwise for the Corporate Defendant's business as a result of the collision occurring on 5/22/07;

d. The precise nature of the legal entity (e.g. corporation, sole proprietorship, partnership, etc.) which employed Defendant Driver on 5/22/07 and which operated as the Corporate Defendant. Also provide documentation of the legal structure of this entity;

e. The nature of the business (both in 2007 and at present) of Corporate Defendant, including but not limited to the products or services provided its customers, the number of employees and their duties, whether any vehicles were used to further the business, etc; and

f. The extent of Defendant Driver's prior driving experience and any investigation into his competence to operate a vehicle.

Said Designated Representative should produce at deposition the following documents:

1. all insurance policies requested above;

2. all documents relating to the legal structure of Corporate Defendant on 5/22/07, including tax and legal records confirming the legal nature of the entity operating as Corporate Defendant on 5/22/07;

3. all photographs of any person or thing involved in or relating to the collision; and

4. all documents which explain the employment relationship between Defendant Driver and Corporate Defendant.

Respectfully submitted,
Plaintiff

By:_____
Law Offices of Jeremy Flachs
Jeremy.Flachs@Flachslaw.com

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

		:
		:
	Plaintiff,	:
vs.		:
		:
	Defendant	:

PLAINTIFF'S NOTICE AND MOTIONS IN LIMINE REGARDING LACK OF VISIBLE PROPERTY DAMAGE AND MINOR IMPACT PHOTOGRAPHS

PLEASE TAKE NOTICE that on _____ at 10:00 a.m., or as soon thereafter as counsel may be heard, the Plaintiff, by counsel, will move this Court for hearing on the attached Motion in Limine.

Respectfully Submitted,

By: _____
Attorneys for Plaintiff

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff,	:
	:
Defendants.	:

PLAINTIFF'S MOTIONS IN LIMINE REGARDING LACK OF VISIBLE PROPERTY DAMAGE AND MINOR IMPACT PHOTOGRAPHS

COMES NOW, Plaintiff, by counsel, and hereby moves this Court to grant her Motion in Limine.

Evidence and Argument Regarding Lack of Significant Property Damage and Lack of Significant Injury to the other Occupants of the Cars in the Accident Must be Excluded.

At the trial of this matter, Defendant should be prevented from arguing or offering any defense based on the proposition that Plaintiff could not have been seriously injured in this accident due to either the minor damage to the parties' automobiles or the limited personal injury of the other occupants of the automobiles in the accident.

Due to the relatively minor property damage to the parties' automobiles, and the fact that none of the other passengers in the automobiles were seriously injured, counsel for the defense will likely attempt to argue that plaintiff could not have been seriously injured in the accident. Such argument is improper in the absence of expert testimony.

Expert opinion is allowed when the witness offered expert has some particular knowledge or experience, not common to the world, which assists the fact finder in resolving an issue. *Bradley v. Poole*, 187 Va. 432 (1948). It follows then, that a lay witness must testify to facts, and cannot give opinions or conclusions. *Hot Springs Lumber & Mfg. Co. V. Revercomb,* 110 Va. 240 (1909). Correlating property damage to personal injury necessarily requires some particular knowledge or experience. None

of defendant's expert designations indicate that an expert will correlate property damage to personal injury. Therefore, defendant cannot offer an argument or make a defense correlating the two at trial. Nor can he admit the photographs of the vehicles for such purpose.[2]

The Supreme Court of Delaware recently held, that in the absence of expert testimony, a party may not directly argue that there exists a correlation between the degree of personal injuries and the damage to the automobiles. *Davis v. Maute*, 770 A.2d 36, 40 (2001). *Davis* involved a low impact automobile accident and claims of substantial personal injury. *Davis* at 40. Defendant did not offer expert testimony to correlate the property damage to personal injury. *Davis* at 40. At trial, defense counsel argued that the accident was a "fender bender" and offered photographs of the parties' vehicles for the consideration of the jury. *Davis* at 40-41. The court held that as defense counsel could not correlate property damage to personal injury without expert testimony, both his characterization of the accident as a "fender bender" and his offer of the photographs for admission were improper. *Davis* at 41-42. The court held that the characterization and the offer were an attempt to argue by implication that which counsel could not argue directly. *Davis* at 41-42.

The facts of the present matter are analogous to those in Davis. Plaintiff claims a substantial injury following an accident with relatively minor property damage. Defendant cannot argue that the accident was a minor fender bender and offer the photographs in an attempt to prove it. In the de bene esse deposition of Plaintiff's physician, a defense expert, Dr. Bruno acknowledged that a number of factors beyond property damage are important to gauge the severity of an accident, including but not

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[2] The photographs of defendant's car shows little visible damage. Yet an estimate of $1,125.17 (attached hereto, Exhibit 1) was generated to repair the car. If the photos are admitted, the repair estimate should be admitted.

limited to: (1) the design of the bumper on each car, (2) the ability of the bumper to absorb the impact, (3) the type of headrest and support provided the upper torso by the seat, (4) the position of the body at impact, and (5) the extent to which the injured person was prepared for the impact.[3] The same analysis applies to any argument which attempts to correlate the injuries of others in the vehicles to plaintiff's injuries. Defendant's likely argument, that plaintiff could not have been seriously hurt if no one else was badly hurt, inherently requires an expert opinion.[4] However, none of defendant's expert designations indicate that defendant's experts will offer such an opinion. Consequently, the argument would be improper.

Therefore, defendant should be prevented from making any argument or offering any defense correlating plaintiff's injuries with either the property damage or the injuries of the other occupants of the automobiles, or otherwise referring to the collision as "minor" or a "fender bender."

But See: *Maybaum v Rakita,* 2002 Ohio 5338; 2002 Ohio App. LEXIS 5359 (2002) (unpublished) The damage to each vehicle was minimal, with the driver's expert testifying that the vehicle damage would have been consistent with a barrier impact of approximately two miles per hour. The appellate court found that the extent of damage to a vehicle was often an excellent indicator of the extent of injuries suffered. The admissibility of the photographs was within the sound discretion of the trial court. There was no concern that the jury could have been unduly prejudiced by the photographs, because there was ample expert testimony proffered by both parties.

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[3] Significantly, one of the defense doctors also acknowledged that he had no information on any of these aspects of the accident and had not used them in developing his opinions.

[4] This is particularly relevant where plaintiff had a pre-existing degenerative condition which made her susceptible to injury.

WHEREFORE, Plaintiff respectfully requests that her Motions in Limine be granted, and that Defendant not be allowed, through the Court or otherwise, to give or make the arguments as outlined above.

Respectfully Submitted,

By: _____

Law Offices of Jeremy Flachs
Jeremy.Flachs@Flachslaw.com
Attorneys for Plaintiff

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff	:	
v.	:	Case No.
Defendants	:	

PLAINTIFF'S MOTION TO AMEND *AD DAMNUM* CLAUSE

COMES NOW the plaintiff, by counsel, and moves this Court for leave to amend the complaint to increase the *ad damnum* from $400,000.00 to $800,000.00, and to add an allegation of willful and wanton negligence. Pursuant to Virginia Supreme Court Rule 1:8 and §8.01-377, leave to amend should be liberally granted in furtherance of the ends of justice.

THE AD DAMNUM NEEDS TO BE INCREASED IF PLAINTIFF IS TO BE FULLY COMPENSATED FOR HIS INJURIES

Plaintiff's treating health care providers have disclosed opinions that Plaintiff's back injuries are permanent, that he will require either surgery or a series of epidural injections every year for life, and that his future medical expenses will exceed $250,000.00. Plaintiff's rehabilitation counselor and life care planner has disclosed an opinion that Plaintiff's expected future wage loss exceeds $. Plaintiff's treating physicians have expressed opinions that his past medical expenses of over $48,000.00 are reasonable and necessary expenses. Plaintiff is 31 years old and has a life expectancy of an additional 45.6 years. Virginia Code §8.01-419. The current

ad damnum of $400,000.00 is clearly insufficient to fully compensate Plaintiff for his injuries.

The Virginia Supreme Court has held that:

> When deciding whether to grant a motion to amend a motion for judgment to increase an *ad damnum* clause, a circuit court must consider whether the defendant will be prejudiced and whether such prejudice will affect the defendant's ability to have a fair trial. The circuit court must also consider the plaintiff's right to be compensated fully for any damages caused by the defendant's acts or omissions.

Peterson v. Castano, 260 Va. 299, 303, 534 S.E.2d 736, 738 (2000). Given the facts of this case, the Defendants do not have good grounds to demonstrate prejudice. Trial is not until October 4, 2010. The basis for the amendment has already been disclosed to Defendants through Plaintiff's expert disclosures, which were filed on February 3, 2010.

The Virginia Supreme Court has previously held that it is not an abuse of discretion to grant such an amendment on the eve of trial. See *Bell v. Kirby*, 226 Va. 641, 646, 311 S.E.2d 799, 802 (1984) (holding no abuse of discretion to grant amendment to double *ad damnum* two days before trial). Certainly there is no abuse of discretion to grant such an amendment more than four months before trial. For these reasons, the motion should be granted and the *ad damnum* increased to $800,000.00.

WHEREFORE these premises considered, Plaintiff requests that this Court grant the motion to amend, increase the *ad damnum*, and deem the attached proposed amended complaint to be filed as of the date of entry of the order granting the motion.

By: _____

Law Offices of Jeremy Flachs
Jeremy.Flachs@Flachslaw.com

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Plaintiff,	:	
v.	:	Case Number:
Defendant.	:	

MOTION TO COMPEL RECORDED STATEMENT OF DEFENDANT

Comes now the Plaintiff, by counsel, and in support of her Motion to Compel refers the Court to the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

On September 1, 2006, Plaintiff was struck by a minivan driven by the Defendant.

In discovery, Plaintiff requested that Defendant produce any written or recorded statements of the parties (Plaintiff's Request for Production of Documents #3). The Defendant provided a recorded statement to her insurance company on September 15, 2006, fourteen days after the accident. The Defendant has objected to producing the transcript of that statement.

I DEFENDANT'S RECORDED STATEMENT WAS NOT OBTAINED IN ANTICIPATION OF LITIGATION

Under Rule 4:1(b)(1), the statement is discoverable unless a privilege applies. The Defendant, as the party asserting the privilege, has the burden of establishing that privilege. *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943).

The majority of Virginia Circuit Courts have found that recorded statements provided by insureds to their insurance carriers are not protected as having been prepared in anticipation of litigation.[56] In *Overton v. Dise*, 35 Va. Cir. 177 (Fairfax, 1994), Judge Wooldridge held that a statement taken day after the accident was taken in the ordinary course of business, and not subject to privilege. In *Estabrook v. Conley*, 42 Va. Cir. 512 (Rockingham, 1997), Judge McGrath held that the involvement of counsel was a prerequisite for the privilege to apply. "If the matter was not significant enough to involve counsel with an eye to preparing a litigation defense, it is not in this Court's view entitled to the protection afforded by Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia." 42 Va. Cir. at 513. See also *McKinnon v. Doman*, 72 Va. Cir. 547 (Norfolk, 2007); *Wood v. Barnhill*, 52 Va. Cir. 274 (Charlottesville, 2000); *Thompson v. Winn Dixie Raleigh, Inc.*, 49 Va. Cir. 115, 116 (Chesterfield, 1999) ("any statement taken prior to the date defense counsel was retained is discoverable").

While the Virginia Supreme Court has not addressed this specific issue, its ruling in *Riverside Hospital, Inc. v. Johnson*, 272 Va. 518 (2006) is instructive. In *Riverside*, the Court was asked to extend privilege to a hospital incident report. In declining to extend the privilege,

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[5] See *Lopez v. Woolever*, 62 Va. Cir. 198, 201 (Fairfax, 2003) and discussion therein. Note however that Judge Alden took the minority view of applying a case-by-case analysis.

[6] A minority use a case-by-case analysis. See *McCullough v. Standard Pressing Machines Co.*, 39 Va. Cir. 191 (Fairfax, 1996) (J. Vieregg) (holding that if serious injuries are involved, then the insurance company is as a consequence necessarily anticipating litigation, and the privilege applies). See also *Veney v. Duke*, 69 Va. Cir. 209 (Fairfax, 2005) (J. Ney) (holding that all statements made by insureds to their insurance carriers were privileged as being taken in anticipation of litigation). In effect, Judge Ney equated the insured/carrier relationship with the attorney/client, doctor/patient, and penitent/priest relationships, thus going well beyond the minority view.

the Court remarked:

> Factual patient care incident information that does not contain or reflect any committee discussion or action by the committee reviewing the information is not the type of information that must "necessarily be confidential" in order to allow

participation in the peer or quality assurance review process. 272 Va. at 533. Likewise, a recorded factual statement provided by a driver to her insurance company shortly after an accident does not contain any strategic information that should be kept confidential. For these reasons the motion to compel should be granted.

II PLAINTIFF HAS A SUBSTANTIAL NEED FOR THE STATEMENT

Even if the recorded statement should be deemed to have been taken in anticipation of litigation, it is still discoverable under Rule 4:1(b)(3). Plaintiff has a substantial need for the statement and is unable to obtain the information contained therein without undue hardship.

Defendant has raised contributory negligence as a defense. In her answers to interrogatories, Defendant states:

> At the time of the accident I was backing out of a parking space. The plaintiff should have kept a proper lookout and should have noticed that I was backing out of my space and should have avoided walking into the path of my vehicle.

At her deposition of January 6, 2009, Defendant testified, on page 53, line 16, as follows:

> Q. Whose fault is it, Ms. Green?
> A. I can't respond to that.
> Q. Why?
> A. Because I have no answer to that.

She later testified on page 62, line 8 as follows:

> Q. But my question is do you have any evidence to suggest Ms. Moss didn't keep a proper lookout?

A. I don't have evidence one way or the other.

In *Larson v. McGuire*, 42 Va. Cir. 40 (Loudoun, 1997), the Court was faced with a similar situation where the Defendant was relying on the defense of contributory negligence. In ruling that the Plaintiff met her burden under Rule 4:1(b)(3) and that the recorded statement provided by the Defendant to her insurer was discoverable, Judge Horne stated:

> These statements would have been taken shortly after the accident and would serve as a basis for understanding defendant's claim of contributory negligence, as that claim is now clouded by deposition testimony. In addition, it is important that the parties be able to fully explore inconsistencies and ambiguities in the testimony of the opposing party during the discovery process. Not only may such statements be used to prove an element of a party's claim but may also serve as a means of impeachment.

42 Va. Cir. at 45.

In *Massenburg v. Hawkins*, 70 Va. Cir. 13 (Greensville, 2005), the Court likewise found the recorded statement was discoverable. As the Court stated:

> Courts are unanimous in finding that a contemporaneous statement provides good cause for allowing discovery. This value is particularly evident in cases where the "witnesses' statements [are] approximately contemporaneous with the accident . . . [and] opposing counsel had no opportunity to question the witnesses until weeks or months later."

70 Va. Cir. at 16, quoting *Guilford Nat'l Bank v. Southern Ry. Co.*, 297 F.2d 921, 926 (4th Cir. 1962).

Defendant's statement, taken a mere fourteen days after the accident, possesses unique qualities that cannot be replicated by other means. For this reason, the motion to compel should be granted.

WHEREFORE these premises considered, Plaintiff requests that this Court grant the motion to compel and direct the Defendant to produce the transcript of the recorded statement provided by the Defendant to her insurer.

By: _____
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SETTLEMENT DEMAND CONTAINING PUNITIVE DAMAGE CLAIM
Date

Nationwide Insurance
7545 Midlothian Turnpike
Richmond, VA 23225

Re: My Client:
Your Insured:
Claim Number:
Date of Loss:

Dear Claims Adjuster:

I. Client Name

Enclosed please find the following exhibits submitted in support of this demand for client.

01	Fairfax County Fire & Rescue	$ 322.50
02	INOVA Mount Vernon Hospital	$ 1,161.55
03	Parker's Lane Emergency Physicians	$ 341.00
04	Association of Alexandria Radiologists	$ 132.00
05	Kaiser Permanente	$ 2,258.00
06a	Prescription - Nabumetone	$ 15.00
06b	Prescription - Methocarbamol	$ 15.00
06c	Prescription - Hydrocodone	$ 11.30

Total Medicals **$ 4,256.35**

Wage Loss: Attached are disability slips from Kaiser confirming that Client was disabled until June 30, 2008, a period of 9 days.

A. Inova Fair Oaks Hospital

Attached is a completed wage loss form documenting a loss of 5 days x 12 hrs x $18.39/hr.....$ 1,103.40

B. Future Care

Attached is a completed wage loss form documenting that she lost her assignment due to her injury. She was averaging 20 hrs/wk and earning $17.00/hr. Her wage loss for only two weeks is 40hrs x $17.00/hr.....$ 680.00

Total Wage Loss **$ 1,703.40**

(**Practice Pointer:** When possible, include photographs depicting significant property damage. If nothing dramatic appears from the photographs, do not include them with the demand.)

Client was injured when your insured rear-ended her car which was stopped at red light n southbound Richmond Highway. Following the impact, Client sat in her car with her hands on her face and leaned on the steering wheel. Following the collision, she experienced neck pain. An ambulance was called which transported her to Fairfax Hospital. She was carried into the hospital on a stretcher and with a neck collar. At the emergency room she was treated for neck injury. Her pain was 8/10 as recorded by the nurse, and she was sent for an x-ray. While in the emergency room, she was given pain relief medication, and upon discharge she was given prescriptions for narcotic pain relievers.

Defendant was convicted of Driving While Intoxicated and had a Blood Alcohol Content of .33, which is more than 4 x the legal limit. This was his second conviction for DWI within 5 years. Driving while drunk with a BAC over .15 permits Client to recover punitive damages. I have set forth the statute below.

§ 8.01-44.5. Exemplary damages for persons injured by intoxicated drivers

In any action for personal injury or death arising from the operation of a motor vehicle, engine or train, the finder of fact may, in its discretion, award exemplary damages to the plaintiff if the evidence proves that the defendant acted with malice

toward the plaintiff or the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others.

A defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath; (ii) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle, engine or train would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

Client came under the care of her physicians and therapists at Kaiser. Her first visit to Kaiser was June 23, 2008 at which time she was in considerable pain and was diagnosed with **muscle spasms in her neck and back.** She was prescribed Relafen, Vicodin and Robaxin and sent for physical therapy. The records reflect 10 physical therapy visits to treat the neck and back pain. The first therapy visit was June 28, 2008 at which time client was experiencing neck and back pain, **which affected her turning her head, sitting or lying down, and sleeping.**

The severe pain continued, and Client returned to her physician on June 29, 2008. At that time she was also experiencing headache, and she was unable to work due to the level of pain. She was given two additional prescriptions for pain relief (Naproxen and Cyclobenzaprene).

She continued with her physical therapy and at her visit on July 15, 2008, the therapist recorded improved neck and back pain (decrease from 7/10 to 5/10). Her last therapy visit was 8/12/08 at which time she was discharged to continue with a home exercise program. Client visited her doctor on September 5., 2008. It was noted that her **muscle spasms were gradually (albeit slowly) improving and there were days when the symptoms worsened. She was discharged with instructions to continue taking medication and apply heat.**

Considering the nature and extent of injury, medical expense and wage loss and drunk driving by your insured, I will recommend a settlement of **$ 65,000.00** .

Very truly yours,
Jeremy Flachs
Jeremy.Flachs@Flachslaw.com