

Case No. _____

In the Supreme Court of Nevada

JACUZZI, INC. doing business as JACUZZI
LUXURY BATH,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the
State of Nevada, in and for the County of Clark;
and THE HONORABLE CRYSTAL ELLER, District
Judge,

Respondents,

and

ROBERT ANSARA, as special administrator of
the ESTATE OF SHERRY LYNN CUNNISON,
deceased; ROBERT ANSARA, as special
administrator of the ESTATE OF MICHAEL
SMITH, deceased heir to the ESTATE OF SHERRY
LYNN CUNNISON, deceased; and DEBORAH
TAMANTINI, individually and heir to the Estate
of SHERRY LYNN CUNNISON, deceased,

Real Parties in Interest.

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**PETITIONER'S APPENDIX
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D. LEE ROBERTS (SBN 8877)
BRITTANY M. LLEWELLYN (SBN 13,527)
JOHNATHAN T. KRAWCHECK (*pro hac vice*)
WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

JOEL D. HENRIOD (SBN 8492)
DANIEL F. POLSENBERG (SBN 2376)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169

Attorneys for Petitioner

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67	Plaintiffs' Reply to: (1) Defendant Jacuzzi, Inc. dba Jacuzzi Luxury Bath's Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions; and (2) Defendant FirstStreet For Boomers & Beyond, Inc., AITHR Dealer, Inc., and Hale Benton's Objections to Plaintiffs' Demand for Certain Jury Instructions and Rulings on Motions in Limine Based on Court Striking Jacuzzi's	11/10/20	28	6906–6923

	Answer Re: Liability			
63	Plaintiffs' Response to Defendant Jacuzzi Inc. d/b/a Jacuzzi Luxury Bath's Objections to Plaintiff's [sic] Proposed "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only" Submitted October 9, 2020	10/20/20	27	6713–6750
56	Plaintiffs' Response to Defendant Jacuzzi's Notice of Waiver of Phase 2 Hearing and Request to Have Phase 2 of Evidentiary Hearing Vacated	09/21/20	27	6562–6572
25	Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing	08/20/19	9	2242–2244
30	Recorder's Transcript of Evidentiary Hearing – Day 1	09/16/19	17	4011–4193
58	Recorder's Transcript of Evidentiary Hearing – Day 1	09/22/20	27	6574–6635
31	Recorder's Transcript of Evidentiary Hearing – Day 2	09/17/19	17 18	4194–4250 4251–4436
32	Recorder's Transcript of Evidentiary Hearing – Day 3	09/18/19	18 19	4437–4500 4501–4584
36	Recorder's Transcript of Evidentiary Hearing – Day 4	10/01/19	19	4596–4736
21	Recorder's Transcript of Hearing Pursuant to Defendant Jacuzzi's Request Filed 6-13-19, Defendant Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath's Request for Status Check; Plaintiffs' Motion for Reconsideration Re: Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s Answer and Motion for Clarification Regarding the Scope of the Forensic Computer Search	07/01/19	8	1887–1973
52	Recorder's Transcript of Pending Motions	06/29/20	27	6509–6549

61	Recorder's Transcript of Pending Motions	10/05/20	27	6639–6671
94	Recorder's Transcript of Pending Motions	07/14/21	32 33	7893–8000 8001–8019
90	Reply in Support of “Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial”	06/30/21	32	7862–7888
50	Reply to Plaintiffs’ (1) response to Jacuzzi’s Objections to Proposed Order, and (2) Opposition to Jacuzzi’s Motion to Clarify the Parameters of Any Waiver of Attorney-Client Privilege	06/24/20	26 27	6495–6500 6501–6506
3	Second Amended Complaint	05/09/16	1	24–33
4	Third Amended Complaint	01/31/17	1	34–49
10	Transcript of All Pending Motions	02/04/19	5 6	1214–1250 1251–1315
20	Transcript of Proceedings – Defendant Jacuzzi, Inc.’s Request for Status Check; Plaintiffs’ Motion for Reconsideration Regarding Plaintiffs’ Renewed Motion to Strike Defendant Jacuzzi, Inc.’s Answer and Motion for Clarification Regarding the Scope of the Forensic Computer Search	07/01/19	8	1794–1886
74	Transcript of Proceedings: Jury Instructions	12/21/20	29	7119–7171
68	Transcript of Proceedings: Motion to Strike	11/19/20	28 29	6924–7000 7001–7010
71	Transcript of Proceedings: Motions in Limine: Jacuzzi’s Nos. 1, 4, 13, 16, and 21/First Street’s No. 4; Jury Instructions	12/07/20	29	7050–7115

CERTIFICATE OF SERVICE

I certify that on October 5, 2021, I submitted the foregoing
“Petitioner’s Appendix” for filing *via* the Court’s eFlex electronic filing
system. Electronic notification will be sent to the following:

Benjamin P. Cloward
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Real Parties in Interest

I further certify that I served a copy of this document by mailing a
true and correct copy thereof, postage prepaid, at Las Vegas, Nevada,
addressed as follows:

The Honorable Crystal Eller
DISTRICT COURT JUDGE – DEPT. 19
200 Lewis Avenue
Las Vegas, Nevada 89155

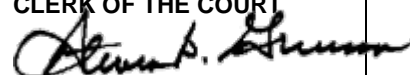
Respondent

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP



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BREF

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.com

D. LEE ROBERTS, JR. (SBN 8877)
BRITTANY M. LLEWELLYN (SBN 13,527)
JOHNATHAN T. KRAWCHECK (*pro hac vice*)
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Boulevard, Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
LRoberts@WWHGD.com
BLlewellyn@WWHGD.com
JKrawcheck@WWHGD.com

*Attorneys for Defendant Jacuzzi Inc.,
dba Jacuzzi Luxury Bath*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

ROBERT ANSARA, as Special
Administrator of the ESTATE OF SHERRY
LYNN CUNNISON, Deceased; MICHAEL
SMITH, individually, and heir to the
Estate of SHERRY LYNN CUNNISON,
DECEASED,

Plaintiffs,

vs.

FIRST STREET FOR BOOMERS & BEYOND,
Inc.; AITHR DEALER, INC.; HALE BENTON,
Individually; HOMECCLICK, LLC; JACUZZI
INC., doing business as JACUZZI LUXURY
BATH; BESTWAY BUILDING &
REMODELING, INC.; WILLIAM BUDD,
Individually and as BUDDS PLUMBING;
DOES I through 20; and ROE
CORPORATIONS I through 20; DOE
EMPLOYEES 1 through 20; DOE 20
INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE 21
SUBCONTRACTORS 1 through 20,
inclusive,

Defendants.

Case No. A-16-731244-C

Dept. No. 2

**BRIEF RESPONDING TO PLAINTIFFS'
REQUEST FOR INFLAMMATORY,
IRRELEVANT, UNSUBSTANTIATED,
OR OTHERWISE INAPPROPRIATE
JURY INSTRUCTIONS**

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1 Plaintiffs have listed 17 jury instructions they would like the Court to
 2 give—merely listing them. They provide no analysis explaining or warranting
 3 the instructions, nor any authority for instructing on the particular concepts,
 4 nor authority to support allowing a sanction to taint jury instructions at all.
 5 Thus, as a general matter, plaintiffs fail to carry *their burden* to justify these
 6 instructions. *See* NRCP 51(a)(3) (“If a party relies on any statute, rule, caselaw,
 7 or other legal authority to support a requested instruction, the party must cite
 8 or provide a copy of the authority.”) The Court should deny all of them.¹

9 The instructions also are substantively inappropriate.² They either are
 10 inflammatory, unsubstantiated by the Court’s findings, unnecessary and
 11 prejudicial to the phases of trial in which they would be given, and/or constitute
 12 impermissible commentary on the evidence relating to determinations that the
 13 Court has left to the jury.

14 I.

15 JURY INSTRUCTIONS ABOUT THE COURSE OF LITIGATION

16 Plaintiffs request three jury instructions that affirmatively seek to vilify
 17 Jacuzzi with accounts of discovery, findings of bad faith, explanations of
 18 discoverability of information and material, and impute dastardly motives to
 19 Jacuzzi:

20 5. The jury should be instructed that the Court has found
 21 that during this litigation, Jacuzzi willfully withheld
 22 evidence related to other end-users being injured in
 23 substantially similar incidents because it knew the evidence
 24 was harmful to its defenses in this case.

25 6. The jury should be instructed that the Court has found

26 ¹ Plaintiffs should not be permitted to sandbag Jacuzzi with new arguments or
 27 authorities in response to these objections. At the hearing on October 5, 2020,
 28 undersigned counsel suggested that plaintiffs lead off with a brief to actually
 justify the instructions they request. Plaintiffs rejected the opportunity,
 insisting that they already had provided all of their points and authorities.

² Perhaps the core notions addressed in a few of them could be combined and
 worded neutrally to give the jury enough context for its determinations.

1 that during this litigation, Jacuzzi willfully withheld
 2 evidence which would tend to show that Jacuzzi had reason
 3 to anticipate that Sherry may slip off the seat into the
 footwell because it knew the evidence was harmful to its
 defenses in this case.

4 7. The jury should be instructed that the Court has found
 5 that during this litigation, Jacuzzi willfully withheld
 6 evidence which would tend to show that Jacuzzi had reason
 7 to anticipate that if Sherry were to slip off the seat into the
 footwell, she would be unable to open the inward opening
 door because it knew the evidence was harmful to its
 defenses in this case.

8 These are highly inappropriate. As a sanction for Jacuzzi's conduct during
 9 discovery, the Court has determined to strike Jacuzzi's liability defense. The
 10 effect is to remove determination of liability for compensatory damages from the
 11 jury. The Court has not, and must not, impose a sanction of *pillorying* Jacuzzi
 12 before the jury in order to inflame and impassion them to inflate their damage
 13 awards with considerations beyond the merits of the case. The instructions are
 14 not relevant to any issue to be decided by the jury; there are merely intended to
 15 inflame and prejudice the jury against Jacuzzi.

16 **A. The Court Cannot Instruct the Jury Regarding**
 17 **Litigation History**

18 Instructions and evidence relating to pretrial litigation inflames the jury
 19 in violation of due process, cannot be understood by the jury, and waste
 20 enormous amounts of time.

21 **1. *Litigation History is Inappropriate for the Jury***

22 Evidence of litigation conduct is inadmissible because it can inflame the
 23 jury, particularly when there is a request for punitive damages, as there is in
 24 this case. *See Bosack v. Soward*, 586 F.3d 1096, 1105 (9th Cir. 2009) ("Absent
 25 an abuse of process or malicious prosecution, 'a defendant's trial tactics and
 26 litigation conduct may not be used to impose punitive damages in a tort action.'"
 27 (quoting *De Anza*, 114 Cal. Rptr. 2d at 730)); *Palmer v. Ted Stevens Honda, Inc.*,
 28 238 Cal. Rptr. 363, 369 (App. 1987) ("Not only was admission of this evidence of

defendant's litigation conduct . . . error, we conclude it undermines the integrity of the punitive damage award" because it "inflamed the jury so as to disregard the court's admonitions about its limited purpose"). That is the general rule in civil cases throughout the country. *See DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 719 (7th Cir. 1998) ("A court is entitled to keep the jury focused on the claim of liability that requires decision; the judge need not allow the defendant to put the plaintiff's litigation tactics on trial."); *Amlan, Inc. v. Detroit Deisel Corp.*, 651 So. 2d 701, 703 (Fla. Dist. Ct. App. 1995) ("Evidence related to the history of pretrial discovery conduct should normally not be a matter submitted for the jury's consideration on the issues of liability."); *Palmer ex rel. Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 916-17 (Mont. 1993) (evidence of defense attorneys' role in meeting with witnesses "was prejudicial because it allowed the jury to second guess Farmers' attorney and to consider legitimate defense strategy and proper litigation tactics as evidence of bad faith"). Jury instructions on the subject or litigation history are even worse, moreover, because they amplify the inflammatory considerations with the Court's commentary and imprimatur of approval.

The only conceivable relevance of discovery proceedings to jury instructions and possible admission in evidence would be to contextualize spoliation instructions, where the Court leaves ultimate conclusions to the jury. *Bass-Davis v. Davis*, 122 Nev. 442, 452-53, 134 P.3d 103, 109-10 (2006). But, here, the Court decided to strike Jacuzzi's liability defense instead.

2. *Jacuzzi's Due Process Rights Would Be Violated By Commenting on Evidence of Litigation Conduct*

"Furthermore, due process considerations are implicated to the extent that tort damages are based on evidence that a defendant filed motions, appeals and other legal proceedings during the course of litigation." *See De Anza*, 114 Cal. Rptr. 2d at 730. "Pursuing authorized forms of relief before courts or other

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1 governmental tribunals is a protected right and cannot be the basis of tort
 2 liability, except in a properly pleaded action for malicious prosecution.” *Id.* The
 3 admission of evidence of litigation strategy also implicates due process because
 4 “it fails to consider or accord any weight to the right of a defendant to defend
 5 itself.” *Id.* at 732 (internal quotation marks omitted). And the acts of the
 6 litigators (and their agents) are not binding on the party in this context. *Id.*

7 “Courts and the Legislature have developed sanction and disciplinary
 8 procedures to address” purported misconduct during litigation. *De Anza*, 114
 9 Cal. Rptr. 2d at 732; see also NRC 11, 37. This Court has used that power to
 10 impose liability. The jury is not the right factfinder for matters of legal
 11 procedure. See *De Anza*, 114 Cal. Rptr. 2d at 730 (“A lay jury is not well-suited
 12 to evaluate the relative merits of a legal position taken by a party.”).

13 Importantly, even if the litigation conduct were somehow relevant (which
 14 it is not), the prejudice to Jacuzzi vastly outweighs its probative value. See
 15 NRS 48.035 (relevant evidence inadmissible if “probative value is substantially
 16 outweighed by the danger of unfair prejudice, or confusion of the issues or of
 17 misleading the jury”); NRS 48.035(2) (relevant evidence may be excluded if
 18 “probative value is substantially outweighed by considerations of undue delay
 19 [or] waste of time); *Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 851 (1998)
 20 (evidence of “marginal relevance and inflammatory nature” should be excluded
 21 especially where “danger of prejudice substantially outweighs the probative
 22 value” of the evidence). The course of discovery is irrelevant to compensatory
 23 damages, or punitive damages, or any other issue to be decided by the jury.

24 **B. The Punitive Damages Claim Raises the Potential** 25 **Prejudice to Constitutional Levels**

26 A punitive damages award must be based on the state of things at the
 27 time of the accident, so subsequent conduct (which includes litigation history) is
 28 inadmissible. See, e.g., *R.E. Linder Steel Erection Co. v. Wedemeyer, Cernik*,

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1 *Corrubia, Inc.*, 585 F. Supp. 1530, 1532 (D. Md. 1984) (“[D]efendants’ allegedly
 2 willful, wanton and reckless acts committed after the [building] collapse . . . are
 3 not admissible to show that defendants’ precollapse conduct was similarly
 4 willful, wanton, and reckless.”); *Forquer v. Pinal County*, 526 P.2d 1064, 1067-
 5 68 (Ariz. Ct. App. 1974) (holding that improper argument about the defendant’s
 6 post-accident failure to file an accident report required a new trial); *Wohlwend*
 7 *v. Edwards*, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003) (“For the jury to punish
 8 [the defendant] for such subsequent conduct would detach the propriety and/or
 9 amount of punitive damages from the compensatory damages due the
 10 plaintiffs.”); *Chavarria v. Fleetwood Retail Corp. of N.M.*, 115 P.3d 799 (N.M.
 11 Ct. App. 2005) (litigation conduct cannot serve as basis for punitive damages),
 12 *rev’d on other grounds*, 143 P.3d 717 (N.M. 2006); *DeMatteo v. Simon*, 812 P.2d
 13 361, 363 (N.M. Ct. App. 1991) (holding that it was error to admit a defendant’s
 14 post-accident driving record to prove a punitive damages claim); *Taylor v. Dyer*,
 15 593 N.Y.S.2d 122, 124 (App. Div. 1993) (“While defendant’s flight from the
 16 scene might be considered reprehensible, such conduct occurring after the
 17 accident did not proximately cause plaintiffs’ injuries . . .”).

18 Even spoliation of evidence—which hasn’t occurred here—cannot be the
 19 basis for punitive damages. The Nevada Supreme Court does not allow a tort
 20 action for spoliation. *Timber Tech Engineered Bldg. Products v. The Home Ins.*
 21 *Co.*, 118 Nev. 630, 632, 55 P.3d 952, 954 (2002). *See also, Cedars-Sinai Medical*
 22 *Center v. Superior Court* (1998) 18 Cal.4th 1, 17-18, 74 Cal.Rptr.2d 248, 954
 23 P.2d 511 (1998), (party has no tort claim for spoliation if he knew of the
 24 spoliation before trial). And other courts have expressly declined to impose
 25 punitive damages based on a defendant’s destruction of evidence, even where it
 26 was intentional, because it is not relevant to whether the defendant had the
 27 requisite state of mind at the time of the conduct that caused the injury.

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1 In *Simmons v. Southern Pacific Transp. Co.*, for example, the California
2 court held that punitive damages did not lie even where a defendant railroad
3 company instituted a regular procedure to strip accident files of any
4 unfavorable documents. 133 Cal. Rptr. 42, 46-47 (1976). “Even assuming that
5 the railroad engaged in file-stripping, evidence suppression, and willful refusal
6 to file accident reports, these matters occurred long after the accident and could
7 not have had any bearing on the accident itself.” *Simmons v. Southern Pac.*
8 *Transportation Co.*, 62 Cal.App.3d 341, 369, 133 Cal.Rptr. 42, 58 (Cal. App.
9 1976) (citing *Noe v. Kaiser Foundation Hospitals*, 435 P.2d 306 (1967)).
10 “Inconsistencies, evasions and untruths made subsequent to the occasion have
11 been considered by this court to be only evidence of an attempt to avoid
12 responsibility for past actions rather than evidence of previous disregard for
13 consequences.” *Id.* (citation omitted).

14 Other courts, too, have recognized that even spoliation of evidence is not
15 the requisite proof of malice, oppression or fraud to sustain a claim for punitive
16 damages. See *Brito v. Gomez Law Group, LLC*, 658 S.E. 2d 178, 184-85 (Ga.
17 App. 2008) (no authority supports punitive damages “as a sanction for
18 spoliation of evidence, and the record contains no evidence of intentional actions
19 by [defendant] going beyond mere spoliation”); *Schenk v. HNA Holdings, Inc.*,
20 613 S.E.2d 503, 24 A.L.R.6th 919 (N.C. App. 2005) (that engineer directed
21 asbestos specialist to destroy memorandum and provide only verbal reports of
22 asbestos removal was insufficient to establish that corporate owner’s officer,
23 director, or manager participated in willful or wanton conduct that resulted in
24 third-party maintenance workers’ asbestos-related injuries; no evidence that
25 destruction of memorandum resulted in workers' injuries); *Reeves v. Alyeska*
26 *Pipeline Service Co.*, 56 P.3d 660 (Alaska 2002) (destruction of evidence was not
27 presented to the jury as separate tort theory, “and it would be improper to
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1 speculate that the jury found that these torts were established, much less that
2 they warranted an award of punitive damages”).

3 The potential prejudice by giving these jury instructions would be of
4 constitutional magnitude. “A defendant should be punished for the conduct
5 that harmed the plaintiff, not for being an unsavory individual or business.”
6 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003).

7 Punishment in the form of punitive damages for litigation strategy thus
8 implicates the constitutional prohibition on grossly excessive or arbitrary
9 punishments. *Id.* at 416-17. “Although evidence of other acts need not be
10 identical to have relevance in the calculation of punitive damages,” the court
11 must exclude evidence regarding conduct “that had nothing to do” with the
12 merits of the plaintiffs’ claim. *Id.* at 423-24. And punishing Jacuzzi for
13 subsequent acts during litigation *in addition* to the conduct that harmed the
14 plaintiff would create “a risk of multiple punishments.” *Wohlwend v. Edwards*,
15 796 N.E.2d 781, 787 (Ind. Ct. App. 2003).

16 The Court must exclude evidence of pretrial conduct to avoid error of a
17 constitutional magnitude, as well as avoid informing the jury of any such
18 procedural history in the jury instructions. The course of discovery has nothing
19 to do with plaintiffs’ claim for punitive damages. Plaintiffs want to inform the
20 jury about the course of discovery for one reason, to vilify Jacuzzi in order to
21 inflame the jury and increase the damage awards based on the jury’s passion
22 and prejudice. That is wholly improper. NRS 48.035.

23 II.

24 WHAT JACUZZI ALLEGEDLY KNEW ABOUT OTHER CUSTOMERS

25 Plaintiffs request three instructions asserting as fact broad suppositions
26 about alleged events behind the complaints received, and what the complaints
27 allegedly caused Jacuzzi to know about the product:

28 8. The jury should be instructed that Jacuzzi knew, prior to
the subject tub being sold to Sherry, that other customers

1 had slipped off the seat and into the footwell of substantially
2 similar Jacuzzi walk in tubs.

3 9. The jury should be instructed that Jacuzzi knew, prior to
4 the subject tub being sold to Sherry, that other customers
5 who had slipped into the footwell were unable to exit
6 because of the inward opening door.

7 10. The jury should be instructed that Jacuzzi knew of other
8 incidents where customers had to call 911 or other
9 emergency responders for help exiting the tub because they
10 were unable to exit due to the inward opening door and
11 weakened physical conditions being elderly or advanced in
12 age.

13 These are improper. The Court never made such findings. The evidence
14 referred to establishes at most the existence of reports of complaints
15 themselves, not the alleged events behind them. Moreover, the subject matter
16 will be irrelevant in the compensatory phase of trial and would improperly
17 invade the province of the jury in the punitive phases.

18 **A. The Court Never Made the Purported Findings**

19 These instructions would indicate that the Court has found facts
20 regarding the merits of the case that it did not. The Court's findings all concern
21 litigation history and the *discoverability* or certain items. The Court did not
22 make any finding regarding the merits that could substantiate these
23 instructions.

24 **B. The Complaints Are Irrelevant to the First Phase**
25 **on Compensatory Damages, and Findings About them**
26 **Would Invade the Province of the Jury in the Second**

27 The Court ought not comment on the alleged merits for plaintiffs' defect
28 claims with findings about the nature of the tub, what Jacuzzi knew about the
29 tub, what Jacuzzi knew about customer complaints and incidents, *etc.*

30 **1. The Issue is Irrelevant to Compensatory Damages**

31 The circumstances underlying the customer complaints, as opposed to the
32 existence of the complaints themselves, would be relevant at most to the

1 existence of a design defect or need for a warning, which the Court's sanction
 2 has established. And the first phase of trial will concern just compensatory
 3 *damages*. For that phase, the jury will need to know only that the Jacuzzi has
 4 been deemed liable for Ms. Cunnison being stuck in the tub.

5 **2. *The Instructions Would Be Improper Commentary***
 6 ***on the Evidence During the Second Phase***

7 To impose punitive damages, the jury must determine what Jacuzzi
 8 understood regarding other incidences, complaints and customers, and their
 9 relevance to overall safety of the product. Jacuzzi understands the Court is not
 10 imposing liability for punitive damages, but is leaving that determination for
 11 the jury, as was done in *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606,
 12 612-12, 245 P. 3d 1182, 1186 (2010).

13 First, for Jacuzzi to have a fair trial on punitive damages, which Plaintiffs
 14 agree Jacuzzi should have, Plaintiffs must prove all of the facts necessary to
 15 support any award of punitive damages, including the allegedly tortious
 16 conduct on which it is predicated, and proof that the tortious conduct caused
 17 damage to Plaintiffs,³ by clear and convincing evidence. See NRS 42.005(1).⁴

18 ³ The documents and other evidence that the Court found Jacuzzi should have
 19 produced earlier in the litigation relates only to whether there is a defect in the
 20 product and whether Jacuzzi had notice of it. This is presumably why the Court
 21 has found liability as a sanction. None of the evidence at issue, however, tends
 22 to make causation more likely than not. Plaintiffs have been in possession of
 23 that evidence since the inception of the case and a sanction on causation would
 24 bear no rational relationship to the sanctionable conduct as found by the Court.
 Plaintiffs should not be relieved of causation in the compensatory phase, and
 they certainly should not be relieved of their even higher burden in the punitive
 phase.

25 ⁴ *Even Unconscionably Irresponsible Conduct Does Not Justify Punitive*
 26 *Damages*: Leading up to the enactment of NRS 42.001, the Court was split over
 27 whether there could be "implied malice" in the sense of conduct that
 28 deliberately disregarded a probability of harm even without a specific intent to
 cause, or whether "implied malice" simply referred to a method of proving a
 defendant's actual intent to cause harm by circumstantial evidence. *Craig v.*

1 “Malice, express or implied’ means conduct which is intended to injure a person
 2 or despicable conduct which is engaged in with a conscious disregard of the
 3 rights or safety of others.” See NRS 42.001(3); see also *Countrywide*, 192 P.3d
 4 at 254-55. That includes all aspects of the claim including the particular defect,
 5 foreknowledge of that particular defect, and a causal nexus of that defect with
 6 causation. “Conscious disregard” is defined as [1] “the knowledge of the
 7 probable harmful *consequences* of a wrongful act and [2] a willful and deliberate
 8 failure to act to avoid *those consequences*.” NRS 42.001(1) (emphasis added). In
 9 other words, not only must there be intention to cause harm, the particular,
 10 blameworthy conduct must be proven to causally relate to the injury. See e.g.,
 11 *Southern Pacific Co.*, 80 Nev. 426, 433-34, 395 P.2d 767, 770-71 (1964)

12
 13 *Circus-Circus Enterprises, Inc.*, 106 Nev. 1, 21, 786 P.2d 22, 35 (1990). There
 14 was no dispute, however, that an “implied malice” standard would at least
 15 require an actual awareness of the harm that would result by acting or failing
 16 to act. By any measure, an unconscionable but unconscious dis-regard for the
 17 plaintiff’s safety would not subject a defendant to punitive damages. See, e.g.,
 18 *First Interstate Bank of Nevada v. Jafbros Auto Body, Inc.*, 106 Nev. 54, 57, 787
 19 P.2d 765, 767 (1990).

20 Although *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 747,
 21 192 P.3d 243, 257 (2008), suggested that the Legislature in enacting the NRS
 22 42.001 definitions had rejected the idea that “unconscionable irresponsibility”
 23 was immune from punitive damages, the legislative history refutes
 24 *Countrywide*’s analysis. *Countrywide* read NRS 42.001 to supersede Justice
 25 Springer’s concurrence in *Craig v. Circus-Circus Enterprises, Inc.*, that a
 26 manager’s “unconscionable irresponsibility” was not an adequate basis for
 27 punitive damages. *Countrywide*, 124 Nev. at 741–42, 192 P.3d at 254 (citing
 28 *Craig*, 106 Nev. 1, 21, 786 P.2d 22, 35 (1990) (Springer, J., con-curring)). But
 the sponsors of the new NRS 42.001 definitions were clear that “[b]y adopting
 the California statutory standards, the bill effectively adopts the standards
 advocated in both the plurality and concurring opinions in *Craig*.” (Leg. Hist.,
 at 64.) The statute explicitly intended that “[b]ad judgment, even
 unconscionably irresponsible conduct . . . does not reflect the evil mind or
 motive” necessary for an award of punitive damages. (Leg. Hist., at 65.) And
 that is in fact how NRS 42.001 was interpreted after its enactment. See
Maduik v. Agency Rent-A-Car, 114 Nev. 1, 953 P.2d 24 (1998).

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1 (reversible error to admit evidence of prior knowledge of dangerous conditions
2 that were not established to be a cause of the injurious incident). One cannot
3 simply point to embarrassing or even suspicious material indiscriminately.

4 Second, the Court cannot give findings of fact for the punitive damages
5 phase. The Court's findings of fact in the order striking Jacuzzi's liability
6 defense relate only to the procedural history of discovery and the discoverability
7 of material, not to the merits of plaintiffs' case. And even if the Court had
8 examined the merits sufficiently to make substantive findings, it did so under a
9 *preponderance of the evidence* standard. As the jury must reach its conclusions
10 by clear and convincing evidence,⁵ it cannot rely on instructions from the Court
11 based on findings established by a mere preponderance of the evidence.

12 Third, there is no excuse for the Court to comment on the other
13 customers, complaints, incidence reports, etc. as they relate to punitive
14 damages. For purposes of punitive damages, at most, only the complaints and
15 reports themselves—what is on the face of them—may be relevant to notice,
16 assuming Jacuzzi received them beforehand and their substantial similarity is
17

18 ⁵ The “clear and convincing evidence” standard “must produce ‘satisfactory’
19 proof that is so strong and cogent as to satisfy the mind and con-science of a
20 common man, and so to convince him that he would venture to act upon that
21 conviction in matters of the highest concern and importance to his own
22 interest.” *Ricks v. Dabney*, 124 Nev. 74, 79, 177 P.3d 1060, 1063 (2008). It
23 “requires a finding of high probability.” *Shade Foods, Inc. v. Innovative Prods.*
24 *Sales & Marketing, Inc.*, 93 Cal. Rptr. 2d 364, 394 (2000). The evidence must be
25 “so clear as to leave no substantial doubt and sufficiently strong to command
26 the unhesitating assent of every reasonable mind.” *Id.* at 394.

27 That burden of proof is an issue of constitutional dimension. Punitive
28 damages have long been analogized to punishment in criminal law, implicating
heightened due process concerns. Awards of punitive damages now routinely
produce appeals based on U.S. Constitutional protections of due process, the
same as criminal appeals. *See, e.g., Philip Morris USA v. Williams*, 549 U.S.
346 (2007); *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1996); *TXO*
Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).

1 apparent. Jacuzzi could not have *consciously* disregarded particular details
2 underlying complaints of which Jacuzzi was never aware. Put simply, in no
3 way could the prejudice that the Court found to justify imposition of liability for
4 compensatory damages possibly affect plaintiffs' ability to present all of their
5 proof on punitive damages. There certainly is no cause for the Court to
6 comment on any of it.

7
8 **C. The Court Should Establish the Parameters**
9 **and Phasing of Trial Before Determining what**
10 **Instructions Will be Appropriate in Each Phase**

11 While the Court expressed an inclination to establish the phases of trial
12 after resolving plaintiffs' renewed motion to strike First Street's answer (filed
13 Oct. 9, 2020), practicality requires the phasing determination be made before
14 settling jury instructions. As set out above, the propriety of any instructions
15 depends on their relevance to the issues before the jury in the particular phase,
16 as well as the burden of proof governing the respective phase.

17 Based on the Court's sanction of imposing liability for compensatory
18 damages, Jacuzzi understands the Court to be following the approach condoned
19 by the Nevada Supreme Court in *Bahena v. Goodyear Tire & Rubber Co.*, 126
20 Nev. 606, 612-12, 245 P. 3d 1182, 1186 (2010). That entails not hindering
21 Jacuzzi's ability to contest liability for punitive damages and implementing the
22 same protections against jury passion and prejudice as Judge Loehrer did in
23 *Bahena*. In that case, the Nevada Supreme Court upheld an order striking a
24 defendant's liability defenses because the defendant received a full jury trial on
25 compensatory and punitive damages. *Bahena*, 126 Nev. at 612-12, 245 P. 3d at
26 1186, *citing Sims v. Fitzpatrick*, 288 S.W.3d 93 (Tex. Ct. App. 2009). In *Bahena*,
27 the district court trifurcated the trial, to ensure at every stage that
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1 inflammatory material never infected the jury's discrete determinations⁶:

2 **Phase 1:** The first phase was limited to evidence and argument
 3 concerning compensatory damages, at the beginning of which the court
 4 informed the jury: "Very briefly, ladies and gentlemen, this portion of the
 5 trial is going to involve damages. Liability was been determined already in
 6 this case. There are a number of people who were involved . . ." (Goodyear
 7 1/29/07 Trans., attached as Exhibit "4," at 36, App. 36.) The phase I jury
 8 instructions (Exhibit "5," App. 47) and Phase I opening statements (1/29/07
 9 Tr. at 98-157, Ex. 4, App. 38-46) corroborate that limited scope. ***All***
 10 ***evidence of prior incidents, accidents, etc., was excluded*** from the
 11 compensatory damages phase of trial because it was relevant only to liability
 12 for punitive damages and allowing discussion of that evidence—while
 13 hindering defendant from rebutting and contextualizing it—would serve only
 14 to inflame passion and prejudice when assessing compensatory damages.
 15 (See Goodyear 1/23/07 Trans. at 27-29, Exhibit 3, App. 21.) And the history
 16 of discovery was never an issue for the jury's consideration during any phase.
 17 Goodyear was also permitted to cross-examine plaintiff's witnesses on
 18 damages and present its own. *Bahena*, 126 Nev. at 612-12, 245 P.3d at 1186.

19 **Phase 2:** After rendering its verdict on compensatory damages, the
 20 jury returned to hear evidence and argument from both parties relevant to
 21 punitive damages, including evidence of prior incidents, accidents, etc.
 22 (Goodyear 1/23/07 Trans. at 27-29, Ex. 3, App. 21.) As the judge explained to
 23 the jury at the commencement of the second phase:

24 This is the second phase of the trial. In the first
 25 phase of trial, you determined compensatory damages. In

26 ⁶ See "Findings of Fact, Conclusions of Law and Order," attached as Exhibit "1,"
 27 at 9, App. 9; "Liability Default Judgment Against Defendant Goodyear Tire and
 28 Rubber Company," attached as Exhibit "2," at 3, App. 12; Goodyear 1/23/07
 Trans., attached as Exhibit "3," at 3-5, App. 15.

1 the second phase, you will determine whether to assess
2 punitive damages against Defendant Goodyear.

3 While compensatory damages are intended to
4 compensate a wronged party, punitive damages are
5 designed solely for the sake of example and by way of
6 punishing the defendant.

7 If you find that punitive damages will be assessed,
8 there will be a third phase . . .⁷

9 Goodyear was given unfettered ability to present evidence and
10 argument justifying its manufacturing decisions, to distinguish prior
11 accidents and incidents and to contest that the alleged defect even caused
12 the subject accident. (*See id.*; Goodyear Phase II jury instructions, attached
13 as Exhibit “6,” App. 84; and Goodyear 2/6/07 Trans., attached as Exhibit “7,”
14 at 35, App. 121.)

15 **Phase 3:** The jury returned from Phase 2 with a verdict in favor of

16 Goodyear. Had the jury instead determined that Goodyear acted with
17 malice, they would have returned for a third phase in which to assess the
18 amount of punitive damages. That never occurred, however, because
19 “Goodyear prevailed upon Bahena's claim for punitive damages.” *Bahena*,
20 126 Nev. at 612-12, 245 P. 3d at 1186.

21 Now that the Court has decided to sanction Jacuzzi along the lines of
22 *Bahena*, the Court should implement the same safeguards to ensure that the
23 “limited” sanction of striking only liability defenses will not spill over to inflame
24 the jury’s passions or to hinder Jacuzzi’s rights to defend in all other respects.

25
26
27
28 ⁷ Goodyear 2/6/07 Trans., attached as Exhibit “7” at 13, App. 115.

1 III.

2 COMMERCIAL FEASIBILITY OF ALTERNATIVE DESIGNS

3 Plaintiffs request three improper instructions regarding the feasibility of
4 measures to make the tub less slippery and to make the door open outwardly:

5
6 11. The jury should be instructed that in response to
7 customer complaints about the slipperiness of the tub
8 surface that it began offering various products to customers
9 free of charge which were meant to increase slip resistance.

10 12. The jury should be instructed that at the time that
11 Sherry's tub was manufactured, other walk-in tub
12 manufacturers were manufacturing similar walk-in tubs
13 with similar features as Sherry's tub that had outward
14 opening doors.

15 13. The jury should be instructed that it was commercially
16 feasible for Jacuzzi to produce a tub with the same
17 dimensions as Sherry's tub, but with an outward opening
18 door instead of an inward opening door.

19 These instructions are inappropriate for several of the reasons articulated
20 above.

21 A. The Court Did Not Make these Findings

22 The Court did not make these findings of fact regarding the merits of the
23 case. In fact, these were not issues addressed at the evidentiary hearing, and
24 do not in any way relate to Jacuzzi's asserted failure to timely disclose other
25 incidents involving walk-in tubs. The Court's findings go to the procedural
26 history and the discoverability of the material at issue—*i.e.*, its potential to be
27 admissible evidence or to lead to the discovery to evidence. The Court's order
28 does not even mention the feasibility of alternative designs or potential
remedial alterations. Nor does the operative complaint. So, these assertions
also cannot be implied.

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1 Here, again, the Court did not, and could not, make such findings of fact about
2 the merits of the case. *See above*. The concepts are irrelevant to the only
3 determination at issue in the first phase of trial, the determination of
4 compensatory damages for Ms. Cunnison's conscious pain and suffering. *See*
5 *above*. And for the jury's determination of punitive damages in the second
6 phase of trial, the plaintiffs will need to prove these concepts by clear and
7 convincing evidence. "Findings" that have been assumed by the Court could
8 never substitute. *See above*.

9
10 V.

11 **INCIDENTS SUBSTANTIALLY SIMILAR FOR PURPOSES**
12 **OF NOTICE AND CONSCIOUS DISREGARD**

13 Plaintiffs request two instructions to establish similarity of the events
14 complained up, for purposes of "notice" of dangerousness and "conscious
15 disregard":

16 20. The jury should be instructed that prior incidents
17 documented in any of the admitted Evidentiary Hearing
18 Exhibits are substantially similar to the subject incident
19 such that Jacuzzi was on notice of the product's dangerous
20 attributes prior to the time it sold the tub to Sherry.

21 21. The jury should be instructed that subsequent incidents
22 documented in any of the admitted Evidentiary Hearing
23 Exhibits are substantially similar to the subject incident
24 such that Jacuzzi consciously disregarded foreseeable and
25 probable harm.

26 These are inappropriate for similar reasons. First, the Court did not find any of
27 these "facts" on the merits. The Court did not find that any prior incident is
28 substantially similar to Ms. Cunnison's incident beyond the surface-level
analysis of discoverability. Nor did the Court rule that documents admitted at
the evidentiary hearing were admitted for trial. Further, these notions are not
even based on allegations in the complaint to which the stricken answer
responded. *See above*. Second, substantial similarity is irrelevant to plaintiff's
compensatory damages. *See above*. Third, in the second phase, the complaints

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1 and incidence reports will speak for themselves (for whatever value they may
2 have); and the substantive similarity of circumstances underlying the
3 complaints will be irrelevant and should not be commented upon. In other
4 words, what is relevant to punitive phase is what is on the face of the
5 complaints and reports themselves, including the content or absence of detail,
6 as well as the indicia of credibility or reasons for skepticism. *See above.* And
7 those determinations are for the jury under the requisite standard of proof.

8 Dated this 20th day of October, 2020.

9 LEWIS ROCA ROTHGERBER CHRISTIE LLP

10
11 By /s/ Joel D. Henriod

12 DANIEL F. POLSENBERG (SBN 2376)
13 JOEL D. HENRIOD (SBN 8492)
14 ABRAHAM G. SMITH (SBN 13,250)
15 3993 Howard Hughes Parkway, Suite 600
16 Las Vegas, Nevada 89169
17 (702) 949-8200

18 D. LEE ROBERTS, JR. (SBN 8877)
19 BRITTANY M. LLEWELLYN (SBN 13,527)
20 JOHNATHAN T. KRAWCHECK (*pro hac vice*)
21 WEINBERG, WHEELER, HUDGINS,
22 GUNN & DIAL, LLC
23 6385 South Rainbow Boulevard, Suite 400
24 Las Vegas, Nevada 89118
25 (702) 938-3838

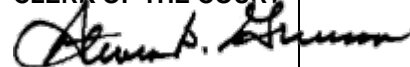
26
27 *Attorneys for Defendant*
28

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APEN

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.com

D. LEE ROBERTS, JR. (SBN 8877)
BRITTANY M. LLEWELLYN (SBN 13,527)
JOHNATHAN T. KRAWCHECK (*pro hac vice*)
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Boulevard, Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
LRoberts@WWHGD.com
BLlewellyn@WWHGD.com
JKrawcheck@WWHGD.com

*Attorneys for Defendant Jacuzzi Inc.,
dba Jacuzzi Luxury Bath*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

ROBERT ANSARA, as Special
Administrator of the ESTATE OF
SHERRY LYNN CUNNISON, Deceased;
MICHAEL SMITH, individually, and heir
to the Estate of SHERRY LYNN
CUNNISON, DECEASED,

Plaintiffs,

vs.

FIRST STREET FOR BOOMERS &
BEYOND, Inc.; AITHR DEALER, INC.;
HALE BENTON, Individually;
HOMECLICK, LLC; JACUZZI INC., doing
business as JACUZZI LUXURY BATH;
BESTWAY BUILDING & REMODELING,
INC.; WILLIAM BUDD, Individually and
as BUDDS PLUMBING; DOES I through
20; and ROE CORPORATIONS I through
20; DOE EMPLOYEES 1 through 20; DOE
20 INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE
21 SUBCONTRACTORS 1 through 20,
inclusive,

Defendants.

Case No. A-16-731244-C

Dept. No. 2

APPENDIX OF EXHIBITS TO

**BRIEF RESPONDING TO
PLAINTIFFS' REQUEST FOR
INFLAMMATORY, IRRELEVANT,
UNSUBSTANTIATED, OR
OTHERWISE INAPPROPRIATE
JURY INSTRUCTIONS**

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TABLE OF CONTENTS TO APPENDIX

Exhibit	Document	Date	Bates
01	Findings of Fact, Conclusions of Law and Order, filed in <i>Bahena, et al. v. Goodyear Tire and Rubber Company</i> , Case No. A503395	01/29/07	1–9
02	Liability Default Judgment Against Defendant Goodyear Tire and Rubber Company, filed in <i>Bahena, et al. v. Goodyear Tire and Rubber Company</i> , Case No. A503395	01/30/07	10–13
03	Reporter’s Transcript of Motions in Limine, filed in <i>Bahena, et al. v. Goodyear Tire and Rubber Company</i> , Case No. A503395	01/23/07	14–33
04	Reporter’s Transcript of Jury Trial, filed in <i>Bahena, et al. v. Goodyear Tire and Rubber Company</i> , Case No. A503395	01/29/07	34–46
05	Phase I Jury Instructions, filed in <i>Bahena, et al. v. Goodyear Tire and Rubber Company</i> , Case No. A503395	02/05/07	47–83
06	Phase II Jury Instructions, filed in <i>Bahena, et al. v. Goodyear Tire and Rubber Company</i> , Case No. A503395	02/09/07	84–111
07	Reporter’s Transcript of Jury Trial, filed in <i>Bahena, et al. v. Goodyear Tire and Rubber Company</i> , Case No. A503395	02/06/07	112–123

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1 Dated this 20th day of October, 2020.

2 LEWIS ROCA ROTHGERBER CHRISTIE LLP

3
4 By /s/ Joel D. Henriod

5 DANIEL F. POLSENBERG (SBN 2376)
6 JOEL D. HENRIOD (SBN 8492)
7 ABRAHAM G. SMITH (SBN 13,250)
8 3993 Howard Hughes Parkway, Suite 600
9 Las Vegas, Nevada 89169
10 (702) 949-8200

11 D. LEE ROBERTS, JR. (SBN 8877)
12 BRITTANY M. LLEWELLYN (SBN 13,527)
13 JOHNATHAN T. KRAWCHECK (*pro hac vice*)
14 WEINBERG, WHEELER,
15 HUDGINS, GUNN & DIAL, LLC
16 6385 South Rainbow Boulevard, Suite 400
17 Las Vegas, Nevada 89118
18 (702) 938-3838

19 *Attorneys for Defendant*

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Benjamin P. Cloward
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101

Meghan M. Goodwin
Philip Goodhart
THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER
1100 East Bridger Avenue
Las Vegas, Nevada 89101

/s/ Cynthia Kelley
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT 1

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EXHIBIT 1

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DISTRICT COURT CLERK OF THE COURT

CLARK COUNTY, NEVADA

TERESA BAHENA, individually, and as special administrator for EVERTINA M. TRUJILLO TAPIA, deceased, MARIANA BAHENA, individually, MERCEDES BAHENA, individually, ROCIO PEREYA, individually, MARICELA BAHENA, individually, ERNESTO TORRES and LEONOR TORRES, individually, and LEONOR TORRES, as special administrator for ANDRES TORRES, deceased, LEONOR TORRES for ARMANDO TORRES and CRYSTAL TORRES, minors, represented as their guardian ad litem, VICTORIA CAMPE, as special administrator of FRANK ENRIQUEZ, deceased, PATRICIA JAYNE MENDEZ for HOSEPH ENRIQUEZ, HEREMY ENRIQUEZ and JAMIE ENRIQUEZ, minors, represented as their guardian ad litem, MARIA ARRIAGA for KOJI ARRIAGA represented as his guardian ad litem,

CASE NO. A503395
DEPT NO. XV

Plaintiffs,

vs.

FORD MOTOR COMPANY, GOODYEAR TIRE AND RUBBER COMPANY, GARM INVESTMENTS, INC., d/b/a VALLEY VIEW HITCH AND TRUCK RENTAL, Roe Corporations I-XX and Does I-XX,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter having come on for hearing originally on January 9, 2007 and then again on January 18, 2007 where Defendant Goodyear Tire and Rubber Company appeared through counsel Dan Polsenberg of Beckley Singleton, Jonathan Owens of

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JAN 29 2007

CLERK OF THE COURT

SALLY LOEHNER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89155

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1 Alverson, Taylor, et al., and Anthony Latiolat of Yoka and Smith (appearing *pro hac*
 2 *vice*); Defendant Ford Motor Company appeared through counsel Jay Schuttert and
 3 Jonathan Hicks of Snell & Wilmer; Defendant Garm Investments appeared through
 4 counsel James Rosenberger of Pico, Escobar & Rosenberger and Timothy Dunn of Dunn
 5 & Dunn (appearing *pro hac vice*); Counterdefendant Ernesto Torres appeared through
 6 counsel Phillip Emerson of Emerson & Manke; the heirs of Plaintiff Erventina Trujillo
 7 Tapia appeared through counsel Matthew Callister of Callister & Reynolds; and all
 8 remaining Plaintiffs appeared through counsel Chad Bowers and Albert Massi; the Court
 9 having considered:
 10

11 a) Plaintiffs' motion to compel, motion for clarification and motion for
 12 sanctions filed December 29, 2006;
 13

14 b) Plaintiffs' supplement to their motion to compel, motion for clarification
 15 and motion for sanctions filed January 2, 2007;
 16

17 c) Defendant Goodyear's opposition to Plaintiffs' motion to compel, motion
 18 for clarification and motion for sanctions filed January 8, 2007;
 19

20 d) Defendant Garm Investments' motion for sanctions filed December 20,
 21 2006;
 22

23 e) Defendant Goodyear's opposition to Garm Investments' motion for
 24 sanctions filed January 3, 2007;
 25

26 f) Plaintiffs' motion for prove up hearing without benefit of a jury filed
 27 January 11, 2007;
 28

g) Plaintiffs' supplement to motion for prove up hearing without benefit of a
 jury filed January 16, 2007;

1 h) Defendant Goodyear's opposition to Plaintiffs' motion for prove up
2 hearing filed January 17, 2007;

3 i) Defendant Goodyear's countermotion for reconsideration of sanctions
4 filed January 17, 2007;

5 j) Defendant Goodyear's exhibits in support of its opposition to motion for
6 prove up hearing and its countermotion to reconsider sanctions filed January 17, 2007;
7 and
8

9 k) Defendant Goodyear's supplement to exhibits to its opposition to motion
10 for prove up hearing and its countermotion to sanctions filed January 19, 2007;
11 the court hereby FINDS:
12

13
14 FINDINGS OF FACT

15 1. On December 5, 2006, the Discovery Commissioner heard a motion to
16 compel filed by all Plaintiffs, wherein Plaintiffs requested that the Commissioner compel
17 Defendant Goodyear to ~~provide complete answers matching specific pages in Goodyear's~~
18 74,000 page production of documents to specific requests for production contained in
19 Ernesto Torres' request for production propounded initially in February, 2006. The
20 Commissioner's findings included that he "does not believe Mr. Owens' client,
21 Defendant Goodyear, is acting in good faith and Goodyear cannot produce documents
22 without designating what request specific documents respond to, as that is evasive non-
23 compliance with discovery."
24

25 2. This Court signed the recommendations from that hearing on January 5,
26 2007 as an order after no timely objection had been filed and served pursuant to
27 NRC16.1(d)(2).
28

1 3. On December 14, 2006, the Discovery Commissioner heard Defendant
2
3 Goodyear's motion for protective order and recommended that:

4 "prior to December 28, 2006, Goodyear will have a representative appear
5 at the office of Plaintiffs' counsel in Las Vegas Nevada to render
6 testimony in the presence of a court reporter regarding the authenticity of
7 the approximately 74,000 documents bates stamped GY-BAHENA
8 produced by Goodyear in this matter. Any document Goodyear's
9 representative does not either affirm or deny as authentic will be deemed
10 authentic."

11 4. That this Court signed the recommendations from that hearing as an order
12 on January 5, 2007 after no timely objection had been filed and served pursuant to NRC
13 16.1(d)(2).

14 5. That at the time the Court signed the order from the December 14, 2006
15 discovery hearing, the Court and the Discovery Commissioner were unaware of any
16 objection being filed and served by Goodyear as required by NRC 16.1(d)(2).

17 6. That the Court re-validated its January 5, 2007 order after hearing
18 Defendant Goodyear's objection at the January 9, 2007 hearing.

19 7. That had the Court been made aware of Goodyear's objection to the
20 Discovery Commissioner's recommendation from the December 14, 2006 hearing, the
21 Court would have overruled Goodyear's objections because the signed recommendation
22 is very clear on its face.

23 8. That Goodyear failed to produce any representative in Nevada by
24 December 28, 2006 pursuant to this Court's order from the December 14, 2006 hearing;

25 9. That Defendant Goodyear provided answers to Plaintiff Ernesto Torres'
26 first set of interrogatories on or about April 3, 2006; supplemental responses to Plaintiff
27 Ernesto Torres' first set of interrogatories on or about May 16, 2006; answers to Plaintiff
28 Joseph Enriquez's interrogatories to Goodyear on or about December 13, 2006; answers

1 to Plaintiff Jeremy Enriquez's interrogatories to Goodyear on or about December 13,
 2 2006; and answers to Defendant Garm Investments' interrogatories to Goodyear, all
 3 without any signature under oath of any representative of Defendant Goodyear.
 4

5 6 CONCLUSIONS OF LAW

7 Pursuant to the factors enumerated in Young v. Johnny Ribiero, 106 Nev. 88
 8 (1990), the court determines:
 9

10 1. That the degree of willfulness of Goodyear is extreme for the following
 11 reasons:

- 12 A. That it was not oversight not to have interrogatories signed; 7
- 13 B. That Goodyear has Nevada counsel and other counsel and it is not
 14 oversight for Goodyear's interrogatory answers not to be verified;
- 15 C. That it was willful for Goodyear's Nevada counsel to sign
 16 unverified interrogatories; A ✓
- 17 D. That throughout this litigation Goodyear has intentionally delayed
 18 responding to everything until the last possible day; ✓ B
- 19 E. That an attorney who signs responses to interrogatories, delivers
 20 them to opposing counsel and does not have the verification from A
 21 his client has violated NRCP Rule 11/26(g) advertently,
 22 inadvertently or willfully; J
- 23 F. That a party pursuing litigation in good faith who does not intend
 24 to provide its employee in Clark County, after a December 14, B
 25 2006 hearing orders the production of an employee by December
 26 28th, does not wait until January 3, 2007 to object to the order

1 from said hearing. That such delay on the eve of trial is bad faith
2 and delay;

3
4 G. That Nevada Rules of Civil Procedure 1 requires all rules to "be
5 construed and administered to secure the just, speedy, and
6 inexpensive determination of every action," and there was nothing
7 either just or speedy about Defendant Goodyear's responses to
8 discovery in this case;

9
10 H. That the Discovery Commissioner found Defendant Goodyear to
11 be "hiding the ball" and not acting in good faith on the prior two
12 occasions this case had been in front of him for discovery disputes.
13 The December proceeding was the third time this matter was
14 before the Discovery Commissioner. The Court finds the degree
15 of willfulness of Goodyear to defeat or obstruct the discovery
16 process to be extreme; and

17
18 I. That Defendant Goodyear's general objections to interrogatories
19 were made in bad faith.

20 2. That considering the extent to which the non offending party would be
21 prejudiced by a lesser sanction, the lesser sanction is to continue the trial date. Here,
22 Plaintiffs include a 14 year old in a persistent vegetative state for the last two years, and
23 the estates of three dead Plaintiffs. Prejudice to Plaintiffs would be extreme and
24 inappropriate if the trial was continued.

25 3. That in considering the severity of striking Goodyear's Answer relative to
26 the severity of the abusive conduct by Goodyear, the decision goes in favor of the
27 Plaintiffs. The Court is unaware of who is directing Goodyear's local counsel to be so
28

1 recalcitrant. The Court could not determine if the marching orders in this case are being
2 given by Goodyear itself, Goodyear's counsel in the mid-west or Mr. Latioliat's firm.
3
4 However, during the entire history of this case, it is clear that Goodyear has taken the
5 approach of stalling, obstructing and objecting. Therefore, the court considers
6 Goodyear's posture in this case to be totally untenable and unjustified. Goodyear's
7 responses to Plaintiffs' interrogatories are nothing short of appalling.

8 4. The fourth consideration in Young v. Ribiero, supra, deals with
9 irreparably lost or destroyed evidence and does not apply to this case.

10 5. The fifth consideration in Young v. Ribiero, supra, deals with available
11 sanctions for lost or destroyed evidence and does not apply to this case.

12 6. The sixth consideration in Young v. Ribiero, supra, is Nevada policy
13 favoring adjudication on the merits. However, the court believes the Nevada Supreme
14 Court is about to create a sea change on abusive discovery tactics and this case may just
15 wind up being the sea change case wherein our Supreme Court will determine whether it
16 is going to allow mega parties to conduct and respond to discovery in the manner in
17 which Goodyear has done in this case. Every policy has its limits and the limits here
18 were broken when on the eve of trial Goodyear failed to respond in good faith to
19 plaintiffs' interrogatories and Goodyear did not object in a timely fashion to the
20 Discovery Commissioner's recommendation that an employee appear in this jurisdiction
21 on or before December 28th given the fact that the trial was scheduled to commence
22 January 29, 2007. Goodyear knew full well that when it filed it's objection on January
23 3rd, that if the court were inclined to require Goodyear to fully respond to discovery and
24 to present its employee here, that the court would have been required to vacate the trial
25 date.
26
27
28

1 7. The seventh consideration in Young v. Ribiero, supra, requires the Court
2 to determine whether the sanctions imposed unfairly operate to penalize the party for the
3 misconduct of its attorneys. As stated in "3" above, attorneys do not take the posture of
4 stalling and delaying and objecting without authorization from their client. Mr. Owens
5 informed this Court on January 9, 2007 that he, in fact, spoke to someone in Akron, Ohio,
6 who he believed worked for Goodyear prior to responding to the interrogatories in
7 question.
8

9 8. The final consideration in Young v. Ribiero, supra, is the need of the
10 Court to deter parties and future litigants from similar abuses. The Court finds in this
11 case that there is an overwhelming need to deter Goodyear from continuation of its
12 abusive discovery practices.
13

14 In regard to Plaintiffs' request for prove up without a jury, the Court believes this
15 request stands on all fours pursuant to Temora Trading Company, Ltd. v. Perry, 98 Nev.
16 229 (1982), where the Court entered default judgment after the Court struck Temora's
17 answer for failing to comply with discovery orders and the default judgment was upheld.
18 However, the Court thinks the policy of this State is for juries to determine damages.
19 Additionally, it is more fair to Defendant Goodyear if the damage issue is presented by
20 the Plaintiffs to a jury.
21

22
23 ORDER

24 The Court, having considered the extensive pleadings filed herein as well as the
25 arguments of counsel at two separate hearings, hereby ORDERS:
26

- 27 1. That Defendant Goodyear's motion for reconsideration is granted.
28 2. That Plaintiffs' motion for prove up without a jury is denied.

SALLY LOEHRER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89156

dpmo
1/15/07

3. That Defendant Goodyear's answer will remain stricken and Goodyear may not defend on liability for and causation of compensatory damages. However, Defendant Goodyear will be allowed to call their own damage witnesses and cross-examine Plaintiffs' witnesses.

4. That Defendant Goodyear is sanctioned the sum of \$10,000.00 in attorney's fees for failure to provide suitable interrogatory answers under oath to Defendant Garm Investments.

5. That Defendant Goodyear is additionally sanctioned the sum of \$10,000.00 in attorney fees for failure to provide verified interrogatory answers under oath to Plaintiffs. This \$10,000.00 sanction may be netted by Defendant Goodyear against monies (approximately \$4,000.00) owed to it by Plaintiffs for the cost of photocopies.

6. In a second phase of trial, Plaintiffs will present evidence of malice for punitive damages and Defendant Goodyear may defend the issue and amount of punitive damages in that phase.

DATED this 29th day of January, 2007


DISTRICT JUDGE

I hereby certify that on the date filed I placed a copy of the foregoing Order in the folder(s) in the Clerk's Office of the following:

Chad Bowers, Esq.	(Al Massi, Ltd.)
Matthew Callister, Esq.	(Callister & Reynolds)
Jonathan Owens, Esq.	(Alverson, Taylor)
Daniel Polsenberg, Esq.	(Beckley Singleton)
Jay Schuttart, Esq.	(Snell & Wilmer)
James Rosenberger, Esq.	(Pico, Escobar)
Phillip Emerson, Esq.	(Emerson & Manke)


DIANE SANZO, Judicial Assistant

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EXHIBIT 2

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EXHIBIT 2

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CLERK OF THE COURT

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1 DFLT
2 MATTHEW Q. CALLISTER, ESQ.
3 Nevada Bar No. 001396
4 R. DUANE FRIZELL, ESQ.
5 Nevada Bar No. 009807
6 CALLISTER & REYNOLDS
7 823 Las Vegas Blvd. So.
8 Las Vegas, NV 89101
9 (702) 385-3343
10 (702) 385-2899—Facsimile
11 Attorneys for the Bahena Plaintiffs

IN THE EIGHTH JUDICIAL DISTRICT COURT

FOR CLARK COUNTY, NEVADA

TERESA BAHENA, *et al.*,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER
COMPANY, *et al.*,

Defendants.

Case No.: A503395
Dept.: 15

**LIABILITY DEFAULT JUDGMENT AGAINST DEFENDANT
GOODYEAR TIRE AND RUBBER COMPANY**

At a hearing on January 9, 2007, the Court struck the answer of Defendant Goodyear Tire and Rubber Company ("Goodyear"). At a subsequent hearing on January 18, 2007, the Court upheld and reaffirmed its decision to strike Goodyear's answer. The findings of fact and conclusions of law supporting the Court's striking of Goodyear's answer are set forth in detail in the transcripts of the hearings as well as in the subsequent written orders and rulings of the Court on the matter.

Pursuant to the Court's findings of fact and conclusions of law, as well as Nevada Rules of Civil Procedure 11(c), 37(b), and 55(b), and *Hamlett v. Reynolds*, 114 Nev. 863, 864-65, 963 P.2d 457, 458 (1998), the Court now enters this liability default judgment against Goodyear and in favor of Plaintiffs as to Plaintiffs' First Amended Complaint (filed Aug. 9, 2006) ("Amended Complaint").

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CLERK OF THE COURT

1 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby
2 entered in favor of Plaintiffs and against Goodyear as follows:

- 3 1. With respect to Plaintiffs' First Cause of Action (Wrongful Death), as set forth in
4 Paragraphs 26-31 of the Amended Complaint, Goodyear is hereby adjudged fully
5 liable to Plaintiffs.
- 6 2. With respect to Plaintiffs' Second Cause of Action (Strict Products Liability), as
7 set forth in Paragraphs 31-52 of the Amended Complaint, Goodyear is hereby
8 adjudged fully liable to Plaintiffs.
- 9 3. With respect to Plaintiffs' Third Cause of Action (Implied Warranty), as set forth
10 in Paragraphs 52-69 of the Amended Complaint, Goodyear is hereby adjudged
11 fully liable to Plaintiffs.
- 12 4. With respect to Plaintiffs' Fourth Cause of Action (Negligence), as set forth in
13 Paragraphs 69-85 of the Amended Complaint, Goodyear is hereby adjudged fully
14 liable to Plaintiffs.
- 15 5. With respect to Plaintiffs' Fifth Cause of Action (Breach of Express Warranty), as
16 set forth in Paragraphs 85-101 of the Amended Complaint, Goodyear is hereby
17 adjudged fully liable to Plaintiffs.
- 18 6. With respect to Plaintiffs' Sixth Cause of Action (Negligent Infliction of
19 Emotional Distress), as set forth in Paragraphs 101-06 of the Amended
20 Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
- 21 7. With respect to Plaintiffs' Seventh Cause of Action (Negligence), as set forth in
22 Paragraphs 106-14 of the Amended Complaint, Goodyear is hereby adjudged fully
23 liable to Plaintiffs.
- 24 8. As to Plaintiffs' First through Seventh Causes of Action (Wrongful Death, Strict
25 Products Liability, Implied Warranty, Negligence, Breach of Express Warranty,
26 Negligent Infliction of Emotional Distress, and Negligence), judgment as to
27
28

1 liability is hereby entered against Goodyear and in favor of Plaintiffs on these
2 claims. Nevertheless, the Court concludes that as to damages for these claims,
3 Goodyear is entitled to a full evidentiary, prove-up hearing to be held in the
4 presence of a jury. Accordingly, a jury shall determine any and all damages to be
5 awarded for these claims.

- 6 9. With respect to Plaintiffs' Eighth Cause of Action (Exemplary, Punitive
7 Damages), as set forth in Paragraphs 114-17 of the Amended Complaint, the
8 Court concludes that under NRS § 42.005(3), punitive damages "will be assessed"
9 against Goodyear. Accordingly, at the prove-up hearing on Plaintiffs'
10 compensatory damages, the jury will not make a finding as to whether punitive
11 damages will be assessed. Nevertheless, no evidence pertaining to Plaintiffs'
12 claim for punitive damages shall be introduced during the prove-up hearing on
13 compensatory damages. Rather, after the jury has rendered a verdict as to
14 compensatory damages, a second prove-up hearing shall ensue. Pursuant to NRS
15 § 42.005(3), the second prove-up hearing shall be limited to "determin[ing] the
16 amount of [punitive] damages to be assessed." At the second hearing, the jury
17 "shall make a finding of the amount to be assessed according to the provisions of
18 [NRS § 42.005]." Further, under NRS § 42.005(3), "[t]he findings . . . must be
19 made by special verdict." In addition, as required by NRS § 42.005(3), "the jury
20 must not be instructed, or otherwise advised, of the limitations on the amount of
21 an award of punitive damages."

1 10. This is not a final, appealable order or judgment.

2 IT IS SO ORDERED.

3 SIGNED this 24 day of January 2007.

4

5

6


DISTRICT COURT JUDGE

7 Submitted By:

8

9

 #9374
MATTHEW Q. CALLISTER, ESQ.

10 Nevada Bar No. 001396

R. DUANE FRIZELL, ESQ.

11 Nevada Bar No. 9807

CALLISTER & REYNOLDS

12 823 Las Vegas Blvd. So.

Las Vegas, NV 89101

13 (702) 385-3343

(702) 385-2899—Facsimile

14 Attorneys for the Bahena Plaintiffs

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EXHIBIT 3

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EXHIBIT 3

1-23-07, A503395

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1 TRAN
2 CASE NO. A503395
3 DEPT. NO. XV

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CLERK OF THE COURT
DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

7 TERESA BAHENA, ET AL,)

ORIGINAL

8 Plaintiffs,)

9 vs.)

REPORTER'S TRANSCRIPT
OF
MOTIONS IN LIMINE

10 GOODYEAR TIRE AND RUBBER)
11 COMPANY,)

12 Defendant.)

13
14 BEFORE THE HONORABLE SALLY LOEHRER
15 DISTRICT COURT JUDGE

16
17 TUESDAY, JANUARY 23, 2007
18 9:00 A.M.

19 APPEARANCES:

20 For the Plaintiff: CHAD BOWERS, ESQ.
21 MATTHEW CALLISTER, ESQ.

22 For the Defendant: ANTHONY LATIOLAIT, ESQ.
JEFFREY CASTO, ESQ.
DANIEL POLSENBERG, ESQ.

Reported by: Mary Beth Cook, CCR #268, RPR

MARY BETH COOK, CCR 268, RPR

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CLERK OF THE COURT

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LAS VEGAS, CLARK COUNTY, NEVADA
TUESDAY, JANUARY 23, 2007
9:00 A.M.

PROCEEDINGS

THE COURT: Bahena versus Ford, Goodyear and Garm Investments. For Bahena we have Chad Bowers, and for Goodyear we have Mr. Latiolait and Mr. Polsenberg.

MR. POLSENBERG: Good morning, your Honor.

THE COURT: And Mr. Owens. And you might be.

MR. CASTO: Jeffrey Casto, your Honor.

MR. POLSENBERG: Mr. Casto is the subject of our motion for pro hoc vice, and if the Court -- he's been cleared by the State Bar.

We've provided the Court with a copy of the documents that will be supporting the motion. If the Court would allow, Mr. Casto will be able to argue some of the motions this morning.

THE COURT: We just got the application this morning. You're pressing the Court to do these things and make sure that they're appropriate and follow the Supreme Court rule,

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punitive damages, and ultimately it would be a jury determination whether punitive damages would be awarded or not, which it always is. And because in the normal trial the jury is asked in the first phase of the trial an interrogatory whether or not they feel punitive damages are warranted, and if they answer it yes then we go to the second part of the trial where additional evidence is taken regarding that.

In this case because the jury is not going to be able to answer that question, we're going to put on a punitive damages second phase of the trial. After the jury has determined compensatory damages and come back and returned that verdict, then we will go forward on punitive damages, and the instructions will be crafted such that the jury will be clearly told that it is within their purview and their purview alone if they find the statutory criteria has been met they may award punitive damages. If the statutory criteria hasn't been met, they can't award punitive damages. Even if the statutory criteria is met, it's still a discretionary call by the jury as to whether they wish to award punitive damages or not. So the instructions that go along

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et cetera. Do you have the order allowing him to practice, Mr. Polsenberg?

MR. POLSENBERG: I don't believe we have the actual order yet. If the Court would just allow him to appear this morning and we can submit the order afterwards.

THE COURT: Mr. Casto, my law clerk has reviewed the application to appear here pro hoc vice. This is only your second appearance in the time frames listed, so the Court will allow you to practice here pro hoc vice. Your order must be filed today.

We also have Mr. Callister for some of the plaintiffs and Mr.

MR. FRIZELL: Frizell.

THE COURT: Mr. Frizell for some of the plaintiffs. What we have is -- let's take defendant's motion for summary judgment on plaintiff's claim for punitive damages first. We discussed this at some length yesterday as to how we were going to do this, and it appeared to me after our discussion yesterday and during our discussion yesterday that punitive damages would be the second part of the trial. That both parties would be allowed to put on evidence of

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that portion of the trial will go in accordance with what I've just said this morning. So for that reason the defendant's motion for summary judgment to dismiss the plaintiff's claim for punitive damages is denied.

Now let's take a look at the motions in limine. The first one is to exclude evidence of discovery conducted in other Goodyear cases. I asked Mr. Bowers yesterday, and my law clerk called him and asked him, to submit to me the depositions that he wanted to use or the portions of the depositions that he wanted to use because there's no way in the world the Court can make a decision on this motion without knowing what it is or -- what it is that the plaintiff wants to use. Mr. Bowers sent over about this much paper under seal, and it was depositions or portion of depositions of Zekowski, Robinson and O'Connor. I'm not sure if he sent over anything from Hammontree.

Did you send anything over on Mr. Hammontree?

MR. BOWERS: I did, your Honor. We obviously didn't understand how you were going to handle this procedurally until yesterday and so we

MARY BETH COOK, CCR 268 (702)671-4408

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1 did what we did a couple of weeks ago and we quit
2 working on that portion of the case. I've gone
3 through partly yesterday and partly again today,
4 and I believe I informed your law clerk, I
5 anticipate all told there are four bankers boxes
6 of material that will ultimately be submitted.
7 Unfortunately those things that I got to you
8 yesterday afternoon was the best I could do on
9 short notice. I sent down three of what I believe
10 are about 12 depositions, so with exhibits and so
11 forth there's another three-and-a-half boxes or
12 so. I'm sorry --

13 THE COURT: Are there other persons
14 other than Zekoski, Robinson, O'Connor and
15 Hammontree?

16 MR. BOWERS: No.

17 THE COURT: Well, I read probably a
18 couple hundred pages of the depositions that you
19 gave to me yesterday. And the first -- the trial
20 is going to be on damages, so none of those
21 depositions would come in during the trial because
22 the trial is simply on damages. And since the
23 plaintiff is going to have to put on a case for
24 punitive damages in the second portion of the
25 trial, I presume that that's where you would want

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1 to use those depositions. Now, Mr. Casto or
2 Mr. Latiolait, I believe pursuant to our statute,
3 NRS 51.325, what I would have to find is that it's
4 the same party and it is a substantially similar
5 issue. Now, in the first deposition that
6 Mr. Bowers gave me, and I can't recall who it was,
7 but I think it was -- isn't there an Olsen? Is it
8 an Olsen, Mr. Richard Olsen?

9 MR. BOWERS: Yes, it is.

10 THE COURT: His name is not typed here,
11 but anyway, I think it was Mr. Olsen's deposition
12 that I read that it's a van, a tire failure on a
13 van, and it was a light truck tire and it was -- I
14 don't remember how they denominated it, but the --
15 happened to be a Kelly-Springfield tire. But in
16 the depositions probably 95 percent of the
17 testimony and the research and these groups that
18 were formed within Goodyear was to address the
19 Goodyear tread separation where the belt and the
20 tread would separate from the bladder of the tire
21 and come off. And that's my understanding of what
22 Goodyear was looking at, what they were studying
23 and what they were figuring out why was there this
24 incidence of this and what was causing it and what
25 could they do to fix it and things of that sort.

8

1 I understand that the defense theory of
2 this case is that this particular tire failed
3 because of a road hazard, and I'm not sure what
4 the plaintiff's theory is because they've never
5 told me.

6 MR. LATIOLAIT: I can tell you if you'd
7 like.

8 THE COURT: All right, why don't you
9 tell me.

10 MR. LATIOLAIT: Mr. Casto can comment on
11 some of these prior depositions because he has a
12 familiarity with those. The plaintiff's theory is
13 twofold. One, it's a design defect; they think
14 that the tire should have had what's called a
15 nylon cap ply which is another component that goes
16 over the steel belt, and their theory is that I
17 guess we should have incorporated it earlier or we
18 failed to warn that it wasn't in the tire. The
19 plaintiff's own expert has testified it wasn't put
20 into all tires at that time by all manufacturers
21 anyway.

22 The plaintiff's second theory of
23 liability is a manufacturing defect theory which I
24 don't think relates to their punitive damage
25 claims. I think there's an issue before the Court

9

1 as to whether their manufacturing defect claim is
2 in play or not here. And that is that there was a
3 lack of adhesion between two of the components in
4 the tire that was a product of something that
5 occurred in the manufacturing plant. Plaintiff's
6 expert, Dennis Carlson, was not able to provide
7 any specificity about it. He just thinks that
8 there was some lack of adhesion caused by
9 potentially overed components, potentially
10 contamination, but he saw no specific physical
11 evidence in the tire that would allow him to point
12 to what exactly occurred in the manufacturing
13 process.

14 THE COURT: From the depositions that I
15 read, it seems like Goodyear never figured out
16 what the problem was either. They identified four
17 issues. They did four things to correct the
18 problem, and from the limited amount of time that
19 I had to read the depositions it seemed that it
20 cured the problem. And those four things were the
21 nylon overlay on the top of the tread, more
22 gauge -- wider-gauge material between the -- I
23 don't know what, between something and something
24 before you get to the steel belts. More material
25 before you get to the steel belts. They changed

MARY BETH COOK, CCR 268 (702)671-4408

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1 the curing process, and I can't remember what the
2 fourth one was, but there was four things that
3 they did that they implemented, and that,
4 according to the depositions I read, fixed the
5 problem.

6 At any rate, in my opinion the question
7 is is whether the issues are substantially similar
8 to this case which I believe they are, so I think
9 under our evidence statute 51.325 those
10 depositions or portions of those depositions could
11 come in during the punitive damage trial on this
12 case.

13 Now, under our rules each party can use
14 whatever parts of the depositions they want to,
15 but if we're going to do it this way what needs to
16 be done, and it needs to be done by February 1st
17 which is Thursday, four days into the trial, each
18 party has to designate what portions of the
19 depositions they're going to use. So this
20 requires the plaintiff to designate in one color
21 ink in the margin on the left what they want to
22 read. Then it goes to the defense and the defense
23 designates in a different color marker on the
24 left-hand side what they want to read. Objections
25 are submitted in writing to the Court because then

12

1 THE COURT: A week from Tuesday is
2 February 6th.

3 MR. BOWERS: I think we're going to have
4 a very difficult -- we certainly want to, but
5 acknowledging that there's experts on each side.

6 THE COURT: Mr. Massi thought the whole
7 case would be done in five days yesterday.

8 MR. POLSENBERG: I know, and the more I
9 look at it, I think we're looking at three weeks.

10 THE COURT: You're not looking at three
11 weeks. You've got two weeks and that's it because
12 we've already scheduled other trials behind you
13 based on our conversation with you. Yesterday was
14 calendar call, so you're looking at two weeks.
15 You've got the week of January 29th and the week
16 of February 5th.

17 MR. BOWERS: That original date you
18 suggested I think we can accommodate and we'll
19 certainly try to get it done sooner.

20 THE COURT: You need to get them to them
21 not later than 5:00 on January 31st what you're
22 going to designate, and then you need to get what
23 you designate and your objections to me not later
24 than 3:00 on Friday, February 2nd so that I can
25 look at them over the weekend even though I'm

11

1 it goes back to them. You object to whatever
2 testimony they want read that you don't like. You
3 object to it by page line and your reason for
4 objection. What you want read goes back to them.
5 They object. I get the list of objections and --
6 when are we going get to -- we're going to get to
7 the punitive damages probably February 5th. I'm
8 unfortunately going to be out of town on the
9 weekend on the 3rd and the 4th, so how soon can
10 you designate what portions that you're going to
11 read?

12 MR. BOWERS: You know, with that
13 deadline I think you suggested February 1st, I
14 think I can accommodate that.

15 THE COURT: You have to designate and
16 then you have to get them to him and he's got to
17 get them back to you.

18 MR. BOWERS: I was just thinking we
19 actually sat down and sort of plotted out
20 witnesses and tried to be as realistic in the time
21 frame as possible. I think it would be overly
22 optimistic to believe that we'd be done with the
23 first portion of this trial prior to a week from
24 Tuesday. I don't know what date that's going to
25 be.

13

1 going to be out of town.

2 MR. LATIOLAIT: Your Honor, can I --
3 couple of points. One, Mr. Bowers said we sat
4 down. He must have been talking about his side of
5 the table because he hasn't sat down with us and
6 told us his schedule so that's something we need
7 to talk about.

8 THE COURT: He gave you a list of
9 witnesses that they're going to call and the order
10 in which they intend to call them. That was given
11 to you yesterday.

12 MR. LATIOLAIT: That looked like an
13 overinclusive list and yesterday the defense was
14 asked to line out those witnesses they really
15 don't intend to call and at some point I'd like
16 the plaintiffs to go through that exercise.

17 MR. BOWERS: There's a list of everybody
18 we intend to call except for punitive damage
19 phase.

20 THE COURT: We got it yesterday. It was
21 given to you and us at the same time.

22 MR. BOWERS: I thought we gave it to
23 them. If they don't have it.

24 MR. POLSENBERG: The only list that we
25 had was the pretrial list which I don't think --

MARY BETH COOK, CCR 268 (702)671-4408

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1 MR. BOWERS: There's another shorter
2 list.
3 THE COURT: It's a short list, and it's
4 in order in which they're going to be called.
5 MR. LATIOLAIT: We didn't get that.
6 THE COURT: My law clerk is going to
7 look for our copy.
8 MR. BOWERS: If not, I'll be happy to
9 provide one to you after court.
10 MR. LATIOLAIT: The other item, your
11 Honor, is something I've done in the past on the
12 designation of testimony that might make the
13 Court's job a little easier and we don't have to
14 prepare as much paperwork, and that is for the
15 objections to the designations my office would
16 prepare a key to the objections kind of numbered
17 one through 12, your basic objections, hearsay,
18 foundation, et cetera, and then just write the
19 number of the objection next to the testimony, and
20 you can rule right in the copies of the
21 depositions.
22 THE COURT: That will be fine. That's
23 an efficient way of doing it.
24 MR. BOWERS: I'm sorry, your Honor. We
25 were handing -- just so I'm clear. We're not

1 depositions they want to use, they've got get them
2 to you. We're not going to reengineer it in the
3 middle of the trial.
4 MR. BOWERS: By January 31st.
5 THE COURT: Yes. Here, Mr. Latiolait,
6 and here, Mr. Bowers, this is the list of
7 witnesses and it looks pretty much like trial
8 witnesses to me.
9 MR. BOWERS: Again, with the caveat,
10 your Honor, we apologize if you didn't get one and
11 this assumes --
12 THE COURT: I added this Chris McGinnis
13 and Larry Moreno.
14 MR. BOWERS: This list will need to be
15 revamped for punitive damages.
16 THE COURT: This is the list in the
17 damage portion of the trial.
18 MR. LATIOLAIT: Are we going to assume
19 they're going to be called in this exact order?
20 MR. BOWERS: We made this list out with
21 that intention. Certainly there may be some
22 deviation for scheduling.
23 MR. LATIOLAIT: Can we get 24-hour
24 notice of any deviation from that schedule for our
25 own planning purposes?

1 designating on a piece of paper what we're using.
2 We're actually physically handing the piles of
3 paper what the text is.
4 THE COURT: Yeah. The deposition, the
5 actual deposition, you use -- what color do you
6 want.
7 MR. BOWERS: I like black, your Honor.
8 THE COURT: It just goes in the margin
9 from the line so you're going to use black and you
10 use red. So what they want read is going to be
11 black on the left-hand side of margin. What you
12 want read you're going to put in red and you're
13 going to give me the key to your objections. To
14 anything that they got in black, you're going to
15 hand write in ink the objection number, one
16 through ten or whatever, and you're going to give
17 me the key to your objections. But I need that
18 from you, Mr. Latiolait, by 3:00 on Friday,
19 February 2nd or by the time we recess court that
20 evening.
21 MR. OWENS: Your Honor, on that point
22 for the benefit of counsel, Mr. Olsen will be here
23 live, Richard Olsen. He's one of the witnesses
24 who will be here live.
25 THE COURT: All right. Now, which

1 THE COURT: To the extent that that's
2 possible. Sometimes people, especially some of
3 these doctors, they may say I'm available on such
4 and such a date, but I'm doing surgery in the
5 morning and there's a wreck in surgery and they
6 don't get out the whole day so.
7 MR. BOWERS: Most of these people are
8 from out of town.
9 THE COURT: Oliveri isn't, and I guess
10 he's the only local one. So you don't have that
11 problem. They weren't treated here locally so,
12 yes, try to give them 24 hours notice of any
13 deviation. I don't care if they're within the day
14 the order is mixed up, as long as the ones that
15 are listed that day testify that day and the same
16 would be -- so the motion in limine to preclude
17 evidence of discovery conducted in other Goodyear
18 cases is denied. However, when the testimony is
19 read from these depositions, the case name will
20 not be identified. The case name won't be
21 identified. So that is part of what your request
22 was if we use these the case name won't be
23 identified, the attorney name won't be identified
24 that's doing it. The questions will be -- you
25 have to provide your own reader. The question

1 will be asked by -- the plaintiff wants a question
 2 asked, the plaintiff asks the question and the
 3 reader reads the answer. If you want the question
 4 asked, you read the question and the reader reads
 5 the answer. But the other than who the deponent
 6 actually is and the date the deposition was
 7 taken -- when were these depositions taken, before
 8 this accident or after?
 9 MR. BOWERS: After primarily.
 10 MR. LATIOLAIT: These depositions taken
 11 after this accident in 2004.
 12 MR. BOWERS: I'm sorry, you're right.
 13 THE COURT: We won't give the date of
 14 the deposition.
 15 MR. LATIOLAIT: My other concern will be
 16 any sort of reference by counsel that this
 17 deposition was taken in a different case.
 18 THE COURT: That motion is limine is
 19 granted. That's being granted. So there won't be
 20 any reference as to the date of the deposition or
 21 the case that it was taken in. They'll simply be
 22 read here in open court for any purpose that
 23 either party wants those portions of the
 24 depositions to be read for.
 25 Now, about -- clearing the courtroom.

1 I'm not going to do that.
 2 MR. POLSENBERG: I agree, your Honor.
 3 In fact, we talked --
 4 THE COURT: You're the one that wanted
 5 it.
 6 MR. POLSENBERG: I know. We talked
 7 about that this morning before the hearing and we
 8 would agree you don't have to clear the courtroom
 9 if you just do the other parts.
 10 THE COURT: Thank you. Goodyear's
 11 motion in limine No. 2 to exclude reference to the
 12 Ford Firestone recall. Now, it seems to me that
 13 where this would come in would be when plaintiff's
 14 expert, Dennis Carlson, is testifying. And I know
 15 you've got another motion to preclude him from
 16 testifying in total.
 17 But for the plaintiffs to qualify their
 18 expert, they have to parade him out with all of
 19 his blue ribbons attached and whatever his
 20 background is in the tire industry, his background
 21 is. Whatever his background is in working for any
 22 regulatory agency that had anything to do with
 23 tires, that's his background. Now, if it's
 24 possible to parade him out with all of his bells
 25 and whistles and ribbons on him and not say

1 Firestone tire recall, they shall do it that way.
 2 If it's not possible or if you're the ones that
 3 are contesting his expertise because his expertise
 4 with the agency was with the Firestone tires,
 5 you're the ones that's opening the door to get
 6 into the Firestone tire problem.
 7 MR. LATIOLAIT: I think we can have a
 8 compromise on this, and I understand that the
 9 plaintiffs want to be able to say that Mr. Carlson
 10 worked for the states' attorney generals on the
 11 Firestone investigation or the investigation
 12 relating to Firestone tires on Explorer, something
 13 like that, but any effort to go beyond that and
 14 talk about that recall and in any way to imply or
 15 compare that situation to these tires is my main
 16 concern.
 17 THE COURT: Well, Firestone tires aren't
 18 Goodyear tires. I think we can all agree to that.
 19 MR. BOWERS: Just so we're clear, we
 20 think there's enough problems with Goodyear light
 21 truck tires we don't need to bring Firestone into
 22 it other than for the purpose you're talking
 23 about. I think your ruling totally suffices.
 24 THE COURT: Other than that, that will
 25 be the end of the Firestone discussion.

1 MR. LATIOLAIT: This motion in limine
 2 isn't intended to address voir dire because in
 3 these cases it's inevitable that you may have a
 4 juror who had a Firestone tire that was recalled
 5 and may talk about that during the voir dire
 6 process.
 7 THE COURT: All right. So that motion
 8 is granted in part and denied in part. Granted in
 9 that we're not going to get into the Firestone
 10 problems with their tires and denied to the extent
 11 that plaintiffs can let the man say that he worked
 12 for the attorney generals during some type of
 13 Firestone problem.
 14 The next one is Goodyear's motion in
 15 limine No. 3 to exclude all testimony evidence or
 16 comment on other accidents, claims, or lawsuits.
 17 I don't know what evidence the plaintiff has
 18 because it wasn't -- at least I didn't read enough
 19 of the depositions to figure that out.
 20 What evidence do you have, Mr. Bowers?
 21 MR. BOWERS: I think that evidence would
 22 consist -- we're sort getting back to the problems
 23 that started all this and I don't want to go all
 24 the way back there, but that evidence would
 25 consist of in part the information submitted by

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1 Goodyear to the National Highway Traffic Safety
2 Administration about the accidents that they had
3 involving only Load Range E tires. We're not
4 looking for all kinds of tires; we're looking for
5 those kinds of tires. The argument that Goodyear
6 is going to make is every tire is different. I
7 think the Court has expressed its thoughts on that
8 one, and its different modes of disablement. The
9 only mode of disablement that we're concerned
10 about is tread separation. We're not worried
11 about anything else. I'm not worried about -- so
12 that's it. It would be evidence that came from
13 Goodyear's own documents or Goodyear's submission
14 of events which I believe its entirety is included
15 in our documents.

16 THE COURT: If we were doing this in a
17 traditional manner, it wouldn't be admissible to
18 the extent that it would be admissible to punitive
19 damage phase of the trial, but this would be
20 admissible in punitive damages because that's what
21 the jury has to consider. This is not just a
22 single isolated event for punitive damage
23 purposes.

24 MR. CASTO: Your Honor, may I be heard?

25 THE COURT: You may.

24

1 minute, your Honor. There's the carcass, couple
2 belts and then a tread. What Goodyear is saying
3 is that NHTSA only looked at or these other
4 accidents only concern belt-to-belt separations.
5 Ours is a carcass-to-belt separation so none of
6 this stuff comes in, totally different tire,
7 forget about it.

8 Our response to that in our expert's
9 affidavit is our allegation is that the lack of a
10 nylon overlay, the layer between the second belt
11 and the tread of the tire, that increases the
12 tire's ability to stay together and --

13 THE COURT: Makes it more robust.

14 MR. BOWERS: Put it on in Latin America
15 where road conditions are worse and you're more
16 likely to hit a road hazard and we did that back
17 in the early '90s more forgiving, that concept.

18 The reason we think that's relevant and Goodyear's
19 own in-house reporting, if you get back into these
20 records with some of these depositions we're going
21 to talk about, don't initially distinguish between
22 belt-to-belt or carcass-to-belt separations.

23 So the main point is our expert
24 affidavit points out, as the Court's observed
25 already this line of questioning is all of the

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1 MR. CASTO: There is a difference for
2 punitive damage purposes. First of all, every
3 single one of these other accidents involves a
4 tread and belt detachment. This case is
5 different. This case involves a detachment of
6 both treads -- the tread and both steel belts.
7 That is a unique failure mode. Plaintiff's expert
8 Dennis Carlson admitted that in his deposition.
9 That's why this case is different from these other
10 accidents. The investigation that Goodyear
11 undertook with respect to Load Range E tires was
12 limited solely to those tires that sustained
13 detachment between the belts. They never had a
14 failure mode like this where they had a failure
15 with both belts coming off of the carcass, and
16 that's what substantially is similar here.
17 Plaintiff's expert says the reason it failed was
18 because of an isolated manufacturing defect which
19 gave this adhesion problem. That is unique to
20 this tire, not to these other cases, so we think
21 the evidence is very prejudicial to Goodyear, and
22 it's not probative because it involves dissimilar
23 tires having dissimilar failure modes.

24 THE COURT: Mr. Bowers.

25 MR. BOWERS: I can speak to that for a

25

1 differences -- they submit an affidavit from a guy
2 named James Stroble who I understand is
3 Mr. Olsen's boss in engineering, recycled from a
4 Texas case called Farrell which was initially
5 drafted and used discovery. They submitted that
6 in this case for the proposition that the tires
7 are too dissimilar. And so a couple paragraphs
8 dealt with that, and then they went on to the rest
9 of whatever the discovery problems were in Farrell.

10 But what's interesting, if you read the
11 things that were different that Mr. Stroble
12 commented on that made this tire not like the
13 others, this tread separation wouldn't qualify,
14 all of those things Mr. Carlson addressed as not
15 having an effect on the separation resistance of
16 the tire, the robustness of the tire, the
17 forgiveness of the tire.

18 That's our argument, and we're not aware
19 of any distinction outside of those made by
20 Goodyear that there's a difference for this
21 particular defect. That's all we're talking
22 about, the Forgiveness, robustness of the tire,
23 ability to stay together. We're not aware of
24 anything other than Goodyear's statements that
25 there's a difference between the belt one and two

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1 and the belt and the carcass.

2 THE COURT: I must have misread the
3 deposition because I thought the first one that I
4 read indicated that the belts came off with the
5 tread.

6 MR. CASTO: No, your Honor. I think the
7 testimony in there would be that the tread and top
8 belt came off. When you see the exhibits that
9 actually go with this, the first team that met on
10 this that Mr. Bill Robinson chaired, the focus of
11 that team and all the teams and all the
12 discussions after that was this between the belt
13 detachment issue. So this is a unique failure
14 mode here.

15 THE COURT: Like I said, I must have
16 misread the deposition because I got the distinct
17 impression -- go get that whole pile of stuff I
18 read last night. I got the distinct impression
19 that the belts came off with the tread, and let me
20 see if I can't find that because I always have to
21 check my thinking abilities and my recollection
22 abilities and make sure that I'm still competent.

23 MR. CASTO: Mr. Olsen was the leader of
24 the first team on this if you will, and he was
25 deposed in this case and said if I had seen this

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1 punitive damage trial on the case. You're able to
2 defend, of course, you're able to distinguish, but
3 I think it goes more to the weight of the evidence
4 rather than admissibility of the evidence, so --
5 other lawsuits we're going to exclude evidence of
6 other lawsuits and what the settlement or what the
7 jury awards may have been because that's not
8 relevant to this case. However, other claims,
9 other statistical data as to tire -- I guess you
10 don't call them failures. What do you call them,
11 adjustments?

12 MR. LATIOLAIT: That's something
13 different.

14 MR. BOWERS: There's several terms, your
15 Honor.

16 THE COURT: What do you call it when a
17 tire that should work doesn't work? What does
18 Goodyear call it?

19 MR. CASTO: We call it a disablement,
20 but the effect to Goodyear, your Honor, if the
21 tire simply there's no damage to the vehicle or no
22 personal injury there's simply a warranty exchange
23 and adjustment. If there's damage to the vehicle
24 there's a property damage claim. If there's
25 damage to the person, it's a personal injury

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1 failure mode there would never have been any other
2 team because this is something we had not seen
3 before and it was because of the impact. Speaking
4 to the overlay issue, the fact that an overlay may
5 make a tire more robust does not mean it makes it
6 indestructible. The force of the impact in this
7 case, and we have a brief animation we can show
8 you, your Honor, the force of the impact in this
9 case was so severe it actually broke the belt of
10 the tire.

11 THE COURT: Give me just a moment,
12 please. I know it was in the first one which is
13 Richard Olsen. You're correct and I'm in error in
14 my reading. They had a couple of tires that the
15 tread and top belt had come off together from the
16 rest of the composite. "We have never seen such a
17 failure mode like that before which raised our
18 curiosity. We saw a few more of those the
19 following month and raised our curiosity even more
20 and we started looking into the situation." So
21 you're correct and I misread the deal.

22 Well, I think that other claims and how
23 they started handling their investigation into
24 these tires based on the property damage and based
25 on all this and the next thing is relevant in the

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1 claim, so those are the three categories.

2 THE COURT: But what you call it is a
3 disablement?

4 MR. CASTO: Yes, your Honor.

5 THE COURT: I never could figure out
6 what word you used. So we're going to limit this
7 to Load Range E tires because that's the tire that
8 was -- so anything that comes in in the punitive
9 damage deal has to be related to Load Range E
10 tires, only light truck tires only. Any other
11 limitations? All right, that's what it's going to
12 be limited to.

13 Goodyear's motion in limine No. 4, to
14 exclude all evidence of any other tire, other
15 Goodyear tire model and other tire disablements.
16 Well, I guess that's granted because all we're
17 talking about is Load Range E light truck tires.
18 Any problems with any other tires that Goodyear
19 has had is simply not relevant to this case and
20 should be excluded. That motion is granted as
21 I've indicated.

22 Goodyear's motion in limine No. 5, to
23 apply the existing protective order to all the
24 documents and prohibit the reference of
25 confidential documents, exhibits, and testimony.

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1 That motion is granted. Now, whatever Goodyear
2 has deemed confidential I think is -- if it's been
3 filed at all, it's filed under seal. Exhibits
4 have to be maintained with the court for a certain
5 number of years, but if exhibits truly are
6 confidential, they can be filed under seal as
7 exhibits. If the case goes to the appellate
8 level, then the appellate court can, of course,
9 open the sealed exhibits so that they can look at
10 them, but we can't return them to you at the end
11 of the trial because the law requires that we keep
12 these as part of the case file. They don't have
13 to be open to view for everybody.

14 But my question to Goodyear might be
15 we're now in the latter half of the 2000s, this
16 decade. We're in 2007. And all these documents
17 came about in '94, '95, '96, '97. What's
18 confidential about that stuff that's ten years
19 old?

20 MR. CASTO: First of all, the documents
21 go beyond that time frame, your Honor. Secondly,
22 the confidentiality is because the history of the
23 tire building builds on itself so that the
24 techniques and approach that Goodyear has, the
25 information that they put within their

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1 going to leave the label on now. Is it going to
2 be on anything that the jury sees?

3 MR. BOWERS: It may ultimately.

4 THE COURT: Whatever exhibit you're
5 going to put on the overhead, I think that that
6 should be obliterated.

7 MR. POLSENBERG: Totally agree.

8 MR. BOWERS: Does Goodyear happen to
9 have nonobliterated copy so we don't have to go
10 back and recopy these things?

11 THE COURT: You don't have to recopy
12 them over again. Don't you have that white stuff
13 that comes out of a tape dispenser?

14 MR. BOWERS: That legend is substantial.
15 It covers a good -- it should be on your motion.

16 MR. CASTO: It's only on the edge of
17 each document.

18 MR. BOWERS: We'll talk about it.
19 That's fine.

20 MR. CASTO: I think what happened
21 mechanically they shrunk the document and then put
22 the legend on it so you can certainly cut the
23 document.

24 THE COURT: Nothing that's shown to the
25 jury, that's exhibited to the jury, will have the

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1 specifications which was produced and
2 specification and history -- this tire was
3 manufactured in 1999. One of the groups of
4 documents we've produced was the specification
5 which is the detailed itemization of the
6 components and placement and location, the
7 centering of those, the gauges of those. Those
8 are produced. There are cure tire drawings that
9 go in there.

10 THE COURT: So that would be still
11 confidential information.

12 MR. CASTO: Yes, your Honor.

13 THE COURT: But a whole bunch of other
14 stuff that's been marked confidential probably
15 isn't, so we will try to make a decision on a
16 paper-by-paper basis outside the presence of the
17 jury which of these the clerk needs to mark and
18 put in her file as sealed.

19 MR. BOWERS: Your Honor, as I recall
20 that motion, there was some obligation to go back
21 and dedesignate everything.

22 THE COURT: We're not going to do that.

23 MR. BOWERS: It's going to be a lot of
24 work.

25 THE COURT: That's too much work. We're

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1 word "confidential" on it, and then at the end of
2 each day we can take the exhibits that were
3 admitted and we'll figure out whether the clerk is
4 supposed to file those exhibits under seal or not,
5 and we'll probably have some code with Jennifer
6 like an S behind the exhibit number or something
7 or an S underneath the exhibit number and that
8 will be our clue that when the trial is all over
9 ones with the little S under the exhibit number on
10 the little exhibit sticker are the ones that are
11 going to be sealed and the ones that don't have
12 that designation on them won't be sealed, and
13 we'll go through that every night at the end of
14 trial.

15 MR. LATIOLAIT: Based upon your
16 comments, your Honor, I presume it's also correct
17 that the plaintiffs are barred from making any
18 improper reference to the assertion of
19 confidentiality.

20 THE COURT: Of course. There will be no
21 reference to it whatsoever. That takes care of
22 number five.

23 Number six, Goodyear's motion in limine
24 No. 6, to exclude all reference to any sort of
25 private recall of tires or other evidence

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1 regarding an alleged postsale duty to recall. I
 2 presume this gets into your expert's testimony.
 3 MR. BOWERS: It does in part. If they
 4 just want to prohibit the use of the word
 5 "recall," that's fine.
 6 THE COURT: Well, it was never a recall.
 7 It was a limited product replacement program and
 8 that's the term you should use. You should use
 9 limited product replacement program. You shall
 10 not use the word "recall" or in essence a recall
 11 because recalls can only be done by government
 12 order; is that correct? Is that what I'm
 13 understanding?
 14 MR. LATIOLAIT: Yes, your Honor.
 15 THE COURT: I thought the manufacturer
 16 issued recalls. I thought read about it in the
 17 newspaper all the time that a manufacturer issued
 18 a recall. Broccoli that's bad or the spinach
 19 that's bad.
 20 MR. LATIOLAIT: In terms of tires, your
 21 Honor, any recall has to be approved by NHTSA, so
 22 it actually does go through the agency before.
 23 THE COURT: Isn't it the manufacturer
 24 that requests it?
 25 MR. LATIOLAIT: In some instances.

1 THE COURT: On all my Ford products I
 2 get my recall notices from Ford and it doesn't say
 3 the government has issued a recall. It says Ford
 4 has issued a recall. Bring your machine in and
 5 they'll replace this or that or the next thing for
 6 free.
 7 MR. LATIOLAIT: Ford would have to
 8 propose it to the agency first. The agency would
 9 have to approve it before the consumer is
 10 notified.
 11 THE COURT: But still it's done by the
 12 manufacturer.
 13 MR. LATIOLAIT: The initiation of many
 14 recalls is done by the manufacturer.
 15 THE COURT: All right, thank you. But
 16 it will be called a limited product replacement
 17 program.
 18 Number seven, Goodyear's motion to
 19 exclude testimony of plaintiff's expert Allan J.
 20 Kam. That's denied. He can testify in the
 21 punitive damages trial as we've indicated, but he
 22 won't get into anything other than that he worked
 23 for the attorney generals on Firestone recall.
 24 MR. BOWERS: I'm sorry, your Honor.
 25 You're confusing Mr. Kam with Mr. Carlson.

1 THE COURT: He's the tire lawyer. Oh,
 2 okay, you know what? Nevada has a real broad
 3 definition of an expert, and a guy who puts down
 4 concrete can be an expert because most of the
 5 jurors don't lay concrete, and he can be an
 6 uneducated whatever, but if he knows how you put
 7 the frame up and put the steel in and flatten the
 8 concrete, he's an expert.
 9 You think that this is going to invade
 10 the province of the jury? Do you think anybody
 11 sitting over there in that box is going to have
 12 any understanding of what these rules and
 13 regulations are, government rules and regulations?
 14 If you don't come from Philadelphia and have 14
 15 letters behind your name, I guarantee none of us
 16 understands that stuff. We do absolutely need
 17 experts to testify and to tell us about what
 18 regulations are and what they mean and how -- we
 19 might read it as A, B, C and D, but then you've
 20 got the whole code of federal regulations that
 21 interprets it E, F, X and Y. So I think it's
 22 absolutely essential to have an expert on
 23 regulations.
 24 Mr. Casto.
 25 MR. CASTO: Thank you. What Mr. Kam is

1 offering is legal conclusions about those
 2 regulations. Number two, those regulations don't
 3 apply in this case because only NHTSA has
 4 authority to order a recall in this case, and
 5 there's no private cause of action by an
 6 individual concerning the failure to recall a
 7 product, or my understanding there's no ability
 8 under Nevada law for a postsale duty to warn.
 9 THE COURT: But isn't this all part of
 10 the punitive damages deal as to how these are
 11 studied and how it happens? And it's good for
 12 your side that it was never recalled.
 13 MR. CASTO: It isn't good for our side
 14 in terms of this analysis because what Mr. Kam
 15 does -- first of all, the preliminary evaluation
 16 that NHTSA undertook occurred after Mr. Kam had
 17 left the agency. Mr. Kam was not involved in this
 18 preliminary evaluation. We are not permitted to
 19 inquire from Mr. Kam how the protocol that he
 20 utilized when he was at NHTSA would compare with
 21 what is done here because he's precluded from law
 22 from testifying about that.
 23 THE COURT: But the end result is is
 24 that NHTSA never recalled your tire.
 25 MR. CASTO: We don't need an expert to

1 tell us that. It's a fact.
 2 THE COURT: He can testify to it.
 3 MR. CASTO: The fact that NHTSA didn't
 4 recall the tire is a fact, your Honor. What
 5 Mr. Kam is going to say is that NHTSA should have
 6 recalled the tire.
 7 THE COURT: That's his opinion. That's
 8 what experts testify about is their opinions.
 9 MR. CASTO: That's a legal conclusion.
 10 MR. BOWERS: Your Honor, if I may --
 11 THE COURT: I'm not sure about that.
 12 That's just his opinion, and experts are not
 13 precluded from giving their opinion on matters
 14 that are in controversy.
 15 MR. CASTO: First of all, Mr. Kam is
 16 going to talk about what the duty is of a
 17 manufacturer under the safety act in terms of
 18 recalling a product. In this particular case
 19 Goodyear undertook the voluntary replacement
 20 program which you called the limited product
 21 replacement program. That's already happened.
 22 That's a fact in terms of what's occurred in the
 23 case with respect to Goodyear.
 24 Mr. Kam is not an engineer. Mr. Kam
 25 hasn't evaluated the tire in this case. We've got

1 THE COURT: But he's an expert in
 2 regulations and the jury certainly isn't.
 3 MR. CASTO: Regulations may be one part
 4 of that, your Honor, but in terms of the
 5 individual documents, he's going to now interpret
 6 the documents and say how they apply to a
 7 regulation when he lacks the predicate
 8 understanding, because NHTSA would undertake the
 9 evaluation in concert with engineers, and Mr. Kam
 10 is not an engineer.
 11 THE COURT: Mr. Bowers.
 12 MR. BOWERS: Your Honor, this is what
 13 Goodyear wants to say. Tire was never recalled so
 14 there's no obligation, everything was fine. NHTSA
 15 never made us recall the tire. In fact, it's
 16 documented at length in Mr. Kam's testimony and at
 17 length in Goodyear's own correspondence and the
 18 testimony of some of the depositions you've
 19 approved what happens is NHTSA said we have
 20 concerns about this problem but this tire is at
 21 the end of its life expectancy, taking this
 22 investigation to the next level and going through
 23 a formal recall is a very tedious process.
 24 Goodyear says we will enter into this limited
 25 product replacement campaign in lieu of a formal

1 Mr. Carlson who is the expert saying that this
 2 tire failed because of a manufacturing defect
 3 because of adhesion between two components. That
 4 individual instance of that tire has nothing to do
 5 with an overarching issue concerning all Load Range
 6 E tires that would give rise to a duty to recall
 7 that Mr. Kam is going to articulate.
 8 Mr. Kam essentially is going to
 9 speculate about what NHTSA would have done or
 10 should have done, and what we have here, in fact,
 11 NHTSA actually did evaluate this. All the
 12 documents that Mr. Kam reviewed were provided to
 13 NHTSA by Goodyear. Goodyear had, in fact,
 14 concluded its investigation of Load Range E tires
 15 before NHTSA even began its evaluation of Load
 16 Range E tires. And so what Mr. Kam is going to do
 17 is say something that's totally irrelevant. What
 18 he's going to do is take these individual
 19 documents and basically give a four-hour closing
 20 argument to the jury by interpreting for the jury
 21 documents which the jury itself is completely
 22 capable of reading on its own.
 23 THE COURT: Oh, I doubt that.
 24 MR. CASTO: Mr. Kam's not an engineer,
 25 neither is the jury.

1 recall and we can all go our separate ways. That
 2 would be great if NHTSA employees were allowed to
 3 testify about what had happened. We could call
 4 them. There's federal regulations that prevent
 5 that from happening.
 6 Mr. Casto just gave a wonderful version
 7 of Goodyear's events of what happened in this
 8 case. We are entitled to our version of events of
 9 what happened in this case. Unfortunately not
 10 being employees of Goodyear or able to have access
 11 to current employees of NHTSA, the only thing we
 12 can do is call somebody who's an expert in how
 13 NHTSA works, how regulations apply to
 14 manufacturers' documents and what happened. I
 15 think the Court is absolutely right; the jury can
 16 have that assistance both from people that come
 17 from Goodyear to give their side of the story and
 18 Mr. Kam give his side of the story and accept or
 19 reject it.
 20 THE COURT: You have people who are
 21 involved in this that are going to testify in your
 22 side.
 23 MR. CASTO: That's absolutely my point.
 24 What Mr. Bowers is that he's not able to present
 25 that evidence. He just told us earlier he's got

1 boxes of depositions and exhibits that do exactly
 2 that, and at the end of the day the jury's
 3 determination is punitive damages arising from the
 4 defect, not punitive damages arising from the
 5 failure to recall.
 6 MR. BOWERS: That's precisely the point.
 7 If he were to come in and say that under Nevada
 8 law this is a breach of the law, he couldn't
 9 necessarily say that, but that's not what he's
 10 saying. He's explaining how this process works.
 11 They've also assert privilege, your
 12 Honor. They've asserted privilege as to what
 13 happened in that dialogue back and forth between
 14 NHTSA. I asked Woody Gaudet, a guy in this case
 15 who sent these letters out, what happened when
 16 NHTSA finished their investigation, why was it
 17 that Goodyear entered into this replacement
 18 campaign. Those things are pretty close in time.
 19 Why was that? Privilege. What was the discussion
 20 that went back and forth? Privilege. Okay, fine,
 21 your counsel is there, assert the privilege. I
 22 can't get it through privilege -- through
 23 Goodyear's employees because of privilege. I
 24 can't get it from NHTSA because of government
 25 regulation. This is the only way that I can get

1 have your people testify. You've got them. They
 2 know exactly what happened and they can testify as
 3 much as you want them to testify.

4 MR. CASTO: If I can make two other
 5 points. The issue of privilege was simply done.
 6 Mr. Gaudet was asked the question where did you
 7 learn about the discussions with NHTSA, and that
 8 was a discussion he had with Goodyear's lawyer, so
 9 that was the basis of privilege was for him not to
 10 divulge conversations we had with Goodyear's
 11 counsel that was negotiating with NHTSA, not that
 12 Mr. Gaudet couldn't talk about what he personally
 13 had done with respect to NHTSA.

14 THE COURT: I appreciate that position,
 15 but the motion is denied.

16 MR. CASTO: May we be permitted to have
 17 a hearing on Mr. Kam outside the presence of the
 18 jury so that we can voir dire him before his
 19 testimony is permitted?

20 THE COURT: Haven't you taken his
 21 deposition?

22 MR. LATIOLAIT: We have, your Honor, but
 23 there's so much ambiguity as to exactly what his
 24 opinions are going to be.

25 THE COURT: No. We're not going to voir

1 this. If I'm wrong, fine, that's what a jury is
 2 for, but I shouldn't be precluded from giving this
 3 evidence.

4 THE COURT: Well, it would seem to me,
 5 Mr. Casto, if your people allege privilege and
 6 wouldn't answer the question, then the best
 7 alternative that the plaintiff has is to call a
 8 guy who used to work there because the government
 9 regulations would preclude anybody who worked on
 10 the job from actually testifying about it. It's a
 11 lot like this med mal stuff. Quality assurance.
 12 We took care of it internally. We're never going
 13 to tell you that the machine failed and that's
 14 what killed you client because that's quality
 15 assurance and we have to report it to the
 16 government, but you can't ever get those reports
 17 where we report to the government because
 18 government is only concerned about fixing things
 19 in the future, they're not concerned about the guy
 20 that got killed today.

21 I understand that's the great overriding
 22 proposition on all this stuff on safety, whether
 23 it's in the tire industry or whether it's in the
 24 medical field. That's the way it works, so I'm
 25 going to allow them to call their person. You can

1 dire him before trial or during the trial when the
 2 jury is out there. We have a Supreme Court that
 3 has told us in no uncertain terms we are not to
 4 waste the jurors' time. Once they're here in the
 5 morning, they're to be in trial and they're not to
 6 sit out in the hall for 20 minutes, 15 minutes,
 7 hour and a half while lawyers are arguing
 8 intricacies of the law to the Court so, no, we're
 9 not going to do that.

10 MR. POLSENBERG: I agree with that, and
 11 I'm probably the number one offender, but I think
 12 that what we could do --

13 THE COURT: So stipulated.

14 MR. POLSENBERG: Let's get your opinion
 15 three weeks from now. I think we could do -- I
 16 have serious concerns about Mr. Kam.

17 THE COURT: Mr. Casto has already
 18 expressed all those, Mr. Polsenberg. You may be
 19 seated.

20 MR. POLSENBERG: My suggestion is we
 21 could do it after the jury leaves for the day and
 22 do a voir dire outside the jury's presence some
 23 evening after they've left.

24 MR. BOWERS: Your Honor --

25 THE COURT: Thank you for your

1 suggestions. Let's move to number eight.
 2 Goodyear's motion in limine No. 8, to
 3 exclude all evidence not produced during
 4 discovery. That motion is granted, and I don't
 5 care who it cuts against or, for, it's just
 6 granted.
 7 MR. OWENS: On that point, yesterday
 8 Mr. Bowers represented that there are three day in
 9 the life videos that were identified, two of which
 10 were identified, one was produced. The one that
 11 was produced was done on the 11th of December.
 12 Last week the Court made reference to Goodyear
 13 waiting until the last moment to disclose
 14 evidence. They had that video since early
 15 October and didn't bother to produce it until the
 16 end of discovery. The other was identified the
 17 last day of discovery. We would ask that those
 18 two videos be excluded.
 19 THE COURT: Mr. Owens, I think that
 20 Mr. Bowers told me yesterday that they told you
 21 when they were available and that you did not go
 22 over to get copies of them.
 23 MR. OWENS: They told us on the 11th and
 24 they told us on the 15th of December. That's what
 25 I'm saying. I'm not saying the first one --

1 THE COURT: What was the discovery
 2 cutoff, December 13th?
 3 MR. BOWERS: It was within the discovery
 4 cutoff. It was the 15th of December.
 5 THE COURT: So do you have them now?
 6 MR. LATIOLAIT: I was handed it this
 7 morning.
 8 MR. BOWERS: They have two of them this
 9 morning. Your Honor, I supplemented these. I
 10 said they're here if you want them. If you want
 11 them they're here. Pictures of Andrew dead are
 12 here. I'm not giving those out either, come to
 13 the office and inspect them. Mr. Owens' office
 14 called, makes an appointment next week at one I
 15 want to come and see the pictures of Andrew dead.
 16 No one shows up. I sent an e-mail, do you want to
 17 come see the pictures. No one shows up.
 18 Eventually John comes over --
 19 THE COURT: I thought this was the day
 20 in the life.
 21 MR. BOWERS: I'm saying this is the same
 22 thing. I'm saying these things are available,
 23 come get them. Nobody gets them, nobody wants
 24 them. Yesterday you say give them to them. I
 25 give them to them. This is just something they're

1 trying to make noise with.
 2 THE COURT: Motion to exclude those is
 3 denied. You had the ability to pick them up
 4 before the discovery close off.
 5 MR. OWENS: There's no reason for him
 6 not to have produced them.
 7 THE COURT: You know what, Mr. Owens,
 8 there's no reason for you not to have answered the
 9 interrogatories.
 10 MR. LATIOLAIT: Your Honor, I have a
 11 concern based upon Mr. Bowers' comments here.
 12 This would have been raised as a motion in limine.
 13 Is he planning on showing photos of dead bodies in
 14 this trial?
 15 THE COURT: Well, I imagine he intends
 16 to show pictures of the people before they died.
 17 MR. BOWERS: There's pictures of Andrew
 18 Torres in the hospital. They've been available.
 19 Your counsel has looked at them a couple of weeks
 20 ago. They've been designated since we took the
 21 deposition of the coroner's investigator in
 22 February of 2006.
 23 MR. LATIOLAIT: Pictures of Andrew
 24 Torres dead, that's what I heard him say.
 25 MR. BOWERS: This isn't carnage on the

1 highway. These are photos from the hospital.
 2 This has been -- these were out in February of
 3 2006.
 4 THE COURT: You can object when he moves
 5 to admit them during the trial and I'll rule on
 6 them at that time.
 7 Goodyear's motion in limine No. 9, to
 8 exclude opinions outside an expert's disclosed
 9 opinions. Now -- let me tell you this. I wrote
 10 this note down to tell you. I allow opposing
 11 experts to sit through the testimony of the other
 12 side's opposing experts, so when the plaintiff's
 13 experts are testifying, the defense experts on
 14 that topic can sit in on the trial, and when the
 15 defense experts are giving testimony on a topic,
 16 the plaintiff's opposing expert can sit in the
 17 trial, so everybody needs to know that. I allow
 18 opposing experts to be in the courtroom while the
 19 other side's expert is testifying. It's faster
 20 and quicker and easier to do that so that if one
 21 side wants to call a rebuttal or this or that or
 22 the next thing, they heard the testimony live and
 23 they can comment on it live. They can sit at
 24 counsel table to assist in preparation of
 25 cross-examination questions, and that's probably

1 unique to me, but that's what I allow and you can
2 do that if you want to. If you don't want to have
3 your expert in here, you don't have to, but I
4 allow it. Otherwise, the exclusion of witness
5 rule applies with the exception of expert
6 witnesses. And if one expert is going to testify
7 on Topic A, he can't sit through the other side's
8 expert on Topic Z. The A to A expert can sit
9 through their testimony and the B to B. It has to
10 be the same thing that each expert is going to
11 testify on they can sit through that.

12 Now, I believe that this is --

13 MR. ROSENBERGER: In that regard I just
14 had one question, just in case I am in this case.
15 In the event that the expert testifies, can we
16 take the transcript of that and give it to the A-A
17 expert.

18 THE COURT: Of course. If you order it.

19 MR. ROSENBERGER: In lieu of him
20 appearing.

21 THE COURT: Order an overnight
22 transcript and pay for it.

23 Now, I believe that this goes primarily
24 to hedonic damages. Was Mr. Johnson asked to
25 calculate hedonic damages before his deposition

1 confused. Did Mr. Johnson testify at his
2 deposition or in his written report that he valued
3 the hedonic damages of X person at so much money?

4 MR. LATIOLAIT: He did not. In fact,
5 this is what happened. He submitted a report on
6 various plaintiffs in this case. Nowhere in any
7 of those reports is there any reference to hedonic
8 damages whatsoever. At his deposition, at the end
9 of his deposition after we'd gone through all of
10 his opinions that were set forth in his report,
11 the question was asked, I think by Ford's counsel,
12 do you intend to offer any other opinions at
13 trial. Yeah, I want to talk to the jury about
14 hedonic damages. Oh, really, what are you going
15 to do? I'm going to explain the principle to them
16 and give them a mechanism for calculating hedonic
17 damages. This isn't in your report. You're
18 right, it's not in my report. Have you calculated
19 hedonic damages? No, I haven't calculated hedonic
20 damages, I haven't been asked to do that.

21 THE COURT: So, Mr. Bowers, has he been
22 asked to calculate hedonic damages?

23 MR. BOWERS: No. I would love to have
24 Mr. Johnson come here and not calculate hedonic
25 damages and talk about what they are as an

1 was taken?

2 MR. BOWERS: He was asked to discuss the
3 fact that hedonic damages are an economic
4 principle that economists use to value loss.

5 THE COURT: Was he asked to do that
6 before his deposition was taken?

7 MR. BOWERS: Yes.

8 THE COURT: So did he have an opinion as
9 to what the hedonic damages were when he was
10 deposed?

11 MR. BOWERS: He answered their
12 questions, but we're not offering him to say what
13 the numbers of hedonic damages were. We're
14 offering him to say hedonic damages include loss
15 of enjoyment of the value of life for things X, Y
16 and Z and that economics recognizes those things.
17 Mr. Weiner thinks that concept doesn't exist,
18 their economics expert. Mr. Johnson's number is
19 too high or his calculation is bad -- that's one
20 of the things he says -- Mr. Weiner says is I
21 don't like the way Mr. Johnson puts a value on
22 hedonic damages, but then he goes on to stay it
23 doesn't matter because this isn't a legitimate
24 economic concept.

25 THE COURT: So, Mr. Latiolait, I'm

1 economic concept. That's all I want. They
2 acknowledge at the end of the deposition, he
3 voluntarily raised -- this wasn't in his report --
4 that there weren't any numbers, this is an
5 economic principle, this is what goes into it.
6 They were free to cross-examine him about it.
7 Their economic expert had a chance to review that
8 material.

9 If you prevent him from putting a number
10 on it, that's absolutely fair. We don't care.
11 That's not the purpose of his testimony. The
12 purpose of his testimony is to explain -- when I
13 say his testimony, we're talking about this
14 limited aspect, there's obviously other things.
15 But the purpose of his testimony on hedonic
16 damages is just explain this concept under
17 economics that there is a value to the loss of
18 enjoyment of life and there are ways to calculate
19 it. That's it. If you want to grant their motion
20 by preventing him from putting a number on it,
21 that would be absolutely fine by us.

22 MR. LATIOLAIT: Your Honor is correct
23 that in the state of Nevada pouring cement is a
24 subject of expert testimony, then an economic
25 principle is a subject of expert testimony and

1 that economic principle was not disclosed to us in
2 Mr. Johnson's report, and it didn't come up until
3 the very end of his deposition, so it wasn't in
4 his report, it ought to be excluded under the
5 rules.

6 THE COURT: Well, let me ask you this,
7 when anybody comes up with -- your expert or their
8 expert comes up with how you value the life of a
9 dead person, I'm sure there's certain things that
10 they go through, companionship and society and
11 earning capacity and support to others and all
12 these factors. Well, doesn't anybody that values
13 this doesn't anybody value enjoyment of life?

14 MR. LATIOLAIT: That's absolutely true,
15 and that's the province of the jury. The jury has
16 specific instructions on how they are to value a
17 death claim, and they should follow the
18 instructions. They should not follow an economic
19 theory that's not captured in the jury
20 instructions, and an economic theory that wasn't
21 disclosed to us in expert reports.

22 THE COURT: Mr. Bowers.

23 MR. BOWERS: The point of an expert
24 report is so that people know what's happening.
25 We're not trying to hide the ball. He volunteered

1 enjoyment of life.

2 THE COURT: I'm going to allow
3 Mr. Johnson to say that when they calculate the
4 value of someone's life they can include that a
5 component for enjoyment of life.

6 MR. BOWERS: Thank you, your Honor.

7 THE COURT: But that's it. It's going
8 to be pretty limited.

9 MR. LATIOLAIT: That's fine.

10 THE COURT: Number 10, to exclude expert
11 testimony regarding economic loss attributable to
12 12-year-old Andrew Torres and 16-year-old Joseph
13 Enriquez. I think that this goes to weight and
14 not admissibility. It's very difficult to predict
15 any individual person. That's why you have to use
16 national statistics from the labor commission or
17 from whatever commissions there are, but it
18 goes -- in my opinion it's not inadmissible. It
19 simply goes to the weight to give whatever that
20 testimony might be.

21 MR. LATIOLAIT: I don't disagree with
22 your Honor on the idea of what future earnings
23 potentially could be, but understand that
24 Mr. Johnson goes beyond this and then gives the
25 jury specific numbers that they're to understand

1 to them well ahead of time what his thoughts were.
2 Their economics expert was able to get a handle on
3 this. The disclosure is a moot point. We're
4 again getting back to is this going to Goodyear's
5 way, or is this going to be the way the law says
6 and the jury makes a decision.

7 THE COURT: Well, wait a minute,
8 Mr. Bowers. We require expert reports to detail
9 what the expert's going to give an opinion on.
10 Why didn't the man put in his written report
11 hedonic damages?

12 MR. BOWERS: Because he didn't have any
13 calculations to go with it. It's like saying he
14 didn't put in his report what the rate of interest
15 is. He's going to talk about it. It's there.
16 It's in the calculations, but he didn't set it out
17 to the side. They had to ask him in his
18 deposition what's the real rate of interest you're
19 going to use. Again, the reason it's not in the
20 report is because we're not offering a specific
21 calculation. We're not offering a number. We're
22 offering -- and the jury instruction is quite
23 clear. Jury instruction is consider these things
24 for what they're worth. All we're offering for is
25 the notion that hedonic damages include a loss of

1 are expert opinion. And included in those numbers
2 of his expert opinion is the opinion that somebody
3 who dies at the age of 12 would have earned X over
4 their lifetime based on statistics. That's an
5 okay expert opinion, but for him to say and I
6 think the money that he would have had for himself
7 is this amount because he would not have gotten
8 married, he would not have had children, he would
9 have allocated a certain amount of his income to
10 his parents. That's not expert opinion. That's
11 rank speculation and, in fact, it defies
12 statistics.

13 THE COURT: Certainly to say how many
14 people are 12 that are going to have children I
15 imagine there's a statistical analysis of that,
16 but for him to say -- and I would think it would
17 be more than 50 percent just being -- I would
18 think that more than 50 percent of the people in
19 America have children at some point in their life,
20 and unless Mr. Johnson has some statistics that
21 show that statistically it is less likely that a
22 person is going to have a child than more likely,
23 then he certainly can't say and he can't put
24 numbers up here saying that it's less likely that
25 this Andrew Torres was going to have children.

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1 Was the guy gay? Did they have that figured out
2 at age 12? Maybe if he was part of the gay
3 population that would be true that it's less
4 likely that he's going to have a child than the
5 nongay population. Is that the allegation here?
6 MR. LATIOLAIT: No, your Honor, and
7 that's exactly the problem. Mr. Johnson uses
8 statistics when they assist his testimony, and
9 when statistics may undercut the numbers that he's
10 going to present to the jury, he wants to ignore
11 them.

12 THE COURT: Unless there's some
13 statistical book out there somewhere that says
14 what percentage of people in the United States
15 don't have children, unless that's the greater
16 percentage of people, then he's not going to be
17 able to put his number up there and his expert
18 report that says he believes and expert opinion
19 that Mr. Andrew Torres who died when he was 12 is
20 not going to have children. Doesn't the average
21 American family have 2.3 kids or 3.1 or 1.7 or
22 something?

23 MR. BOWERS: Your Honor, these are all
24 things that there's multiple books on all this
25 stuff, and that's a lot of difference in economics

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1 glamorized to the millions and millions of dollars
2 a year in income and do not marry and flaunt their
3 children to the world. I sit in this court and
4 see a cross-section of our community every day,
5 and the cross-section of our community that I see
6 every day I'd be hard-pressed to say that the
7 people who are living together and having children
8 more than 50 percent of them are married. I'd be
9 hard-pressed to say that, so I don't know about
10 marriage anymore.

11 MR. LATIOLAIT: Okay, understood, and I
12 guess maybe the basis for my statement is, well,
13 neither does Mr. Johnson, so to come in here and
14 to wear the cloak of an expert and tell the jury
15 that Andrew Torres's loss of future earning
16 calculation should assume that he wasn't going to
17 get married because Mr. Johnson thinks that or
18 that Mr. Torres was going to give 30 percent of
19 his income to his parents because Mr. Johnson
20 thinks that is improper expert opinion.

21 THE COURT: If he has some statistical
22 basis for determining how much money the average
23 child gives to their parent, he can use that
24 percentage, but whether or not the guy's going to
25 marry, unless there's some statistics on that, and

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1 evaluation is which book do you use. They have an
2 economist. His name is Mr. Weiner. He's free to
3 come in and certainly will come in and point out
4 all these discrepancies.

5 THE COURT: I'm granting the motion in
6 limine unless you can come in and show me
7 statistically that it's less likely that a person
8 is going to be a parent than not a parent.

9 MR. BOWERS: Let's be really clear about
10 what we're granting. You're granting a motion in
11 limine as to the assumption that he doesn't have
12 children.

13 THE COURT: That's correct.

14 MR. BOWERS: Can he do a calculation
15 based on him having children and present that
16 instead?

17 THE COURT: Of course, but he hasn't
18 done that yet.

19 MR. LATIOLAIT: Marriage?

20 THE COURT: Well, you know, marriage is
21 these days. It's probably less likely that people
22 get married than not. You're talking to somebody
23 that has been married for 30 years, but, you know,
24 we live in a society where movie stars are
25 glamorized and do not marry. Athletes are

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1 really that would be a forecasting one because
2 let's say he's 12 years old now, he would be
3 trying to forecast ten years from now what
4 percentage of our population marries, and I don't
5 think that's a matter for expert opinion.

6 MR. BOWERS: Whether he's married or
7 not?

8 THE COURT: Yeah, I don't think that's a
9 matter for expert opinion so that motion in limine
10 is granted. They cannot consider whether he does
11 or doesn't marry.

12 MR. BOWERS: Or does or doesn't have
13 children. Those two things are out.

14 THE COURT: Right. The next one is
15 Goodyear's motion in limine No. 11 to exclude
16 certain testimony and opinions of Dennis Carlson.
17 Now, the fact that Mr. Carlson was involved in the
18 tire industry but not in every part of it does not
19 make his testimony inadmissible or his opinion
20 inadmissible. Unlike the other fellow, this guy
21 is a licensed engineer, and so your motion is
22 denied.

23 There's an objection to the declaration
24 of Carlson filed by the plaintiffs in support of
25 their opposition to motion in limine. Mr. Carlson

MARY BETH COOK, CCR 268 (702)671-4408

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1 is going to testify live, correct?

2 MR. BOWERS: You're right.

3 THE COURT: So his affidavit will not be
4 admitted for any purpose in the trial.

5 Plaintiff's motion in limine to use
6 prior Goodyear testimony, that has been granted.
7 I think that was taken care of.

8 Plaintiff's motion in limine to exclude
9 evidence. This is the History Channel film? Now,
10 this is directed to Mr. Latolait. Does the film
11 show the production of a light truck Range E tire?

12 MR. CASTO: I can answer that. He
13 probably can't. It does not, but it's not offered
14 for that. It's offered simply to demonstrate the
15 steps in the manufacturing process generically.
16 It's an exemplar video. It will be edited to have
17 deleted any references to the History Channel or
18 any titles that would have been generated from the
19 History Channel. It's simply the steps --

20 THE COURT: What type of tire components
21 are they using in the production video?

22 MR. CASTO: Doesn't get to the
23 components themselves, your Honor. It's simply
24 the general process by which raw materials are
25 stored. The next step is the general process by

1 their race car tires or whatever all these other
2 things are they may point out might somehow be
3 relevant to that, my contention was I don't want
4 this -- I don't think it's appropriate, I think
5 it's prejudicial to have something clearly
6 associated with the television production and
7 Goodyear. So when Mr. Casto said we will delete
8 any mention of the professional host, any mention
9 of associated with a commercial television
10 program, and I heard him to say, if I'm incorrect
11 please correct me, delete out any mention of the
12 little boxes that come up. I think you know what
13 I'm talking about when you're watching television
14 and there's some sort of graphic on the screen.
15 If those will all be off and this looks like a
16 video some dude made about Goodyear I'm fine with
17 it.

18 THE COURT: You can't have the History
19 Channel.

20 MR. CASTO: That will be done, your
21 Honor.

22 THE COURT: Plaintiff's motion in limine
23 to exclude evidence -- plaintiffs move to exclude
24 evidence of the immigration status of Koji Arriaga
25 and his guardian Maria Arriaga prior drug use or

1 which batches of rubber are mixed. The next
2 process is the general components that go into a
3 tire like a tread and a steel belt. There is a
4 component which is the animation we have provided
5 to counsel which would have the specific
6 components in an animation in this individual tire
7 as they are built. Then it shows generically how
8 the tire is cured or vulcanized and then goes out
9 the door. That's what it generically shows so the
10 jury has some understanding of the different
11 components of the tire and how they're built.

12 THE COURT: Have you watched the video?

13 MR. BOWERS: Which one? There's no --

14 THE COURT: The History Channel.

15 MR. BOWERS: I don't care about the
16 animation, that's fine. Yes, I've watched the
17 video, and my immediate thought is comes on the
18 History Channel, you've got some host walking
19 around with a microphone and down in the corner
20 it's got a professional production on it. If you
21 ever watched "Hands On History" on the History
22 Channel, the minute this comes on, oh, great, they
23 did something about Goodyear, and that was my
24 point. Giving them the benefit of the doubt that
25 somehow sheets of rubber that might be used in one

1 alcohol use. Drug and alcohol use is out because
2 they weren't the driver of the car. Is
3 Mr. Arriaga, Koji Arriaga, and Maria Arriaga are
4 they still alive?

5 MR. BOWERS: Yes, your Honor.

6 THE COURT: And are they in the United
7 States?

8 MR. BOWERS: Yes, your Honor.

9 THE COURT: Well, then their immigration
10 status is irrelevant.

11 MR. LATIOLAIT: May I be heard?

12 THE COURT: That's a real separator of
13 American opinion today having to do with
14 immigration.

15 MR. LATIOLAIT: And, your Honor, we
16 wouldn't offer it for an improper purpose, but
17 there is a proper purpose if Mr. Arriaga is making
18 a claim for loss of earnings. Some jurisdictions
19 in this country recognize the rule that if you're
20 in this country illegally and you file a lawsuit
21 that your claim for loss of earnings if an
22 economist bases it upon earnings in the United
23 States is essentially a claim for illegal earnings
24 and that the loss of earnings should be limited to
25 what they could earn in their own country as legal

1 wages. I wouldn't mention the status. I would
 2 simply say if they're going to put on lost wage
 3 claim, they ought to reduce it to legal wages and
 4 not illegal wages, and the jury knows nothing
 5 about their status.
 6 THE COURT: How old is this fellow?
 7 MR. BOWERS: He'll be 18 shortly, your
 8 Honor.
 9 THE COURT: Is he obtaining legal
 10 status, a green card?
 11 MR. BOWERS: I'm not sure what he's up
 12 to.
 13 THE COURT: Because if you have a green
 14 card, you can --
 15 MR. LATIOLAIT: Absolutely.
 16 THE COURT: -- earn wages.
 17 MR. BOWERS: If Mr. Latiolait -- talk
 18 about something that divides.
 19 THE COURT: Do you have a lost wage
 20 claim for this kid?
 21 MR. BOWERS: I do. I don't know how
 22 strong it is.
 23 THE COURT: Is he disabled or something?
 24 MR. BOWERS: No.
 25 THE COURT: Then you don't have a lost

1 would need the Court's direction on. This relates
 2 to Joseph Enriquez who plaintiff's economist will
 3 provide assumptions of Joseph Enriquez what he
 4 would earn with a high school diploma, what he
 5 would earn with a college degree.
 6 MR. BOWERS: Can we approach on this
 7 issue? There's a privacy concern on this.
 8 THE COURT: You may. How old is Joseph
 9 Enriquez?
 10 MR. BOWERS: He's 17. He's the one
 11 that's a vegetable.
 12 (Off-the-record bench conference.)
 13 THE COURT: Let's look at the jury
 14 questionnaire. That's the ruling regarding
 15 Mr. Enriquez's situation.
 16 MR. BOWERS: Just for the record, can we
 17 state what it was?
 18 THE COURT: The defense will be allowed
 19 to ask the plaintiff's expert if he is aware that
 20 Mr. Enriquez was not even attending school as a
 21 full-time student at the time that this event
 22 occurred and what effect that has on his
 23 calculation of the guy's future earnings.
 24 MR. BOWERS: But can't discuss any of
 25 the specifics.

1 wage claim because he's just 18 now.
 2 MR. BOWERS: If you're going to tell me,
 3 your Honor, that if I pursue a lost wage claim
 4 then I'm going to run of the risk of his
 5 immigration status being discussed, then I will
 6 discuss that matter with the client knowing that
 7 ruling and take care of it if that's how you
 8 decide.
 9 THE COURT: Or else you have to do the
 10 wage claim based on whatever the wages are in his
 11 country for kids that are 16, 18 years of age.
 12 Did he have a job when this event occurred?
 13 MR. BOWERS: I don't know if he had one
 14 at the time. He's been working somewhat since
 15 then. I can handle that. If that's your ruling,
 16 I'll deal with it.
 17 THE COURT: That's the ruling. Let's go
 18 to the plaintiff's motion in limine to exclude
 19 evidence of expert biomechanical evidence. That
 20 whole issue is out.
 21 MR. LATIOLAIT: There's an issue of bad
 22 acts on the plaintiff's first motion that I don't
 23 know the Court has addressed.
 24 THE COURT: Drug and alcohol use is out.
 25 MR. LATIOLAIT: Specifically one that I

1 THE COURT: Can't discuss any of the
 2 specifics as to why he wasn't attending school.
 3 Which questions do we need to look at?
 4 Somebody gave me a copy this morning.
 5 MR. BOWERS: I gave you a copy of the
 6 one I had culled together yesterday before
 7 Mr. Latiolait --
 8 THE COURT: This one was just given to
 9 me today.
 10 MR. BOWERS: Mr. Latiolait sent me some
 11 changes this morning which we will try to bring to
 12 the Court because we have some disagreement.
 13 MR. LATIOLAIT: We handwrote on it so it
 14 will make it all easier.
 15 MR. BOWERS: Your Honor, he wants 88, 89
 16 and 90.
 17 THE COURT: I didn't even have that
 18 many.
 19 MR. BOWERS: No, this is the amendment.
 20 MR. LATIOLAIT: These are the old
 21 numbers. We'll renumber.
 22 MR. BOWERS: He wants those 88 to 90, I
 23 don't want them, and I don't want to prepare the
 24 questionnaire since I had finished one. Whatever
 25 you add to have Mr. Owens' office duplicate and

1 bring it down today.
 2 THE COURT: 88, 89 and 90 those are
 3 perfectly appropriate for voir dire, so those will
 4 be included, and then somebody will bring me the
 5 completed questionnaire today and I'll sign it.
 6 MR. BOWERS: Could you ask Mr. Owens'
 7 office to do that?
 8 MR. LATIOLAIT: What's the timing on
 9 when we get them back and when voir dire begins?
 10 THE COURT: You've got to get them to
 11 me, the original, to sign. Then you've got to
 12 make the copies today. We have to have the copies
 13 at five tonight or eight tomorrow morning at the
 14 jury commission office. The jurors are coming in
 15 tomorrow. Then there has to be copies made, so I
 16 don't know, if you want to pick them up from jury
 17 services tomorrow they should be finished by noon
 18 and then you can make the copies and distribute
 19 them. If jury services does it, I don't know if
 20 they do it in-house or send them out to be copied.
 21 I don't know what happens to them, but after
 22 they're done you can probably pick them up at noon
 23 tomorrow. I think the panel is coming in in the
 24 morning to fill them out. You can pick them up at
 25 noon tomorrow, Mr. Latiolait, and take them down

1 MR. CALLISTER: I kind of figured that
 2 by now. I kind of intuited during the next hour.
 3 MR. LATIOLAIT: So your Honor knows, I
 4 won't be at the hearing on Thursday on the good
 5 faith settlement because Goodyear has not filed a
 6 opposition to it.
 7 THE COURT: That will be fine. I don't
 8 know if I've got Ford's material.
 9 MR. LATIOLAIT: One thing for the
 10 record, I've not been officially told what the
 11 settlement Ford made was nor an allocation and I
 12 assume we're going to get that.
 13 THE COURT: You're not going to object?
 14 MR. LATIOLAIT: Yes, I'm not going to
 15 object, but we do need to know the amount and the
 16 allocation.
 17 THE COURT: I'll tell you what the
 18 allocation is going to be because the attorneys
 19 told me this. The allocation of the money that
 20 Ford and Garm pays simply goes into a pot and it
 21 will be allocated to the plaintiffs according to
 22 however the jury comes up with the damages.
 23 Because there's nine plaintiffs and assuming that
 24 the jury would find damages in favor of each of
 25 the nine plaintiffs, whatever percentage of the

1 to Kinko's or wherever you get your copies made.
 2 The originals come back to the Court. You each
 3 get one set and jury selection begins on Monday.
 4 MR. BOWERS: Just so I'm clear, your
 5 Honor, is Mr. Owens' office going to add these
 6 final things and correct the form?
 7 MR. OWENS: That's fine.
 8 MR. LATIOLAIT: One last question. Time
 9 limits on jury selection or how long does this
 10 Court generally allow?
 11 THE COURT: Well, choosing a jury is the
 12 most important part of your case with all due
 13 respect to the work you've done prior. The jurors
 14 are the most important element of this case, and
 15 we will pick a jury on Monday. We will pick a
 16 jury on Monday. I'll tell you Monday morning when
 17 you get here how we pick jurors. You'll qualify a
 18 panel of, I believe, 20. You get five peremps per
 19 side. You'll qualify 20 jurors, so the plaintiffs
 20 have to share theirs. Hopefully there will be
 21 only one defendant, and after 20 people are
 22 qualified to serve you get the list.
 23 MR. LATIOLAIT: There was a motion for
 24 reconsideration that we received late yesterday.
 25 THE COURT: It's going to be denied.

1 whole damages are that each plaintiff gets, that's
 2 how the damages -- that's how the money that's
 3 into the pot will be distributed because you get
 4 the benefit of the first money that's paid into
 5 the pot because you would only pay whatever is
 6 over and above the money that's in the pot.
 7 So that was the agreement,
 8 Mr. Callister?
 9 MR. CALLISTER: That's correct.
 10 THE COURT: That was the agreement,
 11 Mr. Bowers, so the jury is one that's going to
 12 ultimately be determining the percentage of
 13 distribution of the settlement pot.
 14 MR. POLSENBERG: I hate to raise this
 15 issue. What if the Supreme Court were to reverse
 16 the results of this trial?
 17 THE COURT: Well, the damages have been
 18 tried fully, Mr. Polsenberg, and that portion
 19 shall never have to be tried over again and the
 20 only thing that would have to be tried is
 21 liability.
 22 MR. POLSENBERG: I disagree with the
 23 Court on that.
 24 THE COURT: You have the right to
 25 disagree, Mr. Polsenberg, because this is America.

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3 ATTEST: Full, true and accurate transcript.
4

5 Mary Beth Cook
6 MARY BETH COOK, CCR #268, RPR
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MARY BETH COOK, CCR 268 (702)671-4408

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

TERESA BAHENA, ET AL,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER
COMPANY,

Defendant.

ORIGINAL

REPORTER'S TRANSCRIPT
OF
JURY TRIALBEFORE THE HONORABLE SALLY LOEHRER
DISTRICT COURT JUDGEMONDAY, JANUARY 29, 2007
10:15 A.M.

APPEARANCES:

For the Plaintiffs: ALBERT MASSI, ESQ.
CHAD BOWERS, ESQ.
MATTHEW CALLISTER, ESQ.For the Defendant: ANTHONY LATIOLAIT, ESQ.
JEFFREY CASTO, ESQ.
DANIEL POLSENBERG, ESQ.
JONATHAN OWENS, ESQ.

Reported By: Mary Beth Cook, CCR #268, RPR

MARY BETH COOK, CCR 268, RPR (702) 671-4408

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CLERK OF THE COURT

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MARY BETH COOK, CCR 268, RPR (702) 671-4408

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1 On behalf of Joseph from California Dr. Adams,
 2 Dr. Zehler will be here. Patricia Hedrick, who is
 3 a life care planner on behalf of Joseph, will be
 4 here; a Dr. Robert Johnson, he's an economist and
 5 he'll be here on behalf of several of the
 6 plaintiffs. We also have in addition to the
 7 plaintiffs Dr. Richard Adams, Dr. Schaefer. Alan
 8 Kam and Lawrence Moreno, and that's -- they will
 9 be experts in different fields that really is
 10 irrelevant for our purposes right now.
 11 We expect, ladies and gentlemen, that
 12 our part of this damages trial will last through
 13 the end of this week. Thank you, Judge.
 14 THE COURT: Thank you, Mr. Massi.
 15 Mr. Callister, do you wish to say anything else?
 16 MR. CALLISTER: Nothing else.
 17 THE COURT: For the defense, please
 18 someone introduce yourself and all of the members
 19 of the defense team and your list of witnesses and
 20 give us your two-minute statement.
 21 MR. CASTO: Thank you, your Honor. Good
 22 morning, ladies and gentlemen. My name is Jeffrey
 23 Casto. I represent Goodyear. On behalf of
 24 Goodyear here today is Richard Olsen from Akron,
 25 Ohio. There's also Mr. Latiolait who's counsel

1 for Goodyear, Mr. Owens and Mr. Polsenberg.
 2 There will be a number of witnesses that
 3 will be called here on behalf of Goodyear, and
 4 those include Dr. Brandner, Dr. Chue,
 5 Dr. Elkanich, Darin Lefkowitz, Stan Peralta,
 6 Dr. Rimoldi, David Weiner, Edward Workman, and
 7 Richard Wulff. There may also be testimony that
 8 you will hear from Annette Davis and Al Owens and
 9 James Gardner, James Schultz and Mr. Olsen. I
 10 think I've covered them.
 11 Very briefly, ladies and gentlemen, this
 12 portion of the trial is going to involve damages.
 13 Liability has been determined already in this
 14 case. There are a number of people that were
 15 involved in this accident. There were ten people
 16 in the van in August of 2004. Those people have
 17 different ages, different medical histories,
 18 different family circumstances. Many of the
 19 injuries are not disputed by Goodyear. Some of
 20 the residuals from those injuries may be disputed
 21 in terms of the degree of permanency, in terms of
 22 the degree of future medical care or necessity or
 23 other elements of damages, but the testimony from
 24 Goodyear, I believe, will be relatively brief, and
 25 in that regard we'll be focusing on those issues,

1 not the fact that there were ten people in the van
 2 on August 2004, not about the fact that those
 3 people were injured. Those issues will not be
 4 disputed. Thank you.
 5 THE COURT: Thank you, Counsel.
 6 (Jurors were excused by the Court
 7 who were unable to serve. Colloquy
 8 was reported but not transcribed.)
 9 THE COURT: The questions that I'm going
 10 to ask you are very, very limited this morning
 11 because you were all here and you all filled out
 12 the 70 or 80 questions last week, so what I want
 13 to know is your name and whether you've been a
 14 juror before and if so to tell us what type of
 15 trial or trials you sat on, whether they went
 16 clear through to jury deliberation or not.
 17 And we're going to start with the top
 18 row, far left hand. Mr. Brucken, would you please
 19 stand up, tell us your name.
 20 THE JUROR: Barney Brucken, I've never
 21 been a juror before.
 22 THE COURT: Next.
 23 THE JUROR: Billie Jo Taney, and I've
 24 never been selected before.
 25 THE COURT: Have you been through the

1 jury process? Have you gone this far and not been
 2 chosen or very first time you've ever been in for
 3 service?
 4 THE JUROR: I've been almost as far, but
 5 been dismissed.
 6 THE COURT: Okay, thank you. Next.
 7 THE JUROR: Othon Carranza, and this is
 8 my first time.
 9 THE COURT: Thank you, sir. Next.
 10 THE JUROR: Mike Jackson, first time.
 11 THE COURT: Thank you.
 12 THE JUROR: Nicholas Christensen, never
 13 been called.
 14 THE COURT: Thank you, sir. Next.
 15 THE JUROR: Michael Whiteman, never been
 16 called.
 17 THE COURT: Next.
 18 THE JUROR: Steven Frey, I served on a
 19 criminal case, went to verdict.
 20 THE COURT: Was the jury able to reach a
 21 decision?
 22 THE JUROR: Yes.
 23 THE COURT: Were you the foreman on the
 24 panel?
 25 THE JUROR: No, I was not.

1 THE COURT: It's hard to establish a
2 pattern when there's only one.
3 MR. FRIZELL: There's case law showing
4 that just one is a prima facie.
5 THE COURT: There's only one.
6 MR. POLSENBERG: You understand that my
7 wife is black, right?
8 THE COURT: But there are Hispanics.
9 Were any Hispanics challenged?
10 MR. FRIZELL: Yes. Defendants struck
11 No. 3, Carranza, and also an Asian, your Honor,
12 No. 25, Mike Anselmo.
13 THE COURT: He's Asian?
14 MR. FRIZELL: That's what he put on his
15 questionnaire.
16 MR. POLSENBERG: I didn't know.
17 THE COURT: And you struck the only
18 black person. You struck Anselmo. All right.
19 It's not a pattern, but I always make you put your
20 nonracial reason for striking.
21 MR. POLSENBERG: You bet. For Michael
22 Jackson, I liked him on the questionnaire but once
23 he came in here and started answering questions,
24 every time he answered the question there was more
25 information. On his questionnaire his

1 mother-in-law had a broken limb or something. Now
2 she's in a class action with some radiation case.
3 He had a niece with brain damage. He was part of
4 the Ford Explorer tire separation recall. I loved
5 him on paper. He even said that punitive damages
6 should be consideration of fairness. He was on my
7 keep list until he started adding all this new
8 information.
9 THE COURT: How about Orthon Carranza
10 who appears to have a Hispanic surname?
11 MR. POLSENBERG: When I asked him the
12 question at the end, he was not following me. He
13 also -- he's the one who wrote -- I even asked him
14 about it. I asked him up front about his answers
15 for punitive damages, you do the crime, you do the
16 time. With that kind of mentality, I don't think
17 that I can do that. And, besides, it's not like I
18 got rid of all the Hispanics.
19 THE COURT: How about Michael Anselmo
20 who I would have thought was Hispanic but
21 evidently his questionnaire says Asian background?
22 That's No. 25.
23 MR. POLSENBERG: When he told me right
24 at the end about his father dying, I didn't write
25 down in the notes, somebody in his family dying

1 and he was very sympathetic. He answers on his
2 questionnaire, yes, he's going to have sympathy.
3 I sympathize and I tend to take sides. As much as
4 he said -- his answers kept me from using a
5 challenge for cause because he said no, I could be
6 open-minded, but I didn't believe him.
7 THE COURT: All right. Thank you.
8 Those are all racial and ethnic origin neutral
9 reasons. Your challenge is denied.
10 (Sidebar conference concluded.)
11 (Juror oath administered and
12 pretrial jury instructions
13 concluded.)
14 THE COURT: Does either party wish to
15 invoke the exclusion of witness rule at this time?
16 MR. MASSI: Plaintiff does, your Honor.
17 THE COURT: If there are any persons not
18 parties to the lawsuit who have been subpoenaed or
19 otherwise notified that they will be testifying in
20 the case, please leave the courtroom at this time,
21 remain available in the hallway until the bailiff
22 calls you to testify. After you have testified,
23 please do not discuss your testimony with anyone
24 other than the parties or the attorneys.
25 And the record will reflect that the

1 Batson and JEB Alabama challenges were done to the
2 exercise of preempts by the other side in the
3 hallway and have been ruled upon.
4 That concludes the opening instructions
5 of the court. Is the plaintiff ready to open?
6 MR. MASSI: Yes, your Honor.
7 THE COURT: You may proceed.
8 MR. MASSI: Thank you, Judge. If the
9 Court please, counsel, ladies and gentlemen. As I
10 said, my name is Al Massi, and myself and Chad
11 Bowers represent plaintiffs in this case and their
12 request for damages against Goodyear for the harm
13 that was caused them.
14 There are three ways we're able to
15 present evidence to you. We do it through
16 testimony, we do it through exhibits, or we do
17 what's called demonstrative evidence. Testimony
18 is witnesses, family, experts, physicians. I
19 mentioned before an economist testifying, telling
20 you their story either in person or as the Court
21 indicated through deposition. Exhibits, you'll
22 see packets of exhibits. You'll be presented with
23 tabbed and indexed so you can follow through and
24 check whichever you wish or whatever part you wish
25 containing, for example, medical bills, reports

1 and in the case of Joseph what's called a life
2 care plan, and I'll explain it to you later.
3 Photos of the exhibits.

4 And then as part of demonstrative
5 evidence, photos will also be presented, some of
6 them very difficult, and you need to be prepared
7 for that. Films, charts of experts, particularly
8 economic charts. That seems to be the one that
9 will most be used in this case in the use of an
10 aspect of the chart.

11 All of this is going to be presented in
12 our effort to show you that our clients they
13 aren't just claimants wanting damages from
14 Goodyear. They're people who have not only been
15 physically damaged but they've been emotionally
16 scarred. We want to show you the effects and hope
17 to show you the effects this loss has had on their
18 lives, and by doing that hopefully explain to you
19 that this is their one chance, their one effort, . .
20 their one opportunity here now and to you to be
21 compensated for these damages, to be compensated
22 for their loss.

23 Through testimony we're going to have
24 the testimony of a father, a sister, an aunt and
25 brothers in these extended families, all telling

1 you about the reality of their day every day, and
2 the reality of their families every day. Through
3 exhibits you're going to see the hard evidence, as
4 I said, bills, reports, charts. Photos, you're
5 going to see pictures of people who can't speak
6 for themselves, people who are no longer with us.
7 In one case, Joseph's case, a young man who can't
8 speak at all and cannot speak for himself.
9 They'll be presented by people who care
10 for others for people who can't care for
11 themselves, and they're going to tell you and we
12 hope you'll come to understand about their lives
13 before August the 16th, 2004, and how their lives
14 are now, and how they're going to be for the rest
15 of their lives, after we all go home and they go
16 back to their headquarters and we continue with
17 our lives and they continue on with what is left
18 of their lives, all of which has been affected by
19 something that you've already been told several
20 times, and I'm going to tell you several times
21 again because it's important. It wasn't their
22 fault. Chad Bowers and I represent three of the
23 families in their action against Goodyear for
24 damages. I'm going to tell you again who these
25 people are, and I want you to know them. It's

1 Ernesto and Leonor Torres. These are individuals,
2 husband and wife, who had three children. They
3 now have two children. Their children Armando is
4 here -- their son Armando is here. Crystal is in
5 school. We expect her here. Andrew is deceased.
6 Arriaga, a family friend, is here. Victoria Campe
7 is here, Frank Enriquez's sister. She represents
8 Frank's estate. Frank also had a sister Patricia
9 Jayne Mendez. Patricia will be here tomorrow with
10 Joseph, Jeremy, and Jamie Enriquez. These are
11 Frank's surviving children. Mr. Callister, as I
12 said at the beginning, will be speaking for the
13 Bahena family.

14 What's typical or usual in a civil case,
15 the trial presentation of liability and damages.
16 Damages is what people have suffered. This trial,
17 again, is only about damages. Liability and fault
18 having been decided. Goodyear is responsible for
19 the damages they caused because of this defective
20 tire. That part of it is over. They've got to
21 live with it, just as our clients we're going to
22 show you have to live with the effects of it.

23 There should be no more debate or
24 discussion about it because you're going to be
25 told that it's for you to decide what these

1 damages are going to be and to be the judges of
2 how to compensate these families. It's my burden
3 to show you by a preponderance, and the Court
4 already addressed that to some extent. We all
5 watch television, and we all know that every trial
6 lasts 20 minutes and you get the result by the
7 commercial or else they can't do it again the next
8 week. It isn't the way it is obviously. Some of
9 you have experienced it before. The rest of you
10 will experience it for the first time. It takes
11 time, but it's not our burden beyond a reasonable
12 doubt to show you what these damages are. It is
13 only by a preponderance, more likely than not.
14 What our burden is to show you that the
15 injuries claimed were caused by the acts of
16 Goodyear, that the injuries claimed are of the
17 nature we say they are, many permanent, some
18 life-altering, some life-threatening, and all
19 caused by the accident, the responsibility of
20 Goodyear. You're going to see that the majority
21 of the evidence is not going to be contradicted,
22 as counsel already said, by the defendant.
23 The damages are going to be
24 demonstrated, and that the only remedy that these
25 people have -- a lot of people don't like this,

1 but, again, it's something you have to live with.
 2 The only remedy these people have is money. There
 3 isn't any other remedy that is available and no
 4 other remedy that's appropriate. That is their
 5 only remedy and it's what we're asking and going
 6 to ask for.
 7 To understand how these people, how
 8 these individuals came to share this one tragedy
 9 you have to know about their background, and what
 10 we're going to do is try and tell you about their
 11 background. We're going to tell you that all
 12 these families they lived and worked in Las Vegas.
 13 Now, Jayne Mendez, that's driving up, she does
 14 live in Occanside but has lived in Las Vegas but
 15 is living in Oceanside with her boys now. And
 16 they all lived here before August the 16th, '04.
 17 The common thread among these families
 18 was some of the young men in the family loved
 19 amateur boxing. That was their sport. They had
 20 played some soccer, they played some other, but
 21 they loved amateur boxing. And the families were
 22 on a trip in August of '04 with a couple other
 23 groups, come other families, to go to Kansas for a
 24 boxing tournament. So they rented a van and three
 25 families, Torres family, Koji Arriaga and Frank

1 Enriquez and two of his three boys, were in the
 2 van when they were driving up through eastern Utah
 3 as I told you before. They were following each
 4 other. Ernesto, Leonor, Andrew, Armando and
 5 Crystal, Koji, Joseph, Jeremy and Jamie in that
 6 van. Frank Enriquez was also there.
 7 Now, along with, and my apologies to
 8 Mr. Callister, along with Mrs. Bahena who should
 9 not be left out on the side because it's another
 10 family but a close family. They were traveling
 11 about 9:30 in the morning on 170 in eastern Utah
 12 when the right rear tire came apart, caused the
 13 van to cross the road, go into the median and roll
 14 and roll and roll, and it finally came to rest on
 15 its wheels with a shredded tire that's hanging on
 16 the rim. And I've asked Brian, our tech, to put
 17 him up some pictures to get an impression of what
 18 this impact, what this was like.
 19 Brian, if you could show the side
 20 picture. Next picture, please, and finally the
 21 right side, please.
 22 That's what was left after the rolls.
 23 That's what was left after the impact, and that's
 24 our right rear tire.
 25 You'll be told that the injuries

1 suffered by these families directly and indirectly
 2 were absolutely horrendous. From the moment that
 3 van came to rest, there were three extended
 4 families, and I stress that because this is about
 5 family, you're going to be told, and what the
 6 families did before and what you'll see they have
 7 done after. Three extended families' lives they
 8 were changed forever. The effect was so profound
 9 one family member, little Jamie is Frank's son,
 10 fortunately was not in the van. He was in a truck
 11 ahead. Came back, saw his dad who was lost at the
 12 scene. The brothers, Joseph and Jeremy, Joseph
 13 himself profoundly injured and Jeremy, the middle
 14 son in the van, and saw his dad and his brother
 15 after.
 16 These effects, these losses, the changes
 17 are what we're asking you to evaluate. That's the
 18 hard part for you. That's what you're going to be
 19 the judge of. That's what we're going to be
 20 asking you to do. Using the trial to compensate
 21 these people and hold Goodyear responsible for
 22 what damage they caused because of this defect.
 23 To give you some impression generally of
 24 some of the injuries, and they're going to be
 25 expands on by the doctors and it's not my

1 intention to testify for them. I want to give you
 2 a preview of some of these injuries. Ernesto,
 3 Mr. Torres, on his own behalf he had facial and
 4 scalp laceration, a concussion, left wrist
 5 fracture, ulnar nerve damage, carpal tunnel
 6 damage. Leonor, his wife, her right eye, neck
 7 abrasion, chest wall contusion, bulging disk at
 8 C5-6 in her neck.
 9 Andrew, their son who's 12 years old,
 10 after several days in intensive care Andrew died
 11 of massive closed head trauma, blunt chest trauma,
 12 blunt abdominal trauma with a liver contusion and
 13 ankle fractures.
 14 Crystal, their daughter, amazingly
 15 bumped, bruised, shocked. Armando, was one of the
 16 boxers. We're going to show you he had a closed
 17 head injury, concussion, left brachial plexus left
 18 shoulder, disk bulge in C3 to seven and
 19 depression.
 20 Frank Enriquez, after some time at the
 21 scene, died of massive head and chest trauma.
 22 Jeremy, another one of Frank's sons, had lumps and
 23 bruises. He saw his dad before he died, saw his
 24 brother Joseph. Jamie, young man I told you came
 25 back and saw his father and his brother, and

1 Joseph who will be here only for a short time. I
2 need you to understand what we're going to do is
3 we are going to bring Joseph here, that's why
4 Jayne is driving up today, because we think he
5 deserves to be seen. Joseph suffered a closed
6 head injury, profound closed head injury, subdural
7 hematoma, brain stem injury, right eye hemorrhage,
8 spleen laceration, pelvic rupture, shortened life
9 expectancy, broken ribs.

10 Koji, concussion, right femur fracture,
11 hypertension fracture C6, compression fracture C7.
12 He had an anterior cervical fusion, right wrist
13 and right hip fracture. And Ms. Tapia died of
14 trauma.

15 You're going to be told of the effect of
16 a loss where a boy, a man and a grandmother died.
17 Three boys, Jeremy, Jamie, Joseph, lost their dad.
18 Jeremy and Jamie lost the ability to meaningfully
19 communicate with their brother. Victoria and
20 Jayne will tell you about their brother Frank
21 Enriquez, and Leonor will tell you about their son
22 Andrew, about the effect on their son Armando and
23 their daughter Crystal who lost her brother.
24 Armando lost his brother, the use of his arm, and
25 Koji his neck. You'll learn that they each live

1 planner, an individual when you have catastrophic
2 losses like this what is going to be needed for
3 the rest of these peoples' lives to maintain and
4 care for them and have some quality of life.
5 She'll be here with a plan for Joseph.

6 You'll have life expectancy charts for
7 Frank, Andrew, Mrs. Bahena, and they will tell you
8 how long they should have lived but for what
9 happened because of Goodyear. And for Joseph how
10 his life expectancy has been shortened, the cost
11 of his present care, the cost and need of his
12 future care.

13 Robert Johnson he's a doctor of
14 economics is going to be here to testify and he's
15 going to quantify these losses and he's going to
16 tell you how he arrived at these numbers using
17 some real cold statistics like life expectancy
18 charts and things that economists use. And it's
19 going to be quantification of one of the major
20 aspects of these families' loss, but the part he
21 is not going to quantify for you but tell you that
22 economists recognize is something called the loss
23 of enjoyment of life. It's commonly called
24 hedonic damages. It's part of the general damages
25 that a person suffers, and he's going to tell you

1 every day with that memory and its effect, and
2 they are, as I said, all about family.
3 Joseph -- Brian, do you have Joseph's
4 picture, please. Go back would you please. I
5 apologize. As I went through to do this and I
6 forgot that and I apologize to the families. Show
7 the picture of Frank with the boys. Frank
8 Enriquez is one of the individuals who died at the
9 scene survived by his three children, Jamie,
10 Jeremy and Joseph on the right. Andrew, Ernesto
11 and Leonor's son. May we have one picture of
12 Andrew, please. And may I see a picture of Joseph
13 now, please. Joseph is in a community home care
14 setting in California, you'll be told, near his
15 aunt Jayne, and she takes care of him, visits him,
16 takes care of him at her home, takes him out and
17 helps. She also cares for Jamie and Jeremy.
18 They're going to be here tomorrow.

19 Koji is living and working in California
20 with his uncle now. Armando he will tell you
21 continues to have some hope for his shoulder.

22 You're going to be presented with the
23 hard facts that I told you about, the exhibits,
24 the bills through Ms. Hedrick. Ms. Hedrick,
25 you'll learn, is a registered nurse, a life care

1 that while economists recognize there's a value to
2 loss of enjoyment of life, it's up to you, it's
3 going to be your judgment, not his, needed to
4 determine the value in addition to these hard
5 numbers you're going to be presented.

6 The loss of enjoyment of these people's
7 lives, loss of care, comfort, and society of their
8 loved one, the pain and suffering that they have
9 endured, all part of the general damages because
10 you're going to be asked to value not only Ernesto
11 and Leonor's injuries that they received, you're
12 going to be asked to value the loss of their son,
13 their daughter's injuries; Frank, loss of his life
14 with his son Joe, Jeremy, and Jamie and the loss
15 of their dad. Armando's, Koji's, Jeremy's,
16 Jamie's emotional and physical trauma. Joseph,
17 who is living only with the constant support of
18 others, the value of that.

19 And you're going to see and hear some
20 depositions by medical providers and testimony of
21 doctors and pictures of those losses. In Joseph's
22 case you're going to see something called a day in
23 the life film. This is a film that was done --
24 there's two. We edited them down because we don't
25 want you to sit through the whole day, but edited

1 down day in the life shows what life is like for
 2 Joseph every day, what he goes through, what
 3 others have to go through for him. You're going
 4 to hear from the doctors and economists of the
 5 quantity of his life, how much life he has left,
 6 how much life the others who died would have had.
 7 You're going to see through the film and from
 8 Jeremy and Jamie and Jayne the quality of his
 9 life, and that quality is never going to change.
 10 It's not going to get any better.
 11 We're going to attempt to show you some
 12 of what I'm sure are hundreds of ways their lives
 13 are changed. We're going to try and tell you
 14 through these families how that change is never
 15 going to go away and how it will affect their
 16 families forever.
 17 Told you we only have this one remedy,
 18 the remedy is money, payment of money by the
 19 company, and one opportunity, and we're going to
 20 ask for our clients in this stage of the damage
 21 trial for two different kinds of damages, special
 22 damages they've incurred, the medical bills and
 23 the funeral expenses and the lost wages, the hard
 24 numbers I told you about. And then you are going
 25 to judge these consequential damages, these

1 general damages, pain and suffering, the emotional
 2 distress. Not only their own but that they
 3 suffered because of their other losses directly
 4 and indirectly as fathers -- you have fathers,
 5 mothers, sons, grandmothers, sisters and brothers,
 6 and they're all together and their emotional loss,
 7 the loss of the care, comfort, and society of
 8 loved ones, the loss of enjoyment of life for each
 9 of them.
 10 The limitations you're going to be told
 11 about by Armando, by Koji, by Ernesto, what
 12 Victoria has seen of her nephews and what Jayne
 13 sees of her nephews every day and in particular
 14 Joseph because you can't fix it, but we're
 15 going -- you're going to be instructed you can and
 16 we're going to argue that you should provide the
 17 only justice these families have, the only justice
 18 they're ever going to get and that's compensation,
 19 a money award for the losses that they suffered
 20 for the losses they will forever suffer after
 21 we're all gone all of which was caused by
 22 Goodyear.
 23 We appreciate your time in listening.
 24 We ask that you please do pay attention to
 25 everything everyone says on both sides, and we ask

1 you to consider these things we're going to tell
 2 you and we're going to add to it as we go along.
 3 Thank you, your Honor.
 4 THE COURT: Counsel for Goodyear, would
 5 you like to open.
 6 MR. CASTO: Thank you, your Honor.
 7 MR. CALLISTER: Could I give a brief
 8 opening as well?
 9 THE COURT: I'm sorry. I overlooked
 10 you.
 11 MR. CALLISTER: Thank you, your Honor.
 12 I promise I'll be brief.
 13 Honorable Judge, fellow members of the
 14 Bar, ladies and gentlemen of the jury. I'll try
 15 to just succinctly summarize. Al has done a
 16 stellar job.
 17 I do not envy you your job. One of the
 18 great ironies I've never been in your position.
 19 I've been in this position for a long time. You
 20 have a very difficult challenge in front of you,
 21 and it is a bit of an inversion of what is the
 22 typical scenario that you see on TV. You are not
 23 being presented with a set of curious facts or
 24 allegations and then asked to decide who's right
 25 or wrong. That's been done for you. Your sole

1 job hence is to decide what is the appropriate
 2 amount of compensation that these family members
 3 are entitled to under the law.
 4 I'd like to take a brief second just to
 5 remind you who I represent, and I'll ask them to
 6 stand up. On behalf of the estate of the late
 7 Evertina sometimes referred to as Tapia, sometimes
 8 Bahena but we're going to refer to her as Berta
 9 the mom, is Teresa Bahena. Next to her one of her
 10 sisters Rocio, next to her Maria, all here today
 11 but Teresa especially because she appears
 12 individually on behalf of the estate. Thank you.
 13 Two sisters are not here today. They
 14 could not travel to be with us. There's really
 15 one other sister, Leonor, who you've already met.
 16 This is kind of the sevensisters'
 17 story, and it begins as early as 1988 when while
 18 their mother, the late Evertina, living in Mexico
 19 the sisters start to emigrate to the United
 20 States. They marry. They're here lawfully. They
 21 bear children, they go to work, and by the year
 22 2000 or so mom wants to retire and come be with
 23 her kids. So Ms. Bahena, Berta, comes up, begins
 24 living with two of her daughters here in her home
 25 and all is well. They're traveling, going to

1 Mesquite, going to the lake, doing thing that any
2 loving 64-year-old, very young grandmother would
3 do with her daughters and granddaughters.

4 Unfortunately that includes, as she'd
5 done previously, accompanying some of her
6 grandsons who she was so proud of and loved on a
7 boxing trip. Amateur boxing was a big particular
8 thrill in their family, and unfortunately, as Al
9 has shared with you, they wake up on August 16,
10 2004, get back in the car to continue driving,
11 these three families that are traveling as
12 economically as they can to get back East.

13 By 10:00 a.m. that morning Evertina
14 Bahena is dead, blunt head trauma as a result of a
15 one-car accident as the result of the failure of
16 Goodyear's tire. That's a given. There are no
17 defenses to that now. We're merely asking you in
18 this first phase, in which we address as
19 compensatory damages, what is the appropriate
20 amount. And I agree with everything my esteemed
21 co-counsel has said; it is an abysmal failure of
22 the system that that's the only way we can
23 compensate, but that is our system and that is
24 your obligation.

25 We will present the same type of

1 with that job, knowing that would be their duty.

2 I cannot imagine, I'm sure you cannot, a more
3 horrific task. I can't imagine a more horrific
4 final moments than the time, that small moment of
5 time, the moment Goodyear's tire blew out and --

6 MR. CASTO: Objection, your Honor.

7 THE COURT: Objection is sustained.

8 This is more in the nature of closing than
9 opening.

10 MR. CALLISTER: Thank you, your Honor.

11 -- and the time of her death. We ask
12 you to listen carefully, conscientiously, evaluate
13 both types of damages, economics we've spoken of
14 as well as that loss of consortium, of having your
15 grandmother available to you, having your mother
16 available to you. You'll hear one of the key
17 components which is these seven sisters lost their
18 father who abandoned them more than 25 years ago.
19 Mother was everything to them, friend, confidante,
20 counselor, grandmother.

21 We urge you to listen to the evidence,
22 give it your own thought process, come to a
23 verdict, and we trust it will be a full and fair
24 one.

25 THE COURT: Thank you, Mr. Callister.

1 evidence that you've heard referred to. The judge
2 will instruct you on how to weigh that evidence.
3 We won't show you a day in the life because, of
4 course, that would be just a black screen for the
5 grandmother who is no more.

6 The key to remember, I would guess,
7 coming into this from your perspective is the
8 opportunity to issue a punitive verdict will
9 follow, but that's not this phase one, so the
10 phase one will require you to listen closely to
11 the experts because usually family members are
12 typically rather inept at putting a dollar number
13 on a deceased mother's life. Economic experts can
14 do that within a range, and they can also address
15 things like the funeral costs, if there was
16 ambulance costs or hospitalization cost because
17 that testimony can come in. In the case of the
18 late Evertina, there were none. She was dead at
19 the scene, so you'll only hear some evidence of
20 the funeral costs.

21 You'll get to see and handle her death
22 certificate. You'll see on that death certificate
23 that two of my clients here today, Rocio and
24 Teresa, had to go and identify their late mother's
25 body. They had to travel from where they were

1 Counsel for the defense, would you like to open.

2 MR. CASTO: Thank you, your Honor. Good
3 afternoon, ladies and gentlemen. My name is Jeff
4 Casto, and with my co-counsel I represent
5 Goodyear. On behalf of Goodyear and myself, I
6 would like to extend our condolences to the
7 plaintiffs and the families in this case.

8 This was a very, very serious accident.
9 There were undoubtedly injuries which occurred.
10 There were undoubtedly deaths which occurred, and
11 as I mentioned earlier much of that evidence will
12 not be disputed. This phase of the trial does not
13 require you to determine whether or not Goodyear
14 is liable. Based upon that earlier determination,
15 you will not hear any evidence from Goodyear
16 during this phase of the trial concerning any
17 fault of Goodyear, whether they were at fault,
18 whether they are responsible, or whether they are
19 liable for any of the damages that you're going to
20 hear in the compensatory phase.

21 This trial deals with the damages that
22 will compensate the families in this case, and we
23 need your help in this phase of the trial to
24 listen to the evidence, and based upon all of the
25 evidence to make a determination that is fair and

1 that is appropriate for the injuries and the
2 damages that have occurred.

3 There were ten people in the van on the
4 day of the accident. All of those ten people were
5 different, different ages, different family
6 situations. The injuries that they sustained also
7 differ, and there's a wide array of injuries and
8 damages that they have incurred. Similarly there
9 have been a number of experts that have evaluated
10 this case, and they have a wide array in certain
11 situations of the damages and injuries that flow
12 as a result of the accident and will continue into
13 the future. They will have differences in some
14 instances about the prognosis and about the
15 evaluations of some of the plaintiffs, and I would
16 ask you to listen to all that evidence because, as
17 I mentioned, at the end of the day we need your
18 help to evaluate what is appropriate and
19 reasonable compensation for each of the
20 plaintiffs.

21 Now, there is a large number of people
22 that have filed suit here, and there is a listing
23 of them. Some of the injuries we don't dispute at
24 all. Evertina Tapia, also known as Evertina
25 Bahena, was killed in the accident. Her daughters

1 are listed there. There's another family
2 involving the Torres. There was Ernesto Torres
3 who was in the vehicle. There was Leonor Torres
4 who was in the vehicle, and there were three
5 children: Crystal, Armando and Andres. Andres
6 was killed in the accident, and there's no dispute
7 that that death occurred as a result of it.

8 There was the Enriquez family. Frank
9 Enriquez was the father of three boys. He was
10 killed in the accident. There is no dispute that
11 his death was caused by that accident. His three
12 boys are Jeremy, Joseph and Jamie. And then there
13 is Koji Arriaga. Koji was also involved in the
14 accident.

15 As I mentioned, ladies and gentlemen,
16 much of the death and injury damage testimony is
17 not going to be disputed. But you're going to
18 hear expert testimony, and you're going to need to
19 listen to all the evidence in this case because
20 some of the plaintiffs have made varying degrees
21 of recovery, and there is a dispute amongst
22 medical testimony about the degree of that
23 recovery for each of them.

24 Ernesto Torres was involved in the
25 accident. He injured his neck, his left elbow,

1 his left wrist and received treatment for that.
2 The medical testimony, and I believe the evidence
3 in the case, will show that as a result of that
4 treatment that he has substantially healed in a
5 number of those areas. He reported during his
6 treatment with respect to his neck no pain or
7 problems. With respect to his left elbow, that it
8 had healed, no pain or problems. With respect to
9 his left wrist, no pain or problems. He was
10 treated by a Dr. Oliveri. He last saw Dr. Oliveri
11 in January of 2005, and he stopped physical
12 therapy in 2004.

13 Now, Mr. Torres works as a baker or did
14 work as a baker at the Aladdin. I'm not sure of
15 his current employment. He was back to work full
16 time in the bakery four months after the accident,
17 so Mr. Torres is not a malingerer. He's certainly
18 a gentleman who works for a living and was back to
19 work within four months after the accident. And I
20 believe that's what the evidence in this case will
21 show.

22 Now, how do we know what the evidence
23 will show? It will come from a variety of
24 sources. Some of the evidence will come from
25 exhibits, and you'll see those exhibits in

1 evidence. Some of them show on the screen. Some
2 come because there have been depositions taken,
3 and a deposition is simply a case where a person
4 is questioned under oath and there's a court
5 reporter present, and there's a transcript which
6 is created which both lawyers have an opportunity
7 to review. So we have a sworn testimony of
8 various witnesses so we do understand what some of
9 the witnesses are going to say if they've been
10 deposed in this case.

11 Let me go a little bit further with
12 respect to other plaintiffs in the case. Leonor
13 Torres was involved in the case. She had various
14 injuries. She had injuries to her spine, she had
15 injuries to her knee, and she had injuries to her
16 chest. Now, during the course of her medical
17 treatment, she did receive very good care, and she
18 also went back to work after the accident. In
19 fact, I think she's doing the same job after the
20 accident as she did before the accident, but
21 something happened before the accident that part
22 of the evidence will show in this case.

23 And that was that Leonor Torres slipped
24 and fell at work eight months prior to the
25 accident. Now, why is that important? It's

1 important only because she received extensive
2 treatment for her lower back, for her buttocks,
3 for her neck pain and for her headaches before the
4 accident. She had a problem with her vertebrae,
5 an L5-S1 disk herniation, which was preexisting
6 prior to the accident. They took MRIs of Leonor
7 and determined that her MRIs before and after the
8 accident were identical; that since the accident
9 she plays soccer and that after treating it was
10 determined she made maximum medical improvement
11 and not in need of additional treatment for the
12 accident, but the L5-S1 disk herniation was not
13 caused by the accident. It was preexisting to the
14 accident.

15 Crystal Torres suffered abrasions to her
16 hands. She was treated and released on the day of
17 the accident so her injuries were relatively
18 minor, and I'm not sure that fact is disputed in
19 terms of her physical injuries.

20 Koji Arriaga was also in the van at the
21 time of the accident. He suffered a fracture of
22 his right femur and he suffered a fracture of his
23 cervical vertebrae, two of his vertebrae. His
24 fracture of his femur was repaired with a surgical
25 plate and screws, and the evidence will show that

1 that fracture has healed. He does have injury to
2 his neck which was also repaired surgically with a
3 fusion, and there's been some inconsistent
4 testimony about the nature of the recovery that he
5 has made, but some of the medical records indicate
6 from his treating physician, Dr. Elkanich, that
7 with respect to his cervical fracture it was
8 really minimal neck symptomatology, and that's a
9 note from Dr. Elkanich from a note of November 5th
10 of 2005. Koji was deposed, and during his
11 deposition he testified he didn't want any more
12 neck surgery.

13 Koji is currently employed. He worked
14 as a roofer. Part of his job as a roofer was
15 carrying 40-pound bundles of shingles. Koji, at
16 the time his deposition was taken, was not in
17 school and had not finished high school. But with
18 respect to his employment, he told us there
19 weren't any jobs he couldn't do because of the
20 accident. And that after the accident he played
21 soccer, so, again, Koji is a young man who has
22 tried to move on with his life and has made a very
23 good medical recovery in a number of areas that he
24 sustained as a result of the accident.

25 Jeremy Enriquez, Jeremy suffered minor

1 cuts on his arms. We did not receive any medical
2 bills from him. Jeremy has never seen any doctor
3 for any problems sleeping which was a claim he
4 made during his deposition. He has received
5 counseling and reported that the counseling helped
6 him to learn to deal with the loss of his father
7 which is obviously a tragic event, but he's seeing
8 professional care to cope with that. When he was
9 deposed, Jeremy was going to school.

10 Now, Jamie Enriquez also has a claim,
11 but Jamie Enriquez was not in the van involved in
12 the accident. He did not see his father at the
13 scene of the accident, but he did lose his father.
14 He reports that he's seen and obtained counseling
15 and that the counseling techniques have helped
16 him. He was asked whether he was on any
17 medication for any of his issues, and he reported
18 that he was not.

19 Now, the most serious case is going to
20 involve Joseph. Joseph is the young man who was
21 seriously injured in the accident. Joseph was
22 examined by Dr. Zehler who first saw him in
23 June of 2006. And what Dr. Zehler told us was
24 that with respect to Joseph he did not have an
25 indication that Joseph had any capacity to fixate

1 on anything visually, to see anything visually
2 that he could appreciate. There is a
3 determination that Dr. Zehler ultimately made in
4 terms of his evaluation that Joseph is in a
5 minimally responsive state. That was the
6 diagnosis given to him by Dr. Zehler. He thinks
7 that most of the time his function is closer to a
8 persistent vegetative state. He testified that
9 Joseph does not process things visually; that he
10 is not something -- not someone who will get
11 function based upon his injuries, and that with
12 respect to his vision and memory it is terribly
13 guarded.

14 Now, there is a life care plan that was
15 done by the plaintiffs on behalf of Joseph.
16 Similarly, there was a life care plan evaluation
17 that the defendants did on behalf of Joseph, and
18 you're going to hear both of those individuals
19 testify. The life care planner for the defendant
20 is Edward Workman who's a Ph.D. And what
21 Mr. Workman will tell us is he will give us his
22 experience in formulating life care plans for
23 patients similar to Joseph. So that this was not
24 the first time he had to formulate a life care
25 plan for somebody with the degree of impairment

1 that an individual like Joseph had sustained.
 2 He will tell you what was involved in
 3 formulating his life care plan. He will tell you
 4 of all the medical records that he reviewed in
 5 order to provide his evaluation; that he
 6 personally visited Joseph; that he consulted with
 7 the treatment team for Joseph; and that he
 8 reviewed various reference sources.
 9 Now, Dr. Workman will say is his view of
 10 all this information and discussion that his
 11 belief is the consensus of the medical opinion is
 12 that the physical and neurological condition of
 13 Joseph will remain substantially the same, that
 14 is, he will not improve; that he is not a suitable
 15 candidate for vocational rehabilitation; that he
 16 has a G tube in his stomach into which they
 17 provide hydration, vary, fluids, as well as food
 18 and medication. And that physical rehabilitation
 19 is not likely to produce any change in his ability
 20 for day-to-day function, and that he's not likely
 21 to gain much sight.
 22 Now, what Dr. workman did was evaluated
 23 all the needs of Joseph and will express opinions
 24 about what the costs of those are. That the
 25 objective of the life care plan is to outline what

1 the appropriate services are based upon Joseph's
 2 specific and individualized needs, and that would
 3 include all medical products that he would need,
 4 all services that he would need, such as
 5 occupational therapy, physical therapy, speech
 6 therapy. And he will tell you what the cost would
 7 be for that if Joseph were to remain in an
 8 institution as well as the cost as to what it
 9 would be if Joseph received care at home.
 10 You'll also hear from an economist by
 11 the name of Dr. Weiner. The plaintiffs indicated
 12 that they have an economist. The defendants had
 13 also retained an economist. One thing that's
 14 significant that Mr. Massi mentioned about Joseph
 15 is that a physician by the name of Dr. Adams
 16 testified that Joseph's life expectancy is 25
 17 years from the date of the accident. The other
 18 things that Dr. Weiner evaluated when he reviewed
 19 Joseph was a loss of wage claim, and he will tell
 20 you different things that affect the wages that
 21 someone will have in terms of a loss claim, and
 22 there is a direct relationship between education
 23 and income, and that on the date of the accident
 24 that Joseph was not attending high school.
 25 There are economic reports that

1 Dr. Weiner had also done for Frank Enriquez. One
 2 of those, that he was unemployed on the date of
 3 the accident. Secondly, that he had less than a
 4 high school education, and there's other points
 5 we'll get into when Dr. Weiner is put on the stand
 6 with respect to that.
 7 There's a claim for a wage loss
 8 involving Andres Torres. What Dr. Weiner will
 9 tell you is that Ernesto and Leonor are currently
 10 employed. He will give you his opinions about the
 11 probability of adult children giving money to
 12 their parents, and if they give money his opinion
 13 will be it was very little.
 14 There's also a wage claim involving
 15 Evertina, and what Dr. Weiner will tell you is
 16 that with respect to her economic claim for her
 17 lost wages that she did not give money to her
 18 children when she was alive. In fact, heirs gave
 19 her money, and that at the time of the accident
 20 she was not working and did not have any visible
 21 means of support.
 22 And I mention this just because this is
 23 the evidence that you will hear in the case, and
 24 as part of the evidence that you need to determine
 25 in terms of making a fair, just, and reasonable

1 evaluation of the compensation to which these
 2 individuals are entitled.
 3 As I mentioned, ladies and gentlemen,
 4 liability in this case is not disputed. All that
 5 Goodyear asks in this phase of the case is that
 6 you listen to the evidence and that you make an
 7 award that is an appropriate and reasonable
 8 compensation for these individuals based upon the
 9 evidence that you will hear in the courtroom, from
 10 the witness stand, from the exhibits and from the
 11 deposition testimony. Thank you very much.
 12 THE COURT: Thank you, Counsel.
 13 Counsel, are you ready to call your
 14 first witness?
 15 MR. BOWERS: May we approach for just a
 16 moment, your Honor.
 17 THE COURT: You may.
 18 (off-the-record bench conference.)
 19 MR. MASSI: With your permission, the
 20 first witness is Dr. Smith, the deputy coroner
 21 from Grand Junction. May I take Mr. and
 22 Mrs. Torres from the courtroom during his
 23 testimony.
 24 THE COURT: You may.
 25 / / /

1 All we want to do is get it narrowed down to what
 2 they really are going to bring, that you are
 3 allowing them to bring.
 4 THE COURT: They probably don't know
 5 yet. Probably engineering the case a little bit
 6 on the road, so what were you supposed to do? You
 7 were supposed to designate these depositions for
 8 punitive damages by Wednesday, and then they're
 9 supposed to designate by Thursday, and I'm
 10 supposed to get them by Friday, the objections?
 11 MR. LATIOLAIT: The plaintiffs are going
 12 to designate.
 13 THE COURT: By Wednesday of this week.
 14 Will you be ready to do that?
 15 MR. CALLISTER: We will be able to do it
 16 by Wednesday.
 17 THE COURT: I would guess that that
 18 would be a little bit helpful. When you designate
 19 what you're going to do, I would presume that then
 20 they will be able to figure out what witnesses
 21 they're going to call to rebut that, so I would
 22 hope that -- I wouldn't hope. By Friday of this
 23 week, sometime Friday this week, Mr. Latiolait,
 24 you need to give them your exact list of witnesses
 25 on punitive damages.

1 know.
 2 MR. LATIOLAIT: There's staffing issues
 3 that need to be taken care of in a 48-hour period
 4 so it would be nice to know ahead of time.
 5 THE COURT: You've got seven people.
 6 That seems like a lot.
 7 MR. LATIOLAIT: Who are handling live
 8 witnesses during the trial.

9 -000-

10 ATTEST: Full, true and accurate transcript.

11 *MaryBethCook*
 12
 13 MARY BETH COOK, CCR #266, RPR

1 MR. LATIOLAIT: All right.
 2 THE COURT: Thank you. Anything else?
 3 MR. MASSI: And what their expertise is.
 4 Thanks, Judge.
 5 THE COURT: I think that should be
 6 discovered by now, should it not? We are in
 7 trial.
 8 MR. LATIOLAIT: They have reports.
 9 MR. CASTO: Judge, I had my notes from
 10 the hearing that the 31st the plaintiffs were to
 11 provide their page line designations, and then
 12 February 2nd the defendants were.
 13 THE COURT: They have to be to me. I've
 14 got to have them that afternoon with objections to
 15 them because I've got to rule on the objections
 16 over the weekend so when we come back in here on
 17 February 5th we know what can be read and what
 18 can't be read. When am I supposed to rule on the
 19 objections? You have to give them to me this
 20 Friday.
 21 MR. LATIOLAIT: It would be helpful if
 22 we knew ahead of time what volume of material
 23 we're getting because we produced a ton of
 24 depositions in this case.
 25 THE COURT: I guess Wednesday you'll

EXHIBIT 5

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EXHIBIT 5

@ 4:43 PM
FILED IN OPEN COURT
FEB - 5 2007 20
CHARLES J. SHORT
CLERK OF THE COURT
BY Jennifer Kimmel
JENNIFER KIMMEL DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. A503395

Dept. No. 15

TERESA BAHENA, individually, and as special administrator for EVERTINA M. TRUJILLO TAPIA, deceased, MARIANA BAHENA, individually, MERCEDES BAHENA, individually, ROCIO PEREYA, individually, LOURDES MEZA, individually, MARICELA BAHENA, individually, ERNESTO TORRES and LEONOR TORRES, individually, and LEONOR TORRES, as special administrator for ANDRES TORRES, deceased, LEONOR TORRES for ARMANDO TORRES and CRYSTAL TORRES, minors, represented as their guardian *ad litem*, VICTORIA CAMPE, as special administrator of FRANK ENRIQUEZ, deceased, PATRICIA JAYNE MENDEZ for JOSEPH ENRIQUEZ, JEREMY ENRIQUEZ and JAMIE ENRIQUEZ, minors, represented as their guardian *ad litem*, MARIA ARRIAGA FOR KOJI ARRIAGA represented as his guardian *ad litem*,

Plaintiffs,

v.

GOODYEAR TIRE AND RUBBER COMPANY,
Defendant.

JURY INSTRUCTIONS

INSTRUCTION NO.: 1

LADIES AND GENTLEMEN OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

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INSTRUCTION NO.: 2

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3 If, in these instructions, any rule, direction or idea is repeated or stated in
4 different ways, no emphasis thereon is intended by me and none may be inferred by
5 you. For that reason, you are not to single out any certain sentence or any individual
6 point or instruction and ignore the others, but you are to consider all the instructions
7 as a whole and regard each in the light of all the others.

8 The order in which the instructions are given has no significance as to their
9 relative importance.
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INSTRUCTION NO.: 3

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a corporation.

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INSTRUCTION NO.: 41
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One of the parties to this action is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding the case between individuals.

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INSTRUCTION NO.: 5

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

The term "preponderance of the evidence" means such evidence as, when weighted with that opposed to it, has more convincing force, and from which it appears that the greater probability of truth lies therein.

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INSTRUCTION NO.: 6

The plaintiff has the burden to prove:

1. Plaintiff sustained damages; and
2. That Plaintiff's medical expenses and care were reasonable in cost and medically necessary to treat injuries sustained in the August 16, 2004 motor vehicle accident.

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INSTRUCTION NO.: 7

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3 The heirs of Frank Enriquez, deceased, are Joseph Enriquez, Jeremy Enriquez
4 and Jamie Enriquez.
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INSTRUCTION NO.: 8

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The heirs of Evertina M. Trujillo Tapia, deceased, are Teresa Bahena, Marina Bahena, Mercedes Bahena, Maricela Bahena, Rocio Pereya, Lourdes Meza and Leonor Torres.

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INSTRUCTION NO.: 9

In determining the amount of losses if any suffered by heirs as a result of the death of an adult, such as Frank Enriquez and Evertina Tapia, you will decide upon a sum of money sufficient to reasonably and fairly compensate each heir for the following items:

1. Any grief or sorrow suffered by the heir and any grief or sorrow reasonably certain to be experienced by the heir in the future; and
2. The heir's loss of probable support, companionship, society, comfort and consortium. In determining that loss, you may consider the financial support, if any, which the heir would have received from the deceased except for his death and the right to receive support, if any, which the heir has lost by reason of his death.

In determining the amount of losses, you may also consider:

1. The age of the deceased and of the heir;
2. The health of the deceased and of the heir;
3. The respective life expectancies of the deceased and of the heir;
4. Whether the deceased was kindly, affectionate or otherwise;
5. The disposition of the deceased to contribute financially to support the heir;
6. The earning capacity of the deceased;
7. His habits of industry and thrift; and
8. Any other facts shown by the evidence indicating what benefits the heir might reasonably have been expected to receive from the deceased had he lived.

With respect to life expectancies, you will only be concerned with the shorter of two, that of the heir whose damages you are evaluating or that of the decedent, as one can derive a benefit from the life of another only so long as both are alive.

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INSTRUCTION NO.: 10

The heirs of Andres Torres, deceased, are Leonor Torres and Ernesto Torres.

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INSTRUCTION NO.: 11

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3 In determining the amount of losses if any suffered by the heirs as a result of
4 the death of a child, such as Andres Torres, you will decide upon a sum of money
5 sufficient to reasonably and fairly compensate each heir for the following items:

- 6 1. Any grief or sorrow suffered by the heir and any grief or sorrow
7 reasonably certain to be experienced by the heir in the future; and
8 2. The heir's loss of probable support, companionship, society, and
9 comfort. In determining that loss, you may consider not only the benefits that
10 heir was reasonably certain to have received from the earnings and services of
11 their child during the child's minority, but also the support and financial benefit
12 which it is reasonably certain the heir would have received from the child after
13 the latter's majority and during the period of the common life expectancy.
14 3. You may also consider what loss, if any, the heir has suffered and will
15 suffer in the future with reasonable certainty, by being deprived of the love,
16 companionship, comfort, affection, society, solace or moral support of the child.
17

18 As an offset against the factors of loss mentioned, you should take into
19 consideration what it would have cost the heir to support and educate the deceased
20 child had he lived.

21 In weighing these matters, you may consider:

- 22 1. the age of the deceased and of the heir;
23 2. the state of health of health and the physical condition of the deceased as
24 it existed at the time of death and immediately prior thereto;
25 3. their station in life;
26 4. their respective life expectancies as shown by the evidence;
27 5. the disposition of the deceased, whether it was kindly, affectionate or
28 otherwise;

- 1 6. whether or not he showed a likelihood of contributing to the support of
- 2 the heir;
- 3 7. the earning capacity, if any, of the deceased;
- 4 8. all other facts in evidence that throw light upon the question of what
- 5 benefits the heir might reasonably have been expected to receive from the
- 6 deceased child had he lived.

7 With respect to the matter of life expectancy, you must keep this point in mind:
8 the prospective period of time that will be of concern to you if you decide in favor of
9 any heir is only the shorter of the two life expectancies, that of such heir or that of the
10 deceased child, as one can derive a benefit from the life of another only so long as
11 both are alive.

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INSTRUCTION NO.: 12

Plaintiffs, Victoria Campe, Leonor Torres and Teresa Bahena, are the personal representative of Frank Enriquez, Andres Torres and Evertina Tapia, deceased.

These plaintiffs are entitled to recover an amount that will reasonably compensate the estate for any special damages, such as medical expenses, which the decedent incurred before his or her death, and funeral expenses, provided that you find that such damages were actually suffered by the estate.

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INSTRUCTION NO.: 13

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3 You may also award to such heirs as damages an amount representing the pain,
4 suffering and disfigurement experienced by the decedents and caused by the August
5 16, 2004 motor vehicle accident.
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INSTRUCTION NO.: 14

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3 In determining the amount of losses, if any, suffered by the plaintiffs for their
4 own individual injuries as a proximate result of the accident in question, you will take
5 into consideration the nature, extent and duration of the injuries or damage you
6 believe from the evidence plaintiff has sustained, and you will decide upon a sum of
7 money sufficient to reasonably and fairly compensate plaintiff for the following items:
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9 1. The reasonable medical expenses plaintiffs have necessarily incurred as a result
10 of the accident; and
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12 2. The reasonable medical expenses which you believe the plaintiffs are
13 reasonably certain to incur in the future as a result of the accident; and
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15 3. Plaintiffs loss of earnings from the date of the accident to the present; and
16

17 4. Plaintiffs loss of earnings which you believe the plaintiffs are reasonably certain
18 to experience in the future as a result of the accident; and
19

20 5. The physical and mental pain, suffering, anguish and disability endured by the
21 plaintiffs from the date of the accident to the present; and
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23 6. The physical and mental pain, suffering, anguish and disability which you
24 believe plaintiffs are reasonably certain to experience in the future as a result of the
25 accident.
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INSTRUCTION NO.: 14.5

Hedonic damages or damages for loss of enjoyment of life are to be considered as part of plaintiffs' damages for pain suffering.

The only plaintiffs entitled to claim this type of damages are Frank Enriquez, Evertina Tapia, and Andres Torres from the instant of the accident to the time of death; and plaintiff Joseph Enriquez from the date of the accident for the remainder of his life.

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INSTRUCTION NO. 15

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

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INSTRUCTION NO. 16

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that Plaintiff prove each item of damage by a preponderance of the evidence.

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INSTRUCTION NO.: 17

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true and insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the Court and any evidence ordered stricken by the Court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO.: 18

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2 You must decide all questions of fact in this case from the
3 evidence received in this trial and not from any other source.
4 You must not make any independent investigation of the facts or
5 the law or consider or discuss facts as to which there is no
6 evidence. This means, for example, that you must not on your own
7 visit the scene, conduct experiments, or consult reference works
8 for additional information.
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INSTRUCTION NO.: 19

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

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INSTRUCTION NO.: 20

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2 If, during this trial, I have said or done anything which
3 has suggested to you that I am inclined to favor the claims or
4 position of any party, you will not be influenced by any such
5 suggestion.

6 I have not expressed, nor intended to express, nor have I
7 intended to intimate, any opinion as to which witnesses are or
8 are not worthy of belief, what facts are or are not established,
9 or what inference should be drawn from the evidence. If any
10 expression of mine has seemed to indicate an opinion relating to
11 any of these matters, I instruct you to disregard it.
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INSTRUCTION NO.: 21

There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

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INSTRUCTION NO.: 22

In determining whether any proposition has been proved, you should consider all the evidence bearing on the question without regard to which party produced it.

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INSTRUCTION NO.: 23

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in Court.

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INSTRUCTION NO.: 24

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

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INSTRUCTION NO. 25

Discrepancies in a witness's testimony or between his testimony and that of others, if there are discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

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INSTRUCTION NO.: 26

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

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INSTRUCTION NO.: 27

A person who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his or her opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. You are not bound by such opinions. Give it the weight, if any, to which you deem it entitled.

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INSTRUCTION NO.: 28

A question has been asked in which an expert witness was told to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

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INSTRUCTION NO.: 29

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

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INSTRUCTION NO.: 30

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3 A person who has a condition or disability at the time of an injury is not entitled
4 to recover damages therefor. However, she is entitled to recover damages for any
5 aggravation of such preexisting condition or disability proximately resulting from the
6 injury.

7 This is true even if the person's condition or disability made him more
8 susceptible to the possibility of ill effects than a normally healthy person would have
9 been, and even if a normally healthy person probably would have not suffered any
10 substantial injury.

11 Where a pre-existing condition or disability is so aggravated, the damages as to
12 such condition or disability are limited to the additional injury caused by the
13 aggravation.

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Jury Instruction No. 31

The Court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case, including that of damages, must not be taken as indicating an opinion of the Court as to what you should find to be the facts or as to which parties are entitled to your verdict.

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INSTRUCTION NO.: 32

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2 It is your duty as jurors to consult with one another and
3 to deliberate with a view toward reaching an agreement, if you
4 can do so without violence to your individual judgment. Each of
5 you must decide the case for yourself, but should do so only
6 after a consideration of the case with your fellow jurors, and
7 you should not hesitate to change an opinion when convinced that
8 it is erroneous. However, you should not be influenced to vote
9 in any way on any question submitted to you by the single fact
10 that a majority of the jurors, or any of them, favor such a
11 decision. In other words, you should not surrender your honest
12 convictions concerning the effect or weight of evidence for the
13 mere purpose of returning a verdict or solely because of the
14 opinion of other jurors. Whatever your verdict is, it must be
15 the product of a careful and impartial consideration of all the
16 evidence in the case under the rules of law as given you by the
17 Court.
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INSTRUCTION NO.: 33

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2 If, during your deliberation, you should desire to be further
3 informed on any point of law or hear again portions of the
4 testimony, you must reduce your request to writing signed by the
5 Foreperson. The Officer will then return you to Court where the
6 information sought will be given to you in the presence of the
7 parties or their attorneys.

8 Readbacks of testimony are time consuming and are not
9 encouraged unless you deem it a necessity. Should you require a
10 readback, you must carefully describe the testimony to be read back
11 so that the Court Reporter can arrange her notes. Remember, the
12 Court is not at liberty to supplement the evidence.
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INSTRUCTION NO.: 34

When you retire to consider your verdict, you must select one of your number to act as Foreperson who will preside over your deliberation and will be your spokesman here in Court.

During your deliberations, you will have all the exhibits which were admitted into evidence, these written instructions and a special verdict form which has been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon a verdict, you must have it signed and dated by your Foreperson, and then return it to this room.

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INSTRUCTION NO.: 35

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the laws; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these Instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

Given 2/2/07 *Lucy oeh*

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EXHIBIT 6

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EXHIBIT 6

DISTRICT COURT
CLARK COUNTY, NEVADA

9:41 AM
FILED IN OPEN COURT
FEB - 9 2007 20

CHARLES J. SHORT
CLERK OF THE COURT

BY Jennifer Kimmel
JENNIFER KIMMEL DEPUTY

Dept. No. 15

A503395

TERESA BAHENA, individually, and as special
administrator for EVERTINA M. TRUJILLO TAPIA,
deceased, MARIANA BAHENA, individually,
MERCEDES BAHENA, individually, ROCIO
PEREYA, individually, LOURDES MEZA,
individually, MARICELA BAHENA, individually,
ERNESTO TORRES and LEONOR TORRES,
individually, and LEONOR TORRES, as special
administrator for ANDRES TORRES, deceased,
LEONOR TORRES for ARMANDO TORRES and
CRYSTAL TORRES, minors, represented as their
guardian *ad litem*, VICTORIA CAMPE, as special
administrator of FRANK ENRIQUEZ, deceased,
PATRICIA JAYNE MENDEZ for JOSEPH ENRIQUEZ,
JEREMY ENRIQUEZ and JAMIE ENRIQUEZ, minors,
represented as their guardian *ad litem*, MARIA
ARRIAGA FOR KOJI ARRIAGA represented as his
guardian *ad litem*,

Plaintiffs,

v.

GOODYEAR TIRE AND RUBBER COMPANY,
Defendant.

JURY INSTRUCTIONS

INSTRUCTION NO.: 1

LADIES AND GENTLEMEN OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO.: 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

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INSTRUCTION NO.: 3

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a corporation.

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INSTRUCTION NO.: 4

One of the parties to this action is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding the case between individuals.

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INSTRUCTION NO.: 5

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true and insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the Court and any evidence ordered stricken by the Court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 6

The "clear and convincing evidence" standard of proof for punitive damages is different from the "preponderance of evidence" standard on which I instructed you in the first part of the trial on injury damages. "Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence is a higher showing than proof by a preponderance of the evidence.

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INSTRUCTION NO. 7

Whether you assess any punitive damages is in your discretion, but you may only do so if it is proven by clear and convincing evidence that the defendant has been guilty of malice.

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INSTRUCTION NO. 8

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"Malice" means conduct that is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

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INSTRUCTION NO. 9

"Conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.

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INSTRUCTION NO. 10

To find Goodyear guilty of malice, Goodyear's malice must have been a legal cause of plaintiffs' injury. A legal cause of injury, damage, loss, or harm is a cause which is a substantial factor in bringing about the injury, damage, loss or harm.

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INSTRUCTION NO. 11

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You are not required to assess punitive damages against a defendant even if you find the defendant's acts were malicious.

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INSTRUCTION NO.: 12

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2 You must decide all questions of fact in this case from the
3 evidence received in this trial and not from any other source.
4 You must not make any independent investigation of the facts or
5 the law or consider or discuss facts as to which there is no
6 evidence. This means, for example, that you must not on your own
7 visit the scene, conduct experiments, or consult reference works
8 for additional information.
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INSTRUCTION NO.: 13

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO.: 14

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2 If, during this trial, I have said or done anything which
3 has suggested to you that I am inclined to favor the claims or
4 position of any party, you will not be influenced by any such
5 suggestion.

6 I have not expressed, nor intended to express, nor have I
7 intended to intimate, any opinion as to which witnesses are or
8 are not worthy of belief, what facts are or are not established,
9 or what inference should be drawn from the evidence. If any
10 expression of mine has seemed to indicate an opinion relating to
11 any of these matters, I instruct you to disregard it.
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INSTRUCTION NO.: 15

There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

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INSTRUCTION NO.: 16

In determining whether any proposition has been proved, you should consider all the evidence bearing on the question without regard to which party produced it.

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INSTRUCTION NO.: 17

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in Court.

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INSTRUCTION NO.: 18

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

INSTRUCTION NO. 19

Discrepancies in a witness's testimony or between his testimony and that of others, if there are discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

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INSTRUCTION NO.: 20

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

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INSTRUCTION NO.: 21

A person who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his or her opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. You are not bound by such opinions. Give it the weight, if any, to which you deem it entitled.

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INSTRUCTION NO. 21A

Any expert opinion must be founded on the expert's exercise of science or skill, not on mere assumption, hypotheses or speculation. If, for example, an expert cannot base his opinion in sufficient probability, you cannot rely upon that expert's testimony in reaching your judgment.

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INSTRUCTION NO.: 22

A question has been asked in which an expert witness was told to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

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INSTRUCTION NO. 23

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

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INSTRUCTION NO.: 24

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2 It is your duty as jurors to consult with one another and
3 to deliberate with a view toward reaching an agreement, if you
4 can do so without violence to your individual judgment. Each of
5 you must decide the case for yourself, but should do so only
6 after a consideration of the case with your fellow jurors, and
7 you should not hesitate to change an opinion when convinced that
8 it is erroneous. However, you should not be influenced to vote
9 in any way on any question submitted to you by the single fact
10 that a majority of the jurors, or any of them, favor such a
11 decision. In other words, you should not surrender your honest
12 convictions concerning the effect or weight of evidence for the
13 mere purpose of returning a verdict or solely because of the
14 opinion of other jurors. Whatever your verdict is, it must be
15 the product of a careful and impartial consideration of all the
16 evidence in the case under the rules of law as given you by the
17 Court.
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INSTRUCTION NO.: 25

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2 If, during your deliberation, you should desire to be further
3 informed on any point of law or hear again portions of the
4 testimony, you must reduce your request to writing signed by the
5 Foreperson. The Officer will then return you to Court where the
6 information sought will be given to you in the presence of the
7 parties or their attorneys.

8 Readbacks of testimony are time consuming and are not
9 encouraged unless you deem it a necessity. Should you require a
10 readback, you must carefully describe the testimony to be read back
11 so that the Court Reporter can arrange her notes. Remember, the
12 Court is not at liberty to supplement the evidence.
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INSTRUCTION NO. 261
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During your deliberations, you will have all the exhibits which were admitted into evidence, these written instructions and a special verdict form which has been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon a verdict, you must have it signed and dated by your foreperson, and then return with it to this room.

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INSTRUCTION NO. 27

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

GIVEN: 2/8/67


DISTRICT JUDGE

EXHIBIT 7

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EXHIBIT 7

2-06-07 A503395

TRAN
CASE NO. A503395
DEPT. NO. XV

FILED

MAY 14 11 40 AM '07

DISTRICT COURT
CLARK COUNTY, NEVADA

CD [Signature]
CLERK OF THE COURT

* * *

ORIGINAL

TERESA BAHENA, ET AL,

Plaintiffs,

vs.

GOODYEAR TIRE AND
RUBBER COMPANY,

Defendants.

REPORTER'S TRANSCRIPT
OF
JURY TRIAL

BEFORE THE HONORABLE SALLY LOEHRER
DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 6, 2007
9:30 A.M.

APPEARANCES:

For the Plaintiffs: ALBERT MASSI, ESQ.
CHAD BOWERS, ESQ.
MATTHEW CALLISTER, ESQ.
R. DUANE FRIZELL, ESQ.

For the Defendant: ANTHONY LATIOLAIT, ESQ.
JEFFERY CASTO, ESQ.
DANIEL POLSENBERG, ESQ.
JONATHAN OWENS, ESQ.

REPORTED BY: Blanca I. Cano, CCR No. 861

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CLERK OF THE COURT

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INDEX

WITNESS

PAGE

ALLEN J. KAM (Sealed)

EXHIBITS

NUMBER

ADMITTED

239 ODI closing remedy 17

234 Allen J. Kam's CV (Sealed)

2

and then by Mr. Brown, and it would seem that what Mr. Walker says should be stricken and then the next question by Mr. Brown should be stricken.

Question as it starts about the middle of page 47 is answered then with an -- the answer starts at the top of page 48.

See that?

MR. FRIZELL: Yes, Your Honor.

THE COURT: And then if you go to page 105, the answer, you don't have the answer included.

"ANSWER: I don't recall exactly."

And that needs to be read. So that needs to be in. And then on 144 the reading should stop at answer being, "Yes," because you haven't highlighted anything on the next page. So stop reading at "Yes."

See that?

MR. FRIZELL: Yes, Your Honor.

THE COURT: And then on page 147, again, you've boxed a question but not the answer on the next page. You need to stop reading the answer which is "Right" and the last question shouldn't be read.

Now, I didn't have any problems with -- I didn't mark anything that I found of a technical nature in the Aufiero.

Mr. Latlollait, is Goodyear simply going to ask

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THE COURT: Good morning. Welcome back to pretrial matters in Bahena versus Goodyear. Let the record reflect the presence of Mr. Frizell for the plaintiffs; Mr. Casto, Mr. Latlollait, Mr. Owens, for the defendant.

This morning we're going to go over the deposition designations for Mr. Olsen. And I think that we should start with Ebanks first and then go to the deposition transcript from Aufiero. The reason I say that is because I think it's clearer in the Ebanks deposition. The corporate history that Mr. Olsen has had with Goodyear Tire and Rubber and then we could skip that part in the Aufiero deposition because it seemed to be, in the Aufiero deposition, if I can find the right spots, it seemed to be somewhat -- it wasn't in there.

In the Aufiero deposition, Mr. Olsen's history just wasn't discussed.

Mr. Frizell, do you have an idea in your mind of which one you were going to read from first?

MR. FRIZELL: Your Honor, I think that your suggestion is fine.

THE COURT: So taking a look at the Ebanks deposition, if we turn to page 47 on the bottom, what has been marked out, blocked out, as to be read would include an objection by Mr. Walker and you can answer

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all questions of Mr. Olsen that it wants to ask live and not refer to my depositions or also some parts of the depositions read?

MR. LATIOLAIT: We have no counter designation, Your Honor.

THE COURT: And did you have any objection to the designations and testimony of Mr. Olsen?

MR. LATIOLAIT: I have a few comments. First, I think most is cumulative. The plaintiffs have already designated. It seems to cover a lot of the same testimony that we looked at yesterday.

THE COURT: Well, I agree with you in that respect, but since he's the corporate guy that's going to testify, I think it's important that whatever he said in the past be his predicate to whatever you're going to have him testify to today.

MR. LATIOLAIT: As long as the plaintiff's putting on this testimony doesn't prevent us from putting on what we wish to have.

THE COURT: He's your witness. I presume he's the only guy that's here from Goodyear.

MR. LATIOLAIT: The only other comment on page 33 of Ebanks, the first question on page 33, and Mr. Olsen states, "I don't think that's what I said." Then he clarifies for response. I think, for

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<p>1 completeness sake, you need to have in his answer. 2 "ANSWER: No. I don't think that's what I 3 said." 4 THE COURT: All right. So on page 33 add, "No. 5 I don't think that's what I said," then question, then 6 the answers. The whole thing for completeness sake. 7 Anything else, Mr. Latiolait? 8 MR. LATIOLAIT: On page 101, the first question 9 is not answered. 10 THE COURT: Well, you're right. I think that 11 the question needs to be all read together. So the 12 question would be: 13 "If you looked at the chart -- 87, 88, 89, and 14 90 -- the damage claims are almost nonexistence -- 15 strike that. 16 "Is that what you all were also finding, that 17 the early '90s the damage claims were almost 18 nonexistence as far as these tires were considered?" 19 Well, I guess it doesn't make any difference, 20 but you're right. There is no answer. All right. 21 First question is stricken. 22 MR. FRIZELL: Then I'll begin with, "Is that 23 what you're also finding?" 24 THE COURT: Right. "According to the chart." 25 MR. FRIZELL: I'll stay, "According to the</p> <p style="text-align: right;">6</p>	<p>1 THE COURT: All right. So the question should 2 be stricken on the bottom of page 114, and the top of 3 page 115. 4 MR. LATIOLAIT: Testimony on 145, the question 5 and answer, there's no context to it. 6 "QUESTION: Are you aware of those types of 7 property damage claims?" 8 There's no identification of what types of 9 property damage claims are being talked about. 10 MR. FRIZELL: If you want to continue to the 11 next question, that might fix the problem, prior to the 12 objection. 13 THE COURT: The question supposes facts that 14 Goodyear never testified to. The question above it, the 15 preceding question, top of 145, presumes facts for which 16 Goodyear has never testified. So certainly we don't 17 want to ask that question that's introducing information 18 that Goodyear never substantiated. 19 In fact, I think that Goodyear has consistently 20 testified throughout all its deposition they were never 21 aware of any individual being hurt in any Goodyear tire, 22 or if they were aware of it, it was a big secret in the 23 legal department and never let it filter down to anybody 24 else in the entire company. 25 So it would be inappropriate and they haven't</p> <p style="text-align: right;">8</p>
<p>1 chart?" 2 THE COURT: Yeah. "According to the chart, is 3 that what you all were also finding?" 4 You may continue, Mr. Latiolait. 5 MR. LATIOLAIT: Your Honor, on page 114 there's 6 a series of questions asked about a travel trailer 7 publication, and when you get to the end of the question 8 and answer, Mr. Olsen is essentially saying he doesn't 9 know about it. He doesn't know the specifics about it. 10 So I think that's a complete lack of foundation. 11 THE COURT: Well, not necessarily. Here's his 12 answer. 13 MR. LATIOLAIT: I'm reading at the bottom of -- 14 THE COURT: "Testified earlier some of the 15 trailer travel clubs, folks with the fifth wheels and 16 what have you, talking with each other, had to have 17 documented this in some of their publications that we're 18 aware of." 19 MR. LATIOLAIT: And -- 20 "QUESTION: They were basically saying in their 21 publication there was a problem with these tread throws 22 going on, on this particular Load Range E tire. 23 "ANSWER: I don't know. 24 "Do you know the specifics -- the specifics of 25 it?"</p> <p style="text-align: right;">7</p>	<p>1 circled it to read the first question. And you're 2 right, it has no context, so Mr. Frizell, what's your 3 fix here? 4 MR. FRIZELL: Well, can we take out "those 5 types?" 6 THE COURT: No. He's aware of all the stuff. 7 He's read all the charts, et cetera. So that wasn't -- 8 page 145 is out. 9 Goodyear's objections are sustained. 10 Anything else? 11 MR. LATIOLAIT: Nothing more in the Ebanks, 12 other than the previous objections that were raised in 13 connection with the other transcripts. 14 THE COURT: All right. I understand that. 15 Those are overruled. How about in the Aufiero? 16 MR. LATIOLAIT: Sure. On page 150, Your Honor, 17 there's discussion that begins regarding some group of 18 120 to 150 tires that are looked at, but there's no 19 context. All of a sudden we just jump into a discussion 20 of a 120 to 150 tires. 21 What tires? When were they looked at? Why 22 were they looked at? 23 THE COURT: Well, he doesn't say we never 24 looked at 120, 150, and you can follow that up in your 25 examination of Mr. Olsen because he happens to be here</p> <p style="text-align: right;">9</p>

1 and he can explain that.
2 MR. LATIOLAIT: Also, on page 177, there's
3 testimony that picks up relating to resistance to heat.
4 That's out of context. I don't know that the jury is
5 going to be able to understand what's being offered.

6 THE COURT: I thought it was clear enough. You
7 got to remember they're building upon all the testimony
8 that Goodyear has provided throughout all these
9 depositions regarding all parameters behind the thought
10 process that all the engineers put into this as to what
11 could be the problem.

12 MR. LATIOLAIT: No other comments, other than
13 cumulative and objections that were raised in connection
14 with the teams examination of these issues.

15 THE COURT: All right. Thank you.

16 The staff brought to my attention that there
17 was a John L. Smith column in the newspaper today, and
18 let me assure you the information did not come from the
19 Court. He hates my guts. We don't speak. So rest
20 assure that no information came from this source. We
21 will -- when the jury comes in -- inquire if any of them
22 read it. If they started to read it, they stopped
23 because they realized it was this case or they continued
24 looking at it. We'll find out what the situation is.

25 If any of them read it, I will give an

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1 right, at the punitive phase?

2 THE COURT: Yes. We're doing opening
3 statements. You will be given that opportunity.

4 MR. BOWERS: Your Honor, we're just going to
5 have one reader, right, not a different reader for every
6 deposition?

7 THE COURT: Right.

8 MR. POLSENBERG: Makes absolute sense.

9 MR. LATIOLAIT: I asked counsel this morning.
10 They mentioned they had designated testimony from
11 Mr. Olsen from this case. I still have not received it.

12 MR. FRIZELL: Your Honor, we're working on that
13 trying to put it together to give it to them.

14 THE COURT: All right. Thank you. 10 o'clock.
15 (Whereupon, a break in the proceedings occurred.)

16
17 THE COURT: Good morning, ladies and gentlemen
18 of the jury. Welcome back to the continuation of part
19 two of Bahena versus Goodyear. The record will reflect
20 the presence of plaintiffs, all parties, plaintiffs'
21 counsel, defense counsel, all officers of the court, our
22 full deliberating jury and our alternate juror. As soon
23 as I find what I'm looking for here, we can get started
24 this morning.

25 This is the second phase of the trial. In the

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1 instruction that tells them they are specifically and
2 absolutely to disregard everything that was read in the
3 article. Evidence is only what they hear in the court
4 and that's the curative instruction that I can give.

5 If you have one, I can read it.

6 MR. POLSENBERG: I've had this issue come up in
7 cases I've done with Mr. Eglet where we happened to have
8 articles about him at the time of the trial. I suppose
9 we should inquire first if anybody has seen anything
10 about this case. If we actually say there was something
11 in the RJ, they'll run to it. I debated whether to give
12 the instruction on don't ask for read backs because it's
13 time consuming because then they ask for read backs.

14 THE COURT: I don't give it typically, but I
15 gave it in this case because we had a multiple of
16 witnesses and so many parties, so many claims. In a
17 three-day trial I don't give that.

18 MR. POLSENBERG: We can ask the jury if
19 anybody's read anything and if they have, we can take
20 them individually.

21 THE COURT: Any suggestions?

22 MR. FRIZELL: I think that's a good suggestion.

23 THE COURT: All right. Then we're in recess
24 until 10:00.

25 MR. CASTO: We are doing opening statements,

11

1 first phase of the trial, you determined compensatory
2 damages. In the second phase, you will determine
3 whether you assess punitive damages against Defendant
4 Goodyear.

5 While compensatory damages are intended to
6 compensate a wronged party, punitive damages are
7 designed solely for the sake of example and by way of
8 punishing the defendant.

9 If you find that punitive damages will be
10 assessed, there will be a third phase. Before we get
11 started with the trial, let me ask: Did anybody read
12 any articles about this case?

13 All right. The jury has been paneled and none
14 read any articles. The attorneys will give you opening
15 statements in the same order. The plaintiffs' first and
16 then the defendants and then the plaintiffs will begin
17 calling witnesses.

18 Mr. Callister, your opening.

19 MR. CALLISTER: May I approach, Your Honor?

20 THE COURT: You may.

21 (Off-the-record bench conference.)

22 MR. CALLISTER: Good morning, ladies and
23 gentlemen of the jury. I know the hours are tedious and
24 long. I'll try to make this opening statement as brief
25 as I can in regards to this section of the trial.

13

<p>1 The Court will ultimately instruct you as to 2 the law in regards to punitive damages, but we need to 3 make clear, or I'd like to make clear, a few things. 4 Soon you'll be presented, once again as you have before, 5 with instructions that will help guide you through your 6 deliberations hopefully. And some of the phrases -- 7 some of the phraseology in that instruction I'd like to 8 just briefly address. In particular, that portion that 9 attempts, if you will, to define what punitive damages 10 are and how they differ from the actual damages that 11 have been the issue so far.</p> <p>12 The pertinent line reads as follows: "You may, 13 in your discretion, award such damages, quote, if you 14 find by clear and convincing evidence that said 15 defendant was guilty of malice, express or implied, in 16 the" --</p> <p>17 MR. CASTO: Objection, Your Honor. 18 THE COURT: Objection is sustained. I 19 understand what you're doing, but actually the Court is 20 going to instruct on the law. You're not supposed to 21 instruct on the law in opening statements.</p> <p>22 MR. CALLISTER: Let me direct my comments to 23 one notion. The key element, I believe, is something 24 called conscious disregard. We believe the evidence has 25 shown and will show --</p> <p style="text-align: right;">14</p>	<p>1 tire -- they were well aware of not just the defect in 2 the tire, but perhaps more importantly how to remedy it, 3 how to manufacture a tire that would survive any such 4 sudden blowout without suffering tread separation that 5 was so significant as to cause horrific crashes like 6 this.</p> <p>7 You will also learn of the involvement of the 8 federal government who brought in, as a result of 9 certain inquiry beginning in the year 2000, a team to 10 investigate. That, of course, by 2000 our tire had 11 already been manufactured but we believe that the 12 evidence that you will see that is publicly available 13 that reflects on the investigation conducted by what 14 you've learned is called the Office of Defect 15 Investigation within the US Department of 16 Transports National Highway Traffic Safety 17 Administration, sometimes referred to as NHTSA, will 18 evidence that once again Goodyear knew and failed to 19 take adequate precautions either to notify those who had 20 such a defective tire on their vehicle dating back into 21 the '90s well before and after the date of the 22 manufacture of the tire in the Bahena case, failing to 23 take appropriate -- all appropriate efforts customary to 24 the industry -- to reach out, find individuals at risk, 25 find them and/or somehow replace that defective tire</p> <p style="text-align: right;">16</p>
<p>1 MR. CASTO: Objection, Your Honor. 2 THE COURT: Objection sustained. You tell them 3 what you think the evidence will show.</p> <p>4 MR. CALLISTER: Thank you, Your Honor. The 5 evidence will show in the remainder of this trial 6 through the two witnesses that we have for you to 7 consider the following: That there were a series of 8 decisions made by Goodyear beginning as early as 1996 9 that evidences, I believe, to your satisfaction that 10 they knew and were aware of the fundamental defect, the 11 flaw that caused all of the injuries and deaths that you 12 learned of in the past week.</p> <p>13 That flaw is sometimes referred to as a tread 14 separation, and it is exactly what it sounds like. That 15 immediate severance of the belts from the carcass 16 sometimes referred to as the tire. What you need to 17 listen to through the evidence that will be presented 18 today, what you need to listen for and asking yourselves 19 is: What did Goodyear know and when did Goodyear know 20 it. I would suggest that will help guide you through 21 the process of interpreting what sometimes can sound 22 like a confusing thicket of information.</p> <p>23 I believe the evidence will show to your 24 satisfaction that as early as 1996 -- certainly by 1997, 25 certainly by 1999, the time of the manufacture of our</p> <p style="text-align: right;">15</p>	<p>1 with one that has not suffered that same problem. 2 The remedy was a simple one. You will learn 3 from the evidence the remedy was a simple nylon cap, an 4 additional layer that could be easily installed at the 5 factory at the time for 69 cents. Once you factor in 6 all the costs of the defense, all the costs of having to 7 deal with tragedies like this --</p> <p>8 MR. CASTO: Objection, Your Honor. 9 THE COURT: Objection sustained. 10 That's argumentative, Counsel.</p> <p>11 MR. CALLISTER: I'd like to bring up one brief 12 piece of evidence that you'll have a chance to see, if I 13 could, Your Honor, that would be the ODI closing remedy 14 that you'll have before you as Exhibit 239.</p> <p>15 THE COURT: Has that exhibit been introduced 16 yet? Has it been admitted as evidence?</p> <p>17 MR. CASTO: No objection to that, Your Honor. 18 THE COURT: All right. So then you may go 19 ahead and show that. 239 will now be admitted. 20 (Plaintiffs' Exhibit 239 was admitted.) 21 MR. CALLISTER: Thank you. 22 I know it's difficult to read. It is a 23 publicly available document that reflects the conclusion 24 of the efforts by, as you can see in the upper left-hand 25 corner, the US Department of Transportation to look into</p> <p style="text-align: right;">17</p>

1 this in 2000.
 2 I represent to you that the evidence will show
 3 that investigation began in the year 2000 and by that
 4 time, as you can read for yourself on the board, there
 5 were already 87 known crashes, 158 injuries, and 18
 6 fatalities. Why is that important to your
 7 deliberations? Because if that's what the federal
 8 government knew at the conclusion of their investigation
 9 in 2000, we ask that the question should be, Why did
 10 Goodyear not reach out and make efforts appropriate with
 11 the knowledge of what the immensity of this tragedy and
 12 loss to all of those who still had the subject tire, the
 13 LRE, the Load Range E, as we've talked about on their
 14 vehicles?
 15 We're not talking about the universal vehicle;
 16 we're talking about those that needed the extra strength
 17 of the LRE. You've heard earlier testimony that the
 18 vehicle in question was a small van. Load Range E tires
 19 are specifically, theoretically constructed to bear a
 20 greater weight load. That's what the evidence will tell
 21 you today when you hear from Mr. Kam, a former official
 22 with this state institution, NHTSA, who practiced
 23 routinely with the ODI Office of Defense, the Office of
 24 Defect Investigations within the Department of
 25 Transportation.

18

1 So the question becomes once again, What did
 2 Goodyear know and when did they know it. We believe
 3 other evidence will suggest that as early as 1996 when
 4 they became internally aware, now this is long before
 5 this federal investigation, when they became internally
 6 aware that they had a problem tire. They tried to
 7 figure out ways to remedy it. The evidence will show
 8 you that by 1997, they knew what the remedy was, the
 9 nylon cap. And within that same time frame they began
 10 implementing that remedy in some portions of the market
 11 globally.

12 Where were those areas? The evidence will show
 13 you Latin America, Mexico, Turkey, but in the United
 14 States, no. An intentional corporate decision was made
 15 not once, but repetitively between the years 1996 and
 16 the year of our accident, 2004, to not take the
 17 appropriate action both to notify those who had this
 18 terribly dangerous tire on their vehicle and to cease
 19 the manufacture and sale of this device in the United
 20 States. That didn't happen until sometime in 2000.
 21 That's -- as you can tell, that's the year the federal
 22 investigation finally began. But the evidence will show
 23 that Goodyear knew and failed to cease manufacture,
 24 failed to cease the sale and distribution of this -- I
 25 would suggest, and as the evidence has proven in this

19

1 case -- deadly device. Why?

2 We believe the evidence will dramatically show
 3 you they were favoring at all times profits, the bottom
 4 line, share price over the value of human lives. There
 5 are few times when punitive damages are the appropriate
 6 remedy, but when it's appropriate, it's for a specific
 7 reason. We're attempting to change corporate decision
 8 making at Goodyear.

9 MR. CASTO: Objection, Your Honor.

10 THE COURT: Objection is sustained.

11 MR. CALLISTER: The point of punitive damages
 12 is: How do you modify a series of reprehensible
 13 decisions? How do you change the conduct of the
 14 defendant in this case? You'll hear from certain
 15 experts. You'll hear in particular from Dr. Kam, the
 16 individual that worked at NHTSA in the area of defect
 17 investigation. You'll hear from his report. You'll
 18 hear his report makes startling, terribly important
 19 expert opinions. That you'll hear from him momentarily.
 20 Those include what I've shared with you. They include,
 21 most importantly, that Goodyear knew how to remedy it
 22 and simply failed to do so. They could have prevented
 23 the tragedy that we have all had to relive during the
 24 last two weeks. The decision was made not to.

25 As you listen to the evidence, and studiously

20

1 do so, and I know you will think at all times about that
 2 simple myth -- that simple test that you can apply and I
 3 would urge you to do so. What did they know? When did
 4 they know it? And perhaps I would add one more phrase,
 5 What did they not do? What did they fail to do after
 6 having the knowledge? This slavish devotion that I
 7 believe you'll see the evidence reveal to profitability
 8 as opposed to saving or at least doing all that's
 9 possible to save lives on something that is as
 10 ubiquitous as the tire that we drive to work on every
 11 day.

12 MR. CASTO: Objection, Your Honor.

13 THE COURT: Objection is sustained.

14 MR. CALLISTER: In conclusion, I direct your
 15 attention again to the closing of the investigation that
 16 has been referenced in the document before you. You
 17 know those numbers have changed, don't you? You know
 18 that since 2002, that 18 has become at least 21. You
 19 know that that number of injuries has risen, that those
 20 specific events of August of 2004 that we spent so much
 21 time on, did not need to occur. You alone have the
 22 power as you go into deliberations.

23 MR. CASTO: Objection, Your Honor.

24 THE COURT: Objection is sustained.

25 Mr. Callister, we're not there yet.

21

<p>1 MR. CALLISTER: To decide what is the future 2 remedial action appropriate given the facts. 3 Thank you for your time. 4 THE COURT: Thank you, Counsel. 5 Mr. Casto. 6 MR. CASTO: May it please the Court, ladies and 7 gentlemen. As counsel indicated, this is the punitive 8 damage phase of the trial. Compensatory damages have 9 been determined, and that determination occurred in the 10 first phase of the injury sustained by the plaintiffs in 11 this case, and the determination of what award of 12 damages that this jury has determined for them. And 13 that compensation has been made and that verdict was for 14 compensatory damages. 15 The purpose of this phase is to determine 16 whether punitive damages should apply. Punitive damages 17 are not to compensate; they are to punish. The 18 plaintiff in this case has the burden of proof and the 19 issue of punitive damages is a serious issue. In fact 20 the burden of proof for punitive damages is a different 21 standard. It is clear and convincing evidence as the 22 Court will instruct you about that. Not beyond a 23 reasonable doubt. Not preponderance of the evidence. 24 It is clear and convincing evidence. And the plaintiffs 25 have that burden of proof, the burden of proof to</p> <p style="text-align: right;">22</p>	<p>1 procedures that Goodyear undertakes in the design and 2 manufacture of its tires, to do everything humanly 3 possible to make a product that is safe. But there is 4 no tire, the evidence will show, ladies and gentlemen, 5 that is fail safe. There is no tire that, if abused 6 enough, will not fail. That product does not exist 7 anywhere in the world. 8 Now, the tire in our case, ladies and 9 gentlemen, has a specific size and it is a specific 10 type. It is what's known as an LT, "LT" stands for 11 light truck tire 245/75R16 Load Range E. The 245/75R16 12 is the size of the tire. Load Range E tires are the 13 heaviest tires in the light truck line. They carry the 14 highest loads of tires in the light truck line. After 15 the Load Range E tire, construction of the tire, the 16 evidence will show changes from the construction that 17 was involved in this case to what is known as an all 18 steel medium truck tire which is much more expensive and 19 much more different in terms of the design that it is. 20 As we go through this process, ladies and 21 gentlemen, you learn about -- through the evidence of 22 the methods by which tires are designed and 23 manufactured. This is a construction diagram of the 24 components in the tire in this case that the evidence 25 will be presented to you. And the tire involves</p> <p style="text-align: right;">24</p>
<p>1 determine whether there was malice. Is there going to 2 be evidence shown of malice on the part of Goodyear? Is 3 there evidence shown by plaintiffs in this case that 4 Goodyear acted in a despicable manner? That Goodyear 5 intentionally disregarded known issues? That they 6 proceeded in a manner that was willful and deliberate? 7 The plaintiffs have the burden of proof in this 8 case, ladies and gentlemen, that Goodyear engaged in a 9 conscious disregard to injure the plaintiffs in this 10 case. The verdict in this case, at the beginning in 11 terms of compensatory damages, there was a determination 12 of liability that was given to you and that was not 13 contested by Goodyear in the compensatory phase. 14 But this involves punitive damages, and there 15 will be evidence to show that the conduct of Goodyear in 16 this case does not rise to the level of despicable 17 conduct or malicious conduct. It does not rise to the 18 level of conscious disregard. 19 The evidence in this case will show, ladies and 20 gentlemen, that Goodyear has been in business since 21 1898. It is in the business of designing and 22 manufacturing tires. It's very business depends upon 23 the safety of its products and the care of its 24 customers. 25 You will hear testimony in this case about the</p> <p style="text-align: right;">23</p>	<p>1 different components. 2 It begins with the inner-lining because the 3 tire in this case was tubeless. In this case, it's 4 inner-liner serves the function of a tube. You'll learn 5 about how its tires are constructed that go radially 6 around the tire, hence the term "radial tire," and our 7 two belts in the tire made out of steel. They go on 8 opposite directions. There are belt edge gun strips in 9 this tire wrapped around the edge of the steel. There's 10 a sidewall, a wedge, and a tread, and you'll hear from 11 the experts at Goodyear about all these components and 12 how they're manufactured. 13 Can we approach, Your Honor? 14 THE COURT: You may. 15 (Off-the-record bench conference.) 16 MR. CASTO: You will learn through the 17 evidence, through the manufacturing process, ladies and 18 gentlemen, that tires are built in a laminate fashion. 19 One component after another. It begins with the 20 inner-liner, and then these various components made in 21 different parts of the factory are brought together and 22 then there are the body plies and then there are the 23 beads to the tire which will anchor it to the wheel. 24 The sidewall, the wedge, the steel belts with belt edge 25 gun strips and there are two belts, a bottom belt and a</p> <p style="text-align: right;">25</p>

<p>1 top belt, and then the tread. And those are the 2 components that go into the tire.</p> <p>3 Now, in terms of manufacturing the tire, you'll 4 hear evidence in this case about the quality control 5 procedures that Goodyear utilizes in its factories to 6 insure that the product comes out as best that it can 7 be. There are various quality control checks throughout 8 every stage, beginning with raw material. There are up 9 to 12 quality control checks during the raw material 10 stage of tire manufacturing. During the component 11 stage, there are up to 27 quality control checks. Each 12 component is verified and tested before it's put into 13 the tire. There are actually laboratories within the 14 tire factory that will perform physical and chemical 15 tests before the tires and the components are allowed to 16 be built one on top of another. There are up to nine 17 quality control checks during the tire building stage 18 and then tires receive a hundred percent visual and 19 tactile inspection and quality control checks prior to 20 shipping. All of these are done by Goodyear with a view 21 toward producing the safest product that they can 22 produce.</p> <p>23 Now, the failure mode in this case involves a 24 detachment of tread and both belts. During Goodyear's 25 normal business, it is constantly on a quest to improve</p> <p style="text-align: right;">26</p>	<p>1 belt was coming off of the tread and the bottom belt was 2 staying on the carcass of the tire and the casing or the 3 carcass remained inflated. So the tread and top belt 4 peeled off, but the rest of the tire remained inflated, 5 stayed on the vehicle. The other thing that was unique 6 was there were no signs of heat related failure that 7 they could find.</p> <p>8 So based upon this failure mode, Mr. Olsen 9 launches an investigation at Goodyear and this is in 10 1995. That failure mode looks like this: A tread and 11 top belt detachment. The bottom belt is on the tire, 12 that's what you see there. Mr. Olsen put together a 13 team of engineers from different areas. It's called a 14 cross-functional team. He took people from automotive 15 engineering, from customer engineering, from marketing, 16 from the plant quality control, technical people, people 17 from product development, and people from research, and 18 he put all those people together to evaluate this 19 condition that he saw after seeing six tires.</p> <p>20 Six tires. This investigation is launched. 21 Now, this goes on from 1995 until about the end of the 22 year, and at that point in time, a second team is going 23 to be created. The reason a second team is going to be 24 created, you'll hear from Mr. Olsen, is because he 25 believed that Goodyear should have people working on</p> <p style="text-align: right;">28</p>
<p>1 the performance and the manufacture of its products. 2 One way Goodyear does that is to review tires that 3 returned from the field for adjustment. And adjustment 4 is simply a warranty return. When a customer brings a 5 tire in for some reason, they're dissatisfied, they 6 don't like the way it rides, or handling of it, some 7 other issues, and those tires are collected by Goodyear 8 and brought back for inspection. And they look at that. 9 They evaluate their adjustment information with the 10 purpose of how can we make our product better every 11 single day of every single year.</p> <p>12 You're going to hear testimony in this case 13 that one of these adjustment improvement teams was 14 involved with light truck tires. That's going to be 15 Mr. Olsen, who was in charge at that time, and one of 16 the adjustment review episodes that they had, Mr. Olsen 17 saw two tires with a tread and top belt attachment. He 18 had not seen that failure mode before, that was 19 something different. And then a few weeks later he saw 20 a few more tires, and what Mr. Olsen then did at 21 Goodyear was he launched an investigation as to what was 22 happening that was causing this failure mode that he had 23 not seen before involving a detachment of tread and top 24 belt of the tire.</p> <p>25 That failure mode was unique because the top</p> <p style="text-align: right;">27</p>	<p>1 this full time.</p> <p>2 The people that were on the original team had 3 other jobs at Goodyear in quality control, in marketing, 4 and product developing. Mr. Olson's suggestion was that 5 Goodyear have a team of people and have them do nothing 6 but evaluate this issue full time. So a second team was 7 created in 1996. And it was a cross functional team 8 again that combined people there that had over 200-plus 9 years of experience in technical, research, and 10 manufacturing.</p> <p>11 They used various quality control tools 12 involving brain storming. You're going to hear those 13 terms: Fishbone diagramming, nominal group techniques, 14 Pareto charts, prioritization matrices, Kepner Trago 15 analysis. Those are foreign terms and Mr. Olsen will 16 explain them to you.</p> <p>17 They used various predictive tools like FEA, 18 interlaminar shear, holography, shearography, 19 microscopic analysis, and crosslink density, and they 20 used various physical tests and you'll hear about all 21 those from Mr. Olsen, in terms of what was involved in 22 that issue.</p> <p>23 As this team began, their function was to 24 determine what was the cause of the separation between 25 the belts. And that's a critical issue through the</p> <p style="text-align: right;">29</p>

<p>1 evidence in this case between the belt separation. They 2 came up with what's called a fishbone diagram. A 3 fishbone diagram is one of the analytical techniques 4 they used at Goodyear and the purpose of that was for 5 that -- to criticize their product, to do the 6 self-critical analyses, and to determine through this 7 group of engineers every conceivable design and every 8 conceivable manufacturing issue they could think of that 9 could cause a tread belt detachment related to how the 10 tires were designed or how the tires were manufactured. 11 And the whole point of that was, as the heading 12 indicates, to identify potential causes for radial light 13 truck belt 1-2 separation. The between-the-belt 14 separation. The unique failure mode they were seeing in 15 these tires, and they looked at all these different 16 issues -- belt processing; sheering, which is how you 17 cook a tire after you make it called vulcanization; they 18 looked at the belt package design; looked at the cure 19 processes; they looked at high sheer stresses and they 20 did this full time. 21 Now, the evidence will show that they went 22 through various conclusions here, but their analysis to 23 date indicates some other factors that construction or 24 compound were occurring to cause the crown integrity 25 failures.</p> <p style="text-align: right;">30</p>	<p>1 extraordinarily complicated analytical tools, did a lot 2 of different things in terms of building tires, and 3 you'll hear that from Mr. Olsen. For example, one of 4 the things they did is they would build a number of 5 tires in one plant and then ship them to another plant 6 where they would be cured, and they do vice versa to see 7 if there's some issues in the process of one plant that 8 was different than the other that was causing the issues 9 they were seeing. They evaluated every one of those 10 issues on the fishbone diagram; they couldn't find an 11 issue. 12 They looked at some items involving curing to 13 determine maybe if that could be the issue. And they 14 formed yet a third team in 1997 to look at curing 15 issues. One of the things that you'll see evidence of 16 is that Goodyear saw something called an A Holograph. 17 That is a very small void in a tire. They spent a lot 18 of time and a lot of money trying to determine what was 19 causing the A Holograph, and what they determined was at 20 the end of the day, that A holographs had nothing to 21 with tread belt detachments and, in fact, A Holographs 22 disappear shortly after you cure a tire. It's something 23 you find in a freshly cured tire. It goes away after 24 it's been cured for a short period of time. 25 So they did their analyses, these three teams.</p> <p style="text-align: right;">32</p>
<p>1 Now, during Mr. Olson's team in 1995, one of 2 the things that they discovered was that they had an 3 extraordinarily high number of tread belt detachments in 4 trailer applications. And there was a specific size, an 5 LT 235/85R16 that is a different size tire than the one 6 involved in this case. And it is a different 7 application than the one involved in this case. 8 One of the things that Mr. Olsen team did was 9 that they decided to create a special trailer tire and 10 add an overlay to that in 1996. One of the reasons they 11 discovered the issue involving trailer application is 12 they did a study, and the evidence will show this. They 13 actually went to dealers that sold trailers and they 14 weighed trailers on these lots -- unloaded, brand new, 15 without gasoline, without the hot water tanks filled, 16 without luggage, without towing issues -- and what they 17 discovered was that the tires were overloaded by 18 113 percent while empty, before they put any load into 19 it. These were tires installed by trailer manufactures 20 without knowledge by Goodyear. That this is the tire 21 that they were putting on vehicles. They weren't 22 original equipment for the trailers. They were simply 23 tires trailer manufactures were putting on trailers. 24 Different size, different application than this case. 25 Now, this second team went through some</p> <p style="text-align: right;">31</p>	<p>1 They went through all these problem solving techniques 2 and they couldn't find a root cause. They couldn't find 3 a defect in the design of Goodyear tires. They couldn't 4 find a defect in the manufacture of Goodyear tires. 5 They were seeing some increase in this tread belt 6 attachment because external factors were changing for 7 some of these tires. There were more severe service 8 applications like the trailer tires. 9 And another thing happened in the mid-1990s. 10 The speed limit changed in the interstate highway system 11 from 55 to 70 miles an hour. And with increased speed 12 comes increased propensity for tread belt detachments in 13 the manner that we see in the teams that Mr. Olsen was 14 working with, this tread and top belt. 15 Now, ladies and gentlemen, the plaintiffs will 16 put on a witness by the name of Allen Kam. Mr. Kam's 17 not an engineer. He's not a scientist. He worked at 18 NHTSA, but he retired before the evaluation was done 19 concerning Load Range E tires. Mr. Kam has no personal 20 knowledge of anything involved in any of these 21 investigations. Mr. Kam has no personal knowledge about 22 anything that was done at NHTSA concerning their 23 evaluation of Load Range E tires on behalf of Goodyear. 24 In fact, the documents Mr. Kam reviewed in this 25 case are the same documents Goodyear gave to NHTSA which</p> <p style="text-align: right;">33</p>

<p>1 reached an opposite conclusion. The defect in this case 2 that Mr. Kam will talk about involves the failure to 3 incorporate a nylon overlay. A nylon overlay is a layer 4 of nylon that goes on top of the steel belts. 5 The evidence will show that nylon overlay does 6 not prevent puncture impact damage. They do not prevent 7 tires from being overrun, overload, or underinflated. 8 They do not prevent separation and detachments. It's 9 simply another tool used in a tire for certain 10 applications. 11 You'll hear evidence in this case about the 12 construction of the various tires. One of the things 13 that Goodyear changed in this particular tire involved 14 the belt wire. They actually went to a belt wire that 15 was used in a larger commercial truck tire to provide 16 additional strength. And this wire is actually a bundle 17 of 13 wires. So when you see these steel belts on the 18 tires, each belt core is actually comprised of 13 19 different filaments brought together. 20 Now, the evidence in this case will show that 21 the tire in this case sustained an impact somewhere 22 before the accident. That impact broke the steel belt 23 in this tire. And you'll see physical evidence of that, 24 ladies and gentlemen. 25 When the impact occurred, on these individual</p> <p style="text-align: right;">34</p>	<p>1 It's colorized on the left for the color scheme of 2 components. On the right is its actual photograph and 3 here are the actual broken belt wires. The top belt is 4 broken, broken from impact severe enough to break belt 5 wires with thousands of pounds of tensile strip. 6 There's microscopic analysis you'll see from the 7 examination which, again, established that at the area 8 of impact, this tire broke under tension from the impact 9 and you'll see the cup-and-cone defect in the 10 photographs. 11 And here's an actual photograph of the tire in 12 this case. It's got bungee cords on it to hold the 13 tread and both belts on it. And the area to the right 14 and around, they're numbered by clock phase: 12 o'clock 15 at the top, 6 o'clock, 9 o'clock, et cetera. And this 16 tire came apart between 2 o'clock and 2:30, where the 17 area of the impact occurred. 18 Multiple broken wires are in that area, and 19 you'll see that on top as well as the underside of the 20 belt. And again the side by side comparison. Now, when 21 these wires fractured as a result of that impact, 22 they're sharp. They're steel wires that are fractured 23 and even if an overlay had been in this case, as this 24 tire rotates down the highway, it goes through its 25 footprint. It rotates 650 times every mile fully loaded</p> <p style="text-align: right;">36</p>
<p>1 filaments, there will be physical evidence that these 2 broke under tension. It's called a cup-and-cone break. 3 Which is an indication that these cables broke under 4 tension. Can you see the cup and the cone there? That 5 break extended along a significant portion of the top 6 belt. And that impact occurred before the accident 7 sequence. 8 The evidence in this case will show, ladies and 9 gentlemen, that notwithstanding the absence of a nylon 10 overlay, this tire would still have failed. If the 11 nylon overlay had been there, the tire in this case 12 would still have failed. That will be the evidence 13 presented by Goodyear. And as this tire was going down 14 the road after it sustained this impact damage, some 15 period before it began to develop a separation. And 16 that separation grew to the point that the tread and 17 both belts detached from the tire, which is different 18 from the failure mode study by NHTSA, which is different 19 from the failure mode Mr. Olsen determined in the three 20 teams. 21 This is the detachment of tread and both belts, 22 which can only occur if you break the top belt, and 23 you'll see evidence of this. 360 degrees around the 24 tire, the tread and both belts are off the tire. This 25 is a picture of it taken during the tire examination.</p> <p style="text-align: right;">35</p>	<p>1 on a van. Even if an overlay had been present, the 2 evidence will show that these wires would have cut 3 through the overlay which is simply a thin layer of 4 nylon and the tread belt detachment would have occurred. 5 Different failure mode than one evaluated by Goodyear 6 with a top belt coming off, with the bottom belt staying 7 with the carcass. 8 Again, the number one and the number two belts, 9 all the information in terms of Mr. Olson's studies and 10 the evaluation by NHTSA involved that failure mode, not 11 this failure mode. Tires that look like this; not tires 12 that looked like the one in our case. 13 So the Tread Pro tire is substantially 14 different from the Bahena tires because the Tread Pro, 15 the one evaluated by Goodyear and by NHTSA, the tread 16 and top belt detached. The Bahena, tread and both belts 17 detached. The Tread Pro tire, no broken belt wires; 18 Bahena, numerous broken belt wires. Tread pro, no 19 frayed belt wires; Bahena, multiple frayed wires. The 20 Tread Pro, the casing remained inflated. And the 21 vehicle controllable. In the Bahena, multiple casing 22 splits. After this tread and top belt detached in the 23 Bahena case, the tire went flat instantly because both 24 the belts came off the tire. 25 Now, there's information that was provided by</p> <p style="text-align: right;">37</p>

<p>1 Goodyear to NHTSA in terms of why factors were 2 changing -- about heavier vehicles, and more of them 3 larger vans, larger pickups, 15-passenger vans. The 4 visual analysis that Goodyear had done indicated that 5 after the tread and top belt came off, there was no loss 6 of air and, therefore, the operator could maintain 7 control of the vehicle.</p> <p>8 Goodyear provided all this information to 9 NHTSA. In fact, Goodyear already completed its 10 evaluation before NHTSA ever asked for information. And 11 what that evidence showed was that there was a total 12 population of these radial light truck Load Range E 13 tires of 22 million tires.</p> <p>14 MR. BOWERS: Your Honor, may we approach? 15 THE COURT: You may. 16 (Off-the-record bench conference.) 17 MR. CASTO: You'll learn from the evidence in 18 this case in terms of why tires fail. You'll hear 19 evidence in this case about the van involved in this 20 case which had a mismatch of tires on it. They were 21 passenger tires on the front of the van the Bahenas' 22 were driving. It had two P-metric which is the 23 passenger tires on the front. It had two light truck 24 tires on the right, the right rear and the left rear, 25 and it actually had a spare tire which had a third size</p> <p style="text-align: right;">38</p>	<p>1 over that 9-year period from 1991 to 2000, and 44 of 2 those involved personal injuries. So 44 injuries or 3 accidents involving injuries out of 22 million tires 4 made over 9 years.</p> <p>5 The evidence will further show that Goodyear 6 evaluated those tires that were involved in those 44 7 accidents and those tires showed evidence of impact, 8 punctures, and improper repairs.</p> <p>9 But there's more. As a result of NHTSA's 10 evaluation, and NHTSA's concern about 15-passenger van 11 stability, Goodyear offered to provide a replacement 12 program for owners of 15-passenger vans. That's 13 important because the van in this case is a 15-passenger 14 van. So Goodyear does that. And Goodyear proceeds then 15 to follow the protocol with NHTSA to notify registered 16 owners of 15-passenger vans.</p> <p>17 The evidence will show that what NHTSA does and 18 what Goodyear does is contracted with a company, R.L. 19 Polk. R.L. Polk has agents throughout the United 20 States, and every state, and their job is to assemble 21 registration information for different vehicles. And 22 based upon the vehicle identification number, they can 23 notify people, whether it's an automobile company or a 24 tire company, about replacement programs. So Goodyear 25 followed that procedure. In March of 2002, the owner --</p> <p style="text-align: right;">40</p>
<p>1 tire, which was a passenger tire, a third different 2 size.</p> <p>3 The evidence will show that a prior renter of 4 this van, driving this van involved in the accident, 5 sustained a tread belt detachment on Cooper Tires, prior 6 owner -- prior renter of the van. Now, that was a 7 detachment of the tread and top belt, the kind that 8 Mr. Olson's team evaluated, not a detachment of tread 9 and both belts.</p> <p>10 Now, in 2000, NHTSA opened an evaluation. It's 11 called a preliminary evaluation of Goodyear Load Range E 12 tires. Goodyear gave NHTSA thousands of pages of 13 documents about all the testing it had begun by its 14 teams. All the information NHTSA requested was provide 15 by Goodyear. They did their evaluation and they closed 16 their evaluation of Goodyear Load Range E light truck 17 tires.</p> <p>18 And the closing resume that Mr. Callister 19 showed you during his opening statement will be in the 20 evidence here and that closing resume showed that there 21 were 22,672,000 Load Range E tires manufactured from 22 1991 to 2000. Those tires are made in 14 different 23 sizes, 144 different models in various construction 24 types.</p> <p>25 There were 87 crashes out of 22 million tires</p> <p style="text-align: right;">39</p>	<p>1 the registered owner of the van in this case received a 2 letter sent by Goodyear notifying them of the voluntary 3 replacement program. But the van had been sold by that 4 time, and the current owner of Garm Rentals wasn't 5 notified. But Goodyear undertook what was the 6 replacement program, voluntary on that part, to do this 7 and that notice went out.</p> <p>8 Based upon the ODI closing resume, based upon 9 NHTSA's evaluation of the Goodyear data the same data 10 that Mr. Kam says leads into a different conclusion 11 NHTSA closed its evaluation of PE 46. NHTSA did not do 12 anything further. NHTSA agreed to keep open its 13 evaluation of PE 46, but to this day, there has been no 14 further conduct, no further activity with respect to 15 NHTSA concerning Load Range E tires.</p> <p>16 Ladies and gentlemen, the evidence in this case 17 that you'll see that I've outlined for you does not 18 establish the elements that the plaintiffs need to 19 establish to prove punitive damages. The conduct of 20 Goodyear in this case was not malicious, was not evil, 21 was not despicable.</p> <p>22 The evidence will show that the conduct of 23 Goodyear was exactly the opposite. That Goodyear 24 undertook a scientific methodology, evaluated the 25 situation, and reached a resolution to notify registered</p> <p style="text-align: right;">41</p>

1 owners of 15-passenger vans before this accident
2 occurred. They did all those things. And as a result
3 of that, ladies and gentlemen, at the end of this case,
4 I will ask you the defense verdict with respect to
5 punitive damages on behalf of Goodyear.

6 Thank you.

7 THE COURT: Thank you.

8 Counsel, you may call your first witness.

9 MR. CALLISTER: Yes, Your Honor, we call Allen

10 J. Kam.

11 THE COURT: Mr. Kam, will you please come
12 forward and take the witness stand to be sworn.

13 (Whereupon, the testimony of Allen J. Kam
14 was sealed per order of the Court.)

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18 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT.

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Blanca I. Cano

Blanca I. Cano, CCR No. 861

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A-16-731244-C

**DISTRICT COURT
CLARK COUNTY, NEVADA****Product Liability****COURT MINUTES****October 21, 2020**

A-16-731244-C Robert Ansara, Plaintiff(s)
vs.
First Street for Boomers & Beyond Inc, Defendant(s)

October 21, 2020 03:00 AM Status Check: Decision on Proposed Order

HEARD BY: Scotti, Richard F. **COURTROOM:** Chambers

COURT CLERK: Snow, Grecia

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

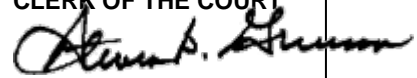
Matter heard.

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RPA
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Phone: (702) 444-4444
Fax: (702) 444-4455
E-Mail: Benjamin@RichardHarrisLaw.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ANSARA, as Special Administrator of the
Estate of SHERRY LYNN CUNNISON, Deceased;
ROBERT ANSARA, as Special Administrator of the
Estate of MICHAEL SMITH, Deceased heir to the
Estate of SHERRY LYNN CUNNISON, Deceased;
and DEBORAH TAMANTINI individually, and heir
to the Estate of SHERRY LYNN CUNNISON,
Deceased,

Plaintiffs,

vs.

FIRST STREET FOR BOOMERS & BEYOND,
INC.; AITHR DEALER, INC.; HALE BENTON,
Individually, HOMECCLICK, LLC; JACUZZI INC.,
doing business as JACUZZI LUXURY BATH;
BESTWAY BUILDING & REMODELING, INC.;
WILLIAM BUDD, Individually and as BUDDS
PLUMBING; DOES 1 through 20; ROE
CORPORATIONS 1 through 20; DOE
EMPLOYEES 1 through 20; DOE
MANUFACTURERS 1 through 20; DOE 20
INSTALLERS I through 20; DOE CONTRACTORS
1 through 20; and DOE 21 SUBCONTRACTORS 1
through 20, inclusive,

Defendants.

AND ALL RELATED MATTERS

CASE NO.: A-16-731244-C
DEPT NO.: II

PLAINTIFFS' REPLY TO:

**(1) DEFENDANT JACUZZI, INC.
DBA JACUZZI LUXURY BATH'S
BRIEF RESPONDING TO
PLAINTIFFS' REQUEST FOR
INFLAMMATORY,
IRRELEVANT,
UNSUBSTANTIATED, OR
OTHERWISE INAPPROPRIATE
JURY INSTRUCTIONS; AND**

**(2) DEFENDANTS FIRSTSTREET
FOR BOOMERS & BEYOND, INC.,
AITHR DEALER, INC., AND
HALE BENTON'S OBJECTIONS
TO PLAINTIFFS' DEMAND FOR
CERTAIN JURY INSTRUCTIONS
AND RULINGS ON MOTIONS IN
LIMINE BASED ON COURT
STRIKING JACUZZI'S ANSWER
RE: LIABILITY**



1 Plaintiffs, by and through their attorney of record, BENJAMIN P. CLOWARD, ESQ. of
2 the RICHARD HARRIS LAW FIRM, hereby submits Plaintiffs' Reply to: (1) Defendant
3 Jacuzzi, Inc. dba Jacuzzi Luxury Bath's ("**Jacuzzi**") Brief Responding to Plaintiffs' Request for
4 Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions; and (2)
5 Defendants first STREET for Boomers & Beyond, Inc., AITHR Dealer, Inc., and Hale Benton's
6 Objections to Plaintiffs' Demand for Certain Jury Instructions and Rulings on Motions in
7 Limine Based on Court Striking Jacuzzi's Answer re: Liability (hereinafter "**Reply**").

8 This Reply is made and based on the papers and pleadings on file herein, the following
9 Memorandum of Points and Authorities, and any oral argument that may be heard by the Court
10 at the time of the hearing on this matter.

11 DATED THIS 10th day of November, 2020.

12 **RICHARD HARRIS LAW FIRM**

13 /s/ Benjamin P. Cloward

14 BENJAMIN P. CLOWARD, ESQ.

15 Nevada Bar No. 11087

16 801 South Fourth Street

17 Las Vegas, Nevada 89101

18 *Attorney for Plaintiffs*



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court's March 5, 2020, Minute Order noted:

Commissioner Bulla and this Court's orders were clear and Jacuzzi fully understood them. Jacuzzi willfully and repeatedly violated the orders by failing to produce all discoverable documents and by failing to conduct a reasonable search despite knowing how to do so. **Jacuzzi's failure to act has irreparably harmed Plaintiffs and extraordinary relief is necessary.**¹

The Court's Minute Order explained that, "[i]t would not be fair to require Plaintiffs to expend additional time and resources and to sift through Jacuzzi's disjointed, misleading, and incomplete discovery to prepare for trial."² Therefore, to cure **some** of the prejudice caused to Plaintiffs, the Court has decided to strike Jacuzzi's Answer as to liability.

While striking Jacuzzi's Answer as to liability might cure the prejudice relating to Plaintiffs' liability case, it does not cure the prejudice caused to Plaintiffs' punitive damages case. The Court recognized the ongoing prejudice to Plaintiffs' case when it stated in its Minute Order that "[t]he 'drip-drip-drip' productions by Jacuzzi make this Court ... concerned that Jacuzzi has still failed to produce all relevant documents."³ The prejudice to Plaintiffs is compounded by the fact that trial is now set for March 1, 2021, and, due to the five-year rule, trial must go forward. Plaintiffs find themselves in the unfair position where trial must proceed even though they have not been given a fair chance to prepare all aspects of their case. Therefore, the Court must make evidentiary findings – whether through jury instructions or some other method – which address the prejudice caused to Plaintiffs that have not been cured by striking Jacuzzi's Answer as to liability.

Jacuzzi appears to acknowledge, at least on some level, that equity requires that the jury be given some context during trial which explains that Plaintiffs' evidence presentation is

¹ Minute Order, Mar. 5, 2020, at 1 (quoting Pls.' Evidentiary Hr'g Reply Br., at 45)(**emphasis added**).

² Id., at 3.

³ Id., at 2.

1 incomplete. In a footnote, Jacuzzi's Brief states, "Perhaps the core notions addressed in a few
2 of [Plaintiffs' requested jury instructions] could be combined and worded neutrally to give the
3 jury enough context for its determinations."⁴ At its core, this footnote acknowledges the need
4 for what Plaintiffs are seeking—some remedy to address the prejudice caused to their entire
5 case presentation, which includes their presentation on punitive damages.⁵

6 **II. LEGAL ARGUMENT**

7 Jacuzzi's brief tries to reframe this jury instruction issue as some sort of separate motion
8 where Plaintiffs are required to meet some new burden to support their request for certain jury
9 instructions.⁶ Plaintiffs have already met their burden during the four-day Evidentiary Hearing
10 and in the subsequent briefing, which has led to Jacuzzi's Answer being stricken. As the Court
11 recalls, the Court separated its final decision on the sanction order into two parts. First, the
12 Court will finalize a final Order Striking Jacuzzi's Answer. Then, the Court will decide what
13 additional sanctions are necessary. Thus, these instructions are necessary for the same reasons
14 it was necessary to strike Jacuzzi's Answer.⁷

15 The Court has the power to grant these sanctions under NRCP 37 and its inherent
16 equitable powers. As the Court in Young v. Johnny Ribeiro Bldg., Inc., explained:

17 Two sources of authority support the district court's judgment of sanctions.
18 First, NRCP 37(b)(2) authorizes as discovery sanctions dismissal of a
19 complaint, entry of default judgment, and awards of fees and costs.
20 Generally, NRCP 37 authorizes discovery sanctions only if there has been
willful noncompliance with a discovery order of the court. Fire Insurance

21 ⁴ Jacuzzi's Br. at 2, fn. 2

22 ⁵ Plaintiffs note for the Court that the requests as written in Plaintiffs' briefing are core
23 concepts—not the exact phrasings of specific jury instructions. In other words, Plaintiffs are
requesting jury instructions in concept with the exact wording to be determined at a later time.

24 ⁶ Jacuzzi's Br. at 2:2-6 ("[Plaintiffs] provide no analysis explaining or warranting the
25 instructions, not any authority for instructing on particular concepts, nor authority to support
26 allowing a sanction to taint jury instructions at all. Thus, as a general matter, plaintiffs fail to
carry their burden to justify these instructions.")

27 ⁷ As the Court noted at the Sept. 22, 2020, hearing, Plaintiffs' position regarding the requested
28 jury instructions has been clear for years—instructions are necessary to cure the irreparable
prejudice caused by Jacuzzi. Therefore, Plaintiffs will not belabor the point here.

Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). ... Second, courts have “inherent equitable powers to dismiss actions or enter default judgments for ... abusive litigation practices.” TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir.1987) (citations omitted). **Litigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute.**⁸

In addition to the sanction of striking Jacuzzi’s Answer, additional sanctions in the form of jury instructions are necessary to give Plaintiffs some semblance of a fair trial. Jacuzzi has categorized Plaintiffs’ seventeen (17) jury instruction requests into five (5) categories. Plaintiffs shall address each category in turn.

A. JURY INSTRUCTIONS REGARDING JACUZZI’S MISCONDUCT

Plaintiffs’ Requests 5, 6, and 7 seek to inform the jury as to why the evidence at trial is incomplete and to explain to the jury that the evidence is incomplete due to Jacuzzi’s conduct—not due to any failure of the Plaintiffs. The requests state:

5. The jury should be instructed that the Court has found that during this litigation, Jacuzzi willfully withheld evidence related to other end-users being injured in substantially similar incidents because it knew the evidence was harmful to its defenses in this case

6. The jury should be instructed that the Court has found that during this litigation, Jacuzzi willfully withheld evidence which would tend to show that Jacuzzi had reason to anticipate that Sherry may slip off the seat into the footwell because it knew the evidence was harmful to its defenses in this case.

7. The jury should be instructed that the Court has found that during this litigation, Jacuzzi willfully withheld evidence which would tend to show that Jacuzzi had reason to anticipate that if Sherry were to slip off the seat into the footwell, she would be unable to open the inward opening door because it knew the evidence was harmful to its defenses in this case.

Jacuzzi’s Brief attempts to misconstrue and misrepresent the issue here. Jacuzzi goes to great lengths to discuss constitutional due process law and argues that it would be unconstitutional to inform the jury that the Court has found that Jacuzzi has not produced

⁸ Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

evidence in this case. While due process ensures that a defendant is given a fair opportunity to be heard, it does not preclude this Court from exercising its inherent equitable powers and the powers granted under NRCP 37(c) and Nevada case law.

NRCP 37(c) specifically allows the Court to inform the jury that Jacuzzi has failed to produce evidence in this case. NRCP 37(c) states:

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 16.1(a)(1), 16.2(d) or (e), 16.205(d) or (e), or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(1).

NRCP 37(c) – as well as its federal counterpart – specifically allow a court to “inform the jury of the party’s failure” as a sanction for failure to produce evidence. That is exactly what has happened here—Jacuzzi has failed to produce evidence, and the Court must now inform the jury of that failure.

Jacuzzi argues that punitive damages must be proven by clear and convincing evidence and that any jury instructions informing the jury of Jacuzzi’s failure would invade the province of the jury. Jacuzzi’s argument makes too big of a logical leap. The requested instructions do not seek to instruct the jury as to what factual conclusions to reach. The requests only seek to inform the jury, as specifically allowed under NRCP 37(c), of Jacuzzi’s failure to produce evidence relevant to Plaintiffs’ claims. They are intended to cure the prejudice Jacuzzi caused to Plaintiffs’ ability to obtain evidence. If the jury is not informed why the evidence is

1 incomplete, Plaintiffs would be unfairly prejudiced through no fault of their own. The Court
2 has already noted that it has concerns whether Jacuzzi has ever produced all relevant evidence
3 in this case. While it is unfair for Plaintiffs to have to proceed to trial in a case where there are
4 such concerns that not all evidence has been produced, the Court must, at a minimum, cure the
5 prejudice by informing the jury of Jacuzzi's failures. The jury will still be required to award
6 punitive damages under the clear and convincing standard; Plaintiffs are simply requesting that
7 the Court inform the jury as to the true nature (i.e., incompleteness) of the evidence that will be
8 presented.

9 Jacuzzi also argues that the Court cannot give these jury instructions because the Court
10 utilized the preponderance of the evidence standard in deciding Plaintiffs' motion to strike.
11 Plaintiffs are not asking to have the jury determine punitive damages under a lesser standard.
12 The analysis is simply whether sanctions are proper. There is no requirement under NRCP 37
13 (nor NRCP 37's Advisory Notes) or any Nevada case law that requires the Court to only grant
14 sanctions under the clear and convincing standard. Stated differently, the issue before the Court
15 is whether sanctions are necessary. The standard for this decision is controlled by NRCP 37
16 and the Young case. The clear and convincing standard will control the jury's determinations at
17 trial, not what sanctions this Court enters to address Jacuzzi's misconduct.

18 Practically speaking, Jacuzzi is asking this Court to allow the following closing
19 argument at trial: "Plaintiffs were required to prove that they are entitled to punitive damages
20 by clear and convincing evidence. They have not presented enough evidence about prior
21 incidents. Therefore, you must find that they have not met the clear and convincing evidence
22 standard." This argument is completely unfair given the fact that the Court has found that
23 Jacuzzi willfully withheld evidence in this case. The jury must be informed of Jacuzzi's
24 failures.

25 Additionally, Jacuzzi's argument that a jury can never be advised of a party's discovery
26 failures in a case involving punitive damages must be rejected. As the Court is well aware, the
27 majority of trials proceed with liability and damages case presented to the jury in a single phase.
28 Accepting Jacuzzi's logic that a jury cannot be informed of a party's discovery failures in a

1 punitive damages case would mean that no jury could ever be informed of a party's failure to
 2 produce evidence (pursuant to NRCP 37(c)) in any case involving a claim for punitive damages.
 3 That is simply not the case.

4 Simply put, this is not a Constitutional issue. This is not a Due Process issue. This is
 5 simply an issue of the Court curing the irreparable prejudice Jacuzzi has caused to Plaintiffs'
 6 case. If the jury was not informed of Jacuzzi's failure to produce evidence, Jacuzzi would
 7 benefit to Plaintiffs' prejudice. The Court has the power under NRCP 37, Nevada case law,
 8 and its inherent equitable powers to grant these requests.

9 **B. JURY INSTRUCTIONS REGARDING JACUZZI'S KNOWLEDGE ABOUT OTHER**
 10 **CUSTOMERS**

11 Requests 8, 9, and 10 seek to cure the prejudice caused to Plaintiffs ability to present a
 12 full case on the issue of notice:

13 8. The jury should be instructed that Jacuzzi knew, prior to the
 14 subject tub being sold to Sherry, that other customers had slipped off the
 15 seat and into the footwell of substantially similar Jacuzzi walk in tubs.

16 9. The jury should be instructed that Jacuzzi knew, prior to the
 17 subject tub being sold to Sherry, that other customers who had slipped into
 18 the footwell were unable to exit because of the inward opening door.

19 10. The jury should be instructed that Jacuzzi knew of other incidents
 20 where customers had to call 911 or other emergency responders for help
 21 exiting the tub because they were unable to exit due to the inward opening
 22 door and weakened physical conditions being elderly or advanced in age.

23 These requests go directly towards the prejudice Jacuzzi has caused to Plaintiffs' ability
 24 to present their case to the jury on Jacuzzi's notice of defects and knowledge regarding defects.⁹
 25 The following excerpt from Plaintiffs' Evidentiary Hearing Closing Brief describes the type of
 26 evidence Jacuzzi withheld and illustrates why these jury instructions are necessary:

27 Jacuzzi's July 26, 2019, August 12, 2019, August 23, 2019 and
 28 August 29, 2019 disclosures were a document dump of e-mails,

⁹ Notably, these requests have no effect on the *firstSTREET*/AITHR Defendants because they deal specifically with Jacuzzi's—not *firstSTREET*/AITHR's—knowledge.

communications and previously undisclosed Salesforce entries which reference not only **prior** customer complaints, but also reference **prior incidents involving bodily injury**. ... The documents show that Jacuzzi knew of customers who complained of the same risks that caused Sherry's death prior to Sherry's death despite previously boldly proclaiming that, prior searches "did not contain any prior incidents of personal injury **even remotely related** to the claims Plaintiffs have asserted."¹⁰

For example, a December 27, 2013 e-mail (prior to the Cunnison DOL), from one of Jacuzzi's dealers/installers to Jacuzzi informed Jacuzzi about **frequent** customer complaints and referenced injured customers. The e-mail specifically referenced four customers who had slipped and two who had **seriously** injured themselves:

Also he says the bottom of the tub is extremely slippery, he has slipped, and also a friend has slipped in using it. **We get this complaint a lot, we have two customers right now that have injured themselves seriously and are threatening law suits.** We have sent out bath mats to put in the tub to three other customers because they slipped and were afraid to use the tub.¹¹

A July 9, 2012 e-mail chain (also prior to the Cunnison DOL), with the Subject "All Firststreet unresolved incidents" contained a reference to a customer with broken hips complaining about the slipperiness and lack of adequate grab bars.¹² An April 9, 2013 e-mail chain (also prior to Cunnison) contained information about a customer named Donald Raidt who called to complain that he slipped and fell and hurt his back. He informed Jacuzzi that he is willing to get a lawyer if the tub is not taken out.¹³ A December 2013 email (also prior) stated "**we have a big issue** and . . . Due to the circumstances involved with time line and **slip injuries this needs to be settled...**"¹⁴ A June 2013 e-mail chain (prior to Cunnison) with the Subject "Service issues on 5230/5229" from Regina Reyes to Kurt Bachmeyer referred to a customer I. Stoldt, who became "stuck in tub."¹⁵ The same email mentions David Greenwell, who slipped and became stuck in the footwell for two hours.¹⁶ A second e-mail chain

¹⁰ See, Jacuzzi's Mot. for Protective Order, filed Sept. 11, 2018, **Evidentiary Hr'g Ex. 211** at 7:17-23 (**emphasis** added).

¹¹ See, **Evidentiary Hr'g Ex. 11**, at JACUZZI005320 (**emphasis** added).

¹² See, **Evidentiary Hr'g Ex. 2**, at JACUZZI005287.

¹³ See, **Evidentiary Hr'g Ex. 8**, at JACUZZI005367.

¹⁴ See, **Evidentiary Hr'g Ex. 41**, at JACUZZI005327 (**emphasis** added).

¹⁵ See, **Evidentiary Hr'g Ex. 10**, at JACUZZI005374.

¹⁶ **Id.**

shows that Mr. Greenwell had to call the fire department to get out.¹⁷ Similarly, that same e-mail references a customer “C. Lashinsky” whose partner slipped in the tub such that the customer “had to remove the door to get her out.”¹⁸

...

Several other e-mails discuss how customers frequently complained about the slipperiness of the tub (“Hello: I have so many people stating that the tub seat and floor are extremely slippery;”¹⁹ “we are having a few customers slipping on the bottom of a Jacuzzi tub,”²⁰ “we have had customers call concerned that they slip off the seat,”²¹ “Customer Harris...said the floor of the tub is very slippery. She said she slipped off the seat,”²²). Another customer complained: “seat slippery – you fall off onto the tub floor – door opens in so very hard to get up or be helped up.”²³ One dealer/installer informed Jacuzzi there were “a couple of tubs in the field that people want removed because the customers claim they are too slippery to use.”²⁴

The list goes on and on. A quick review of the table summaries in Exhibit 205 shows that Jacuzzi has known about each of the issues involved in this case. Jacuzzi has known that an end user like Sherry could slide off the seat. Jacuzzi has known that a customer can become stuck in the foot well. Jacuzzi has known that a customer would need additional grab bars.

Jacuzzi prejudiced Plaintiffs’ ability to conduct full and complete discovery regarding what Jacuzzi knew regarding the dangerousness of its product. These requests are aimed at curing the direct harms of Jacuzzi’s misconduct.

1. These Instructions Are Proper Even in a Punitive Damages Phase

Throughout its brief, Jacuzzi argues that none of these instructions should be given in

¹⁷ See, Id., at Jacuzzi005623.

¹⁸ Id.

¹⁹ See, Evidentiary Hr’g Ex. 37, at Jacuzzi005566.

²⁰ See, Evidentiary Hr’g Ex. 36, at Jacuzzi005646.

²¹ See, Evidentiary Hr’g Ex. 6, at Jacuzzi005414.

²² See, Evidentiary Hr’g Ex. 47, at Jacuzzi005722.

²³ See, Evidentiary Hr’g Ex. 30, at Jacuzzi005334.

²⁴ See, Evidentiary Hr’g Ex. 43, at Jacuzzi005643.

1 any punitive damages phase. Jacuzzi argues:

2 First, for Jacuzzi to have a fair trial on punitive damages, which Plaintiff
3 agrees Jacuzzi should have, Plaintiffs must first prove all of the facts
4 necessary to support any award of punitive damages, including the
5 allegedly tortious conduct on which it is predicated, and proof that the
6 tortious conduct caused damage to Plaintiffs, by clear and convincing
7 evidence.²⁵

8 Jacuzzi argues that it would be improper to give any of Plaintiffs' requested instructions
9 during a punitive damages phase because doing so would invade the province of the jury.

10 Plaintiffs do agree that Jacuzzi should have a fair trial on punitive damages. However,
11 fairness requires that all sides be given a fair opportunity to present their claims and defenses.
12 Here, Jacuzzi has prejudiced Plaintiffs' ability to present a full case to the jury on punitive
13 damages. Therefore, fairness requires that the Court attempt to cure the prejudice Jacuzzi has
14 caused. The fact that the Court has stricken Jacuzzi's Answer as to liability such that Plaintiffs
15 will likely obtain an award for compensatory damages has no effect on the prejudice Jacuzzi
16 caused to Plaintiffs' punitive damages claim.

17 Jacuzzi has prevented Plaintiffs from being able to obtain evidence regarding not only
18 whether the tub was defective but also evidence regarding Jacuzzi's notice of such defects.
19 Evidence regarding prior knowledge goes directly towards whether Jacuzzi acted with either
20 express or implied malice. In fact, evidence regarding notice is the most important type of
21 evidence in Plaintiffs' punitive damages claim.

22 From the moment discovery opened, Plaintiffs legitimately and rightfully sought
23 evidence regarding notice—not simply to prove liability but also to prove malice. Jacuzzi has
24 prevented Plaintiffs from being able to present a full punitive damages case to the jury and now
25 Jacuzzi is effectively asking the Court to condone its misconduct. Jacuzzi must not be
26 permitted to thwart Plaintiffs' discovery efforts regarding notice and then later argue to the jury
27 that Plaintiffs have failed to prove notice. Simply put, the fact that the Court has stricken
28 Jacuzzi's Answer as to liability does not cure the prejudice Jacuzzi has caused with respect to

²⁵ Jacuzzi's Br. at 10:13-17.

1 Plaintiffs' punitive damages case.

2 **2. The Final Order Should Rule that Jacuzzi is Precluded from Asserting**
 3 **"Substantial Similarity" Arguments**

4 Jacuzzi has taken the position that the late-disclosed documents were discoverable but
 5 not admissible. Jacuzzi should not be permitted to argue that other incidents do not meet the
 6 substantial similarity requirements.²⁶ It was Jacuzzi's misconduct that prevented Plaintiffs from
 7 being able to develop the evidence in this case. Now, with the five-year rule looming, Plaintiffs
 8 have no choice but to present the case they have even though all parties and this Court know
 9 that Plaintiffs have incomplete evidence. Jacuzzi should not be permitted to argue that other
 10 incidents were not substantially similar because any of their own misconduct prejudiced
 11 Plaintiffs' ability to show substantial similarity.

12 **C. JURY INSTRUCTIONS REGARDING COMMERCIAL FEASIBILITY**

13 Plaintiffs' Requests 11, 12, and 13 seek to cure the prejudice Jacuzzi caused to
 14 Plaintiffs' ability to conduct full discovery because Plaintiffs have had to commit endless time
 15 and resources fighting discovery disputes rather than preparing their case:

16 11. The jury should be instructed that in response to customer complaints
 17 about the slipperiness of the tub surface that it began offering various
 18 products to customers free of charge which were meant to increase slip
 19 resistance.

20 12. The jury should be instructed that at the time that Sherry's tub was
 21 manufactured, other walk-in tub manufacturers were manufacturing
 22 similar walk-in tubs with similar features as Sherry's tub that had
 23 outward opening doors.

24 ²⁶ For the same reason, the Court should reject any "substantial similarity" argument offered by
 25 Jacuzzi in any of its Motions in Limine. It is unfair for Jacuzzi to rely on a "substantial
 26 similarity" argument when Jacuzzi's misconduct prejudiced Plaintiffs' ability to fully develop
 27 the other incidents evidence. Plaintiffs were not given a fair opportunity to conduct meaningful
 28 discovery regarding the other incidents and, therefore, should not be prevented from presenting
 the other incident evidence to the jury. Similarly, Plaintiffs were not given a fair opportunity to
 cure any evidentiary deficiencies (e.g., hearsay, authentication, etc.) and would be unfairly
 prejudiced if any of Jacuzzi's Motions in Limine were granted on any grounds which Plaintiffs
 did not have a fair opportunity to address.

13. The jury should be instructed that it was commercially feasible for Jacuzzi to produce a tub with the same dimensions as Sherry's tub, but with an outward opening door instead of an inward opening door.

Jacuzzi argues that these requests should be denied because the evidence that Jacuzzi withheld does not directly relate to the commercial feasibility of alternative designs. This argument ignores the real-world effect of Jacuzzi's years-long misconduct. Jacuzzi's discovery misconduct and gamesmanship had a ripple effect on Plaintiffs' entire case.

It has taken Plaintiffs years to get to "square one." Rather than preparing their case, Plaintiffs have been stuck in a never-ending game of cat and mouse due to Jacuzzi's failure to produce evidence. As the Court stated in its March 5, 2020, Minute Order, "The 'drip-drip-drip' productions by Jacuzzi make this Court, and Plaintiffs, concerned that Jacuzzi has still failed to produce all relevant documents."²⁷

Therefore, these instructions are necessary to counter any commercial feasibility arguments Jacuzzi might offer at trial, even in a punitive damages phase. These instructions would only go towards showing the tub was defective and do not go towards a showing of malice or oppression.

D. JURY INSTRUCTIONS REGARDING CONSUMER EXPECTATIONS, DUTY TO WARN, MISUSE

Requests 14, 15, 16, 17, 18, and 19 seek to cure the prejudice Jacuzzi caused to Plaintiffs' ability to develop the evidence regarding other incidents:

14. The jury should be instructed that Jacuzzi had a duty to warn Sherry of the risk of slipping off the seat.

15. The jury should be instructed that Jacuzzi had a duty to warn Sherry of the risk of entrapment due to the inward opening door.

16. The jury should be instructed that a reasonable consumer would not expect that the seat of a walk-in tub would be slippery enough to cause the consumer to slip off the seat during normal use.

²⁷ Minute Order, Mar. 5, 2020, at 2.

1 17. The jury should be instructed that a reasonable consumer would not
2 expect that he/she would become entrapped in a walk-in tub due to the
3 inability to open the tub door.

4 18. The jury should be instructed that any evidence in this case relating to
5 an end-user slipping in a walk-in tub was not the result of customer
6 misuse of the tub.

7 19. The jury should be instructed that any evidence in this case relating to
8 an end-user becoming entrapped in a walk-in tub was not the result of
9 customer misuse of the tub.

10 As noted above, Jacuzzi's "drip-drip-drip" productions and years-long gamesmanship
11 has irreparably prejudiced Plaintiffs' ability to conduct meaningful discovery. Before Jacuzzi
12 produced the late-disclosed documents, Plaintiffs spent tens of thousands of dollars flying
13 around the country deposing other customers. In reality, Plaintiffs should have been deposing
14 the customers referenced above like Mr. Greenwell who had to call the fire department to get
15 out of his tub, Mr. Raidt who slip and injured himself in a tub, or "C. Lashinsky" whose partner
16 slipped and fell in the tub. Plaintiffs should have been given a fair opportunity to develop the
17 evidence regarding the slipperiness of the tub and the volume of customer complaints on that
18 **at the beginning of discovery.** These instructions are required to preclude Jacuzzi from
19 benefitting from Plaintiffs' incomplete discovery.

20 **E. JURY INSTRUCTIONS REGARDING SUBSTANTIAL SIMILARITY**

21 Like many of the requests discussed *supra*, Requests 20 and 21 seek to cure the
22 prejudice caused to Plaintiffs' ability to complete discovery in this litigation:

23 20. The jury should be instructed that prior incidents documented in any of
24 the admitted Evidentiary Hearing Exhibits are substantially similar to
25 the subject incident such that Jacuzzi was on notice of the product's
26 dangerous attributes prior to the time it sold the tub to Sherry.

27 21. The jury should be instructed that subsequent incidents documented in
28 any of the admitted Evidentiary Hearing Exhibits are substantially
similar to the subject incident such that Jacuzzi consciously
disregarded foreseeable and probable harm.

As discussed above, Jacuzzi should not be able to benefit from its own misconduct by

1 arguing that any of the other incidents contained in the late-disclosed documents are not
2 substantially similar incidents because Jacuzzi prevented Plaintiffs from conducting meaningful
3 follow-up discovery to determine whether the incidents were in fact substantially similar.
4 Plaintiffs have been precluded from finding and deposing the customers whom Plaintiffs now
5 know have slipped off their tub seats, who have gotten stuck in the footwell, or who have had to
6 call 911 to get out of the tub. Accordingly, the jury should either be instructed that all other
7 incidents have been determined to be substantially similar or Jacuzzi should be precluded to
8 make any substantially similar arguments.

9 **III. REPLY TO FIRSTSTREET/AITHR'S BRIEF**

10 With respect to Defendants *firstSTREET* and AITHR's Objection to Plaintiffs' Demand
11 for Certain Jury Instructions and Rulings on Motions in Limine Based on Court Striking
12 Jacuzzi's Answer Re: Liability, Plaintiffs hereby incorporate by reference all arguments and
13 briefs pertaining to Plaintiffs' Renewed Motion to Strike *firstSTREET* for Boomers & Beyond,
14 Inc. and AITHR Dealer, Inc.'s Answer to Plaintiffs' Fourth Amended Complaint. The hearing
15 on Plaintiffs' Renewed Motion to Strike is set for November 19, 2020. Therefore, by the time
16 of the December 7, 2020, hearing on this matter, the Court will have considered all briefs and
17 oral argument regarding Plaintiffs' assertions of firstSTREET/AITHR's discovery misconduct.
18 Whether or not the Court grants Plaintiffs' Renewed Motion to Strike *firstSTREET/AITHR's*
19 Answer, Plaintiffs are entitled to the requested jury instructions and motion in limine relief
20 against *firstSTREET/AITHR* for the same reasons noted in the relevant briefing as well for the
21 reasons stated above with respect to Jacuzzi.

22 **IV. TRIAL PHASES**

23 Jacuzzi's Brief presumes that the Court has already determined that trial will proceed
24 under the same phases that the trial court used in Bahena v. Goodyear Tire & Rubber Co., 126
25 Nev. 606, 245 P.3d 1182 (2010). That is simply not the case. As the parties and the Court have
26 acknowledged, it is still unclear what the evidence presentation will look like at trial. At the
27 time of this filing, the Court has decided to strike Jacuzzi's Answer, but Plaintiffs' Renewed
28 Motion to Strike *firstSTREET* Defendants' Answer is still pending. There are simply too many

1 “moving parts” for the Court or the parties to determine how exactly the trial should be phased.
 2 In fact, the Court has already stated that it will defer the decision regarding trial phasing until
 3 after the Court makes a decision on Plaintiffs’ Renewed Motion.²⁸

4 **V. NOTE REGARDING PLAINTIFFS’ REQUESTS REGARDING VARIOUS**
MOTIONS IN LIMINE

5 Plaintiffs have also requested that the Court deny certain motions in limine filed by
 6 Jacuzzi as a sanction for Jacuzzi’s misconduct. Pursuant to this Court’s orders, Plaintiffs filed
 7 substantive Oppositions to the motions in limine at issue on October 12, 2020.

8 Independent of the arguments in Plaintiffs’ opposition briefs, the Court should deny the
 9 motions in limine as a sanction for all the reasons set forth in Plaintiffs’ Evidentiary Hearing
 10 Closing Briefs as well as the reasons set forth herein.

11 **VI. CONCLUSION**

12 This Court has already found that Jacuzzi has irreparably prejudiced Plaintiffs’ ability to
 13 fairly litigate this case. As the Court noted in its Minute Order, Jacuzzi’s misconduct was so
 14 severe that the Court considered striking Jacuzzi’s entire Answer but ultimately decided to
 15 strike as to liability only. Unfortunately, striking Jacuzzi’s Answer as to liability does not
 16 sufficiently cure the prejudice Jacuzzi caused. Whether the Court enters orders in limine,
 17 evidentiary findings, or certain jury instructions, the Court must provide the jury with some
 18 explanation or context as to the incomplete nature of the evidence at trial.

19 DATED THIS 10th day of November, 2020.

20 **RICHARD HARRIS LAW FIRM**

21 /s/ Benjamin P. Cloward

22 BENJAMIN P. CLOWARD, ESQ.

23 Nevada Bar No. 11087

24 801 South Fourth Street

25 Las Vegas, Nevada 89101

26 *Attorney for Plaintiffs*

27 ²⁸ Hr’g Tr., Oct. 5, 2020, at 19:22-25 (“I am going to defer the issues regarding phasing of trial
 28 until such time as the Court receives and considers, hears and rules upon the motion for
 sanctions against First Street that the Plaintiff has indicated is forthcoming.”)

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and/or NEFCR 9, I hereby certify that on this 10th day of November, 2020, I caused to be served a true copy of the foregoing **PLAINTIFFS' REPLY TO: (1) DEFENDANT JACUZZI, INC. DBA JACUZZI LUXURY BATH'S BRIEF RESPONDING TO PLAINTIFFS' REQUEST FOR INFLAMMATORY, IRRELEVANT, UNSUBSTANTIATED, OR OTHERWISE INAPPROPRIATE JURY INSTRUCTIONS; AND (2) DEFENDANTS FIRSTSTREET FOR BOOMERS & BEYOND, INC., AITHR DEALER, INC., AND HALE BENTON'S OBJECTIONS TO PLAINTIFFS' DEMAND FOR CERTAIN JURY INSTRUCTIONS AND RULINGS ON MOTIONS IN LIMINE BASED ON COURT STRIKING JACUZZI'S ANSWER RE: LIABILITY** as follows:

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Electronic Mail—By emailing an attached Adobe Acrobat PDF of the document to the email addresses identified below; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below; and/or

☒ Electronic Service —By electronic means upon all eligible electronic recipients via the Clark County District Court E-filing system (Odyssey).

Meghan M. Goodwin, Esq.
Philip Goodhart, Esq.
Thorndal Armstrong Delk
Balkenbush & Eisinger
1100 East Bridger Ave.
Las Vegas, Nevada 89101-5315
Telephone: 702-366-0622
Fax: 702-366-0327
E-mail: MMG@thorndal.com
E-mail: png@thorndal.com

Mail to:
P.O. Box 2070
Las Vegas, Nevada 89125-2070
Attorneys for Defendants/Cross-Defendants firstSTREET for Boomers and Beyond, Inc. and AITHR Dealer, Inc. and Defendant, Hale Benton

Vaughn A. Crawford, Esq.
Morgan Petrelli, Esq.
Snell & Wilmer, LLP
3883 Howard Hughes Pkwy., Suite 1100
Las Vegas, Nevada 89159
Telephone: 702-784-5200
Fax: 702-784-5252
E-mail: vcrawford@swlaw.com
E-mail: mpetrelli@swlaw.com

D. Lee Roberts, Esq.
Brittany M. Llewellyn, Esq.
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Phone: 702.938.3838
Fax: 702.938.3864
E-mail: lroberts@wwhgd.com
E-mail: bllewellyn@wwhgd.com



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1 Daniel F. Polsenberg, Esq.
2 Joel D. Henriod, Esq.
3 Abraham G. Smith, Esq.
4 Lewis Roca Rothgerber Christie, LLP
5 3993 Howard Hughes Pkwy., Suite 600
6 Las Vegas, Nevada 89169-5996
7 E-mail: DPolsenberg@LRRC.com
8 E-mail: JHenriod@LRRC.com
9 E-mail: ASmith@LRRC.com
10 *Attorneys for Defendant/Cross-Defendant, Jacuzzi, Inc.*
11 *dba Jacuzzi Luxury Bath*

12 /s/ Catherine Barnhill

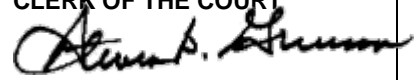
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT ANSARA, DEBORAH)	CASE NO.	A-16-731244-C
TAMANTINI, ESTATE OF SHERRY)		
LYNN CUNNISON,)		
)	DEPT. NO.	II
Plaintiffs,)		
)		
vs.)	Transcript of Proceedings	
)		
FIRST STREET FOR BOOMERS &)		
BEYOND, INC., ET AL.,)		
)		
Defendants.)		

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE

MOTION TO STRIKE

THURSDAY, NOVEMBER 19, 2020

SEE APPEARANCES ON PAGE 2

RECORDED BY:	BRITTANY AMOROSO, DISTRICT COURT
TRANSCRIBED BY:	KRISTEN LUNKWITZ

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

1 APPEARANCES:

2 [ALL VIA VIDEO/TELEPHONE CONFERENCE]

3 For the Plaintiffs: IAN C. ESTRADA, ESQ.
4 BENJAMIN P. CLOWARD, ESQ.
5 CHARLES H. ALLEN, ESQ.

6 For the Defendants: D. LEE ROBERTS, JR., ESQ.
7 BRITTANY M. LLEWELLYN, ESQ.
8 JOHNATHAN T. KRAWCHECK, ESQ.
9 JOEL D. HENRIOD, ESQ.
10 PHILIP GOODHART, ESQ.

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1 THURSDAY, NOVEMBER 19, 2020 AT 9:06 A.M.

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3 THE COURT: Case number A731244. Let's find out
4 who's here for the parties. Who is here for the plaintiff?

5 MR. CLOWARD: Good morning, Your Honor. Ben
6 Cloward for the plaintiff. Also on the call is my
7 paralegal, Cat Barnhill. Additionally, Charles Allen, co-
8 counsel, as well as Ian Estrada. And, if you want, they
9 can make their appearances, as well.

10 THE COURT: No. That's fine. Who do we have for
11 defendant, Jacuzzi?

12 MR. ROBERTS: Good morning, Your Honor. Lee
13 Roberts is here for defendant Jacuzzi. Also on the line is
14 my partner, Johnny Krawcheck, Joel Henriod, and Brittany
15 Llewellyn. I think I got everyone.

16 THE COURT: Great. Great. Thank you. Do we have
17 anyone from Mr. Polsenberg's firm on the line?

18 MR. ROBERTS: Joel's here, Your Honor.

19 THE COURT: Oh, wait. You're here from -- that's
20 right. Thank you. And, then, what about defendant First
21 Street? Who do we have on the line?

22 MR. GOODHART: Good morning, Your Honor. Philip
23 Goodhart for defendants, First Street and Aithr. I
24 apologize for not having the video up, Your Honor, because
25 for some reason it wasn't working this morning.

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1 THE COURT: That's okay. Not a problem.

2 All right. What other attorneys do we have on the
3 line? Anybody? Okay. That might be it. Good.

4 Are there any preliminary, procedural, or
5 logistical issues that anybody wants to discuss before I
6 ask a few questions?

7 MR. GOODHART: Your Honor, this is Philip Goodhart
8 on behalf of First Street and Aithr. I think I have a
9 procedural issue that I do need to discuss.

10 THE COURT: Please.

11 MR. GOODHART: On Friday, in addition to
12 Plaintiffs' Reply in Support of their Motion to Strike
13 First Street and Aithr's Answers, there was also a Motion
14 for Leave to Exceed the Page Limit in their Plaintiffs'
15 Reply from I think it was either 20 or 30 pages to what it
16 is now, which is in excess of 50 pages.

17 THE COURT: Right.

18 MR. GOODHART: That same day, I received a Notice
19 of Hearing for that Motion dated December 21, 2020. The
20 Motion did not appear to be on an order shortening time. I
21 did not file any Opposition to it because I received the
22 Notice that it was December 21, 2020, per the due course,
23 but, then, a few minutes later, on November the 18th, about
24 an hour later, I received a signed Order granting
25 Plaintiffs' Motion for Leave to File to Exceed the Page

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1 Limit.

2 I'm a little confused how that could have
3 happened. I'm not sure if that had any impact, but I just
4 thought I needed to bring that to the Court's attention
5 because Plaintiffs' Reply did end up being in excess of 44
6 pages.

7 THE COURT: Right. Sometimes these things get
8 automatically set for the future, and then it came to my
9 attention, and I thought about it, and just decided, after
10 looking at it, that I would grant it. I didn't have any
11 communication with any of the parties about this and, as
12 far as I know, my staff didn't either. And I looked at the
13 request and I was thinking that, you know, the facts have
14 been so carefully addressed by the parties in the past and
15 I didn't think that the actual legal issues were that
16 complex. And, although I wasn't too excited about the idea
17 of reading an extra 20 pages, I decided that it would be
18 okay and that I would let the parties let me know if there
19 was anything, you know, significantly new in there that
20 they would need maybe some more time to address. That was
21 my thinking on that.

22 MR. GOODHART: Well, there are -- there's a
23 significant argument that are contained in this Reply that
24 I think should have been contained within the original
25 Motion. And, since I don't get a Sur-Reply and was not

1 advised that a Sur-Reply would be possible, I'm kind of,
2 you know, behind the eight ball a little bit in trying to
3 respond to each and every single allegation contained in
4 this 46-page brief.

5 THE COURT: Right. No, I understand. Is there a
6 particular section that you think you would need more time
7 to address or are you saying that there's facts that are
8 interspersed and --

9 MR. GOODHART: Well, there's really --

10 THE COURT: And would you be able to identify
11 those so we can see if it's something significant enough
12 that you would need more time or if we could just give you
13 a chance to deal with those today?

14 MR. GOODHART: Well, Your Honor, I feel
15 comfortable enough being able to deal with that today, but
16 my concern is that, you know, as part of the record, and
17 things like that, that I know after these hearings you take
18 your time to review all the pleadings and the papers and
19 take a look at everything closely, which is precisely what
20 you did at the time of the first Motion to Strike my
21 client's Answers. Originally, you issued a minute order
22 indicating that there was sufficient evidence and that an
23 evidentiary hearing would be required. And, then, about a
24 week or so later, you issued an updated minute order saying
25 that you primly had a time to review all the documents and

1 found --

2 THE COURT: Right.

3 MR. GOODHART: -- that there were no claims that
4 were valid against my client or even Jacuzzi at that point
5 in time.

6 THE COURT: At that point. Right.

7 MR. GOODHART: Right. And I'm just a little
8 concerned that, you know, I can certainly address many of
9 the things that are in here through the oral argument, but
10 to the extent that, you know, notes are taken and things
11 like that, I don't really know if -- I know you review the
12 papers very, very closely. So, you know, I am prepared to
13 go forward with the oral argument this morning, as we've
14 indicated. It's just if the Court would like a Sur-Reply
15 before it renders a decision, I would like the opportunity
16 to do so so that, in paperwork, if necessary. After I've
17 answered your questions and things like that, I could
18 possibly prepare one.

19 THE COURT: I understand that. So, I didn't want
20 to delay this anymore, but why don't we use this approach?
21 We'll have the parties answer my questions to make sure I
22 can organize all of the relevant facts in a way that helps
23 me to resolve this. And, if during the argument you
24 believe that there is some particular argument or fact that
25 you believe should have been in the Motion but it was in

1 the Reply and you want more time to address that or handle
2 it differently, let me know. Now, to the extent you can
3 identify that. All right?

4 MR. GOODHART: I would -- yeah. I would
5 appreciate that, Your Honor. Like I said, I'm not sure I
6 will need to, depending upon your questions and the
7 argument, however, I will try to indicate that if at all
8 possible. And I appreciate it. Thank you.

9 THE COURT: Sure. Mr. Cloward, did you want to
10 say anything about that?

11 MR. CLOWARD: Yes, Your Honor. I would. I
12 appreciate the opportunity.

13 You know, I -- we're somewhat befuddled because we
14 followed the exact format that was contained in the
15 Opposition and replied exactly to the sections that were in
16 the Opposition. So, for instance, you know, their first
17 thing that they set out was the Fox allegations and then
18 the Guild Surveys, and the front row seat, and our format
19 was the same. We didn't create new arguments. We just
20 addressed that -- the arguments that they set forth, number
21 one.

22 And, number two, we were very critical of First
23 Street for not addressing in full all of the important
24 aspects that we set forth in the Motion. On two or three
25 separate occasions, throughout our Reply, we pointed out:

1 Look, Judge, this was a real big deal. They only devoted
2 two paragraphs to it. They've glossed over it and I think
3 that their current request is a way to get another bite at
4 that apple to flesh that out. That -- and that wouldn't be
5 fair to us. We spent the time to do this. I have a lot of
6 personal issues going on last week with just real serious
7 things and, you know, I asked for one extra day to address
8 these issues. I didn't ask to kick this out and, you know,
9 -- so, we feel like it's been adequately briefed. We feel
10 that any other attempt would be to just continue to delay
11 the issue, Judge.

12 THE COURT: Okay. Thank you. Let's proceed then.

13 Counsel, it would be helpful to me if I prepared
14 my notes while we're going through this with particular
15 facts identified to me in short statements that I can put
16 into like one page sheets that I am working on.

17 Well, let me explain it this way. What I would
18 like to do is for the top five pieces of evidence, Mr.
19 Cloward, for you to identify what the piece of evidence at
20 issue is, --

21 MR. CLOWARD: Okay.

22 THE COURT: -- and, then, the next point would be:
23 When did the relevance of that issue or that piece of
24 evidence become known? Next would be: When did First
25 Street obtain that evidence? Perhaps they always had it.

1 The fourth piece of information I would need is: Was the
2 production excused? And there's arguments that things
3 might have been excused because of a discovery order, or a
4 meet and confer, or the language used by the plaintiff in a
5 particular document request. So, that's the fourth point.
6 And then the last point was: When was the evidence
7 actually produced?

8 Now, a lot of this, Mr. Cloward, is in your brief
9 and in First Street's brief and in the Reply brief, but it
10 wasn't always clear to me. Since we're dealing with
11 allegations of discovery violations, in particular relevant
12 things weren't produced on time, I need to know, you know,
13 these five points one more time: What's the piece of
14 evidence? When did relevance become known? When did First
15 Street have the evidence? Was their production excused?
16 And when was it ultimately produced?

17 And let's just take -- one, for example, let's
18 just begin this with Guild Survey, so you can follow my
19 analysis. And this isn't the full extent of my analysis.
20 This is just me trying to prepare a grid that has some of
21 the critical facts to help me go forward in understanding
22 your argument and doing my analysis after the hearing.

23 So, Guild Surveys, I think, is the first one you
24 addressed, Mr. Cloward, and, specifically, Guild Surveys
25 relating to slips, slips and falls. So that would be the

1 first piece of evidence that you think is critical that was
2 either not disclosed or not disclosed on time.

3 So, then the next issue for you to identify in one
4 or two sentences would be: When did that relevance become
5 known? And, so, we're dealing with: When should First
6 Street have known that evidence of slip and falls was
7 relevant in this case? And, of course, there's been some
8 argument among the parties on whether that was the First,
9 Second, Third, or Fourth Amended Complaint.

10 So, why don't we take it from there, Mr. Cloward?
11 The first piece of evidence is Guild Surveys versus slips.
12 Let's deal with that one. Okay?

13 MR. CLOWARD: You got it, Judge.

14 THE COURT: So, when did -- what's your position
15 on when that -- when the relevance of those Guild Surveys
16 regarding slips became known?

17 MR. CLOWARD: I would think that during the
18 deposition of Bradley Vanpamel [phonetic], which was in --
19 approximately, if memory serves me right -- and if the
20 Court wants, you know, very specifics, I can take a moment
21 to get that, but I believe late 2017 or early 2018.

22 THE COURT: All right.

23 MR. CLOWARD: It was early in the litigation.

24 THE COURT: And -- right. And I don't need
25 specifics unless it's -- unless the timing is critical.

1 And, after I get these pieces of information, I will give
2 you, Mr. Cloward, and opportunity to present whatever
3 argument you've prepared to present today.

4 All right. So, what's your position on when First
5 Street obtained this evidence? I assume your information
6 would be they always had it.

7 MR. CLOWARD: Correct.

8 THE COURT: All right. And I'm assuming your
9 position would be that production of such evidence was
10 never excused. Right?

11 MR. CLOWARD: Correct.

12 THE COURT: And then the -- then, we get to the
13 issue is: When was it produced? And you had a statement
14 in your brief on page 3 that they've only turned over one
15 year of Guild Surveys and that was just from 2015. And,
16 then, there's some discussion of it, of the surveys being
17 produced in August 2019. So, I'm assuming from this, your
18 position would be that they produced the Guild Surveys in
19 August 2019, but it was only for 2015?

20 MR. CLOWARD: Correct. And I was mistaken. As I
21 set forth in the Reply, that was the one issue --

22 THE COURT: Right.

23 MR. CLOWARD: -- that I was mistaken. It was
24 named 2015, so I assumed, and I apologize to the Court for
25 making that assumption. It does appear as though there

1 were surveys that were produced up to, I believe, 2017.

2 THE COURT: And then we had the statement from
3 First Street, I believe, in there that said they produced
4 all surveys.

5 But, anyway, so, see, that's kind of the initial
6 analysis that I wanted to do, Mr. Cloward. So, we have
7 Guild Surveys regarding slips with a piece of evidence at
8 issue. Relevance became known late 2017. They always had
9 it. They -- production was not excused. And they didn't
10 produce it until August 2019, perhaps almost two years
11 later. That would be your position on the Guild Surveys.

12 So what's the next most critical piece of evidence
13 that you have an issue with, Mr. Cloward?

14 MR. CLOWARD: I would think e-mails, internal e-
15 mails from team members of First Street within the First
16 Street organization, as well as the Aithr organization, as
17 well as e-mails back and forth from Jacuzzi regarding not
18 only slips but any incidents really, any safety incidents.
19 You know, incidents with the door, or incidents with people
20 not being able to get back out of the tub, you know, any
21 incident.

22 THE COURT: All right. So the -- kind of lumping
23 all of that together, it obviously makes it difficult to
24 prepare a one-page data sheet because we're dealing with e-
25 mails on different topics, prepared at different points in

1 time. And, of course, different dates of production. So,
2 let's deal with e-mails differently.

3 What about -- what's the next piece of evidence
4 that you believe is critical in this case that you didn't
5 receive or didn't timely receive?

6 MR. CLOWARD: Information pertaining to the
7 slipperiness -- I guess, preventative measures that were
8 taken. So, for instance, there were products that were
9 utilized by the parties, and if you want to break these
10 down into subcategories or one broad category, there was a
11 product called LiquiGuard, StepCote LiquiGuard. And,
12 apparently, it was a product that could be applied somehow
13 by one of the dealers or one of the installers. I don't
14 really know the details about exactly how the product is
15 even applied, or if it's a gel, or if it's a sticker. I
16 don't really know, you know, what they do to apply that.

17 But that would be something that I think would
18 have been relevant during Bradley Vanpamel's deposition in
19 2017, early -- or late 2017, early 2018, because the way
20 that he described this incident is that she was, you know,
21 reaching for the controls and slipped off of the seat and
22 kind of into that footwell position.

23 And what we find in a subsequent discovery that
24 Mr. Lee Roberts produced is that -- and the e-mail -- the
25 most important -- one of the most important e-mails was one

1 that Nick Fox authored all the way back in I believe it's
2 December of 2013, potentially, or -- I think that's when it
3 was. Maybe 2013. But, you know, he actually said to
4 Jacuzzi, and keep in mind, Judge, you know, Nick Fox is an
5 employee of First Street and Aithr, and he's telling
6 Jacuzzi: Hey, look, with respect to this slipperiness
7 issue, we ought to put it on the seat and the floor because
8 we're having some issues with folks.

9 So, it's clearly an issue of the tub. They had
10 information about it. Bradley Vanpamel's description of
11 how she got into the footwell, that's when --

12 THE COURT: Okay. No, I got that one.

13 MR. CLOWARD: -- it would seem --

14 THE COURT: So, what was the other preventative
15 measure that would come in this category?

16 MR. CLOWARD: The -- I would say the bath mat
17 issue, the bath mats.

18 THE COURT: Oh, by the way, back up for a second.
19 The LiquiGuard, when was that evidence produced? For my
20 chart here.

21 MR. CLOWARD: So, I've been -- and I would just
22 ask the Court, give me a little bit of allowance to be
23 precise. I like to be precise and I know the Court likes
24 the precision, and, so, if I'm a little wrong on some of
25 these dates, I apologize. But I think that they were

1 produced anywhere between July and August of 2019. So, at
2 the very end of discovery or after discovery, and they were
3 never produced by First Street to my knowledge. I double-
4 checked the disclosures to make sure that I could make that
5 representation to the Court. I had a paralegal that -- Ms.
6 Barnhill helped me with that. And I don't believe that
7 First Street ever produced any of the information with
8 respect to the LiquiGuard, or the StepCote, or the bath
9 mats. And, so, that was produced by Jacuzzi.

10 THE COURT: All right. Very good. So,
11 LiquiGuard, bath mat, what other preventative measure was,
12 in your opinion, not disclosed?

13 MR. CLOWARD: I think that the information with
14 respect to the Kahuna Grip could have more timely disclosed
15 so that we could have had more thoughtful discovery and
16 thoughtful participation with the depositions of the
17 30(b)(6) witnesses with our experts, with, you know, really
18 all of the folks who have participated in this case, with
19 their experts, with the 30(b)(6) witnesses for both
20 parties. But, quite frankly, we didn't get that
21 information -- any of the documents relative to that
22 produced until 2019.

23 Mr. Modena did testify to that. You know, he said
24 that there was a product, you know, called Kahuna something
25 or -- he wasn't -- I can't remember the testimony off the

1 top of my head, but that was in, I believe, December 2018.
2 You know, so well into this litigation, years into the
3 litigation, well after Bradley Vanpamel's deposition where
4 slipperiness was an issue and should have been produced in
5 a timely manner such that we could have utilized that for
6 our experts and for the depositions.

7 THE COURT: I got -- what's your position on when
8 First Street obtained evidence of these preventative
9 measures, the LiquiGuard, bath mat, and Kahuna Grip?

10 MR. CLOWARD: Well, the documents that have been
11 produced, they've had this information -- we could prove to
12 the Court that they've had this the entire time and they've
13 been involved with the development of these products.

14 You know, one of the things that is befuddling to
15 the plaintiffs is they -- First Street says: Well, you
16 know, we don't have some of these documents. Or: Hey, we
17 weren't copied on these documents. You know, things of
18 that nature. One of the documents in particular was a
19 dealer bulletin that specifically said that they had tested
20 the Aithr Aging in the Home, A-I-T-H-R, had tested a
21 product and that they were pleased to announce that both
22 Jacuzzi and Aithr had tested it, and that right there is an
23 example of -- you know, well, what did they do to test it?
24 How did they test it? What measures were taken to test it?
25 Where are the other documents pertaining to that testing?

1 Who else was present --

2 THE COURT: No. I got that. I got that.

3 All right. So, what's the next most critical
4 piece of evidence in your mind, other than we have, you
5 know, the Guild Surveys, the e-mails, and the preventative
6 measures. What would be next in your mind?

7 MR. CLOWARD: I think that the Alert 911 is -- was
8 a big deal. And, you know, Ruth Cranute [phonetic] was a -
9 - an individual who filled out a formal request with
10 Consumer Products Safety Commission and they have a website
11 that you can go to if you're a consumer. You fill out the
12 form and if it's -- if they are going to put it on their
13 website, they send you some more information. You have to
14 authorize for them to do that. It's a formal process. It
15 takes some time. It takes some doing and effort by an
16 individual to actually go through with that process,
17 because there's back and forth communication with the
18 individual and the Consumer Product Safety Commission.

19 And, so, she went to that extent, filled that out,
20 and, in there, she said: You know, the Guardian Alert or
21 the Alert 911, I can't remember the exact terminology she
22 used, but, you know, it would have been useless to me that
23 they provided. So, early on, and that was -- we obtained
24 that in at least early -- I would say, you know,
25 April/May-ish of 2018, before the deposition of Bill

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1 Demeritt, the Jacuzzi 30(b)(6).

2 So, we had that document in our possession. We
3 used that to cross-examine Bill Demeritt when he said:
4 Hey, look, Jacuzzi only knows of two incidents, both of
5 them are being litigated by you, Mr. Cloward. Those are
6 the only ones we know about. Well, gave him every chance
7 and pulled that document out and said: Well, what about
8 this? You know, this Guardian Alert. And, I think, at the
9 time, we didn't know it -- you know, anything other than
10 what was on the document as to what that product was.

11 And, so, I guess, when was it known to be
12 relevant? I would say during Bill Demeritt's deposition
13 when we cross-examined Bill Demeritt on that. That's when
14 it first came out that that would be an issue.

15 And as far as: When did First Street have the
16 evidence? Well, they've always had it. They were -- you
17 know, they, apparently, were more involved with the product
18 than Jacuzzi.

19 Was it excused? Their argument is going to be:
20 Well, you know, during the hearing, during the August 2018
21 hearing, Commissioner Bulla said: Well, you know, send
22 some written discovery, I guess, if you want on that
23 product. And my response to that would be: Well, Judge, I
24 had had several conversations with counsel involved and it
25 was always represented that they didn't know anything about

1 it, they didn't have anything to do with it. And, so,
2 that's why we didn't send the discovery. And, you know,
3 that's part of my complaint is that, you know, we should --
4 I should be able to trust what counsel says to me and
5 that's what's been disheartening about this case, you know,
6 first with Josh Cools having eye-to-eye, you know,
7 conversations of like: Well, this just doesn't make sense.
8 It doesn't feel right in my gut. I mean, are you sure?

9 And the same thing applies with this product with
10 Mr. Goodhart. I had multiple conversations with him. And
11 it was always represented: No, we don't -- we didn't -- we
12 don't know what it is. We don't have anything to do with
13 it. And, then, we find out, during the deposition of Ms.
14 Cranute, -- and, fortunately, she kept the paperwork. You
15 know, if she hadn't kept the paperwork, this might still be
16 an issue that we're chasing around and we're trying to find
17 information and answers to.

18 But I would think that if the company is giving an
19 Alert 911 system and part of the evidence that we have in
20 the Guild Survey is that folks were told not to use it
21 without -- not to use the tub without having this nearby,
22 now that's a pretty big deal. That's a big issue. And we
23 haven't been able to just do any discovery with respect to
24 that. So, that would be the next on the list.

25 THE COURT: All right. Give me one more.

1 MR. CLOWARD: Okay. Could I give you two more?

2 THE COURT: Sure. All right.

3 MR. CLOWARD: Okay. So, the -- I guess the
4 Cunnison recording. You know, this is one that is a huge
5 thing and, you know, for First Street to say, you know, we
6 didn't keep certain documents or we didn't keep certain
7 recordings, we didn't offload certain recordings, you know,
8 Dave Modena's testimony -- or his affidavit belies that
9 position. His affidavit says, and I'm quoting for the
10 Court, quote:

11 Mr. Fox was told by counsel to retain anything and
12 everything related to Sherry Cunnison in Aithr's files,
13 including all recorded calls, end quote.

14 So, if you don't have these recordings, why are
15 you telling your individual to save these recorded calls?
16 You know, but then they come years later and say: Well,
17 Judge, we didn't save these because we had the Lead
18 Perfection and, so, you know, we would only save them into
19 the -- or we would just type the notes of what it meant.
20 Well, your affidavit from Mr. Modena belies that argument
21 because he's instructing Mr. Fox to save all of the
22 recorded calls.

23 So, -- and, obviously, there is an issue as to
24 this other call where she dove -- had to dive under the
25 water. First off, the documents -- their own Lead

1 Perfection notes and the note from the Allstate adjuster
2 indicates that at some point there was confusion about that
3 issue and that the drain was what caused her to be stuck.
4 And, you know, what does Nick Fox have to lose? What does
5 Annie Duback [phonetic] have to lose? They don't want to
6 get tied up into litigation. They don't want to be
7 deposed. They don't want to be involved, yet they said
8 that she called and she told them that she got stuck. She
9 had to dive underneath the water.

10 Yet, the thing that's disheartening, again, Judge,
11 is when we find additional information from the 911
12 responders, and so we file the Motion and focus on that
13 information, they crucify me and try to make it look like
14 my whole claim, my case is changing, and ever-changing, and
15 I can't tell you how many times they've criticized, and
16 been critical of me for that, and it's just not fair
17 because the evidence shows that -- now we know that there
18 were two calls and that there were two issues.

19 THE COURT: All right.

20 MR. CLOWARD: So, in answering the Court's
21 questions, I guess the calls -- so, we're talking Ring
22 Central, we're talking the -- RingCentral and Five9, those
23 calls would -- that would be a piece of evidence. When it
24 was known to be relevant, I would say back in 2017 during
25 Bradley Vanpamel's deposition -- or, actually, those

1 particular -- so, you would want to break those down into
2 two components. Number one, the calls with respect to
3 Sherry Cunnison. Those would have been relevant from day
4 one, but the broader calls of other claimants calling in to
5 complain about the tub and document safety issues, those
6 would have been known to have been relevant as early as
7 2017, during Bradley Vanpamel's deposition when he
8 described what took place and how she became stuck.
9 Because you may have folks -- or we know that folks called
10 in saying: Hey, look I was -- you know, my husband was
11 stuck in the tub for two hours. We had to call the fire
12 department, or I had to call my cousin to help him out, or
13 I had to call -- you know, we had to cut the door off. You
14 know, so there -- those other issues would have been
15 relevant early on, Your Honor.

16 When did First Street --

17 THE COURT: Okay.

18 MR. CLOWARD: -- have the evidence? When did
19 First Street have the evidence? Well, we know for a fact
20 that First Street had the evidence with respect to the call
21 of Sherry Cunnison around, I believe, 2014. I believe
22 that's when the -- it was set out in the Motion, when Mr.
23 Goodhart, in the Motion, indicated that there was an e-mail
24 to Nick Fox saying: Hey, save everything. They had the
25 information at that point. Nick Fox was able to obtain it.

1 According to his affidavit, he provided it by a thumb drive
2 to Dave Modena. So they had it early, early on.

3 Was it excused? Absolutely not. There's no
4 excuse to not disclose those documents.

5 And when was it actually produced? It was
6 actually produced in 2020, upon plaintiff's -- so, it's
7 never been produced by First Street. Plaintiff's efforts,
8 we were able to obtain it. And those are the calls with
9 respect to Sherry.

10 With respect to the other individuals, First
11 Street -- I guess it depends on if you believe First
12 Street's affidavit as to when they had the evidence. They
13 had the evidence when folks would call in, but they claimed
14 that they downloaded or input the information obtained in
15 the call into their Lead Perfection System, but that's, you
16 know, -- who knows if that's actually accurate. I mean,
17 maybe it is, maybe it isn't. We don't know.

18 Was it excused? We don't believe that it's ever
19 been excused. We believe that the Court has been pretty
20 clear on what's relevant information and the rules are very
21 clear on what's relevant information. It's claims and
22 defenses. Evidence pertaining to claims and defenses,
23 you've got to produce it. And, so, we don't believe that
24 it's ever been excused.

25 When was it actually ever produced? It never has

1 been produced.

2 THE COURT: Okay. You said you have one more.

3 MR. CLOWARD: Yeah, one more.

4 THE COURT: Well, [indiscernible] one more.

5 MR. CLOWARD: I appreciate that, Judge.

6 You know, the dealers were still an issue. You
7 know, this was the basis of the first Motion.

8 THE COURT: Right.

9 MR. CLOWARD: And the -- I guess the -- I just
10 wanted to highlight the prejudice that has been caused.
11 You know, the Court gave leave to take those depositions
12 and we attempted to take depositions, and what we found are
13 that most of these companies are out of business. The
14 attempts that we did make, people just didn't show up and,
15 you know, you can see the prejudice when you see Dave
16 Modena's affidavit and Dave Modena says: Look, a lot of
17 these claims came in completely and solely through the
18 dealers. We had no access to their information. We had no
19 access to their computer systems. And, so, you know, we
20 don't know what they're told.

21 Well, so, that's a whole bucket of evidence and
22 Dave Modena even testifies that the dealers are the folks
23 most likely to have the information. So, that's a huge
24 bucket of evidence that's out there that nobody knows
25 anything about. And because of the delay of First Street

1 not producing that information when we requested in an
2 interrogatory, you know, that's information that will
3 likely never be found because those folks are out of
4 business or they're no longer doing those -- selling those
5 products and it's just gone.

6 And, so, with respect to the dealer network, we
7 believe that they had that as early as 2011 or 2012 when
8 the Manufacturing Agreement was signed by the parties and
9 there was specific language in the Manufacturing Agreement.

10 As the Court may recall, our interrogatory cited
11 the Manufacturing Agreement and said: Hey, on page, you
12 know, 5, and that's not the correct page, I just don't
13 remember the page, but, hey, on page 5, paragraph 6, the
14 manufacturing agreement says X, Y, Z, the, quote, network
15 of dealers. Please provide the name of the network of
16 dealers. And they said: Well, Aithr is the only dealer.
17 And we found that that was not true.

18 And, so, you know, those should have been
19 affirmatively produced by 16.1. Had they been produced by
20 16.1 back in 2016/2017, we would have had a better
21 opportunity to hopefully gather the information from those
22 dealers, but we were not afforded that opportunity due to
23 the delay in time.

24 We don't think that it was ever excused and it was
25 produced in 20 -- I think 2018/2019. The map, but, again,

1 by then, it was too late.

2 THE COURT: All right. And, so, what you're
3 adding to your prior Motion on this issue is the prejudice
4 is what's new then.

5 MR. CLOWARD: Correct.

6 THE COURT: All right. Very good. So, thank you.
7 That's a good start for my chart. Let's go ahead then and
8 whatever argument you had prepared to present today, you
9 may do that now.

10 MR. CLOWARD: Okay. And I don't want to rehash
11 everything. You know, we're fortunate that Your Honor
12 carefully evaluates and reads everything, so I don't want
13 to waste the Court's time and just rehash --

14 THE COURT: Well, it's -- there's a lot of
15 material here and I am committed to being motivated to get
16 this done right, so let's proceed.

17 MR. CLOWARD: Understood.

18 Well, I think, you know, one of the fundamental
19 notions of the civil -- really of the justice system is the
20 right to a speedy matter, a speedy adjudication of your
21 issue, and we agree with the defendants that cases should
22 be heard on the merits. And that's all that we've ever
23 wanted. We wanted to just proceed. We wanted to be able
24 to present our case. We've wanted to be able to know the
25 information relative to proving our case. And one of the

1 things that's important to our case is that we have to show
2 that the product was dangerous, number one. And, number
3 two, we have to show that they knew about the dangerousness
4 of the product.

5 And, so, that's what we've attempted to do
6 throughout this process, from as early as 2017 when we sent
7 discovery and began fighting with Jacuzzi about these
8 issues. And First Street has been sitting there, front
9 seat, they've watched the slugfest. They watched all of
10 this happen, all of these arguments about: Well, what is
11 an incident? Well, what is prior versus subsequent? And
12 time and time again, Jacuzzi lost and Commissioner Bulla at
13 those hearings said -- then Commissioner Bulla at those
14 hearings said: You know, ordinary course. And she
15 understood what plaintiffs had to prove. They understood
16 at that point what plaintiffs had to prove.

17 They know that as a -- as being in the stream of
18 commerce, that they have the same defenses and that the
19 plaintiff has to prove the same things against First Street
20 that plaintiff would have to against Jacuzzi. So, at that
21 point, they have an affirmative obligation to turn those
22 things over.

23 And throughout this process, there has been a
24 number of discovery responses -- or, excuse me, discovery
25 requests that are directly on point, that ask for -- I

1 mean, you know, for instance, this interrogatory, it's the
2 first set of interrogatory, it's Number 11, and it's:

3 Please state whether the defendant, First Street,
4 has ever received notice either verbal or written from
5 or on behalf of any person claiming injury or damage
6 from his use of Jacuzzi walk-in tub, which is the
7 subject of this litigation.

8 Like, it's directly on point. And their response
9 is: We only know of, you know, Leonard Baize and Max
10 Smith. Conveniently, plaintiffs are prosecuting Max Smith
11 and, conveniently, Leonard Baize was one that plaintiffs
12 found.

13 So, there's been no good faith participation by
14 First Street and their whole position, Judge, has been:
15 Hey, there's never been an order compelling. And, so, if
16 there's not an order compelling, then we don't have to
17 produce it. And that's their position boiled down to its
18 essence. And that's not what the caselaw says. That's not
19 what the statute says. That's not what NRS 16.1 subpart 3,
20 I believe (c), says. They have an affirmative obligation.
21 Twenty-six -- Rule 26, NRCP 26 says that there's an
22 affirmative obligation to seasonably supplement your
23 disclosures and your responses.

24 This discovery response was back in 2018. It's
25 never been supplemented. And we know, from the document

1 dump that took place at the end of 2019, or at the latter
2 part of 2019, the summer and latter part of 2019. I mean,
3 Judge, you've seen now, at this point, the problems that
4 this tub had and the number of issues that were documented,
5 clearly documented, yet plaintiff was -- has lost the
6 opportunity to do further discovery on those, to depose the
7 relevant individuals.

8 And, most important, plaintiff has lost the
9 opportunity to depose the 30(b)(6). I can't compel Dave
10 Modena to come and testify at trial as the 30(b)(6). You
11 know, you have to be prepared during a 30(b)(6) deposition.
12 You have to get the information. You have to get whatever
13 concessions you're going to get. You have to authenticate
14 the documents. You have to be very prepared to do all of
15 those foundational requirements, so that when you find
16 yourself in trial, and it's an out of state corporation,
17 you don't find that you are, you know, out of luck and not
18 able to prove your case. And we've been denied those
19 fundamental opportunities.

20 You know, it goes -- and it's from all of these
21 relevant issues. I mean, you look at the advertising
22 issues, you look at the Alert 911 issue, you look at the
23 dealer issue, you look at, you know, all of these issues,
24 it's been a fight, fight, fight. There's been no good
25 faith disclosure. And, so, we haven't been able to have

1 the documents to use during -- to effectively use during
2 the depositions, and to give to our experts, and to cross-
3 examine their experts, and to use potentially with other
4 lay witnesses who might have knowledge, like Audrey
5 Martinez, for instance, or Kurt Bachmeyer.

6 So, there are just -- there are a lot of issues
7 that plaintiffs believe First Street and Aithr created due
8 to their obstructionist behavior and, you know, it's -- as
9 I mentioned before, it's disheartening when before a
10 deposition I reach out to opposing counsel and say, hey,
11 are you sure about this, and the response is: Yeah, we
12 didn't have anything to do with it. And, then, during the
13 deposition, again, give them an opportunity. And, then, I
14 pulled the document out and say -- or after Ms. Cranute
15 talks about it, hey, Mr. Goodhart, here's the document,
16 it's got First Street written all over it, now all of a
17 sudden the story changes. You know, so, I think that we've
18 been significantly prejudiced.

19 I mean, think of getting ready for trial, Judge,
20 what would be involved in this case? To get ready for
21 trial, we'd have to redepose pretty much all of the
22 witnesses in the case now that we have the documents, now
23 that we are actually in possession of, hopefully, the
24 majority of the documents. First Street still has not
25 produced documents. A lot of these internal documents that

1 they claim, well, we looked for them, and we don't have
2 them, and we don't know where they're at, yet Jacuzzi was
3 able to produce them. That just doesn't make sense. How
4 is it that Jacuzzi can produce these documents but, First
5 Street, you can't?

6 So, but, let's just say that we have the bucket of
7 information that we have and we would have to redepose the
8 30(b)(6)s for all of the companies, to talk to them, to
9 authenticate documents, to have further discussion about
10 the documents, to find out about what happened, when it
11 happened, who was involved. I mean, you know, as -- I use
12 the StepCote as an example earlier and, in that dealer
13 bulletin, the dealer bulletin says that Aithr performed its
14 own tests. That's a big issue, you know? You're claiming
15 -- First Street is claiming: Hey, we didn't manufacture
16 the product. That was solely due to -- that was solely
17 Jacuzzi's responsibility. All we did was we just
18 advertised it. Well, the dealer bulletin belies that
19 argument in that you are at least involved in solutions
20 and, if you are involved in solutions to the slippery issue
21 or the issue of folks falling, then clearly you knew about
22 it. And what is the extent that you knew about it?

23 And, so, those are additional things that the
24 plaintiff has lost the opportunity to discover and, Your
25 Honor, if the Court has anything else that it wants us to

1 address in particular, but I think that our pleadings are
2 sufficient and adequate.

3 We attempted to -- and I know -- and I apologize,
4 they're long. We just wanted to make sure that the Court
5 had all of the relevant information, all of the relevant
6 citations, all of the relevant documents so the Court
7 doesn't have to take anyone's word for it but can look at
8 the documents itself and make the determination.

9 THE COURT: Thank you. I appreciate that. Thank
10 you very much.

11 All right. So, Mr. Goodhart, I'll let you proceed
12 however you would prefer. You can deal with the six
13 different pieces of evidence that I asked Mr. Cloward about
14 initially, if you want to do that, or simply incorporate
15 that into your argument. But I wanted him to identify
16 those pieces of evidence and those particular facts.
17 That's just for my benefit, but yours as well. Well, I
18 will let you proceed however you deem it most effective for
19 you.

20 MR. GOODHART: All right, Your Honor. I
21 appreciate that.

22 Just real quickly, going through these, and then
23 I'll proceed. With respect to the Guild Surveys, it wasn't
24 until July of 2019 that plaintiff sent out a Request for
25 Production of Documents to my client and asked me to

1 produce any and all surveys, regardless of what it was that
2 was being reported by the consumer.

3 And, again, these are customer surveys where First
4 Street and Aithr are trying to find out: How did we do
5 with the installation process? Are you happy with the
6 product? What's going on? These aren't surveys designed
7 for any type of complaint.

8 And, as Mr. Cloward certainly knows from a
9 document production that was probably back in April 2019
10 and also again in August of 2019, in response to this
11 Request for Production of Documents, several hundreds of
12 pages of [indiscernible] surveys were produced for the 2013
13 and 2014 time frame. And these surveys would only have
14 written information on them if there was a complaint about
15 slipperiness or anything like that. So, it would be a
16 virtual impossibility to search any of these documents,
17 even if they were scanned into the system, to determine
18 whether somebody said: Well, the tub seems kind of
19 slippery.

20 But it's note that -- it would have been, those --
21 each and every survey, regardless of whether there was a
22 complaint, was produced in response to the Request for
23 Production of Documents. It was that simple. In addition
24 to that, the Guild Survey, we produced a searchable Excel
25 spreadsheet.

1 One of the biggest issues that plaintiffs has had
2 with Jacuzzi over the years is Jacuzzi would handpick which
3 documents to produce. As I recall, one of the biggest
4 issues and perhaps one of the main issues why the Court
5 granted the Motion to Strike Jacuzzi's Answer, appeared to
6 be that when Mr. Cloward's experts did some searches of the
7 sales [indiscernible] records, that documents that Jacuzzi
8 had originally set had been searched for, words and phrases
9 had been searched for and turned up nothing. Actually
10 turned up numerous complaints. And this is Jacuzzi.

11 So, we didn't hide any of that. We didn't try to
12 hide any of that. We produced everything, as far as the
13 surveys, when we were asked to produce them in their
14 Request for Production of Documents. These surveys were,
15 in fact, identified back in December of 2018 when we
16 deposited a whole bunch of e-mails that predated Ms.
17 Cunnison's death and that's kind of what started all of
18 this going.

19 So, plaintiff was fully aware that there were
20 surveys because we produced a couple of them that we had
21 sent to Jacuzzi over some customers' concerns, yet they
22 wait until July of 2019 to do a Request for Production of
23 Documents and we produced those documents within a month.

24 With respect to the internal e-mails, I can
25 represent to the Court that all e-mails have been produced

1 that we are in possession of. In fact, my client, First
2 Street and Aithr, were unable to search the e-mails in
3 their systems because of various reasons over antiquity of
4 the e-mail systems, and switching e-mails, and things like
5 that. And they provided my office with all the e-mails and
6 I had a paralegal and an associate go through the e-mails.
7 Again, they had problems searching the e-mails and,
8 therefore, we had to read -- they had to read well over
9 120,000 e-, trying to identify which ones needed to be
10 produced. And they were identified.

11 So, if the e-mails become the issue, well, then,
12 under one of the *Young* factors, the e-mails were viewed by
13 counsel. So that cannot be used as a guide or as a sword
14 or a hammer on my clients, First Street or Aithr.

15 With respect to the preventative measures that Mr.
16 Cloward has identified, First Street has never, ever denied
17 that they had conversations with Jacuzzi about some
18 customer saying the tub appears to be slippery, is there
19 anything we can do about that? And we produced e-mails to
20 and from Jacuzzi indicating that those concerns were
21 expressed to Jacuzzi. And, in response, Jacuzzi advised --
22 and, again, these e-mails have been produced. Jacuzzi
23 advised First Street that the tub floor -- and, again,
24 we're talking about the tub floor here. Met all the IAMPO
25 standard resistance requirements, that it was not slippery,

1 that perhaps customers could use an oil that are increasing
2 the slipperiness. And because the -- but because of that,
3 Jacuzzi then took a look to see whether or not there may be
4 some type of substance they can put on the floor of the
5 footwell. That was Jacuzzi that was doing that. Jacuzzi
6 was analyzing it because it's their product. The last
7 thing First Street would want to do is have a customer put
8 something on the floor of the product or to do it
9 themselves through Aithr or through subcontractor which
10 would void a warranty. So, this had to be something that
11 was directed and controlled by Jacuzzi, which the documents
12 clearly reveal was.

13 I understand Mr. Cloward doesn't like it. I
14 understand Mr. Cloward wants to read things into documents
15 and issues that certainly aren't there. He has every right
16 to do so. We have had Mr. Modena here for trial and he can
17 cross-examine Mr. Modena at trial all he wants on these
18 issues. But the fact of the matter is we never tried to
19 hide anything. We have never destroyed anything.

20 The 911 Alert, again, as indicated in Mr. Modena's
21 affidavit and in our Opposition, this was an add-on. This
22 was an add that was in magazines where, if you purchased
23 the tub, First Street would provide or the dealer would
24 provide you with a \$200 gift for free. It wasn't designed
25 because we knew people were slipping and falling or being

1 injured. No, some of the gifts were \$200 dinners to a
2 restaurant. Some of the gifts were magazine subscriptions.
3 It was a simple: Hey, thank you for buying this tub.
4 Here's a gift for you. And, oh, if you even allow us just
5 to come into your home to give you the presentation, we'll
6 give you the gift as well. There wasn't any nebulous
7 reason behind this. Mr. Cloward wants to read conspiracies
8 into this by saying: Well, we must have known that this
9 tub was slippery and dangerous otherwise we would have
10 never given people 911 Alert bracelets. That is simply not
11 true and that's what Mr. Modena testified to about. Again,
12 we haven't hid anything.

13 With respect to the Cunnison recording and the
14 Five9 and RingCentral, I'll deal with those in a second.
15 As far as the dealers go, again, this issue was addressed
16 in the very first Motion to Strike and the Court read our
17 response and said: You know what? Maybe it could have
18 been a little bit clearer, but you certainly, plaintiffs,
19 could have raised that issue in a Motion to Compel. But
20 you didn't. You accepted the answer. And the answer was
21 restricted to who would have been selling these kind of
22 products.

23 When plaintiff asked for the dealer information,
24 again, through -- it wasn't even through formal discovery.
25 It was during a deposition. We complied and within a week

1 or two, we provided plaintiffs with all of that
2 information. And, again, what we're dealing with is
3 information from dealers who are not related to First
4 Street or Aithr.

5 And just to give the Court some -- a little bit of
6 a background with this as well, to make sure that it truly
7 understands what's going on here and what the ramifications
8 may be of striking First Street and Aithr's Answer is the
9 Court needs to clearly understand that Aithr is not
10 Jacuzzi.

11 THE COURT: Okay.

12 MR. GOODHART: First Street is not Jacuzzi. They
13 are completely separate and apart organizations from each
14 other. Jacuzzi and First Street entered into an agreement
15 where First Street would market and advertise Jacuzzi's
16 walk-in tub. That's it.

17 In that same agreement, Jacuzzi said they would
18 design and manufacture the tub. So, with this agreement in
19 place, First Street utilized Aithr as a dealer. Aithr was
20 not the only dealer because there were dealers across the
21 country. There was a geographical area. I attached that
22 to the affidavit of Mr. Modena, which is Exhibit 1 in the
23 Opposition. That's the information we immediately provided
24 to the plaintiffs when we discovered through a 2.34
25 conference, during a deposition of our 30(b)(6) witness,

1 that that was what they were looking for. Up until that
2 point in time, we didn't know because it had never been
3 asked of us. As soon as it was asked of us, we immediately
4 produced it.

5 This Ms. Cranute that plaintiffs have been talking
6 about with respect to 911 issues, well, what he didn't tell
7 you, Your Honor, is that Ms. Cranute lives in Florida.
8 Florida is not Aithr's territory. Florida is Fairbanks
9 Construction's territory. Whatever information Fairbanks
10 Construction received as indicated in Mr. Modena's
11 affidavit, First Street doesn't find out about it unless it
12 is voluntarily provided to them. Fairbanks Construction
13 did have communications with Jacuzzi about some concerns
14 customers were having, but First Street was never involved
15 in those communications. We know that because Jacuzzi has
16 produced documents with communications with Fairbanks
17 Construction. We didn't produce those documents because we
18 do not have those documents.

19 We were not included in e-mail change or exchange
20 with those documents. And, quite honestly, it's not
21 surprising. Again, First Street does advertising and
22 marketing. While they're doing the advertising and
23 marketing, they obtained customer leads. Customers call in
24 and say: I'm interested in that product. First Street
25 will then find out where this customer lives and go to one

1 of the dealers and say: Hey, can you send a salesperson
2 out to their home to do an in-home sales presentation?

3 In Las Vegas, and with respect to Ms. Cunnison,
4 that dealer was Aithr. So, Aithr then sent a salesperson
5 who has been provided with sales and marketing material and
6 trained by First Street, as the marketing and advertising
7 experts, to give a presentation. At the conclusion of the
8 presentation, Ms. Cunnison wanted to buy this tub.
9 Ironically, the salesperson, Mr. Benson [phonetic], said to
10 her: You're a little large. This may not be a right fit
11 for you. But, again, she insisted and said: No, I'm going
12 to lose weight and I want to buy this tub. Mr. Benson even
13 had her sign the contract saying that she appeared to be a
14 little bit too large for this tub.

15 Ms. Cunnison never provided Mr. Benson with any
16 type of medical history, any type of history of falls, any
17 type of history of medications that may have caused anybody
18 to say: Hang on a second, you may not want to get this
19 tub. I'm not going to do that for you.

20 Further, dealing with the advertising and
21 marketing issues, though, that is what Aithr was
22 responsible for and, more importantly, First Street was
23 responsible for, marketing and advertising. Aithr would
24 then subcontract out the installation of the tub to a
25 subcontractor, a general contractor, who would then perform

1 the installation. Neither Aithr nor First Street would
2 ever see the tub until after it was installed, when
3 somebody did a follow-up with the customer.

4 So, the issues in this case, and as plaintiffs
5 have framed it in their Motion, deal exclusively with NRCP
6 16.1 and the mandatory disclosure requirement. And
7 plaintiff, [indiscernible], you know, there's mandatory
8 disclosure requirement to disclose all evidence regarding
9 claims and defenses. Okay. Well, let's take a step back
10 because that is the only issue before this Court, 16.1
11 violations. There's never been a discovery order. There
12 has never been a discovery motion filed. And that is
13 significant.

14 In fact, plaintiff, even in the Reply, said:
15 Well, we were going to file a Motion. Your Honor, here's a
16 copy of the Motion we filed with the Discovery
17 Commissioner, but it was rejected because of a clerical
18 error. Rather than fix that clerical error and refile and
19 have it decided, nothing was ever done. Nothing. So, the
20 only issue before this Court is: What are the requirements
21 of 16.1?

22 Now, as the Court will recall, plaintiff's counsel
23 is very, very good at finding cases in other District Court
24 Judge's chambers that supports positions that he wants to
25 argue. I believe he cited two or three cases decided by

1 other judges in the Eighth Judicial District Court and
2 attached Orders from those judges when he was going through
3 Plaintiff's Motion to Strike Jacuzzi's Answer. So, one
4 would think that if a Court in the Eighth Judicial District
5 had ever struck an Answer, a terminating sanction, because
6 they did not comply or voluntarily disclose items, it would
7 be out there. But it's not.

8 Then, plaintiff, tries to cite some unpublished
9 decisions by the Nevada Supreme Court. What's important to
10 note, and as all the decisions cited by the plaintiff in
11 his brief, I think there were two or three of them, not one
12 of them did the Court strike the Answer. They all dealt
13 with limiting the evidentiary -- the evidence that was
14 going to be admitted at trial. Never was the Answer
15 stricken. The only times Answers have been stricken for
16 violations of 16.1 is where the plaintiff failed to comply
17 with a clear and unequivocal requirement to give a
18 computation of damages. Everybody knows what a computation
19 of damages is and looks like. In fact, there's a form in
20 Nevada Rules of Civil Procedure to do it.

21 Here, what are claims and defenses? Everybody has
22 a difference of opinion between claims and defenses. And,
23 because everybody has a difference of opinion between
24 claims and defenses, we have discovery, written discovery.
25 Plaintiff [indiscernible], I believe, over 200 Requests for

1 Production of Documents, over 60 or 70 interrogatories. I
2 have the numbers in my Opposition, and I apologize if I'm
3 not citing them correctly, and they were all responded to.
4 If plaintiff didn't like the responses, you have the
5 opportunity to file a Motion to Compel.

6 And I think the clearest example of this is the
7 911 Alert. And I made this argument in my Opposition and
8 I'll make it again. If a 911 Alert, according to Mr.
9 Cloward, was something that should have been voluntarily
10 disclosed at the onset of the litigation, then why in the
11 world would the Discovery Commissioner, who does this for a
12 living, very knowledgeable in discovery abuses, order
13 plaintiff to do a Request for Production of Documents to
14 get that information? He did it because she knows that
15 that type of disclosure is not mandated and required under
16 NRCP 16.1. It's that simple.

17 The plaintiffs want you to rewrite the rule and
18 basically eliminate written discovery completely and
19 require all parties, no matter who they are, to essentially
20 turn over everything that could be imaginably relevant or
21 necessary in a case, without any orders of the Court, any
22 disputes, any Rule 2.34 conferences whatsoever. In fact, I
23 have at least three 2.34 conferences with plaintiff's
24 counsel and I discussed my positions with him. He
25 discussed his positions with me. We agreed to disagree.

1 That's allowed. We're litigating a case where plaintiffs
2 are seeking tens of millions of dollars. We can agree to
3 disagree. Fortunately, we have a process where parties
4 disagree that we go through. It's called discovery motion.
5 Plaintiff is very, very familiar with those, going through
6 those with Jacuzzi.

7 So, now, with that in mind and what this case is
8 really about an NRCP 16.1 issue, we have to kind of take a
9 look at the Complaint and figure out what we're looking at
10 here. So, if you look at the Complaint, it's the Fourth
11 Amended Complaint. Now, I attached it as Exhibit 5 to the
12 Opposition. So, in that Complaint, at paragraph 15 and 16,
13 plaintiff understands the role of First Street and Aithr.
14 First Street does marketing and advertising, and Aithr does
15 sales. All right.

16 First cause of action begins on page 17 and it's a
17 negligence cause of action. So, what negligence claims are
18 plaintiff making against First Street and Aithr? Well, if
19 you look at paragraph 41 of page 8 of the Fourth Amended
20 Complaint, plaintiffs are making reference to First Street
21 and Aithr's duties relating to the marketing of the tub,
22 which is what First Street and Aithr did. But everything
23 else deals with product liability, manufacturing, improper
24 design, improper testing.

25 But, then, we have to figure out what else is

1 going on here and if you look at page 12 of the Fourth
2 Amended Complaint, under punitive damage allegation, you
3 look at paragraph 78 through 84. Each of those paragraphs
4 addressed advertising and marketing of the tub, which was
5 the exclusive and sole province of First Street and Aithr.
6 Read those together with the first cause of action for
7 negligence and it appears to me, and I think it -- Mr.
8 Cloward would agree that they're making a claim against
9 First Street and Aithr in that first cause of action for
10 improper advertising and marketing.

11 THE COURT: Yeah. But, Mr. Goodhart, --

12 MR. GOODHART: Yeah.

13 THE COURT: -- if I -- I just want to make sure I
14 understand where you're going with this. Essentially,
15 you're saying that First Street did not have a duty to
16 produce evidence that might have been relevant to claims
17 that the plaintiff had directly against and only against
18 Jacuzzi?

19 MR. GOODHART: Correct.

20 THE COURT: Even if -- and I'm not disagreeing
21 with you. I'm just making sure I understand your position.
22 That even if First Street knew that it had in its
23 possession some evidence critical to claims against
24 Jacuzzi, one of the co-defendants, you don't have a duty
25 under the discovery rules to produce that under 16.1?

1 MR. GOODHART: We did not know that we had
2 anything in our possession until we started producing
3 materials and that we were then asked to produce materials
4 by plaintiffs through written discovery.

5 THE COURT: Okay. All right.

6 MR. GOODHART: We produced every single relevant
7 piece of information relating to marketing and advertising,
8 which is the first cause of action for negligence in
9 plaintiff's Complaint against First Street and Aithr.

10 THE COURT: Okay.

11 MR. GOODHART: We limited that to pre-accident
12 marketing and advertising because we understand that Ms.
13 Cunnison could not have relied upon any marketing or
14 advertising that took place after she died. So, that's
15 what we produced. That claim is still out there. There's
16 still a negligent claim for advertising and marketing.

17 Mr. Cloward went through -- I counted eight
18 different major issues and I looked through his brief and
19 his Reply. His brief and Reply deal exclusively with
20 strict product liability or product defect claims. That
21 would be the second cause of action.

22 So, and I'm not -- I don't think the Court could
23 do this, but, even arguably, if the Court were to find that
24 First Street should have produced some materials under 16.1
25 that it did not produce on a product liability claim, then

1 the Court can only strike the Answer to the product
2 liability claim. It cannot strike the Answer to the
3 negligent advertising and marketing claim. Because that is
4 not an issue here because plaintiffs never brought it up
5 because First Street and Aithr produced everything that
6 they were required to produce in a 16.1 to the plaintiff.

7 When everything, and all of the e-mails have gone
8 through, yes it took time. And that was done in December
9 of 2018. And, again, there hasn't been a single motion
10 with respect to advertising and marketing materials.

11 Now, dealing with the second cause of action for
12 product liability, defective design, manufacture, and
13 failure to warn, it is undisputed that the exclusive
14 responsibility to manufacture and design the walk-in tub
15 was the responsibility of Jacuzzi and they are a named
16 defendant in the case.

17 So, with respect to the defective product claim,
18 as it currently stands with the Court striking Jacuzzi's
19 Answer, that claim is more or less resolved. So, I'm
20 puzzled by what, if any, prejudice plaintiffs claim they
21 could have suffered when the Court has already found that
22 Jacuzzi's Answer on liability for product defects has been
23 stricken. It's not like, you know, a jury awards plaintiff
24 \$500,000 for strict product liability and they get 500,000
25 from Jacuzzi and they get 500,000 from First Street.

1 Again, and as Mr. Cloward identified, First Street and
2 Aithr are on the second cause of action, and really the
3 third and the fourth as well, simply because they're in the
4 stream of commerce and everything will flow to Jacuzzi at
5 some point in time. Jacuzzi is not a fly by night
6 organization. They are a global manufacturing company with
7 hundreds, if not thousands, of products and product lines.

8 So, where is the prejudice on a product defect
9 claim, which First Street's exposure would simply be
10 because it was in the chain of commerce because it didn't
11 manufacture and design the product? So, -- and, again, I -
12 - but I want to reiterate that First Street has produced
13 everything that it has in its possession. Now, Mr. Cloward
14 may not like it, but that is the fact of the matter.

15 The e-mails all went through my office, through
16 paralegals and associates. It was 120 some thousand of
17 them. First Street, I must admit, did not have the best
18 record retention policy. My office still has this where
19 you double delete an e-mail, it is gone forever. That
20 could explain why there are e-mails showing up in Jacuzzi's
21 production that do not show up in my production. But they
22 showed up. Jacuzzi produced them. We've never sat here --
23 First Street and Aithr has never sat here and said: No,
24 there's never been a single problem with this tub, nobody's
25 ever slipped, nobody's ever fell. We've produced what we

1 have to the plaintiff. Jacuzzi has produced what they have
2 to this plaintiff. And this Court has stricken Jacuzzi's
3 Answer on liability on the product defect claim.

4 So, what I want to get into now is Nick Fox. He's
5 the smoking gun in this Motion to Strike First Street and
6 Aithr's Answer. Well, I've gone through, in my Opposition,
7 questioning many of Mr. Fox's assertions, but there's a
8 couple more to do. Most importantly, when you read through
9 the affidavit, which is Exhibit 21 in Plaintiff's Motion,
10 it's readily apparent that it's nothing more than a self-
11 serving, literally -- literally, Your Honor, fill in the
12 blank, affidavit prepared by Mr. Cloward. There's little,
13 if any, foundational basis for any of the comments or
14 allegations that Mr. Fox has made.

15 And what Mr. Cloward doesn't know is that there
16 are some falsehoods in that affidavit. Perhaps the largest
17 is in an affidavit, it has to be signed and sworn by
18 somebody in their legal name. I'm sure that Mr. Cloward
19 doesn't know that Nick Fox is not Nick Fox's legal name.
20 It's Jonathan Fox. That was conveniently omitted and left
21 out. So, it is not even signed legally by Mr. Fox.

22 He also claims that the general manager of Aihr
23 and First Street, this is paragraph 3 of his affidavit, but
24 we know for a fact he was never general manager of First
25 Street. He was never employed by First Street. He had no

1 employment whatsoever with First Street. Another falsity.
2 And, then, we go into the affidavit and several times it
3 makes reference to: He worked for Aihhr. But, honestly,
4 Your Honor, I do not know what Aihhr is. If you look at the
5 caption in this case, we have Aithr Dealer, Inc. as the
6 named defendant, as it should be.

7 So, there's falsities in this affidavit that are
8 readily apparent on its face. Mr. Fox has never been
9 placed under oath by a court reporter. Mr. Fox has never
10 undergone any type of cross-examination, yet plaintiff's
11 counsel just wants you to take this as full volume.

12 Then, to top it off, and this is a killer. I've
13 never seen this before. In the Reply, plaintiff, counsel,
14 Mr. Cloward, submits his own sworn declaration that he
15 talked to Mr. Fox about things I had brought up and how Mr.
16 Fox claims that they're not true. And Mr. Cloward wants
17 you to take that as evidence. That's hearsay, at its
18 worst, is an affidavit of the plaintiff's counsel. It's
19 not an affidavit of Mr. Fox.

20 Earlier today you heard Mr. Cloward say that --
21 let me get this. That Mr. Fox said he gave an affidavit or
22 gave a thumb drive to Mr. Modena. Mr. Fox did not put that
23 in his affidavit. You read the affidavit in Exhibit 21, I
24 dare you to find where he said he gave Mr. Modena a thumb
25 drive. No. That is coming from plaintiff's counsel. So

1 is plaintiff's counsel now a witness to this evidence to
2 this hearing or to this issue? Perhaps he is.

3 These comments are purely hearsay. But even when
4 you look at what Mr. Cloward's put in his declaration,
5 there's absolutely no foundation to any argument that Mr.
6 Fox, according to Mr. Cloward, through hearsay, claims that
7 you can make changes to Lead Perfection. If you read the
8 affidavit of Mr. Cloward, Mr. Cloward says that Mr. Fox, at
9 his current business, not at First Street or not at Aithr,
10 has Lead Perfection. And that, at his current business,
11 Mr. Fox just tried to make some changes to Lead Perfection
12 and he could. So, of course, because Mr. Fox, through
13 hearsay, can make changes at his current employment on Lead
14 Perfection, that must mean everyone, including First
15 Street, can make changes to Lead Perfection, even though
16 it's directly contrary to a sworn affidavit signed by Mr.
17 Modena.

18 Really, Mr. Fox cannot be trusted. Mr. Fox's
19 affidavit, the one he actually did sign, although it's Nick
20 Fox instead of Jonathan Fox, is disputed by the affidavit
21 of Annie Duback. And I pointed that out in my Opposition.
22 And, then, when you look at the affidavit of Annie Duback,
23 he was never shown a copy of the LP notes. There's no
24 evidence of that in the affidavit. There's no foundation
25 of it. He said that she had approximately six

1 conversations. But when you actually look at the LP notes,
2 which were attached as an exhibit to Mr. Fox's affidavit,
3 Exhibit 21, you can fully see she had more than an [sic]
4 conversation with Ms. Cunnison.

5 So, when you also read her affidavit on paragraph
6 13, she recalls customers having some concerns with
7 complaints, but slipperiness isn't one of those. But,
8 then, you go to paragraph 14, she says: One of the
9 complaints that was received was because it's too slippery.
10 Well, does that mean one person? Because it's in a
11 separate line. So, she received one complaint in the two
12 and a half years that she worked as a production assistant/
13 production manager about slipperiness. Because it read
14 that way. Again, without the cross-examination testimony,
15 that affidavit is simply a self-serving affidavit prepared
16 by counsel.

17 So, we have the issue of this video of a
18 recording. I have provided the Court with Mr. [inaudible]
19 affidavit and I've also provided the Court with -- I
20 believe it is Exhibit 8 to my Opposition. And Exhibit 8 is
21 an e-mail where First Street demanded and requested that
22 Mr. Fox produce everything they have. And, again, yes, we
23 included a request for any recordings because, yes, LP and
24 Five9 did record for 30 days. So, maybe it had been kept.
25 So, Mr. Fox was instructed to make everything and send it

1 over.

2 You have Mr. Modena's affidavit. That recording
3 of Ms. Cunnison was never sent over. Never. To this day,
4 my client is not in possession of that recording. So, how
5 can we be held to produce something we have never actually
6 had? And I just think it's very curious that a disgruntled
7 employee of Aithr, who was terminated, all of a sudden has
8 this recording and produces it. And, now, counsel wants to
9 use that recording to strike the disgruntled former
10 employer -- employee's employer, First Street.

11 So, one also has to ask, if my client had this
12 information, why in the world would he hide it? Again, one
13 of the causes of action in this case is for negligence. In
14 our Answer, we asserted affirmative defenses of comparative
15 fault and contributory negligence. Now, if Ms. Cunnison
16 had, in fact, used the tub, and had, in fact, become stuck
17 in it, well that would be evidence -- clear evidence that
18 Ms. Cunnison knew without a shadow of a doubt that she
19 could become stuck in the tub. And, in spite of this
20 knowledge, continued to use the tub. That would be
21 important evidence for us to have to establish our
22 contributory negligence/comparative fault defenses. She
23 was on notice, if you want to believe this. So, why in the
24 world would we hide this type of information?

25 And, so, Your Honor, plaintiff wants to take this

1 to the extreme of a 16.1 mandatory disclosure requirement
2 about evidence regarding claims and defenses. Well, let me
3 posit this to you, the Court, that -- you know, plaintiff
4 has a negligence claim and comparative fault defenses
5 asserted, wouldn't a plaintiff have to produce medical
6 records of the plaintiff, pre-accident medical records, so
7 that perhaps the defendant can determine whether or not the
8 plaintiff might have been on medications or had some other
9 issues -- medical issues with her which could have created
10 the fall, the issue of being stuck in the tub? On the
11 plaintiff's theory, that would be an affirmative obligation
12 on the plaintiffs to produce in a 16.1 production and never
13 would have to be asked for. Now, interestingly in this
14 case, even though we have a negligence claim and
15 comparative fault claim, plaintiff has never produced a
16 single pre-accident medical record of Ms. Cunnison.

17 Plaintiff also has damages claimed in this case by
18 Mike Smith, one of the heirs. Mike Smith, in his Responses
19 to Interrogatories, said he talked to his mother
20 frequently. Mike Smith passed away. We don't have
21 information anymore, that testimony anymore, his deposition
22 was not taken. They're making a claim of damages based
23 upon a connection he had with his mother, which he is to
24 get, wouldn't phone records be relevant to the claims? And
25 our defense is they didn't talk that much. So, shouldn't

1 under 16.1, under plaintiff's theory, have to produce on
2 their own, without us asking, all of the phone records that
3 support the claim they talked 6, 12, 14 times a month?

4 Plaintiff, in the advertising portion of it, infer
5 that they relied or that she relied upon First Street's
6 advertising and marketing campaign and sales presentation
7 to buy the tub and somehow conned her into buying it.

8 Well, if that is a claim that she is making, in order for
9 us to defend that claim, shouldn't plaintiff have
10 voluntarily, under 16.1, as plaintiff is arguing,

11 negligence claim, voluntarily have produced her laptop or
12 her computer so that we could find out what other websites
13 she visited and obtained information from and researched?

14 In fact, her daughter, Deborah Tamantini testified, very
15 clearly, that in her opinion, her mother was extremely
16 thorough and would have thoroughly researched everything on
17 this tub before buying it.

18 Where is the laptop? Why wasn't it produced?
19 Under plaintiff's theory of 16.1, they had an affirmative
20 obligation to produce that without ever being asked. And
21 where are the phone call records to show how many calls she
22 made to First Street?

23 Plaintiffs are now advancing this theory that
24 we've deleted a note of a phone call. Well, certainly
25 evidence of that would clearly be established through phone

1 records. And, again, because it's dealing with evidence
2 regarding claims and defenses, under 16.1, that must have
3 been voluntarily produced by plaintiffs.

4 So, plaintiffs are not coming to this argument
5 with clean hands. If under their argument we have failed
6 to voluntarily produce records, then plaintiffs have
7 clearly also voluntarily failed to have produced records.

8 So, as I indicated, Your Honor, the biggest claim
9 in defending First Street and Aithr in this case is the
10 advertising claim in the negligence cause of action. The
11 focus has been on that claim, because that is an
12 independent claim to which Jacuzzi would not ultimately be
13 responsible for. There's nothing in this Motion
14 referencing that claim. So, even if this Court were to
15 somehow find that 16.1 required us to voluntarily produce
16 these items, and because we did not voluntarily produce
17 these items you're going to strike the Answer, the Answer
18 stricken has to be limited to the Answer to the second,
19 third, and fourth causes of action for product defect or
20 product liability, defective design, defective
21 manufacturing.

22 And, again, as I have pointed out, the Court has
23 already struck Jacuzzi's Answer with respect to those
24 causes of action and, therefore, what prejudice could
25 plaintiffs have possibly suffered because of any alleged

1 conduct of First Street and Aithr?

2 And I'm not saying this to tell the Court that
3 we've hidden things because we have not. First Street and
4 Aithr has produced things when they have been asked to
5 produce things. We have supplemented our 16.1s. We have
6 provided plaintiffs with the information they desire. We
7 have agreed to disagree with each other. Plaintiff never
8 filed a single Motion to Compel.

9 I don't know if the Court has any questions.

10 THE COURT: No. That was really helpful, Mr.
11 Goodhart.

12 So, before we continue with the Reply, usually
13 after about an hour and a half, I give my staff a break.
14 Let me ask, Mr. Cloward, how much time would you like to
15 have on reply?

16 MR. CLOWARD: Probably no more than maybe 10 or 15
17 minutes, pretty short.

18 THE COURT: All right. So, let me ask my staff.
19 Does anybody need a break at this time? I'll have no
20 problem with it if you want a break.

21 THE CLERK: We're good, Judge.

22 THE COURT RECORDER: We're good, Your Honor.

23 THE MARSHAL: Thanks, Judge.

24 THE COURT: You're okay? All right. Well, thank
25 you. All right.

1 Mr. Cloward, you may proceed.

2 MR. CLOWARD: Okay. So, I think the question that
3 the Court was drilling down on and it's apparent that the
4 response from First Street is that they don't have to
5 produce any documents that would be relevant to plaintiff's
6 claim against Jacuzzi for the manufacturing. That's the
7 position that they're taking. They're trying to reinvent
8 the Complaint and say: Hey, look, we only are responsible
9 for the advertising claims. We don't have any
10 responsibility on the manufacturing defect, product
11 liability claims. And, so, we never had a duty to produce
12 any of that information, because that's just Jacuzzi's
13 information.

14 Well, the problem with that argument, Judge, is
15 that the claims against First Street are identical to the
16 claims against Jacuzzi. So, therefore, the duties and
17 obligations are the same. So, not only does Jacuzzi or
18 does First Street have an obligation to produce documents
19 that would be helpful in plaintiff's claim against Jacuzzi,
20 but First Street also has an obligation to present and
21 produce documents that would be helpful for plaintiff's
22 claim against First Street and Aithr, which they have not
23 done. Clearly, that's been the excuse that they've used to
24 justify their nondisclosure and their misconduct. They've
25 said: Hey, look. We didn't have to do that and we're, you

1 know, -- we don't have to do that.

2 THE COURT: There is a little bit of a different
3 though. Right? I mean, under *Ribeiro*, I know state of
4 mind is relevant and, given their unique position as
5 handling the advertising and marketing, that would affect
6 their state of mind with respect to their discovery
7 obligations on the product defect issues. Something I
8 certainly have to consider.

9 MR. CLOWARD: Yeah. But I think the fact that we
10 have product defect claims directly against them in causes
11 of action, I think that their excuse is easily -- I guess,
12 is easily excused. I mean, they -- it's not a strong
13 excuse because we have active claims against them. We've
14 been seeking the same information.

15 All of the discovery has been the same. And, so,
16 how can they come and say: Hey, look, we're only focused
17 on the advertising, when our discovery has not been only
18 focused on the advertising? Our discovery has been focused
19 on the manufacturing. It's been focused on the warnings.
20 It's been focused on the incidents. Our 30(b)(6) notice,
21 the same thing. It's the -- you know, a lot of the
22 discovery is identical.

23 And, so, I don't think that that's a very strong
24 argument that they have. I think it's a terribly weak
25 argument. They have to produce this stuff because we have

1 active claims against them.

2 Regarding the, you know, -- they pose the question
3 of: Why would we hide information regarding Sherry
4 Cunnison, because that would help in our comparative
5 negligence claim? Well, you would hide that because it's
6 actual notice that this tub was not a good fit for this
7 individual. It's actual notice that more should have been
8 done to help her figure out whether this -- the tub was
9 appropriate. You know, it's actual notice, Judge. It's
10 not anything other than that.

11 The characterization that our Motion hinges on
12 Nick Fox's affidavit is not true. Nick Fox's involvement
13 in this is the small part of the years and years of
14 litigation abuse. You know, when you have -- when you look
15 at the information that's been produced by First Street,
16 they try to sound as though they voluntarily produced this
17 or, hey, we've produced this when we've been asked, or --
18 and that's not the case. They've been -- they produced the
19 information when we found it, period, end of story. When
20 we would stumble across something and we would send the
21 information, that's when it would be produced. And that is
22 not how discovery is supposed to happen.

23 For instance, a plaintiff, when they're asked,
24 give us all medical providers. We're talking about, you
25 know, an auto case, a personal injury case, when they say,

1 hey, give us all providers, that list should be complete.
2 It -- if the defendant stumbles upon 10 providers
3 throughout the process at various different times, that's
4 not how discovery works. And their argument is -- and I'm
5 -- I tried to quote this, but it's: Hey, Judge, you know,
6 we've never said that there were never any problems with
7 this tub. We've never said that there weren't, you know,
8 issues with the slipperiness. We've never this and that.
9 We've never tried to say that there are no incidents.
10 Horse hockey. That's exactly the position they've taken.

11 In written discovery, when we asked, provide us
12 the incidents, provide us the claims, provide us this
13 information, they would only list two. During Dave
14 Modena's deposition: Tell us the incidents that you're
15 aware of. Well, I only know of one, this incident where
16 I'm sitting in the deposition right now. Oh really? Well,
17 geez, that's odd. Well, maybe Stacey Hackney [phonetic]
18 might know something.

19 And, so, they go outside and she comes back in, or
20 they all come back in, and conveniently, they can only
21 remember two and it's the two that we found, one I was
22 litigating and one we found with Leonard Baize. So, for
23 First Street to say, hey, we've never said that there's
24 anything wrong with the tub, or we've never tried to deny
25 that, we've always been up front and honest, that is not

1 true. That is the exact position they've taken the entire
2 time. And that's why it's been so, so prejudicial.

3 Further, if they knew that the product that they
4 were distributing was defective, okay, with respect to
5 either Ms. Cunnison or any of the other plaintiffs, but if
6 they knew that the product was defective, that's an
7 independent basis for punitive damages against them. So,
8 if they're receiving information that Jacuzzi is not, for
9 instance, if you have the First Street or the Aging in the
10 Home -- let's say the Aging in the Home, the installers
11 that are going and they're finding out that there are big
12 problems with the tub, they're finding out that people are
13 getting stuck, they're finding out that people are falling
14 down, and they're not sharing that information with
15 Jacuzzi, well, that right there is an independent basis of
16 punitive damages, an independent basis of notice,
17 independent basis of knowledge that doesn't have anything
18 to do with Jacuzzi. So that's another reason of why their
19 argument of, hey, we didn't turn this over because it
20 doesn't have anything to do with Jacuzzi, is improper.
21 There are independent arguments; there are independent
22 pieces of evidence that would apply only to them.

23 And let me see. I'm just going through my notes
24 here, Your Honor. I want to be as succinct as possible and
25 not regurgitate arguments. Let's see.

1 Oh, First Street says, you know, we never had the
2 recording of Sherry Cunnison. That's not true because Nick
3 Fox and Annie Duback are your employees. They are First
4 Street, Aging in the Home employees. So, you, by and
5 through your employees, did have possession of this
6 document. You can claim that you didn't. Maybe Dave
7 Modena didn't know about it, if you don't believe Nick
8 Fox's affidavit, but the fact of the matter is these
9 employees were employed at the time in their respective
10 positions and they did have this information.

11 With respect to the e-mails, you know, Mr.
12 Goodhart has said: Hey, you know, we have these e-mails
13 and there's, you know, 120,000. I've heard estimates of
14 200,000. I've heard estimates of, you know, 50 or 60,000.
15 Who knows what the actual number of e-mails are. Number
16 one, no privilege log has ever been produced, which is
17 required by the rules. It's a Discovery Commissioner
18 formal opinion that's been given. It has to be produced to
19 privilege log. They've never produced a privilege log and
20 I think with respect to the fifth prong of *Young*, I think
21 the Court would need to know when the e-mails were received
22 by First Street and if they were actually produced by First
23 Street. And this whole claim that, hey, we couldn't search
24 these e-mails and it took a long time, you know, I don't
25 know how they do things over at the firm -- Thorndal

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1 Armstrong. I don't know how they do things, but I can tell
2 you what. You can OCR documents by a PDF. It converts the
3 documents. It's a process that would take maybe, with that
4 volume of documents, to OCR it, you can send it over to
5 Litigation Services. They can OCR it so that you can
6 electronically search all of the e-mails --

7 THE COURT: I've done that. I'm familiar with
8 that and, you know, how it works and the extent to which
9 it's reliable. It's pretty costly to do that. Right? OCR
10 everything, especially if you have 120,000 e-mails. And I
11 don't know how long each e-mail is, but I'm familiar with
12 that.

13 MR. CLOWARD: It's not very costly. We had about
14 -- I think in the trial I had in February, approximately
15 40,000 documents. We used a company to actually create an
16 index of the documents, summarize the documents, and create
17 a hot link within the documents that you click on one and
18 it takes you to the document, and I want to say it was less
19 than \$10,000 to do that. So, it's not something that's --

20 THE COURT: All right.

21 MR. CLOWARD: -- impractical at all.

22 THE COURT: You said 40,000 pages. Here, if it is
23 120, that's three times that. So then we're talking about
24 something less than 30,000, but --

25 MR. CLOWARD: Yeah.

1 THE COURT: Okay. Okay.

2 MR. CLOWARD: The documents that have been
3 produced -- one thing that counsel says is: Hey, we've
4 turned over the marketing and advertising. They filed a
5 Motion. The Motion was unsuccessful or, you know, it was
6 kicked back. Well, the reason the documents were turned
7 over, Judge, is because I e-mailed the Motion to Phil
8 Goodhart and said: Hey, we're filing this Motion. When he
9 saw that the Motion had been drafted and prepared and sent
10 down, then the documents came. Okay? So that's how
11 discovery has been.

12 I find out about the 911, ask him about it: No,
13 we don't have anything to do with it. Hand him the
14 document: Oh, it looks like you've got the goods. Oh,
15 yeah, I guess -- I never said that we didn't sell that to
16 them. You know, the story changes. That's not how
17 discovery should work.

18 Regarding the dealers, they said that -- Mr.
19 Goodhart said that: Look, you only asked for the dealer
20 with respect to Ms. Cunnison. Well, I would like to read
21 for the Court, for the record, the interrogatory regarding
22 the dealer. And I quote, it says -- this is Interrogatory
23 Number 1. The very first interrogatory that we requested.
24 Quote:

25 In the Manufacturing Agreement between First

1 Street and Jacuzzi, Bates stamped as JACUZZI001588
2 through JACUZZI001606, the document indicates that
3 First Street desired Jacuzzi to manufacture walk-in
4 tubs and other bath products for First Street and its
5 network of dealers and distributors - please list all
6 dealers and distributors within the network of First
7 Street.

8 We didn't say: Hey, give us just the dealer with
9 respect to Ms. Cunnison. That's not what it was limited
10 to. Their response didn't limit it to that. Instead,
11 here's their response:

12 Question: -- or excuse me. Answer, quote:

13 Objection. This interrogatory is overbroad with
14 respect to time frame. Without waiving said
15 objections, the only dealer or distributor within the
16 network of First Street is Aithr. As First Street's
17 discovery on this issue is ongoing, defendant reserves
18 the right to amend and/or supplement this response as
19 additional information becomes known, end quote.

20 What they did is when we, you know, I guess,
21 caught them on that, then they tried to come into court and
22 explain away this nondisclosure and said: Oh, well, we
23 thought that that -- that what they meant was only with
24 respect to Ms. Cunnison. That's how they justified it,
25 Judge. And that's what they've done from day one, is

1 they've -- when they get caught, they come in and they try
2 to justify and explain away to the Court their misbehavior.
3 Oh, well we didn't produce thousands of pages of relevant
4 documents because plaintiff doesn't -- you know, because we
5 weren't the manufacturer of the product, even though and
6 ignoring the fact that plaintiff has claims against them
7 for product liability, which are identical -- the elements
8 are identical for them as they are with Jacuzzi. So,
9 plaintiff has to prove the exact same thing.

10 Regarding the Guild Surveys, the -- it's important
11 for the Court to understand the survey issue because First
12 Street sits there and says: Hey, look, you know, Judge,
13 when we were asked this, we turned it over and we gave them
14 the information when they asked. Well, how did we find out
15 about it? How did we find out that there were even these
16 surveys that were important in the case? Well, we find out
17 after Mr. Lee Roberts got involved. And, after Lee
18 Roberts, before the deposition of Kurt Bachmeyer, realized,
19 hey, there's been some things that should have been turned
20 over but they weren't turned over, so, Ben, here you go,
21 I'm going to turn over a lot of documents, thousands of
22 documents.

23 Oh, well, guess what. Guess what were in those
24 documents. And that was in July of 2019, Judge. Some
25 surveys. And guess what the surveys talked about. The

1 slipperiness issue. And, so, what did plaintiff do?
2 Plaintiff said, in specific discovery: Hey, First Street,
3 these are your documents. Why haven't you turned them
4 over? Give us all the documents. That's the only reason
5 that they produced this information.

6 And what if we wouldn't have -- you know, what if
7 Mr. Roberts hadn't gotten involved and those documents
8 hadn't been turned over? Well, guess what. Plaintiff
9 wouldn't have had any of that information and that's the
10 way that discovery is supposed to work, especially when
11 we've asked about that. We have specifically -- we have
12 specific discovery requests that are on point for those
13 issues.

14 Same thing with the StepCote and the LiquiGuard.
15 Those things came out because of productions by Jacuzzi and
16 they were not produced by First Street, even though First
17 Street was in the thick of things and was involved during
18 all of that development.

19 And, finally, you know, Your Honor, with regard to
20 the 911 Alert, how can you be more clear in the text
21 message and on the record that First Street didn't have
22 involvement? But they gloss over that. They gloss over
23 the fact that they flatly misrepresented their involvement
24 with that product and, until they're going to get caught,
25 they're just simply not going to turn anything over,

1 period. That's the way that it works.

2 And the Court should be quite concerned when it's
3 represented in open court, yeah, we've had maybe 200,000 e-
4 mails and we've been kind of just sitting on them and going
5 through them, or 120,000, however many there are. We have
6 just been sitting -- you know, sifting through them.
7 They've had them for a long time, apparently, and there's
8 no privilege log and I can tell you this. They haven't
9 produced 100,000 e-mails. If anything, they've produced
10 maybe, maybe -- I would estimate maybe 1,000 e-mails. I
11 don't even think that many.

12 And when you look at the e-mails that have been
13 produced by Jacuzzi, Jacuzzi has produced significant e-
14 mails that have never been produced by First Street. That
15 should be concerning. You know, you can't have your cake
16 and eat it too. If you're First Street, you can't say:
17 Well, Judge, we lost -- maybe lost some e-mails, and the
18 system is really poor, and we don't know what the system
19 is, and it's really cumbersome, and so this -- that
20 probably explains the nondisclosure of these e-mails, but
21 then in the next breath say: Well, I've been in possession
22 of 200,000 or 120,000 e-mails. Either you have the e-mails
23 or you don't. I mean, you can't say: Hey, look, we might
24 not have relevant information because maybe it was deleted.
25 But then be in possession of the relevant e-mails.

1 And, so, you know, at a very minimum, Your Honor,
2 I think that our request would be that there would be a
3 one-day evidentiary hearing regarding the e-mails,
4 regarding these issues, regarding the other documents that
5 were produced to find out when those were obtained by
6 outside counsel so that the Court can make a proper
7 assessment under the fifth prong of *Young*. And, at a very
8 minimum, because the position has been, well, you know, we
9 don't have to turn it over until the Court orders us, we
10 would like an order today ordering that all relevant
11 information with respect to the advertising, with respect
12 to the marketing, with respect to the manufacturing, with
13 respect to the slipperiness, with respect to other
14 incidents, regardless of time, and regardless of, you know,
15 any other limitation they want to make, that that -- they
16 need to produce that information within 30 days. And that
17 they pay for us to continue Dave Modena's deposition on all
18 of those issues.

19 But we feel like there are so many other issues
20 that simply there's not time to address, that we've been
21 prejudiced in such a way that the Court -- the only fair
22 way to handle this is to strike the Answer. And I'd --
23 16.13(c)(3) is therefore a reason. And their position of,
24 look, we don't have to turn it over until there's an order,
25 that is really thumbing the nose at that rule and is

1 basically saying, look, Judge, we're never going to produce
2 documents pursuant to this rule. And until there's an
3 order, we're not going to do anything and we don't really
4 care what the order's -- or what the rule says.

5 I mean, the rule is there for a reason, Judge.
6 This behavior in this case with these two defendants is
7 exactly what the rule envisioned to protect. The defendant
8 has relevant documents, they know they're relevant, they
9 know they're important, yet they sit there and hold on to
10 them and it's only when a party stumbles upon the documents
11 are they produced. When the Court looks at the documents
12 that we've stumbled upon, it's the surveys, it was the bath
13 mat, it's the StepCote, the LiquiGuard, it's the Alert 911,
14 it's the -- I mean, the only reason they produced the
15 advertising and marketing information was because Mike
16 Dominguez was untruthful in his deposition and said Jacuzzi
17 didn't have anything to do with the product.

18 If you read my affidavit from the Motion that we
19 submitted that the Court sent back -- that the Discovery
20 Commissioner sent back, you know, the only reason that they
21 turned that information over was because Mike Dominguez was
22 not truthful about it. And, so, they were like: Well, no.
23 That's not true. You know, and they called me up on the
24 phone. Well, if you know that these claims are relevant,
25 produce them. Don't only produce them when a witness is

1 not truthful about it or we stumble upon it. That's not
2 fair.

3 And the other question, I guess, the concern that
4 I have is these are just the issues that we've stumbled
5 upon. What other issues are there out there that we don't
6 even know about?

7 And, so, you know, the ability of plaintiff to
8 have a fair trial in this case is gone. And, you know,
9 Judge, I don't like to do -- have cases decided like this.
10 I would prefer to be in a jury trial. I think that -- you
11 know, I hope that my reputation is such that people don't
12 think that that's the way I like to resolve cases. I'm a
13 trial lawyer. I like to be in trial. But it's awfully
14 scary for me to go to trial when I think that I only have
15 half of the information or a portion of the information.
16 And, unfortunately, that's the position that I am in
17 because there has not been good faith participation in the
18 discovery process.

19 And, so, with that, Your Honor, unless the Court
20 has some other issues that it would like -- or answers that
21 it would like me to address, I will rest.

22 THE COURT: Let me ask, is Mr. Roberts still on
23 the line or Ms. Llewellyn?

24 MR. ROBERTS: Yes, Your Honor. I'm still on the
25 line.

1 THE COURT: All right. So, not as to substance,
2 but is there anything that you feel compelled, at this
3 point, that you would need to say as to, you know,
4 procedure or logistics? Or if you need to make a couple of
5 sentences for any reason to preserve Jacuzzi's record on
6 anything. I'm not saying that you do. I'm just simply
7 giving you the floor if you want to make a very brief
8 statement on anything.

9 MR. ROBERTS: The only thing that I would like to
10 add, Your Honor, is there was some discussion of the
11 product defect claim against Jacuzzi having already been
12 decided as a result of this Court's sanction. And, while
13 that's true, I don't see how a sanction against Jacuzzi
14 could have decided the product defect claim against First
15 Street, and, therefore, I think that is still something
16 that the plaintiffs would have to prove independently of
17 the sanction against my client.

18 THE COURT: Understood. I understand that. Thank
19 you.

20 MR. ROBERTS: Thank you, Your Honor.

21 THE COURT: we had, at one point, Mr. Henriod on
22 the line as well. I don't know if he's on the line or if
23 he needs to say anything very briefly.

24 All right. So, a couple of things. Given the
25 history of this case, the volume of material presented, the

1 affidavits, and all of the exhibits, I don't believe that
2 an evidentiary hearing is necessary for me at this time to
3 resolve this. So, I'm not going to order an evidentiary
4 hearing.

5 As to the request by Mr. Cloward for an additional
6 discovery order, I'm not going to do that either. I think
7 the discovery obligations of each of the parties are mostly
8 clear and the rule and the prior orders and outstanding
9 written discovery is sufficient to make it clear to
10 everybody what they were obligated to do or not obligated
11 to do. And if I -- it would confuse things. If I were to
12 issue a new Order now for certain discovery to be
13 conducted, then that would suggest that there's some period
14 in which to comply with the Court Order. And that would
15 also be viewed as opening up discovery and I don't want
16 there to be any confusion on those issues in this case
17 going farther down the road here. I need to resolve what's
18 in front of me now and I intend to do that.

19 I'm going to take this under advisement and have a
20 decision -- there's a lot of material here and I
21 anticipate, because I already started doing this, having a
22 detailed opinion rather than, you know, simply cutting or
23 pasting, or asking one party to prepare an Order. So I
24 will need a little bit more time to do that here.

25 Let's see. Thanksgiving is next Thursday. Most

1 likely, I'll have something right after Thanksgiving. That
2 should give everybody enough time, but it shouldn't impact
3 this case in any way, given that trial is not set until
4 March 1.

5 Now I understand -- let's talk about that for a
6 moment. First, is there anything anyone else needs to say
7 before we discuss scheduling?

8 MR. GOODHART: Your Honor, this is Philip Goodhart
9 for First Street and Aithr.

10 THE COURT: Yes.

11 MR. GOODHART: I believe plaintiffs did provide
12 you with a searchable Excel spreadsheet of the Guild
13 Surveys. Plaintiff had made an issue about that in his
14 response.

15 THE COURT: Yes.

16 MR. GOODHART: I would urge the Court to search
17 that searchable spreadsheet for the words injure, injury,
18 injured, or hazard. And the Court will find that there are
19 zero hits for any of those terms.

20 THE COURT: All right. Well, I'll do that then
21 and take into consideration the significance of whatever I
22 find there.

23 MR. GOODHART: [Indiscernible].

24 THE COURT: I see Mr. Henriod back on the line.
25 I'll give you an opportunity to make a short, three or

1 four, please keep it to that, statement, on any, you know,
2 procedural or logistical issues that we must discuss from
3 your perspective or to make any statement to preserve any
4 record.

5 MR. HENRIOD: Thank you, Your Honor. And I
6 apologize. My cable went out.

7 THE COURT: Oh, no problem.

8 MR. HENRIOD: Yeah, I just wanted to raise what
9 Your Honor does with this Motion I think may affect the
10 jury instructions and the phasing of trial. So, timing
11 wise, I just want to make sure that we don't get the cart
12 before the horse, because when we had brought up the
13 phasing issue, in light of the sanction against us, one of
14 the arguments made by plaintiff was that they would have to
15 prove certain things against First Street. We had
16 suggested that maybe then the trial needed to not just be
17 phased as to us, but be broken between the parties. And,
18 so, if this issue were decided before the jury instruction
19 issue and the phasing question, that might be most
20 efficient.

21 THE COURT: All right. Not a problem. When's the
22 next hearing in this case? It looks like the Motion
23 Regarding Jury Instructions is December 7th. So that won't
24 be a problem here.

25 MR. HENRIOD: Very good. Thank you, Your Honor.