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.

# PETITIONER'S APPENDIX
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| 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<br>18 | 4194–4250<br>4251–4436 |
| 32 | Recorder's Transcript of Evidentiary Hearing – Day 3 | 09/18/19 | 18<br>19 | 4437–4500<br>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 Jaccuzi, 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 |

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| 61 | Recorder's Transcript of Pending Motions | 10/05/20 | 27 | 6639–6671 |
| 94 | Recorder's Transcript of Pending Motions | 07/14/21 | 32<br>33 | 7893–8000<br>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<br>27 | 6495–6500<br>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<br>6 | 1214–1250<br>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<br>29 | 6924–7000<br>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:

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*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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**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,<br><br>Plaintiffs,<br>*vs.*<br><br>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,<br><br>Defendants. | Case No. A-16-731244-C<br><br>Dept. No. 2<br><br>**BRIEF RESPONDING TO PLAINTIFFS' REQUEST FOR INFLAMMATORY, IRRELEVANT, UNSUBSTANTIATED, OR OTHERWISE INAPPROPRIATE JURY INSTRUCTIONS** |



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

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

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## I.

## JURY INSTRUCTIONS ABOUT THE COURSE OF LITIGATION

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

> 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

[1] Plaintiffs should not be permitted to sandbag Jacuzzi with new arguments or authorities in response to these objections. At the hearing on October 5, 2020, 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.

> 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.

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

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### A. The Court Cannot Instruct the Jury Regarding Litigation History

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

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

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

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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

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

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

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

### B. The Punitive Damages Claim Raises the Potential Prejudice to Constitutional Levels

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

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

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

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

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

speculate that the jury found that these torts were established, much less that they warranted an award of punitive damages").

The potential prejudice by giving these jury instructions would be of constitutional magnitude. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003). Punishment in the form of punitive damages for litigation strategy thus implicates the constitutional prohibition on grossly excessive or arbitrary punishments. *Id.* at 416-17. "Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages," the court must exclude evidence regarding conduct "that had nothing to do" with the merits of the plaintiffs' claim. *Id.* at 423-24. And punishing Jacuzzi for subsequent acts during litigation *in addition* to the conduct that harmed the plaintiff would create "a risk of multiple punishments." *Wohlwend v. Edwards*, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003).

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

## II.

## WHAT JACUZZI ALLEGEDLY KNEW ABOUT OTHER CUSTOMERS

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

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

> had slipped off the seat and into the footwell of substantially similar Jacuzzi walk in tubs.
>
> 9. The jury should be instructed that Jacuzzi knew, prior to the subject tub being sold to Sherry, that other customers who had slipped into the footwell were unable to exit because of the inward opening door.
>
> 10. The jury should be instructed that Jacuzzi knew of other incidents where customers had to call 911 or other emergency responders for help exiting the tub because they were unable to exit due to the inward opening door and weakened physical conditions being elderly or advanced in age.

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

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**A. <u>The Court Never Made the Purported Findings</u>**

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

**B. The Complaints Are Irrelevant to the First Phase on Compensatory Damages, and Findings About them <u>Would Invade the Province of the Jury in the Second</u>**

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

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

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

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

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

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

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

[3] The documents and other evidence that the Court found Jacuzzi should have produced earlier in the litigation relates only to whether there is a defect in the product and whether Jacuzzi had notice of it. This is presumably why the Court has found liability as a sanction. None of the evidence at issue, however, tends to make causation more likely than not. Plaintiffs have been in possession of that evidence since the inception of the case and a sanction on causation would 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.

[4] *Even Unconscionably Irresponsible Conduct Does Not Justify Punitive Damages*: Leading up to the enactment of NRS 42.001, the Court was split over whether there could be "implied malice" in the sense of conduct that 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. *Craigo v.*

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

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

Although *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 747, 192 P.3d 243, 257 (2008), suggested that the Legislature in enacting the NRS 42.001 definitions had rejected the idea that "unconscionable irresponsibility" was immune from punitive damages, the legislative history refutes *Countrywide's* analysis. *Countrywide* read NRS 42.001 to supersede Justice Springer's concurrence in *Craigo v. Circus-Circus Enterprises, Inc.*, that a manager's "unconscionable irresponsibility" was not an adequate basis for punitive damages. *Countrywide*, 124 Nev. at 741–42, 192 P.3d at 254 (*citing Craigo*, 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 *Craigo*." (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 Maduike v. Agency Rent–A–Car*, 114 Nev. 1, 953 P.2d 24 (1998).

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

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

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

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

That burden of proof is an issue of constitutional dimension. Punitive 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).

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

### C. The Court Should Establish the Parameters and Phasing of Trial Before Determining what Instructions Will be Appropriate in Each Phase

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

Based on the Court's sanction of imposing liability for compensatory damages, Jacuzzi understands the Court to be following the approach condoned by the Nevada Supreme Court in *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 612-12, 245 P. 3d 1182, 1186 (2010). That entails not hindering Jacuzzi's ability to contest liability for punitive damages and implementing the same protections against jury passion and prejudice as Judge Loehrer did in *Bahena*. In that case, the Nevada Supreme Court upheld an order striking a defendant's liability defenses because the defendant received a full jury trial on compensatory and punitive damages. *Bahena*, 126 Nev. at 612-12, 245 P. 3d at 1186, *citing Sims v. Fitzpatrick*, 288 S.W.3d 93 (Tex. Ct. App. 2009). In *Bahena*, the district court trifurcated the trial, to ensure at every stage that

inflammatory material never infected the jury's discrete determinations[6]:

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

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

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

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

> the second phase, you will determine whether to assess punitive damages against Defendant Goodyear.
>
> While compensatory damages are intended to compensate a wronged party, punitive damages are designed solely for the sake of example and by way of punishing the defendant.
>
> If you find that punitive damages will be assessed, there will be a third phase . . .[7]

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

**Phase 3**: The jury returned from Phase 2 with a verdict in favor of Goodyear. Had the jury instead determined that Goodyear acted with malice, they would have returned for a third phase in which to assess the amount of punitive damages. That never occurred, however, because "Goodyear prevailed upon Bahena's claim for punitive damages." *Bahena*, 126 Nev. at 612-12, 245 P. 3d at 1186.

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

[7] Goodyear 2/6/07 Trans., attached as Exhibit "7" at 13, App. 115.

## III.

## COMMERCIAL FEASIBILITY OF ALTERNATIVE DESIGNS

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

> 11. The jury should be instructed that in response to customer complaints about the slipperiness of the tub surface that it began offering various products to customers free of charge which were meant to increase slip resistance.
>
> 12. The jury should be instructed that at the time that Sherry's tub was manufactured, other walk-in tub manufacturers were manufacturing similar walk-in tubs with similar features as Sherry's tub that had outward opening doors.
>
> 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.

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

### A. The Court Did Not Make these Findings

The Court did not make these findings of fact regarding the merits of the case. In fact, these were not issues addressed at the evidentiary hearing, and do not in any way relate to Jacuzzi's asserted failure to timely disclose other incidents involving walk-in tubs. The Court's findings go to the procedural history and the discoverability of the material at issue—*i.e.*, its potential to be admissible evidence or to lead to the discovery to evidence. The Court's order 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.

### B. Commercial Feasibility is Irrelevant to the First Phase, and is a Question for the Jury in the Second Phase

Commercial feasibility is irrelevant to the jury's determination of Ms. Cunnison's compensatory damages and is not an issue previously addressed by the Court. *See above.*

During the second phase of trial to determine liability for punitive damages, questions of commercial feasibility will be for the jury to determine, employing a clear-and-convincing-evidence standard of proof. *See above*. It would be erroneous for the Court to comment on evidence during that phase and invade the province of the jury, especially commenting with findings reached under a lesser standard of proof. *See above*.

## IV.

## CONSUMER EXPECTATIONS, DUTY TO WARN, AND MISUSE

Plaintiffs request six instructions drawing conclusions about consumer expectations, the substance of warnings required under the circumstances and the inapplicability of consumer misuse:

> 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.
>
> 17. The jury should be instructed that a reasonable consumer would not expect that the he/she would become entrapped in a walk-in tub due to the inability to open the tub door.
>
> 18. The jury should be instructed that any evidence in this case relating to an end-user slipping in a walk-in tub was not the result of customer misuse of the tub.
>
> 19. The jury should be instructed that any evidence in this case relating to an end-user becoming entrapped in a walk-in tub was not the result of customer misuse of the tub.





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

## V.

## INCIDENTS SUBSTANTIALLY SIMILAR FOR PURPOSES OF NOTICE AND CONSCIOUS DISREGARD

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

> 20. The jury should be instructed that prior incidents documented in any of the admitted Evidentiary Hearing Exhibits are substantially similar to the subject incident such that Jacuzzi was on notice of the product's dangerous attributes prior to the time it sold the tub to Sherry.
>
> 21. The jury should be instructed that subsequent incidents documented in any of the admitted Evidentiary Hearing Exhibits are substantially similar to the subject incident such that Jacuzzi consciously disregarded foreseeable and probable harm.

These are inappropriate for similar reasons. First, the Court did not find any of these "facts" on the merits. The Court did not find that any prior incident is 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

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

Dated this 20th day of October, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/ Joel D. Henriod*

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(702) 938-3838

*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2020, I served the foregoing "Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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

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Steven D. Grierson
CLERK OF THE COURT

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

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**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,<br><br>Plaintiffs,<br>*vs.*<br><br>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,<br><br>Defendants. | Case No. A-16-731244-C<br><br>Dept. No. 2<br><br>**APPENDIX OF EXHIBITS TO**<br><br>**BRIEF RESPONDING TO PLAINTIFFS' REQUEST FOR INFLAMMATORY, IRRELEVANT, UNSUBSTANTIATED, OR OTHERWISE INAPPROPRIATE JURY INSTRUCTIONS** |

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Case Number: A-16-731244-C

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Dated this 20th day of October, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/ Joel D. Henriod*

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*Attorneys for Defendant*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2020,, I served the foregoing "Appendix of Exhibits to Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions" on counsel by the Court's electronic filing system to the persons and addresses listed below:

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Las Vegas, Nevada 89101

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

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# EXHIBIT 1

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EXHIBIT 1

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CLERK OF THE COURT

DISTRICT 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,

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.

CASE NO. A503395
DEPT NO. XV

/

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JAN 29 2007
CLERK OF THE COURT

SALLY LOEHRER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89155

**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

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

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

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

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

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

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

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

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

SALLY LOEHRER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89155

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

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

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

k) Defendant Goodyear's supplement to exhibits to its opposition to motion for prove up hearing and its countermotion to sanctions filed January 19, 2007;

the court hereby FINDS:

FINDINGS OF FACT

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

2. This Court signed the recommendations from that hearing on January 5, 2007 as an order after no timely objection had been filed and served pursuant to NRCP16.1(d)(2).

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DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89155

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

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

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

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

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

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

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

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

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DISTRICT JUDGE
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LAS VEGAS, NEVADA 89155

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

CONCLUSIONS OF LAW

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

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

A. That it was not oversight not to have interrogatories signed;

B. That Goodyear has Nevada counsel and other counsel and it is not oversight for Goodyear's interrogatory answers not to be verified;

C. That it was willful for Goodyear's Nevada counsel to sign unverified interrogatories;

D. That throughout this litigation Goodyear has intentionally delayed responding to everything until the last possible day;

E. That an attorney who signs responses to interrogatories, delivers them to opposing counsel and does not have the verification from his client has violated NRCP Rule 11/26(g) advertently, inadvertently or willfully;

F. That a party pursuing litigation in good faith who does not intend to provide its employee in Clark County, after a December 14, 2006 hearing orders the production of an employee by December 28th, does not wait until January 3, 2007 to object to the order

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

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

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

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

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

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



BALLY LOEHRER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89155

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

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

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

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

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

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

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

ORDER

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

1. That Defendant Goodyear's motion for reconsideration is granted.

2. That Plaintiffs' motion for prove up without a jury is denied.

SALLY LOEHRER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89155

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 Schuttert, Esq. | (Snell & Wilmer) |
| James Rosenberger, Esq. | (Pico, Escobar) |
| Phillip Emerson, Esq. | (Emerson & Manke) |

DIANE SANZO, Judicial Assistant

SALLY LOEHRER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS, NEVADA 89155



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# EXHIBIT 2



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EXHIBIT 2

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*Attorneys for the Bahena Plaintiffs*

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JAN 30 4 21 PM '07
FILED

**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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JAN 30 2007
CLERK OF THE COURT

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

1. With respect to Plaintiffs' First Cause of Action (Wrongful Death), as set forth in Paragraphs 26-31 of the Amended Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
2. With respect to Plaintiffs' Second Cause of Action (Strict Products Liability), as set forth in Paragraphs 31-52 of the Amended Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
3. With respect to Plaintiffs' Third Cause of Action (Implied Warranty), as set forth in Paragraphs 52-69 of the Amended Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
4. With respect to Plaintiffs' Fourth Cause of Action (Negligence), as set forth in Paragraphs 69-85 of the Amended Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
5. With respect to Plaintiffs' Fifth Cause of Action (Breach of Express Warranty), as set forth in Paragraphs 85-101 of the Amended Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
6. With respect to Plaintiffs' Sixth Cause of Action (Negligent Infliction of Emotional Distress), as set forth in Paragraphs 101-06 of the Amended Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
7. With respect to Plaintiffs' Seventh Cause of Action (Negligence), as set forth in Paragraphs 106-14 of the Amended Complaint, Goodyear is hereby adjudged fully liable to Plaintiffs.
8. As to Plaintiffs' First through Seventh Causes of Action (Wrongful Death, Strict Products Liability, Implied Warranty, Negligence, Breach of Express Warranty, Negligent Infliction of Emotional Distress, and Negligence), judgment as to

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

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

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

IT IS SO ORDERED.

SIGNED this 24 day of January 2007.

DISTRICT COURT JUDGE

Submitted By:

#9374

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# EXHIBIT 3



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EXHIBIT 3

TRAN
CASE NO. A503395
DEPT. NO. XV

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

TERESA BAHENA, ET AL,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER COMPANY,

Defendant.

ORIGINAL

REPORTER'S TRANSCRIPT
OF
MOTIONS IN LIMINE

BEFORE THE HONORABLE SALLY LOEHRER
DISTRICT COURT JUDGE

TUESDAY, JANUARY 23, 2007
9:00 A.M.

APPEARANCES:

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

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

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

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,



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



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



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

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

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

MR. BOWERS: No.

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



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

MR. BOWERS: Yes, it is.

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



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

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

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

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

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



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

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

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

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

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



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

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

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

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



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

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

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

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

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

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

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



going to be out of town.

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

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

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

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

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

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

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

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



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



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



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

will be asked by -- the plaintiff wants a question asked, the plaintiff asks the question and the reader reads the answer. If you want the question asked, you read the question and the reader reads the answer. But the other than who the deponent actually is and the date the deposition was taken -- when were these depositions taken, before this accident or after?

MR. BOWERS: After primarily.

MR. LATIOLAIT: These depositions taken after this accident in 2004.

MR. BOWERS: I'm sorry, you're right.

THE COURT: We won't give the date of the deposition.

MR. LATIOLAIT: My other concern will be any sort of reference by counsel that this deposition was taken in a different case.

THE COURT: That motion is limine is granted. That's being granted. So there won't be any reference as to the date of the deposition or the case that it was taken in. They'll simply be read here in open court for any purpose that either party wants those portions of the depositions to be read for.

Now, about -- clearing the courtroom.



I'm not going to do that.

MR. POLSENBERG: I agree, your Honor. In fact, we talked --

THE COURT: You're the one that wanted it.

MR. POLSENBERG: I know. We talked about that this morning before the hearing and we would agree you don't have to clear the courtroom if you just do the other parts.

THE COURT: Thank you. Goodyear's motion in limine No. 2 to exclude reference to the Ford Firestone recall. Now, it seems to me that where this would come in would be when plaintiff's expert, Dennis Carlson, is testifying. And I know you've got another motion to preclude him from testifying in total.

But for the plaintiffs to qualify their expert, they have to parade him out with all of his blue ribbons attached and whatever his background is in the tire industry, his background is. Whatever his background is in working for any regulatory agency that had anything to do with tires, that's his background. Now, if it's possible to parade him out with all of his bells and whistles and ribbons on him and not say



Firestone tire recall, they shall do it that way. If it's not possible or if you're the ones that are contesting his expertise because his expertise with the agency was with the Firestone tires, you're the ones that's opening the door to get into the Firestone tire problem.

MR. LATIOLAIT: I think we can have a compromise on this, and I understand that the plaintiffs want to be able to say that Mr. Carlson worked for the states' attorney generals on the Firestone investigation or the investigation relating to Firestone tires on Explorer, something like that, but any effort to go beyond that and talk about that recall and in any way to imply or compare that situation to these tires is my main concern.

THE COURT: Well, Firestone tires aren't Goodyear tires. I think we can all agree to that.

MR. BOWERS: Just so we're clear, we think there's enough problems with Goodyear light truck tires we don't need to bring Firestone into it other than for the purpose you're talking about. I think your ruling totally suffices.

THE COURT: Other than that, that will be the end of the Firestone discussion.



MR. LATIOLAIT: This motion in limine isn't intended to address voir dire because in these cases it's inevitable that you may have a juror who had a Firestone tire that was recalled and may talk about that during the voir dire process.

THE COURT: All right. So that motion is granted in part and denied in part. Granted in that we're not going to get into the Firestone problems with their tires and denied to the extent that plaintiffs can let the man say that he worked for the attorney generals during some type of Firestone problem.

The next one is Goodyear's motion in limine No. 3 to exclude all testimony evidence or comment on other accidents, claims, or lawsuits. I don't know what evidence the plaintiff has because it wasn't -- at least I didn't read enough of the depositions to figure that out.

What evidence do you have,Mr. Bowers?

MR. BOWERS: I think that evidence would consist -- we're sort getting back to the problems that started all this and I don't want to go all the way back there, but that evidence would consist of in part the information submitted by

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

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

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

THE COURT: You may.

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

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

THE COURT: Makes it more robust.l.

MR. BOWERS: Put it on in Latin America where road conditions are worse and you're more likely to hit a road hazard and we did that back in the early '90s more forgiving, that concept. The reason we think that's relevant and Goodyear's own in-house reporting, if you get back into these records with some of these depositions we're going to talk about, don't initially distinguish between belt-to-belt or carcass-to-belt separations.

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

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

THE COURT: Mr. Bowers.

MR. BOWERS: I can speak to that for a

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

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

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

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and the belt and the carcass.
THE COURT: I must have misread the deposition because I thought the first one that I read indicated that the belts came off with the tread.
MR. CASTO: No, your Honor. I think the testimony in there would be that the tread and top belt came off. When you see the exhibits that actually go with this, the first team that met on this that Mr. Bill Robinson chaired, the focus of that team and all the teams and all the discussions after that was this between the belt detachment issue. So this is a unique failure mode here.
THE COURT: Like I said, I must have misread the deposition because I got the distinct impression -- go get that whole pile of stuff I read last night. I got the distinct impression that the belts came off with the tread, and let me see if I can't find that because I always have to check my thinking abilities and my recollection abilities and make sure that I'm still competent.
MR. CASTO: Mr. Olsen was the leader of the first team on this if you will, and he was deposed in this case and said if I had seen this



punitive damage trial on the case. You're able to defend, of course, you're able to distinguish, but I think it goes more to the weight of the evidence rather than admissibility of the evidence, so -- other lawsuits we're going to exclude evidence of other lawsuits and what the settlement or what the jury awards may have been because that's not relevant to this case. However, other claims, other statistical data as to tire -- I guess you don't call them failures. What do you call them, adjustments?
MR. LATIOLAIT: That's something different.
MR. BOWERS: There's several terms, your Honor.
THE COURT: What do you call it when a tire that should work doesn't work? What does Goodyear call it?
MR. CASTO: We call it a disablement, but the effect to Goodyear, your Honor, if the tire simply there's no damage to the vehicle or no personal injury there's simply a warranty exchange and adjustment. If there's damage to the vehicle there's a property damage claim. If there's damage to the person, it's a personal injury



failure mode there would never have been any other team because this is something we had not seen before and it was because of the impact. Speaking to the overlay issue, the fact that an overlay may make a tire more robust does not mean it makes it indestructible. The force of the impact in this case, and we have a brief animation we can show you, your Honor, the force of the impact in this case was so severe it actually broke the belt of the tire.
THE COURT: Give me just a moment, please. I know it was in the first one which is Richard Olsen. You're correct and I'm in error in my reading. They had a couple of tires that the tread and top belt had come off together from the rest of the composite. "We have never seen such a failure mode like that before which raised our curiosity. We saw a few more of those the following month and raised our curiosity even more and we started looking into the situation." So you're correct and I misread the deal.
Well, I think that other claims and how they started handling their investigation into these tires based on the property damage and based on all this and the next thing is relevant in the



claim, so those are the three categories.
THE COURT: But what you call it is a disablement?
MR. CASTO: Yes, your Honor.
THE COURT: I never could figure out what word you used. So we're going to limit this to Load Range E tires because that's the tire that was -- so anything that comes in in the punitive damage deal has to be related to Load Range E tires, only light truck tires only. Any other limitations? All right, that's what it's going to be limited to.
Goodyear's motion in limine No. 4, to exclude all evidence of any other tire, other Goodyear tire model and other tire disablements. Well, I guess that's granted because all we're talking about is Load Range E light truck tires. Any problems with any other tires that Goodyear has had is simply not relevant to this case and should be excluded. That motion is granted as I've indicated.
Goodyear's motion in limine No. 5, to apply the existing protective order to all the documents and prohibit the reference of confidential documents, exhibits, and testimony.

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

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

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

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

THE COURT: So that would be still confidential information.

MR. CASTO: Yes, your Honor.

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

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

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

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

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

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

MR. BOWERS: It may ultimately.

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

MR. POLSENBERG: Totally agree.

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

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

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

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

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

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

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

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

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

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

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

regarding an alleged postsale duty to recall. I presume this gets into your expert's testimony.

MR. BOWERS: It does in part. If they just want to prohibit the use of the word "recall," that's fine.

THE COURT: Well, it was never a recall. It was a limited product replacement program and that's the term you should use. You should use limited product replacement program. You shall not use the word "recall" or in essence a recall because recalls can only be done by government order; is that correct? Is that what I'm understanding?

MR. LATIOLAIT: Yes, your Honor.

THE COURT: I thought the manufacturer issued recalls. I thought read about it in the newspaper all the time that a manufacturer issued a recall. Broccoli that's bad or the spinach that's bad.

MR. LATIOLAIT: In terms of tires, your Honor, any recall has to be approved by NHTSA, so it actually does go through the agency before.

THE COURT: Isn't it the manufacturer that requests it?

MR. LATIOLAIT: In some instances.



THE COURT: On all my Ford products I get my recall notices from Ford and it doesn't say the government has issued a recall. It says Ford has issued a recall. Bring your machine in and they'll replace this or that or the next thing for free.

MR. LATIOLAIT: Ford would have to propose it to the agency first. The agency would have to approve it before the consumer is notified.

THE COURT: But still it's done by the manufacturer.

MR. LATIOLAIT: The initiation of many recalls is done by the manufacturer.

THE COURT: All right, thank you. But it will be called a limited product replacement program.

Number seven, Goodyear's motion to exclude testimony of plaintiff's expert Allan J. Kam. That's denied. He can testify in the punitive damages trial as we've indicated, but he won't get into anything other than that he worked for the attorney generals on Firestone recall.

MR. BOWERS: I'm sorry, your Honor. You're confusing Mr. Kam with Mr. Carlson.



THE COURT: He's the tire lawyer. Oh, okay, you know what? Nevada has a real broad definition of an expert, and a guy who puts down concrete can be an expert because most of the jurors don't lay concrete, and he can be an uneducated whatever, but if he knows how you put the frame up and put the steel in and flatten the concrete, he's an expert.

You think that this is going to invade the province of the jury? Do you think anybody sitting over there in that box is going to have any understanding of what these rules and regulations are, government rules and regulations? If you don't come from Philadelphia and have 14 letters behind your name, I guarantee none of us understands that stuff. We do absolutely need experts to testify and to tell us about what regulations are and what they mean and how -- we might read it as A, B, C and D, but then you've got the whole code of federal regulations that interprets it E, F, X and Y. So I think it's absolutely essential to have an expert on regulations.

Mr. Casto.

MR. CASTO: Thank you. What Mr. Kam is



offering is legal conclusions about those regulations. Number two, those regulations don't apply in this case because only NHTSA has authority to order a recall in this case, and there's no private cause of action by an individual concerning the failure to recall a product, or my understanding there's no ability under Nevada law for a postsale duty to warn.

THE COURT: But isn't this all part of the punitive damages deal as to how these are studied and how it happens? And it's good for your side that it was never recalled.

MR. CASTO: It isn't good for our side in terms of this analysis because what Mr. Kam does -- first of all, the preliminary evaluation that NHTSA undertook occurred after Mr. Kam had left the agency. Mr. Kam was not involved in this preliminary evaluation. We are not permitted to inquire from Mr. Kam how the protocol that he utilized when he was at NHTSA would compare with what is done here because he's precluded from law from testifying about that.

THE COURT: But the end result is is that NHTSA never recalled your tire.

MR. CASTO: We don't need an expert to

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



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



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



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

boxes of depositions and exhibits that do exactly that, and at the end of the day the jury's determination is punitive damages arising from the defect, not punitive damages arising from the failure to recall.

MR. BOWERS: That's precisely the point. If he were to come in and say that under Nevada law this is a breach of the law, he couldn't necessarily say that, but that's not what he's saying. He's explaining how this process works.

They've also assert privilege, your Honor. They've asserted privilege as to what happened in that dialogue back and forth between NHTSA. I asked Woody Gaudet, a guy in this case who sent these letters out, what happened when NHTSA finished their investigation, why was it that Goodyear entered into this replacement campaign. Those things are pretty close in time. Why was that? Privilege. What was the discussion that went back and forth? Privilege. Okay, fine, your counsel is there, assert the privilege. I can't get it through privilege -- through Goodyear's employees because of privilege. I can't get it from NHTSA because of government regulation. This is the only way that I can get



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

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

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



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

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

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

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

THE COURT: Haven't you taken his deposition?

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

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



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

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

THE COURT: So stipulated.

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

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

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

MR. BOWERS: Your Honor --

THE COURT: Thank you for your

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



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



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



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

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

Now, I believe that this is --

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

THE COURT: Of course. If you order it.

MR. ROSENBERGER: In lieu of him appearing.

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

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

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was taken?

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

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

MR. BOWERS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Mr. Bowers.

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



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

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

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



enjoyment of life.

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

MR. BOWERS: Thank you, your Honor.

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

MR. LATIOLAIT: That's fine.

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

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



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

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

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Was the guy gay? Did they have that figured out at age 12? Maybe if he was part of the gay population that would be true that it's less likely that he's going to have a child than the nongay population. Is that the allegation here?

MR. LATIOLAIT: No, your Honor, and that's exactly the problem. Mr. Johnson uses statistics when they assist his testimony, and when statistics may undercut the numbers that he's going to present to the jury, he wants to ignore them.

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

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

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

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

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

THE COURT: That's correct.

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

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

MR. LATIOLAIT: Marriage?

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

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

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

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

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

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

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

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

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

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



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is going to testify live, correct?
MR. BOWERS: You're right.
THE COURT: So his affidavit will not be admitted for any purpose in the trial.
Plaintiff's motion in limine to use prior Goodyear testimony, that has been granted. I think that was taken care of.
Plaintiff's motion in limine to exclude evidence. This is the History Channel film? Now, this is directed to Mr. Latiolait. Does the film show the production of a light truck Range E tire?
MR. CASTO: I can answer that. He probably can't. It does not, but it's not offered for that. It's offered simply to demonstrate the steps in the manufacturing process generically. It's an exemplar video. It will be edited to have deleted any references to the History Channel or any titles that would have been generated from the History Channel. It's simply the steps --
THE COURT: What type of tire components are they using in the production video?
MR. CASTO: Doesn't get to the components themselves, your Honor. It's simply the general process by which raw materials are stored. The next step is the general process by



which batches of rubber are mixed. The next process is the general components that go into a tire like a tread and a steel belt. There is a component which is the animation we have provided to counsel which would have the specific components in an animation in this individual tire as they are built. Then it shows generically how the tire is cured or vulcanized and then goes out the door. That's what it generically shows so the jury has some understanding of the different components of the tire and how they're built.
THE COURT: Have you watched the video?
MR. BOWERS: Which one? There's no --
THE COURT: The History Channel.
MR. BOWERS: I don't care about the animation, that's fine. Yes, I've watched the video, and my immediate thought is comes on the History Channel, you've got some host walking around with a microphone and down in the corner it's got a professional production on it. If you ever watched "Hands On History" on the History Channel, the minute this comes on, oh, great, they did something about Goodyear, and that was my point. Giving them the benefit of the doubt that somehow sheets of rubber that might be used in one



their race car tires or whatever all these other things are they may point out might somehow be relevant to that, my contention was I don't want this -- I don't think it's appropriate, I think it's prejudicial to have something clearly associated with the television production and Goodyear. So when Mr. Casto said we will delete any mention of the professional host, any mention of associated with a commercial television program, and I heard him to say, if I'm incorrect please correct me, delete out any mention of the little boxes that come up. I think you know what I'm talking about when you're watching television and there's some sort of graphic on the screen. If those will all be off and this looks like a video some dude made about Goodyear I'm fine with it.
THE COURT: You can't have the History Channel.
MR. CASTO: That will be done, your Honor.
THE COURT: Plaintiff's motion in limine to exclude evidence -- plaintiffs move to exclude evidence of the immigration status of Koji Arriaga and his guardian Maria Arriaga prior drug use or



alcohol use. Drug and alcohol use is out because they weren't the driver of the car. Is Mr. Arriaga, Koji Arriaga, and Maria Arriaga are they still alive?
MR. BOWERS: Yes, your Honor.
THE COURT: And are they in the United States?
MR. BOWERS: Yes, your Honor.
THE COURT: Well, then their immigration status is irrelevant.
MR. LATIOLAIT: May I be heard?
THE COURT: That's a real separator of American opinion today having to do with immigration.
MR. LATIOLAIT: And, your Honor, we wouldn't offer it for an improper purpose, but there is a proper purpose if Mr. Arriaga is making a claim for loss of earnings. Some jurisdictions in this country recognize the rule that if you're in this country illegally and you file a lawsuit that your claim for loss of earnings if an economist bases it upon earnings in the United States is essentially a claim for illegal earnings and that the loss of earnings should be limited to what they could earn in their own country as legal

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wages. I wouldn't mention the status. I would simply say if they're going to put on lost wage claim, they ought to reduce it to legal wages and not illegal wages, and the jury knows nothing about their status.

THE COURT: How old is this fellow?

MR. BOWERS: He'll be 18 shortly, your Honor.

THE COURT: Is he obtaining legal status, a green card?

MR. BOWERS: I'm not sure what he's up to.

THE COURT: Because if you have a green card, you can --

MR. LATIOLAIT: Absolutely.

THE COURT: -- earn wages.

MR. BOWERS: If Mr. Latiolait -- talk about something that divides.

THE COURT: Do you have a lost wage claim for this kid?

MR. BOWERS: I do. I don't know how strong it is.

THE COURT: Is he disabled or something?

MR. BOWERS: No.

THE COURT: Then you don't have a lost

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wage claim because he's just 18 now.

MR. BOWERS: If you're going to tell me, your Honor, that if I pursue a lost wage claim then I'm going to run of the risk of his immigration status being discussed, then I will discuss that matter with the client knowing that ruling and take care of it if that's how you decide.

THE COURT: Or else you have to do the wage claim based on whatever the wages are in his country for kids that are 16, 18 years of age. Did he have a job when this event occurred?

MR. BOWERS: I don't know if he had one at the time. He's been working somewhat since then. I can handle that. If that's your ruling, I'll deal with it.

THE COURT: That's the ruling. Let's go to the plaintiff's motion in limine to exclude evidence of expert biomechanical evidence. That whole issue is out.

MR. LATIOLAIT: There's an issue of bad acts on the plaintiff's first motion that I don't know the Court has addressed.

THE COURT: Drug and alcohol use is out.

MR. LATIOLAIT: Specifically one that I

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would need the Court's direction on. This relates to Joseph Enriquez who plaintiff's economist will provide assumptions of Joseph Enriquez what he would earn with a high school diploma, what he would earn with a college degree.

MR. BOWERS: Can we approach on this issue? There's a privacy concern on this.

THE COURT: You may. How old is Joseph Enriquez?

MR. BOWERS: He's 17. He's the one that's a vegetable.

(Off-the-record bench conference.)

THE COURT: Let's look at the jury questionnaire. That's the ruling regarding Mr. Enriquez's situation.

MR. BOWERS: Just for the record, can we state what it was?

THE COURT: The defense will be allowed to ask the plaintiff's expert if he is aware that Mr. Enriquez was not even attending school as a full-time student at the time that this event occurred and what effect that has on his calculation of the guy's future earnings.

MR. BOWERS: But can't discuss any of the specifics.

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THE COURT: Can't discuss any of the specifics as to why he wasn't attending school.

Which questions do we need to look at? Somebody gave me a copy this morning.

MR. BOWERS: I gave you a copy of the one I had culled together yesterday before Mr. Latiolait --

THE COURT: This one was just given to me today.

MR. BOWERS: Mr. Latiolait sent me some changes this morning which we will try to bring to the Court because we have some disagreement.

MR. LATIOLAIT: We handwrote on it so it will make it all easier.

MR. BOWERS: Your Honor, he wants 88, 89 and 90.

THE COURT: I didn't even have that many.

MR. BOWERS: No, this is the amendment.

MR. LATIOLAIT: These are the old numbers. We'll renumber.

MR. BOWERS: He wants those 88 to 90, I don't want them, and I don't want to prepare the questionnaire since I had finished one. Whatever you add to have Mr. Owens' office duplicate and

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



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



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



whole damages are that each plaintiff gets, that's how the damages -- that's how the money that's into the pot will be distributed because you get the benefit of the first money that's paid into the pot because you would only pay whatever is over and above the money that's in the pot.
So that was the agreement, Mr. Callister?
MR. CALLISTER: That's correct.
THE COURT: That was the agreement, Mr. Bowers, so the jury is one that's going to ultimately be determining the percentage of distribution of the settlement pot.
MR. POLSENBERG: I hate to raise this issue. What if the Supreme Court were to reverse the results of this trial?
THE COURT: Well, the damages have been tried fully, Mr. Polsenberg, and that portion shall never have to be tried over again and the only thing that would have to be tried is liability.
MR. POLSENBERG: I disagree with the Court on that.
THE COURT: You have the right to disagree, Mr. Polsenberg, because this is America.

-oOo-

ATTEST: Full, true and accurate transcript.

MARY BETH COOK, CCR #268, RPR

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# EXHIBIT 4



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EXHIBIT 4

FILED
Apr 16 11 00 AM '07
CLERK OF THE COURT

TRAN
CASE NO. A503395
DEPT. NO. XV

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

TERESA BAHENA, ET AL,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER COMPANY,

Defendant.

ORIGINAL

REPORTER'S TRANSCRIPT
OF
JURY TRIAL

BEFORE THE HONORABLE SALLY LOEHRER
DISTRICT COURT JUDGE

MONDAY, 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

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On behalf of Joseph from California Dr. Adams, Dr. Zehler will be here. Patricia Hedrick, who is a life care planner on behalf of Joseph, will be here; a Dr. Robert Johnson, he's an economist and he'll be here on behalf of several of the plaintiffs. We also have in addition to the plaintiffs Dr. Richard Adams, Dr. Schaefer. Alan Kam and Lawrence Moreno, and that's -- they will be experts in different fields that really is irrelevant for our purposes right now.

We expect, ladies and gentlemen, that our part of this damages trial will last through the end of this week. Thank you, Judge.

THE COURT: Thank you, Mr. Massi. Mr. Callister, do you wish to say anything else?

MR. CALLISTER: Nothing else.

THE COURT: For the defense, please someone introduce yourself and all of the members of the defense team and your list of witnesses and give us your two-minute statement.

MR. CASTO: Thank you, your Honor. Good morning, ladies and gentlemen. My name is Jeffrey Casto. I represent Goodyear. On behalf of Goodyear here today is Richard Olsen from Akron, Ohio. There's also Mr. Latiolait who's counsel



for Goodyear, Mr. Owens and Mr. Polsenberg.

There will be a number of witnesses that will be called here on behalf of Goodyear, and those include Dr. Brandner, Dr. Chue, Dr. Elkanich, Darin Lefkowitz, Stan Peralta, Dr. Rimoldi, David Weiner, Edward Workman, and Richard Wulff. There may also be testimony that you will hear from Annette Davis and Al Owens and James Gardner, James Schultz and Mr. Olsen. I think I've covered them.

Very briefly, ladies and gentlemen, this portion of the trial is going to involve damages. Liability has been determined already in this case. There are a number of people that were involved in this accident. There were ten people in the van in August of 2004. Those people have different ages, different medical histories, different family circumstances. Many of the injuries are not disputed by Goodyear. Some of the residuals from those injuries may be disputed in terms of the degree of permanency, in terms of the degree of future medical care or necessity or other elements of damages, but the testimony from Goodyear, I believe, will be relatively brief, and in that regard we'll be focusing on those issues,



not the fact that there were ten people in the van on August 2004, not about the fact that those people were injured. Those issues will not be disputed. Thank you.

THE COURT: Thank you, Counsel.

(Jurors were excused by the Court who were unable to serve. Colloquy was reported but not transcribed.)

THE COURT: The questions that I'm going to ask you are very, very limited this morning because you were all here and you all filled out the 70 or 80 questions last week, so what I want to know is your name and whether you've been a juror before and if so to tell us what type of trial or trials you sat on, whether they went clear through to jury deliberation or not.

And we're going to start with the top row, far left hand. Mr. Brucken, would you please stand up, tell us your name.

THE JUROR: Barney Brucken, I've never been a juror before.

THE COURT: Next.

THE JUROR: Billie Jo Taney, and I've never been selected before.

THE COURT: Have you been through the



jury process? Have you gone this far and not been chosen or very first time you've ever been in for service?

THE JUROR: I've been almost as far, but been dismissed.

THE COURT: Okay, thank you. Next.

THE JUROR: Othon Carranza, and this is my first time.

THE COURT: Thank you, sir. Next.

THE JUROR: Mike Jackson, first time.

THE COURT: Thank you.

THE JUROR: Nicholas Christensen, never been called.

THE COURT: Thank you, sir. Next.

THE JUROR: Michael Whiteman, never been called.

THE COURT: Next.

THE JUROR: Steven Frey, I served on a criminal case, went to verdict.

THE COURT: Was the jury able to reach a decision?

THE JUROR: Yes.

THE COURT: Were you the foreman on the panel?

THE JUROR: No, I was not.

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



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



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



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

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

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

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

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



you about the reality of their day every day, and the reality of their families every day. Through exhibits you're going to see the hard evidence, as I said, bills, reports, charts. Photos, you're going to see pictures of people who can't speak for themselves, people who are no longer with us. In one case, Joseph's case, a young man who can't speak at all and cannot speak for himself.

They'll be presented by people who care for others for people who can't care for themselves, and they're going to tell you and we hope you'll come to understand about their lives before August the 16th, 2004, and how their lives are now, and how they're going to be for the rest of their lives, after we all go home and they go back to their headquarters and we continue with our lives and they continue on with what is left of their lives, all of which has been affected by something that you've already been told several times, and I'm going to tell you several times again because it's important. It wasn't their fault. Chad Bowers and I represent three of the families in their action against Goodyear for damages. I'm going to tell you again who these people are, and I want you to know them. It's



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

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

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



damages are going to be and to be the judges of how to compensate these families. It's my burden to show you by a preponderance, and the Court already addressed that to some extent. We all watch television, and we all know that every trial lasts 20 minutes and you get the result by the commercial or else they can't do it again the next week. It isn't the way it is obviously. Some of you have experienced it before. The rest of you will experience it for the first time. It takes time, but it's not our burden beyond a reasonable doubt to show you what these damages are. It is only by a preponderance, more likely than not.

What our burden is to show you that the injuries claimed were caused by the acts of Goodyear, that the injuries claimed are of the nature we say they are, many permanent, some life-altering, some life-threatening, and all caused by the accident, the responsibility of Goodyear. You're going to see that the majority of the evidence is not going to be contradicted, as counsel already said, by the defendant.

The damages are going to be demonstrated, and that the only remedy that these people have -- a lot of people don't like this,

but, again, it's something you have to live with. The only remedy these people have is money. There isn't any other remedy that is available and no other remedy that's appropriate. That is their only remedy and it's what we're asking and going to ask for.

To understand how these people, how these individuals came to share this one tragedy you have to know about their background, and what we're going to do is try and tell you about their background. We're going to tell you that all these families they lived and worked in Las Vegas. Now, Jayne Mendez, that's driving up, she does live in Oceanside but has lived in Las Vegas but is living in Oceanside with her boys now. And they all lived here before August the 16th, '04.

The common thread among these families was some of the young men in the family loved amateur boxing. That was their sport. They had played some soccer, they played some other, but they loved amateur boxing. And the families were on a trip in August of '04 with a couple other groups, come other families, to go to Kansas for a boxing tournament. So they rented a van and three families, Torres family, Koji Arriaga and Frank



Enriquez and two of his three boys, were in the van when they were driving up through eastern Utah as I told you before. They were following each other. Ernesto, Leonor, Andrew, Armando and Crystal, Koji, Joseph, Jeremy and Jamie in that van. Frank Enriquez was also there.

Now, along with, and my apologies to Mr. Callister, along with Mrs. Bahena who should not be left out on the side because it's another family but a close family. They were traveling about 9:30 in the morning on I70 in eastern Utah when the right rear tire came apart, caused the van to cross the road, go into the median and roll and roll and roll, and it finally came to rest on its wheels with a shredded tire that's hanging on the rim. And I've asked Brian, our tech, to put him up some pictures to get an impression of what this impact, what this was like.

Brian, if you could show the side picture. Next picture, please, and finally the right side, please.

That's what was left after the rolls. That's what was left after the impact, and that's our right rear tire.

You'll be told that the injuries



suffered by these families directly and indirectly were absolutely horrendous. From the moment that van came to rest, there were three extended families, and I stress that because this is about family, you're going to be told, and what the families did before and what you'll see they have done after. Three extended families' lives they were changed forever. The effect was so profound one family member, little Jamie is Frank's son, fortunately was not in the van. He was in a truck ahead. Came back, saw his dad who was lost at the scene. The brothers, Joseph and Jeremy, Joseph himself profoundly injured and Jeremy, the middle son in the van, and saw his dad and his brother after.

These effects, these losses, the changes are what we're asking you to evaluate. That's the hard part for you. That's what you're going to be the judge of. That's what we're going to be asking you to do. Using the trial to compensate these people and hold Goodyear responsible for what damage they caused because of this defect.

To give you some impression generally of some of the injuries, and they're going to be expands on by the doctors and it's not my



intention to testify for them. I want to give you a preview of some of these injuries. Ernesto, Mr. Torres, on his own behalf he had facial and scalp laceration, a concussion, left wrist fracture, ulnar nerve damage, carpal tunnel damage. Leonor, his wife, her right eye, neck abrasion, chest wall contusion, bulging disk at C5-6 in her neck.

Andrew, their son who's 12 years old, after several days in intensive care Andrew died of massive closed head trauma, blunt chest trauma, blunt abdominal trauma with a liver contusion and ankle fractures.

Crystal, their daughter, amazingly bumped, bruised, shocked. Armando, was one of the boxers. We're going to show you he had a closed head injury, concussion, left brachial plexus left shoulder, disk bulge in C3 to seven and depression.

Frank Enriquez, after some time at the scene, died of massive head and chest trauma. Jeremy, another one of Frank's sons, had lumps and bruises. He saw his dad before he died, saw his brother Joseph. Jamie, young man I told you came back and saw his father and his brother, and

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

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

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



every day with that memory and its effect, and they are, as I said, all about family.

Joseph -- Brian, do you have Joseph's picture, please. Go back would you please. I apologize. As I went through to do this and I forgot that and I apologize to the families. Show the picture of Frank with the boys. Frank Enriquez is one of the individuals who died at the scene survived by his three children, Jamie, Jeremy and Joseph on the right. Andrew, Ernesto and Leonor's son. May we have one picture of Andrew, please. And may I see a picture of Joseph now, please. Joseph is in a community home care setting in California, you'll be told, near his aunt Jayne, and she takes care of him, visits him, takes care of him at her home, takes him out and helps. She also cares for Jamie and Jeremy. They're going to be here tomorrow.

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

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



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

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

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



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

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

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

down day in the life shows what life is like for Joseph every day, what he goes through, what others have to go through for him. You're going to hear from the doctors and economists of the quantity of his life, how much life he has left, how much life the others who died would have had. You're going to see through the film and from Jeremy and Jamie and Jayne the quality of his life, and that quality is never going to change. It's not going to get any better.

We're going to attempt to show you some of what I'm sure are hundreds of ways their lives are changed. We're going to try and tell you through these families how that change is never going to go away and how it will affect their families forever.

Told you we only have this one remedy, the remedy is money, payment of money by the company, and one opportunity, and we're going to ask for our clients in this stage of the damage trial for two different kinds of damages, special damages they've incurred, the medical bills and the funeral expenses and the lost wages, the hard numbers I told you about. And then you are going to judge these consequential damages, these



general damages, pain and suffering, the emotional distress. Not only their own but that they suffered because of their other losses directly and indirectly as fathers -- you have fathers, mothers, sons, grandmothers, sisters and brothers, and they're all together and their emotional loss, the loss of the care, comfort, and society of loved ones, the loss of enjoyment of life for each of them.

The limitations you're going to be told about by Armando, by Koji, by Ernesto, what Victoria has seen of her nephews and what Jayne sees of her nephews every day and in particular Joseph because you can't fix it, but we're going -- you're going to be instructed you can and we're going to argue that you should provide the only justice these families have, the only justice they're ever going to get and that's compensation, a money award for the losses that they suffered for the losses they will forever suffer after we're all gone all of which was caused by Goodyear.

We appreciate your time in listening. We ask that you please do pay attention to everything everyone says on both sides, and we ask



you to consider these things we're going to tell you and we're going to add to it as we go along. Thank you, your Honor.

THE COURT: Counsel for Goodyear, would you like to open.

MR. CASTO: Thank you, your Honor.

MR. CALLISTER: Could I give a brief opening as well?

THE COURT: I'm sorry. I overlooked you.

MR. CALLISTER: Thank you, your Honor. I promise I'll be brief.

Honorable Judge, fellow members of the Bar, ladies and gentlemen of the jury. I'll try to just succinctly summarize. Al has done a stellar job.

I do not envy you your job. One of the great ironies I've never been in your position. I've been in this position for a long time. You have a very difficult challenge in front of you, and it is a bit of an inversion of what is the typical scenario that you see on TV. You are not being presented with a set of curious facts or allegations and then asked to decide who's right or wrong. That's been done for you. Your sole



job hence is to decide what is the appropriate amount of compensation that these family members are entitled to under the law.

I'd like to take a brief second just to remind you who I represent, and I'll ask them to stand up. On behalf of the estate of the late Evertina sometimes referred to as Tapia, sometimes Bahena but we're going to refer to her as Berta the mom, is Teresa Bahena. Next to her one of her sisters Rocio, next to her Maria, all here today but Teresa especially because she appears individually on behalf of the estate. Thank you.

Two sisters are not here today. They could not travel to be with us. There's really one other sister, Leonor, who you've already met.

This is kind of the sevensisters' story, and it begins as early as 1988 when while their mother, the late Evertina, living in Mexico the sisters start to emigrate to the United States. They marry. They're here lawfully. They bear children, they go to work, and by the year 2000 or so mom wants to retire and come be with her kids. So Ms. Bahena, Berta, comes up, begins living with two of her daughters here in her home and all is well. They're traveling, going to

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

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

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

We will present the same type of



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

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

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



with that job, knowing that would be their duty. I cannot imagine, I'm sure you cannot, a more horrific task. I can't imagine a more horrific final moments than the time, that small moment of time, the moment Goodyear's tire blew out and --

MR. CASTO: Objection, your Honor.

THE COURT: Objection is sustained. This is more in the nature of closing than opening.

MR. CALLISTER: Thank you, your Honor.

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

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

THE COURT: Thank you, Mr. Callister.



Counsel for the defense, would you like to open.

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

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

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

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

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

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



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

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

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

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



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

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

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



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

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

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

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

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

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



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

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

Jeremy Enriquez, Jeremy suffered minor



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

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

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



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

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

that an individual like Joseph had sustained.

He will tell you what was involved in formulating his life care plan. He will tell you of all the medical records that he reviewed in order to provide his evaluation; that he personally visited Joseph; that he consulted with the treatment team for Joseph; and that he reviewed various reference sources.

Now, Dr. Workman will say is his view of all this information and discussion that his belief is the consensus of the medical opinion is that the physical and neurological condition of Joseph will remain substantially the same, that is, he will not improve; that he is not a suitable candidate for vocational rehabilitation; that he has a G tube in his stomach into which they provide hydration, wary, fluids, as well as food and medication. And that physical rehabilitation is not likely to produce any change in his ability for day-to-day function, and that he's not likely to gain much sight.

Now, what Dr. workman did was evaluated all the needs of Joseph and will express opinions about what the costs of those are. That the objective of the life care plan is to outline what



the appropriate services are based upon Joseph's specific and individualized needs, and that would include all medical products that he would need, all services that he would need, such as occupational therapy, physical therapy, speech therapy. And he will tell you what the cost would be for that if Joseph were to remain in an institution as well as the cost as to what it would be if Joseph received care at home.

You'll also hear from an economist by the name of Dr. Weiner. The plaintiffs indicated that they have an economist. The defendants had also retained an economist. One thing that's significant that Mr. Massi mentioned about Joseph is that a physician by the name of Dr. Adams testified that Joseph's life expectancy is 25 years from the date of the accident. The other things that Dr. Weiner evaluated when he reviewed Joseph was a loss of wage claim, and he will tell you different things that affect the wages that someone will have in terms of a loss claim, and there is a direct relationship between education and income, and that on the date of the accident that Joseph was not attending high school.

There are economic reports that



Dr. Weiner had also done for Frank Enriquez. One of those, that he was unemployed on the date of the accident. Secondly, that he had less than a high school education, and there's other points we'll get into when Dr. Weiner is put on the stand with respect to that.

There's a claim for a wage loss involving Andres Torres. What Dr. Weiner will tell you is that Ernesto and Leonor are currently employed. He will give you his opinions about the probability of adult children giving money to their parents, and if they give money his opinion will be it was very little.

There's also a wage claim involving Evertina, and what Dr. Weiner will tell you is that with respect to her economic claim for her lost wages that she did not give money to her children when she was alive. In fact, heirs gave her money, and that at the time of the accident she was not working and did not have any visible means of support.

And I mention this just because this is the evidence that you will hear in the case, and as part of the evidence that you need to determine in terms of making a fair, just, and reasonable



evaluation of the compensation to which these individuals are entitled.

As I mentioned, ladies and gentlemen, liability in this case is not disputed. All that Goodyear asks in this phase of the case is that you listen tot he evidence and that you make an award that is an appropriate and reasonable compensation for these individuals based upon the evidence that you will hear in the courtroom, from the witness stand, from the exhibits and from the deposition testimony. Thank you very much.

THE COURT: Thank you, Counsel.

Counsel, are you ready to call your first witness?

MR. BOWERS: May we approach for just a moment, your Honor.

THE COURT: You may.

(Off-the-record bench conference.)

MR. MASSI: With your permission, the first witness is Dr. Smith, the deputy coroner from Grand Junction. May I take Mr. and Mrs. Torres from the courtroom during his testimony.

THE COURT: You may.

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All we want to do is get it narrowed down to what they really are going to bring, that you are allowing them to bring.

THE COURT: They probably don't know yet. Probably engineering the case a little bit on the road, so what were you supposed to do? You were supposed to designate these depositions for punitive damages by Wednesday, and then they're supposed to designate by Thursday, and I'm supposed to get them by Friday, the objections?

MR. LATIOLAIT: The plaintiffs are going to designate.

THE COURT: By Wednesday of this week. Will you be ready to do that?

MR. CALLISTER: We will be able to do it by Wednesday.

THE COURT: I would guess that that would be a little bit helpful. When you designate what you're going to do, I would presume that then they will be able to figure out what witnesses they're going to call to rebut that, so I would hope that – I wouldn't hope. By Friday of this week, sometime Friday this week, Mr. Latiolait, you need to give them your exact list of witnesses on punitive damages.



MR. LATIOLAIT: All right.

THE COURT: Thank you. Anything else?

MR. MASSI: And what their expertise is. Thanks, Judge.

THE COURT: I think that should be discovered by now, should it not? We are in trial.

MR. LATIOLAIT: They have reports.

MR. CASTO: Judge, I had my notes from the hearing that the 31st the plaintiffs were to provide their page line designations, and then February 2nd the defendants were.

THE COURT: They have to be to me. I've got to have them that afternoon with objections to them because I've got to rule on the objections over the weekend so when we come back in here on February 5th we know what can be read and what can't be read. When am I supposed to rule on the objections? You have to give them to me this Friday.

MR. LATIOLAIT: It would be helpful if we knew ahead of time what volume of material we're getting because we produced a ton of depositions in this case.

THE COURT: I guess Wednesday you'll know.



MR. LATIOLAIT: There's staffing issues that need to be taken care of in a 48-hour period so it would be nice to know ahead of time.

THE COURT: You've got seven people. That seems like a lot.

MR. LATIOLAIT: Who are handling live witnesses during the trial.

-oOo-

ATTEST: Full, true and accurate transcript.

MaryBethCook

MARY BETH COOK, CCR #268, RPR

# 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

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.

Case No. A503395

Dept. No. 15

**JURY INSTRUCTIONS**

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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.

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.

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.

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 is 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.

INSTRUCTION NO.: 7

The heirs of Frank Enriquez, deceased, are Joseph Enriquez, Jeremy Enriquez and Jamie Enriquez.


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INSTRUCTION NO.: 8

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

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 descendent, as one can derive a benefit from the life of another only so long as both are alive.

INSTRUCTION NO.: 10

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

INSTRUCTION NO.: 11

In determining the amount of losses if any suffered by the heirs as a result of the death of a child, such as Andres Torres, 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, and comfort. In determining that loss, you may consider not only the benefits that heir was reasonably certain to have received from the earnings and services of their child during the child's minority, but also the support and financial benefit which it is reasonably certain the heir would have received from the child after the latter's majority and during the period of the common life expectancy.

3. You may also consider what loss, if any, the heir has suffered and will suffer in the future with reasonable certainty, by being deprived of the love, companionship, comfort, affection, society, solace or moral support of the child.

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

In weighing these matters, you may consider:

1. the age of the deceased and of the heir;

2. the state of health of health and the physical condition of the deceased as it existed at the time of death and immediately prior thereto;

3. their station in life;

4. their respective life expectancies as shown by the evidence;

5. the disposition of the deceased, whether it was kindly, affectionate or otherwise;

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6. whether or not he showed a likelihood of contributing to the support of the heir;

7. the earning capacity, if any, of the deceased;

8. all other facts in evidence that throw light upon the question of what benefits the heir might reasonably have been expected to receive from the deceased child had he lived.

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

You may also award to such heirs as damages an amount representing the pain, suffering and disfigurement experienced by the decedents and caused by the August 16, 2004 motor vehicle accident.

INSTRUCTION NO.: 14

In determining the amount of losses, if any, suffered by the plaintiffs for their own individual injuries as a proximate result of the accident in question, you will take into consideration the nature, extent and duration of the injuries or damage you believe from the evidence plaintiff has sustained, and you will decide upon a sum of money sufficient to reasonably and fairly compensate plaintiff for the following items:

1. The reasonable medical expenses plaintiffs have necessarily incurred as a result of the accident; and

2. The reasonable medical expenses which you believe the plaintiffs are reasonably certain to incur in the future as a result of the accident; and

3. Plaintiffs loss of earnings from the date of the accident to the present; and

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

5. The physical and mental pain, suffering, anguish and disability endured by the plaintiffs from the date of the accident to the present; and

6. The physical and mental pain, suffering, anguish and disability which you believe plaintiffs are reasonably certain to experience in the future as a result of the 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.

**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.

**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.

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**INSTRUCTION NO.:** 18

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

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

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to 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.

**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.

**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.

**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.

INSTRUCTION NO.: 24

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

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

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

Where a pre-existing condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the 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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BECKLEY SINGLETON CHTD
ATTORNEYS AT LAW
530 LAS VEGAS BLVD SOUTH
LAS VEGAS, NEVADA 89101

**INSTRUCTION NO.: 32**

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the Court.

INSTRUCTION NO.: 33

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

Readbacks of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be read back so that the Court Reporter can arrange her notes. Remember, the 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

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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 DEPUTY
JENNIFER KIMMEL

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.

Dept. No. 15

A503395

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.

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.

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.

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INSTRUCTION NO. 60

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.

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.

INSTRUCTION NO. 8

"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.

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.

INSTRUCTION NO. 11

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

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

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INSTRUCTION NO.: 14

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

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to 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.

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.

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.

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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.

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.

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.

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.

006886 000106

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.

006887 000107

INSTRUCTION NO.: 24

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the Court.

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INSTRUCTION NO.: 25

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

Readbacks of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be read back so that the Court Reporter can arrange her notes. Remember, the Court is not at liberty to supplement the evidence.

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INSTRUCTION NO. 26

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. 21

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: 2/8/07

DISTRICT JUDGE

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# 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
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

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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| ALLEN J. KAM (Sealed) | | |

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| NUMBER | | ADMITTED |
|---|---|---|
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| 234 | Allen J. Kam's CV | (Sealed) |



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. Latiolait, 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



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. Latiolait, is Goodyear simply going to ask



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 puting 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

completeness sake, you need to have in his answer.
"ANSWER: No. I don't think that's what I said."
THE COURT: All right. So on page 33 add, "No. I don't think that's what I said," then question, then the answers. The whole thing for completeness sake.
Anything else, Mr. Latiolait?
MR. LATIOLAIT: On page 101, the first question is not answered.
THE COURT: Well, you're right. I think that the question needs to be all read together. So the question would be:
"If you looked at the chart -- 87, 88, 89, and 90 -- the damage claims are almost nonexistence -- strike that.
"Is that what you all were also finding, that the early '90s the damage claims were almost nonexistence as far as these tires were considered?"
Well, I guess it doesn't make any difference, but you're right. There is no answer. All right. First question is stricken.
MR. FRIZELL: Then I'll begin with, "Is that what you're also finding?"
THE COURT: Right. "According to the chart."
MR. FRIZELL: I'll stay, "According to the



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chart"?
THE COURT: Yeah. "According to the chart, is that what you all were also finding?"
You may continue, Mr. Latiolait.
MR. LATIOLAIT: Your Honor, on page 114 there's a series of questions asked about a travel trailer publication, and when you get to the end of the question and answer, Mr. Olsen is essentially saying he doesn't know about it. He doesn't know the specifics about it. So I think that's a complete lack of foundation.
THE COURT: Well, not necessarily. Here's his answer.
MR. LATIOLAIT: I'm reading at the bottom of --
THE COURT: "Testified earlier some of the trailer travel clubs, folks with the fifth wheels and what have you, talking with each other, had to have documented this in some of their publications that we're aware of."
MR. LATIOLAIT: And --
"QUESTION: They were basically saying in their publication there was a problem with these tread throws going on, on this particular Load Range E tire.
"ANSWER: I don't know.
"Do you know the specifics -- the specifics of it?"



THE COURT: All right. So the question should be stricken on the bottom of page 114, and the top of page 115.
MR. LATIOLAIT: Testimony on 145, the question and answer, there's no context to it.
"QUESTION: Are you aware of those types of property damage claims?"
There's no identification of what types of property damage claims are being talked about.
MR. FRIZELL: If you want to continue to the next question, that might fix the problem, prior to the objection.
THE COURT: The question supposes facts that Goodyear never testified to. The question above it, the preceding question, top of 145, presumes facts for which Goodyear has never testified. So certainly we don't want to ask that question that's introducing information that Goodyear never substantiated.
In fact, I think that Goodyear has consistently testified throughout all its deposition they were never aware of any individual being hurt in any Goodyear tire, or if they were aware of it, it was a big secret in the legal department and never let it filter down to anybody else in the entire company.
So it would be inappropriate and they haven't



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circled it to read the first question. And you're right, it has no context, so Mr. Frizell, what's your fix here?
MR. FRIZELL: Well, can we take out "those types"?
THE COURT: No. He's aware of all the stuff. He's read all the charts, et cetera. So that wasn't -- page 145 is out.
Goodyear's objections are sustained.
Anything else?
MR. LATIOLAIT: Nothing more in the Ebanks, other than the previous objections that were raised in connection with the other transcripts.
THE COURT: All right. I understand that. Those are overruled. How about in the Aufiero?
MR. LATIOLAIT: Sure. On page 150, Your Honor, there's discussion that begins regarding some group of 120 to 150 tires that are looked at, but there's no context. All of a sudden we just jump into a discussion of a 120 to 150 tires.
What tires? When were they looked at? Why were they looked at?
THE COURT: Well, he doesn't say we never looked at 120, 150, and you can follow that up in your examination of Mr. Olsen because he happens to be here







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and he can explain that.
MR. LATIOLAIT: Also, on page 177, there's testimony that picks up relating to resistance to heat. That's out of context. I don't know that the jury is going to be able to understand what's being offered.
THE COURT: I thought it was clear enough. You got to remember they're building upon all the testimony that Goodyear has provided throughout all these depositions regarding all parameters behind the thought process that all the engineers put into this as to what could be the problem.
MR. LATIOLAIT: No other comments, other than cumulative and objections that were raised in connection with the teams examination of these issues.
THE COURT: All right. Thank you.
The staff brought to my attention that there was a John L. Smith column in the newspaper today, and let me assure you the information did not come from the Court. He hates my guts. We don't speak. So rest assure that no information came from this source. We will -- when the jury comes in -- inquire if any of them read it. If they started to read it, they stopped because they realized it was this case or they continued looking at it. We'll find out what the situation is.
If any of them read it, I will give an



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instruction that tells them they are specifically and absolutely to disregard everything that was read in the article. Evidence is only what they hear in the court and that's the curative instruction that I can give.
If you have one, I can read it.
MR. POLSENBERG: I've had this issue come up in cases I've done with Mr. Eglet where we happened to have articles about him at the time of the trial. I suppose we should inquire first if anybody has seen anything about this case. If we actually say there was something in the RJ, they'll run to it. I debated whether to give the instruction on don't ask for read backs because it's time consuming because then they ask for read backs.
THE COURT: I don't give it typically, but I gave it in this case because we had a multiple of witnesses and so many parties, so many claims. In a three-day trial I don't give that.
MR. POLSENBERG: We can ask the jury if anybody's read anything and if they have, we can take them individually.
THE COURT: Any suggestions?
MR. FRIZELL: I think that's a good suggestion.
THE COURT: All right. Then we're in recess until 10:00.
MR. CASTO: We are doing opening statements,



right, at the punitive phase?
THE COURT: Yes. We're doing opening statements. You will be given that opportunity.
MR. BOWERS: Your Honor, we're just going to have one reader, right, not a different reader for every deposition?
THE COURT: Right.
MR. POLSENBERG: Makes absolute sense.
MR. LATIOLAIT: I asked counsel this morning. They mentioned they had designated testimony from Mr. Olsen from this case. I still have not received it.
MR. FRIZELL: Your Honor, we're working on that trying to put it together to give it to them.
THE COURT: All right. Thank you. 10 o'clock.
(Whereupon, a break in the proceedings occured.)

THE COURT: Good morning, ladies and gentlemen of the jury. Welcome back to the continuation of part two of Bahena versus Goodyear. The record will reflect the presence of plaintiffs, all parties, plaintiffs' counsel, defense counsel, all officers of the court, our full deliberating jury and our alternate juror. As soon as I find what I'm looking for here, we can get started this morning.
This is the second phase of the trial. In the



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first phase of the trial, you determined compensatory damages. In the second phase, you will determine whether you assess punitive damages against Defendant Goodyear.
While compensatory damages are intended to compensate a wronged party, punitive damages are designed solely for the sake of example and by way of punishing the defendant.
If you find that punitive damages will be assessed, there will be a third phase. Before we get started with the trial, let me ask: Did anybody read any articles about this case?
All right. The jury has been paneled and none read any articles. The attorneys will give you opening statements in the same order. The plaintiffs' first and then the defendants and then the plaintiffs will begin calling witnesses.
Mr. Callister, your opening.
MR. CALLISTER: May I approach, Your Honor?
THE COURT: You may.
(Off-the-record bench conference.)
MR. CALLISTER: Good morning, ladies and gentlemen of the jury. I know the hours are tedious and long. I'll try to make this opening statement as brief as I can in regards to this section of the trial.







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The Court will ultimately instruct you as to the law in regards to punitive damages, but we need to make clear, or I'd like to make clear, a few things. Soon you'll be presented, once again as you have before, with instructions that will help guide you through your deliberations hopefully. And some of the phrases -- some of the phraseology in that instruction I'd like to just briefly address. In particular, that portion that attempts, if you will, to define what punitive damages are and how they differ from the actual damages that have been the issue so far.

The pertinent line reads as follows: "You may, in your discretion, award such damages, quote, if you find by clear and convincing evidence that said defendant was guilty of malice, express or implied, in the" --

MR. CASTO: Objection, Your Honor.

THE COURT: Objection is sustained. I understand what you're doing, but actually the Court is going to instruct on the law. You're not supposed to instruct on the law in opening statements.

MR. CALLISTER: Let me direct my comments to one notion. The key element, I believe, is something called conscious disregard. We believe the evidence has shown and will show --



MR. CASTO: Objection, Your Honor.

THE COURT: Objection sustained. You tell them what you think the evidence will show.

MR. CALLISTER: Thank you, Your Honor. The evidence will show in the remainder of this trial through the two witnesses that we have for you to consider the following:. That there were a series of decisions made by Goodyear beginning as early as 1996 that evidences, I believe, to your satisfaction that they knew and were aware of the fundamental defect, the flaw that caused all of the injuries and deaths that you learned of in the past week.

That flaw is sometimes referred to as a tread separation, and it is exactly what it sounds like. That immediate severance of the belts from the carcass sometimes referred to as the tire. What you need to listen to through the evidence that will be presented today, what you need to listen for and asking yourselves is: What did Goodyear know and when did Goodyear know it. I would suggest that will help guide you through the process of interpreting what sometimes can sound like a confusing thicket of information.

I believe the evidence will show to your satisfaction that as early as 1996 -- certainly by 1997, certainly by 1999, the time of the manufacture of our



tire -- they were well aware of not just the defect in the tire, but perhaps more importantly how to remedy it, how to manufacture a tire that would survive any such sudden blowout without suffering tread separation that was so significant as to cause horrific crashes like this.

You will also learn of the involvement of the federal government who brought in, as a result of certain inquiry beginning in the year 2000, a team to investigate. That, of course, by 2000 our tire had already been manufactured but we believe that the evidence that you will see that is publicly available that reflects on the investigation conducted by what you've learned is called the Office of Defect Investigation within the US Department of Transportations National Highway Traffic Safety Administration, sometimes referred to as NHTSA, will evidence that once again Goodyear knew and failed to take adequate precautions either to notify those who had such a defective tire on their vehicle dating back into the '90s well before and after the date of the manufacture of the tire in the Bahena case, failing to take appropriate -- all appropriate efforts customary to the industry -- to reach out, find individuals at risk, find them and/or somehow replace that defective tire



with one that has not suffered that same problem.

The remedy was a simple one. You will learn from the evidence the remedy was a simple nylon cap, an additional layer that could be easily installed at the factory at the time for 69 cents. Once you factor in all the costs of the defense, all the costs of having to deal with tragedies like this --

MR. CASTO: Objection, Your Honor.

THE COURT: Objection sustained.

That's argumentative, Counsel.

MR. CALLISTER: I'd like to bring up one brief piece of evidence that you'll have a chance to see, if I could, Your Honor, that would be the ODI closing remedy that you'll have before you as Exhibit 239.

THE COURT: Has that exhibit been introduced yet? Has it been admitted as evidence?

MR. CASTO: No objection to that, Your Honor.

THE COURT: All right. So then you may go ahead and show that. 239 will now be admitted.

(Plaintiffs' Exhibit 239 was admitted.)

MR. CALLISTER: Thank you.

I know it's difficult to read. It is a publicly available document that reflects the conclusion of the efforts by, as you can see in the upper left-hand corner, the US Department of Transportation to look into

this in 2000.

I represent to you that the evidence will show that investigation began in the year 2000 and by that time, as you can read for yourself on the board, there were already 87 known crashes, 158 injuries, and 18 fatalities. Why is that important to your deliberations? Because if that's what the federal government knew at the conclusion of their investigation in 2000, we ask that the question should be, Why did Goodyear not reach out and make efforts appropriate with the knowledge of what the immensity of this tragedy and loss to all of those who still had the subject tire, the LRE, the Load Range E, as we've talked about on their vehicles?

We're not talking about the universal vehicle; we're talking about those that needed the extra strength of the LRE. You've heard earlier testimony that the vehicle in question was a small van. Load Range E tires are specifically, theoretically constructed to bear a greater weight load. That's what the evidence will tell you today when you hear from Mr. Kam, a former official with this state institution, NHTSA, who practiced routinely with the ODI Office of Defense, the Office of Defect Investigations within the Department of Transportation.



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

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



case -- deadly device. Why?

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

MR. CASTO: Objection, Your Honor.

THE COURT: Objection is sustained.

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

As you listen to the evidence, and studiously



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

MR. CASTO: Objection, Your Honor.

THE COURT: Objection is sustained.

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

MR. CASTO: Objection, Your Honor.

THE COURT: Objection is sustained.

Mr. Callister, we're not there yet.

MR. CALLISTER: To decide what is the future remedial action appropriate given the facts.

Thank you for your time.

THE COURT: Thank you, Counsel.

Mr. Casto.

MR. CASTO: May it please the Court, ladies and gentlemen. As counsel indicated, this is the punitive damage phase of the trial. Compensatory damages have been determined, and that determination occurred in the first phase of the injury sustained by the plaintiffs in this case, and the determination of what award of damages that this jury has determined for them. And that compensation has been made and that verdict was for compensatory damages.

The purpose of this phase is to determine whether punitive damages should apply. Punitive damages are not to compensate; they are to punish. The plaintiff in this case has the burden of proof and the issue of punitive damages is a serious issue. In fact the burden of proof for punitive damages is a different standard. It is clear and convincing evidence as the Court will instruct you about that. Not beyond a reasonable doubt. Not preponderance of the evidence. It is clear and convincing evidence. And the plaintiffs have that burden of proof, the burden of proof to



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determine whether there was malice. Is there going to be evidence shown of malice on the part of Goodyear? Is there evidence shown by plaintiffs in this case that Goodyear acted in a despicable manner? That Goodyear intentionally disregarded known issues? That they proceeded in a manner that was willful and deliberate?

The plaintiffs have the burden of proof in this case, ladies and gentlemen, that Goodyear engaged in a conscious disregard to injure the plaintiffs in this case. The verdict in this case, at the beginning in terms of compensatory damages, there was a determination of liability that was given to you and that was not contested by Goodyear in the compensatory phase.

But this involves punitive damages, and there will be evidence to show that the conduct of Goodyear in this case does not rise to the level of despicable conduct or malicious conduct. It does not rise to the level of conscious disregard.

The evidence in this case will show, ladies and gentlemen, that Goodyear has been in business since 1898. It is in the business of designing and manufacturing tires. It's very business depends upon the safety of its products and the care of its customers.

You will hear testimony in this case about the



procedures that Goodyear undertakes in the design and manufacture of its tires, to do everything humanly possible to make a product that is safe. But there is no tire, the evidence will show, ladies and gentlemen, that is fail safe. There is no tire that, if abused enough, will not fail. That product does not exist anywhere in the world.

Now, the tire in our case, ladies and gentlemen, has a specific size and it is a specific type. It is what's known as an LT, "LT" stands for light truck tire 245/75R16 Load Range E. The 245/75R16 is the size of the tire. Load Range E tires are the heaviest tires in the light truck line. They carry the highest loads of tires in the light truck line. After the Load Range E tire, construction of the tire, the evidence will show changes from the construction that was involved in this case to what is known as an all steel medium truck tire which is much more expensive and much more different in terms of the design that it is.

As we go through this process, ladies and gentlemen, you learn about -- through the evidence of the methods by which tires are designed and manufactured. This is a construction diagram of the components in the tire in this case that the evidence will be presented to you. And the tire involves



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different components.

It begins with the inner-lining because the tire in this case was tubeless. In this case, it's inner-liner serves the function of a tube. You'll learn about how its tires are constructed that go radially around the tire, hence the term "radial tire," and our two belts in the tire made out of steel. They go on opposite directions. There are belt edge gun strips in this tire wrapped around the edge of the steel. There's a sidewall, a wedge, and a tread, and you'll hear from the experts at Goodyear about all these components and how they're manufactured.

Can we approach, Your Honor?

THE COURT: You may.

(Off-the-record bench conference.)

MR. CASTO: You will learn through the evidence, through the manufacturing process, ladies and gentlemen, that tires are built in a laminate fashion. One component after another. It begins with the inner-liner, and then these various components made in different parts of the factory are brought together and then there are the body plies and then there are the beads to the tire which will anchor it to the wheel. The sidewall, the wedge, the steel belts with belt edge gun strips and there are two belts, a bottom belt and a

top belt, and then the tread. And those are the components that go into the tire.

Now, in terms of manufacturing the tire, you'll hear evidence in this case about the quality control procedures that Goodyear utilizes in its factories to insure that the product comes out as best that it can be. There are various quality control checks throughout every stage, beginning with raw material. There are up to 12 quality control checks during the raw material stage of tire manufacturing. During the component stage, there are up to 27 quality control checks. Each component is verified and tested before it's put into the tire. There are actually laboratories within the tire factory that will perform physical and chemical tests before the tires and the components are allowed to be built one on top of another. There are up to nine quality control checks during the tire building stage and then tires receive a hundred percent visual and tactile inspection and quality control checks prior to shipping. All of these are done by Goodyear with a view toward producing the safest product that they can produce.

Now, the failure mode in this case involves a detachment of tread and both belts. During Goodyear's normal business, it is constantly on a quest to improve



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the performance and the manufacture of its products. One way Goodyear does that is to review tires that returned from the field for adjustment. And adjustment is simply a warranty return. When a customer brings a tire in for some reason, they're dissatisfied, they don't like the way it rides, or handling of it, some other issues, and those tires are collected by Goodyear and brought back for inspection. And they look at that. They evaluate their adjustment information with the purpose of how can we make our product better every single day of every single year.

You're going to hear testimony in this case that one of these adjustment improvement teams was involved with light truck tires. That's going to be Mr. Olsen, who was in charge at that time, and one of the adjustment review episodes that they had, Mr. Olsen saw two tires with a tread and top belt attachment. He had not seen that failure mode before, that was something different. And then a few weeks later he saw a few more tires, and what Mr. Olsen then did at Goodyear was he launched an investigation as to what was happening that was causing this failure mode that he had not seen before involving a detachment of tread and top belt of the tire.

That failure mode was unique because the top



belt was coming off of the tread and the bottom belt was staying on the carcass of the tire and the casing or the carcass remained inflated. So the tread and top belt peeled off, but the rest of the tire remained inflated, stayed on the vehicle. The other thing that was unique was there were no signs of heat related failure that they could find.

So based upon this failure mode, Mr. Olsen launches an investigation at Goodyear and this is in 1995. That failure mode looks like this: A tread and top belt detachment. The bottom belt is on the tire, that's what you see there. Mr. Olsen put together a team of engineers from different areas. It's called a cross-functional team. He took people from automotive engineering, from customer engineering, from marketing, from the plant quality control, technical people, people from product development, and people from research, and he put all those people together to evaluate this condition that he saw after seeing six tires.

Six tires. This investigation is launched. Now, this goes on from 1995 until about the end of the year, and at that point in time, a second team is going to be created. The reason a second team is going to be created, you'll hear from Mr. Olsen, is because he believed that Goodyear should have people working on



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this full time.

The people that were on the original team had other jobs at Goodyear in quality control, in marketing, and product developing. Mr. Olson's suggestion was that Goodyear have a team of people and have them do nothing but evaluate this issue full time. So a second team was created in 1996. And it was a cross functional team again that combined people there that had over 200-plus years of experience in technical, research, and manufacturing.

They used various quality control tools involving brain storming. You're going to hear those terms: Fishbone diagramming, nominal group techniques, Pareto charts, prioritization matrices, Kepner Trago analysis. Those are foreign terms and Mr. Olsen will explain them to you.

They used various predictive tools like FEA, interlaminar sheer, holography, shearography, microscopic analysis, and crosslink density, and they used various physical tests and you'll hear about all those from Mr. Olsen, in terms of what was involved in that issue.

As this team began, their function was to determine what was the cause of the separation between the belts. And that's a critical issue through the

evidence in this case between the belt separation. They came up with what's called a fishbone diagram. A fishbone diagram is one of the analytical techniques they used at Goodyear and the purpose of that was for that -- to criticize their product, to do the self-critical analyses, and to determine through this group of engineers every conceivable design and every conceivable manufacturing issue they could think of that could cause a tread belt detachment related to how the tires were designed or how the tires were manufactured.

And the whole point of that was, as the heading indicates, to identify potential causes for radial light truck belt 1-2 separation. The between-the-belt separation. The unique failure mode they were seeing in these tires, and they looked at all these different issues -- belt processing; sheering, which is how you cook a tire after you make it called vulcanization; they looked at the belt package design; looked at the cure processes; they looked at high sheer stresses and they did this full time.

Now, the evidence will show that they went through various conclusions here, but their analysis to date indicates some other factors that construction or compound were occurring to cause the crown integrity failures.



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Now, during Mr. Olson's team in 1995, one of the things that they discovered was that they had an extraordinarily high number of tread belt detachments in trailer applications. And there was a specific size, an LT 235/85R16 that is a different size tire than the one involved in this case. And it is a different application than the one involved in this case.

One of the things that Mr. Olsen team did was that they decided to create a special trailer tire and add an overlay to that in 1996. One of the reasons they discovered the issue involving trailer application is they did a study, and the evidence will show this. They actually went to dealers that sold trailers and they weighed trailers on these lots -- unloaded, brand new, without gasoline, without the hot water tanks filled, without luggage, without towing issues -- and what they discovered was that the tires were overloaded by 113 percent while empty, before they put any load into it. These were tires installed by trailer manufactures without knowledge by Goodyear. That this is the tire that they were putting on vehicles. They weren't original equipment for the trailers. They were simply tires trailer manufactures were putting on trailers. Different size, different application than this case.

Now, this second team went through some



extraordinarily complicated analytical tools, did a lot of different things in terms of building tires, and you'll hear that from Mr. Olsen. For example, one of the things they did is they would build a number of tires in one plant and then ship them to another plant where they would be cured, and they do vice versa to see if there's some issues in the process of one plant that was different than the other that was causing the issues they were seeing. They evaluated every one of those issues on the fishbone diagram; they couldn't find an issue.

They looked at some items involving curing to determine maybe if that could be the issue. And they formed yet a third team in 1997 to look at curing issues. One of the things that you'll see evidence of is that Goodyear saw something called an A Holograph. That is a very small void in a tire. They spent a lot of time and a lot of money trying to determine what was causing the A Holograph, and what they determined was at the end of the day, that A holographs had nothing to with tread belt detachments and, in fact, A Holographs disappear shortly after you cure a tire. It's something you find in a freshly cured tire. It goes away after it's been cured for a short period of time.

So they did their analyses, these three teams.



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They went through all these problem solving techniques and they couldn't find a root cause. They couldn't find a defect in the design of Goodyear tires. They couldn't find a defect in the manufacture of Goodyear tires. They were seeing some increase in this tread belt attachment because external factors were changing for some of these tires. There were more severe service applications like the trailer tires.

And another thing happened in the mid-1990s. The speed limit changed in the interstate highway system from 55 to 70 miles an hour. And with increased speed comes increased propensity for tread belt detachments in the manner that we see in the teams that Mr. Olsen was working with, this tread and top belt.

Now, ladies and gentlemen, the plaintiffs will put on a witness by the name of Allen Kam. Mr. Kam's not an engineer. He's not a scientist. He worked at NHTSA, but he retired before the evaluation was done concerning Load Range E tires. Mr. Kam has no personal knowledge of anything involved in any of these investigations. Mr. Kam has no personal knowledge about anything that was done at NHTSA concerning their evaluation of Load Range E tires on behalf of Goodyear.

In fact, the documents Mr. Kam reviewed in this case are the same documents Goodyear gave to NHTSA which

reached an opposite conclusion. The defect in this case that Mr. Kam will talk about involves the failure to incorporate a nylon overlay. A nylon overlay is a layer of nylon that goes on top of the steel belts.

The evidence will show that nylon overlay does not prevent puncture impact damage. They do not prevent tires from being overrun, overload, or underinflated. They do not prevent separation and detachments. It's simply another tool used in a tire for certain applications.

You'll hear evidence in this case about the construction of the various tires. One of the things that Goodyear changed in this particular tire involved the belt wire. They actually went to a belt wire that was used in a larger commercial truck tire to provide additional strength. And this wire is actually a bundle of 13 wires. So when you see these steel belts on the tires, each belt core is actually comprised of 13 different filaments brought together.

Now, the evidence in this case will show that the tire in this case sustained an impact somewhere before the accident. That impact broke the steel belt in this tire. And you'll see physical evidence of that, ladies and gentlemen.

When the impact occurred, on these individual



filaments, there will be physical evidence that these broke under tension. It's called a cup-and-cone break. Which is an indication that these cables broke under tension. Can you sea the cup and the cone there? That break extended along a significant portion of the top belt. And that impact occurred before the accident sequence.

The evidence in this case will show, ladies and gentlemen, that notwithstanding the absence of a nylon overlay, this tire would still have failed. If the nylon overlay had been there, the tire in this case would still have failed. That will be the evidence presented by Goodyear. And as this tire was going down the road after it sustained this impact damage, some period before it began to develop a separation. And that separation grew to the point that the tread and both belts detached from the tire, which is different from the failure mode study by NHTSA, which is different from the failure mode Mr. Olsen determined in the three teams.

This is the detachment of tread and both belts, which can only occur if you break the top belt, and you'll see evidence of this. 360 degrees around the tire, the tread and both belts are off the tire. This is a picture of it taken during the tire examination.



It's colorized on the left for the color scheme of components. On the right is its actual photograph and here are the actual broken belt wires. The top belt is broken, broken from impact severe enough to break belt wires with thousands of pounds of tensile strip. There's microscopic analysis you'll see from the examination which, again, established that at the area of impact, this tire broke under tension from the impact and you'll see the cup-and-cone defect in the photographs.

And here's an actual photograph of the tire in this case. It's got bungee cords on it to hold the tread and both belts on it. And the area to the right and around, they're numbered by clock phase: 12 o'clock at the top, 6 o'clock, 9 o'clock, et cetera. And this tire came apart between 2 o'clock and 2:30, where the area of the impact occurred.

Multiple broken wires are in that area, and you'll see that on top as well as the underside of the belt. And again the side by side comparison. Now, when these wires fractured as a result of that impact, they're sharp. They're steel wires that are fractured and even if an overlay had been in this case, as this tire rotates down the highway, it goes through its footprint. It rotates 650 times every mile fully loaded



on a van. Even if an overlay had been present, the evidence will show that these wires would have cut through the overlay which is simply a thin layer of nylon and the tread belt detachment would have occurred. Different failure mode than one evaluated by Goodyear with a top belt coming off, with the bottom belt staying with the carcass.

Again, the number one and the number two belts, all the information in terms of Mr. Olson's studies and the evaluation by NHTSA involved that failure mode, not this failure mode. Tires that look like this; not tires that looked like the one in our case.

So the Tread Pro tire is substantially different from the Bahena tires because the Tread Pro, the one evaluated by Goodyear and by NHTSA, the tread and top belt detached. The Bahena, tread and both belts detached. The Tread Pro tire, no broken belt wires; Bahena, numerous broken belt wires. Tread pro, no frayed belt wires; Bahena, multiple frayed wires. The Tread Pro, the casing remained inflated. And the vehicle controllable. In the Bahena, multiple casing splits. After this tread and top belt detached in the Bahena case, the tire went flat instantly because both the belts came off the tire.

Now, there's information that was provided by



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Goodyear to NHTSA in terms of why factors were changing -- about heavier vehicles, and more of them larger vans, larger pickups, 15-passenger vans. The visual analysis that Goodyear had done indicated that after the tread and top belt came off, there was no loss of air and, therefore, the operator could maintain control of the vehicle.

Goodyear provided all this information to NHTSA. In fact, Goodyear already completed its evaluation before NHTSA ever asked for information. And what that evidence showed was that there was a total population of these radial light truck Load Range E tires of 22 million tires.

MR. BOWERS: Your Honor, may we approach?

THE COURT: You may.

(Off-the-record bench conference.)

MR. CASTO: You'll learn from the evidence in this case in terms of why tires fail. You'll hear evidence in this case about the van involved in this case which had a mismatch of tires on it. They were passenger tires on the front of the van the Bahenas' were driving. It had two P-metric which is the passenger tires on the front. It had two light truck tires on the right, the right rear and the left rear, and it actually had a spare tire which had a third size



tire, which was a passenger tire, a third different size.

The evidence will show that a prior renter of this van, driving this van involved in the accident, sustained a tread belt detachment on Cooper Tires, prior owner -- prior renter of the van. Now, that was a detachment of the tread and top belt, the kind that Mr. Olson's team evaluated, not a detachment of tread and both belts.

Now, in 2000, NHTSA opened an evaluation. It's called a preliminary evaluation of Goodyear Load Range E tires. Goodyear gave NHTSA thousands of pages of documents about all the testing it had begun by its teams. All the information NHTSA requested was provide by Goodyear. They did their evaluation and they closed their evaluation of Goodyear Load Range E light truck tires.

And the closing resume that Mr. Callister showed you during his opening statement will be in the evidence here and that closing resume showed that there were 22,672,000 Load Range E tires manufactured from 1991 to 2000. Those tires are made in 14 different sizes, 144 different models in various construction types.

There were 87 crashes out of 22 million tires



over that 9-year period from 1991 to 2000, and 44 of those involved personal injuries. So 44 injuries or accidents involving injuries out of 22 million tires made over 9 years.

The evidence will further show that Goodyear evaluated those tires that were involved in those 44 accidents and those tires showed evidence of impact, punctures, and improper repairs.

But there's more. As a result of NHTSA's evaluation, and NHTSA's concern about 15-passenger van stability, Goodyear offered to provide a replacement program for owners of 15-passenger vans. That's important because the van in this case is a 15-passenger van. So Goodyear does that. And Goodyear proceeds then to follow the protocol with NHTSA to notify registered owners of 15-passenger vans.

The evidence will show that what NHTSA does and what Goodyear does is contracted with a company, R.L. Polk. R.L. Polk has agents throughout the United States, and every state, and their job is to assemble registration information for different vehicles. And based upon the vehicle identification number, they can notify people, whether it's an automobile company or a tire company, about replacement programs. So Goodyear followed that procedure. In March of 2002, the owner --



the registered owner of the van in this case received a letter sent by Goodyear notifying them of the voluntary replacement program. But the van had been sold by that time, and the current owner of Garm Rentals wasn't notified. But Goodyear undertook what was the replacement program, voluntary on that part, to do this and that notice went out.

Based upon the ODI closing resume, based upon NHTSA's evaluation of the Goodyear data the same data that Mr. Kam says leads into a different conclusion NHTSA closed its evaluation of PE 46. NHTSA did not do anything further. NHTSA agreed to keep open its evaluation of PE 46, but to this day, there has been no further conduct, no further activity with respect to NHTSA concerning Load Range E tires.

Ladies and gentlemen, the evidence in this case that you'll see that I've outlined for you does not establish the elements that the plaintiffs need to establish to prove punitive damages. The conduct of Goodyear in this case was not malicious, was not evil, was not despicable.

The evidence will show that the conduct of Goodyear was exactly the opposite. That Goodyear undertook a scientific methodology, evaluated the situation, and reached a resolution to notify registered









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

Thank you.

THE COURT: Thank you.

Counsel, you may call your first witness.

MR. CALLISTER: Yes, Your Honor, we call Allen J. Kam.

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

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

-oOo-

ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT.

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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*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, HOMECLICK, 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**



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Plaintiffs, by and through their attorney of record, BENJAMIN P. CLOWARD, ESQ. of the RICHARD HARRIS LAW FIRM, hereby submits Plaintiffs' Reply to: (1) Defendant Jacuzzi, Inc. dba Jacuzzi Luxury Bath's ("**Jacuzzi**") 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 (hereinafter "**Reply**").

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

DATED THIS 10th day of November, 2020.

**RICHARD HARRIS LAW FIRM**

/s/ *Benjamin P. Cloward*

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801 South Fourth Street
Las Vegas, Nevada 89101
*Attorney for Plaintiffs*



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## 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

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[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.

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

## II. LEGAL ARGUMENT

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

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

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

[4] Jacuzzi's Br. at 2, fn. 2

[5] Plaintiffs note for the Court that the requests as written in Plaintiffs' briefing are core 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.

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

[7] As the Court noted at the Sept. 22, 2020, hearing, Plaintiffs' position regarding the requested 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.





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> 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).





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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

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

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

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

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

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

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

### B. JURY INSTRUCTIONS REGARDING JACUZZI'S KNOWLEDGE ABOUT OTHER CUSTOMERS

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

> 8. The jury should be instructed that Jacuzzi knew, prior to the subject tub being sold to Sherry, that other customers had slipped off the seat and into the footwell of substantially similar Jacuzzi walk in tubs.
>
> 9. The jury should be instructed that Jacuzzi knew, prior to the subject tub being sold to Sherry, that other customers who had slipped into the footwell were unable to exit because of the inward opening door.
>
> 10. The jury should be instructed that Jacuzzi knew of other incidents where customers had to call 911 or other emergency responders for help exiting the tub because they were unable to exit due to the inward opening door and weakened physical conditions being elderly or advanced in age.

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

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

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





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> 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.



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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

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[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.



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any punitive damages phase. Jacuzzi argues:

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

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

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

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

From the moment discovery opened, Plaintiffs legitimately and rightfully sought evidence regarding notice—not simply to prove liability but also to prove malice. Jacuzzi has prevented Plaintiffs from being able to present a full punitive damages case to the jury and now Jacuzzi is effectively asking the Court to condone its misconduct. Jacuzzi must not be permitted to thwart Plaintiffs' discovery efforts regarding notice and then later argue to the jury that Plaintiffs have failed to prove notice. Simply put, the fact that the Court has stricken 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.





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Plaintiffs' punitive damages case.

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

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

### C. JURY INSTRUCTIONS REGARDING COMMERCIAL FEASIBILITY

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

> 11. The jury should be instructed that in response to customer complaints about the slipperiness of the tub surface that it began offering various products to customers free of charge which were meant to increase slip resistance.
>
> 12. The jury should be instructed that at the time that Sherry's tub was manufactured, other walk-in tub manufacturers were manufacturing similar walk-in tubs with similar features as Sherry's tub that had outward opening doors.

[26] For the same reason, the Court should reject any "substantial similarity" argument offered by Jacuzzi in any of its Motions in Limine. It is unfair for Jacuzzi to rely on a "substantial similarity" argument when Jacuzzi's misconduct prejudiced Plaintiffs' ability to fully develop the other incidents evidence. Plaintiffs were not given a fair opportunity to conduct meaningful 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.





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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.



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### 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.



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

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

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

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



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### E. JURY INSTRUCTIONS REGARDING SUBSTANTIAL SIMILARITY

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

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

21. The jury should be instructed that subsequent incidents documented in 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



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

## III. REPLY TO FIRSTSTREET/AITHR'S BRIEF

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

## IV. TRIAL PHASES

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





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"moving parts" for the Court or the parties to determine how exactly the trial should be phased. In fact, the Court has already stated that it will defer the decision regarding trial phasing until after the Court makes a decision on Plaintiffs' Renewed Motion. [28]

## V. NOTE REGARDING PLAINTIFFS' REQUESTS REGARDING VARIOUS MOTIONS IN LIMINE

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

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

## VI. CONCLUSION

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

DATED THIS 10th day of November, 2020.

**RICHARD HARRIS LAW FIRM**
/s/ *Benjamin P. Cloward*
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
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*Attorney for Plaintiffs*

[28] Hr'g Tr., Oct. 5, 2020, at 19:22-25 ("I am going to defer the issues regarding phasing of trial 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.")





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## 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).

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An employee of RICHARD HARRIS LAW FIRM



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CLARK COUNTY, NEVADA

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

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.



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APPEARANCES:
[ALL VIA VIDEO/TELEPHONE CONFERENCE]

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CHARLES H. ALLEN, ESQ.

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


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

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

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

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

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

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

MR. ROBERTS: Joel's here, Your Honor.

THE COURT: Oh, wait. You're here from -- that's right. Thank you. And, then, what about defendant First Street? Who do we have on the line?

MR. GOODHART: Good morning, Your Honor. Philip Goodhart for defendants, First Street and Aithr. I apologize for not having the video up, Your Honor, because for some reason it wasn't working this morning.



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THE COURT: That's okay. Not a problem.

All right. What other attorneys do we have on the line? Anybody? Okay. That might be it. Good.

Are there any preliminary, procedural, or logistical issues that anybody wants to discuss before I ask a few questions?

MR. GOODHART: Your Honor, this is Philip Goodhart on behalf of First Street and Aithr. I think I have a procedural issue that I do need to discuss.

THE COURT: Please.

MR. GOODHART: On Friday, in addition to Plaintiffs' Reply in Support of their Motion to Strike First Street and Aithr's Answers, there was also a Motion for Leave to Exceed the Page Limit in their Plaintiffs' Reply from I think it was either 20 or 30 pages to what it is now, which is in excess of 50 pages.

THE COURT: Right.

MR. GOODHART: That same day, I received a Notice of Hearing for that Motion dated December 21, 2020. The Motion did not appear to be on an order shortening time. I did not file any Opposition to it because I received the Notice that it was December 21, 2020, per the due course, but, then, a few minutes later, on November the 18th, about an hour later, I received a signed Order granting Plaintiffs' Motion for Leave to File to Exceed the Page



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Limit.

I'm a little confused how that could have happened. I'm not sure if that had any impact, but I just thought I needed to bring that to the Court's attention because Plaintiffs' Reply did end up being in excess of 44 pages.

THE COURT: Right. Sometimes these things get automatically set for the future, and then it came to my attention, and I thought about it, and just decided, after looking at it, that I would grant it. I didn't have any communication with any of the parties about this and, as far as I know, my staff didn't either. And I looked at the request and I was thinking that, you know, the facts have been so carefully addressed by the parties in the past and I didn't think that the actual legal issues were that complex. And, although I wasn't too excited about the idea of reading an extra 20 pages, I decided that it would be okay and that I would let the parties let me know if there was anything, you know, significantly new in there that they would need maybe some more time to address. That was my thinking on that.

MR. GOODHART: Well, there are -- there's a significant argument that are contained in this Reply that I think should have been contained within the original Motion. And, since I don't get a Sur-Reply and was not

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advised that a Sur-Reply would be possible, I'm kind of, you know, behind the eight ball a little bit in trying to respond to each and every single allegation contained in this 46-page brief.

THE COURT: Right. No, I understand. Is there a particular section that you think you would need more time to address or are you saying that there's facts that are interspersed and --

MR. GOODHART: Well, there's really --

THE COURT: And would you be able to identify those so we can see if it's something significant enough that you would need more time or if we could just give you a chance to deal with those today?

MR. GOODHART: Well, Your Honor, I feel comfortable enough being able to deal with that today, but my concern is that, you know, as part of the record, and things like that, that I know after these hearings you take your time to review all the pleadings and the papers and take a look at everything closely, which is precisely what you did at the time of the first Motion to Strike my client's Answers. Originally, you issued a minute order indicating that there was sufficient evidence and that an evidentiary hearing would be required. And, then, about a week or so later, you issued an updated minute order saying that you primly had a time to review all the documents and

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found --

THE COURT: Right.

MR. GOODHART: -- that there were no claims that were valid against my client or even Jacuzzi at that point in time.

THE COURT: At that point. Right.

MR. GOODHART: Right. And I'm just a little concerned that, you know, I can certainly address many of the things that are in here through the oral argument, but to the extent that, you know, notes are taken and things like that, I don't really know if -- I know you review the papers very, very closely. So, you know, I am prepared to go forward with the oral argument this morning, as we've indicated. It's just if the Court would like a Sur-Reply before it renders a decision, I would like the opportunity to do so so that, in paperwork, if necessary. After I've answered your questions and things like that, I could possibly prepare one.

THE COURT: I understand that. So, I didn't want to delay this anymore, but why don't we use this approach? We'll have the parties answer my questions to make sure I can organize all of the relevant facts in a way that helps me to resolve this. And, if during the argument you believe that there is some particular argument or fact that you believe should have been in the Motion but it was in



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the Reply and you want more time to address that or handle it differently, let me know. Now, to the extent you can identify that. All right?

MR. GOODHART: I would -- yeah. I would appreciate that, Your Honor. Like I said, I'm not sure I will need to, depending upon your questions and the argument, however, I will try to indicate that if at all possible. And I appreciate it. Thank you.

THE COURT: Sure. Mr. Cloward, did you want to say anything about that?

MR. CLOWARD: Yes, Your Honor. I would. I appreciate the opportunity.

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You know, I -- we're somewhat befuddled because we followed the exact format that was contained in the Opposition and replied exactly to the sections that were in the Opposition. So, for instance, you know, their first thing that they set out was the Fox allegations and then the Guild Surveys, and the front row seat, and our format was the same. We didn't create new arguments. We just addressed that -- the arguments that they set forth, number one.

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And, number two, we were very critical of First Street for not addressing in full all of the important aspects that we set forth in the Motion. On two or three separate occasions, throughout our Reply, we pointed out:



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Look, Judge, this was a real big deal. They only devoted two paragraphs to it. They've glossed over it and I think that their current request is a way to get another bite at that apple to flesh that out. That -- and that wouldn't be fair to us. We spent the time to do this. I have a lot of personal issues going on last week with just real serious things and, you know, I asked for one extra day to address these issues. I didn't ask to kick this out and, you know, -- so, we feel like it's been adequately briefed. We feel that any other attempt would be to just continue to delay the issue, Judge.

THE COURT: Okay. Thank you. Let's proceed then.

Counsel, it would be helpful to me if I prepared my notes while we're going through this with particular facts identified to me in short statements that I can put into like one page sheets that I am working on.

Well, let me explain it this way. What I would like to do is for the top five pieces of evidence, Mr. Cloward, for you to identify what the piece of evidence at issue is, --

MR. CLOWARD: Okay.

THE COURT: -- and, then, the next point would be: When did the relevance of that issue or that piece of evidence become known? Next would be: When did First Street obtain that evidence? Perhaps they always had it.



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The fourth piece of information I would need is: Was the production excused? And there's arguments that things might have been excused because of a discovery order, or a meet and confer, or the language used by the plaintiff in a particular document request. So, that's the fourth point. And then the last point was: When was the evidence actually produced?

Now, a lot of this, Mr. Cloward, is in your brief and in First Street's brief and in the Reply brief, but it wasn't always clear to me. Since we're dealing with allegations of discovery violations, in particular relevant things weren't produced on time, I need to know, you know, these five points one more time: What's the piece of evidence? When did relevance become known? When did First Street have the evidence? Was their production excused? And when was it ultimately produced?

And let's just take -- one, for example, let's just begin this with Guild Survey, so you can follow my analysis. And this isn't the full extent of my analysis. This is just me trying to prepare a grid that has some of the critical facts to help me go forward in understanding your argument and doing my analysis after the hearing.

So, Guild Surveys, I think, is the first one you addressed, Mr. Cloward, and, specifically, Guild Surveys relating to slips, slips and falls. So that would be the

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first piece of evidence that you think is critical that was either not disclosed or not disclosed on time.

So, then the next issue for you to identify in one or two sentences would be: When did that relevance become known? And, so, we're dealing with: When should First Street have known that evidence of slip and falls was relevant in this case? And, of course, there's been some argument among the parties on whether that was the First, Second, Third, or Fourth Amended Complaint.

So, why don't we take it from there, Mr. Cloward? The first piece of evidence is Guild Surveys versus slips. Let's deal with that one. Okay?

MR. CLOWARD: You got it, Judge.

THE COURT: So, when did -- what's your position on when that -- when the relevance of those Guild Surveys regarding slips became known?

MR. CLOWARD: I would think that during the deposition of Bradley Vanpamel [phonetic], which was in -- approximately, if memory serves me right -- and if the Court wants, you know, very specifics, I can take a moment to get that, but I believe late 2017 or early 2018.

THE COURT: All right.

MR. CLOWARD: It was early in the litigation.

THE COURT: And -- right. And I don't need specifics unless it's -- unless the timing is critical.

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And, after I get these pieces of information, I will give you, Mr. Cloward, and opportunity to present whatever argument you've prepared to present today.

All right. So, what's your position on when First Street obtained this evidence? I assume your information would be they always had it.

MR. CLOWARD: Correct.

THE COURT: All right. And I'm assuming your position would be that production of such evidence was never excused. Right?

MR. CLOWARD: Correct.

THE COURT: And then the -- then, we get to the issue is: When was it produced? And you had a statement in your brief on page 3 that they've only turned over one year of Guild Surveys and that was just from 2015. And, then, there's some discussion of it, of the surveys being produced in August 2019. So, I'm assuming from this, your position would be that they produced the Guild Surveys in August 2019, but it was only for 2015?

MR. CLOWARD: Correct. And I was mistaken. As I set forth in the Reply, that was the one issue --

THE COURT: Right.

MR. CLOWARD: -- that I was mistaken. It was named 2015, so I assumed, and I apologize to the Court for making that assumption. It does appear as though there





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were surveys that were produced up to, I believe, 2017.

THE COURT: And then we had the statement from First Street, I believe, in there that said they produced all surveys.

But, anyway, so, see, that's kind of the initial analysis that I wanted to do, Mr. Cloward. So, we have Guild Surveys regarding slips with a piece of evidence at issue. Relevance became known late 2017. They always had it. They -- production was not excused. And they didn't produce it until August 2019, perhaps almost two years later. That would be your position on the Guild Surveys.

So what's the next most critical piece of evidence that you have an issue with, Mr. Cloward?

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MR. CLOWARD: I would think e-mails, internal e-mails from team members of First Street within the First Street organization, as well as the Aithr organization, as well as e-mails back and forth from Jacuzzi regarding not only slips but any incidents really, any safety incidents. You know, incidents with the door, or incidents with people not being able to get back out of the tub, you know, any incident.

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THE COURT: All right. So the -- kind of lumping all of that together, it obviously makes it difficult to prepare a one-page data sheet because we're dealing with e-mails on different topics, prepared at different points in



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time. And, of course, different dates of production. So, let's deal with e-mails differently.

What about -- what's the next piece of evidence that you believe is critical in this case that you didn't receive or didn't timely receive?

MR. CLOWARD: Information pertaining to the slipperiness -- I guess, preventative measures that were taken. So, for instance, there were products that were utilized by the parties, and if you want to break these down into subcategories or one broad category, there was a product called LiquiGuard, StepCote LiquiGuard. And, apparently, it was a product that could be applied somehow by one of the dealers or one of the installers. I don't really know the details about exactly how the product is even applied, or if it's a gel, or if it's a sticker. I don't really know, you know, what they do to apply that.

But that would be something that I think would have been relevant during Bradley Vanpamel's deposition in 2017, early -- or late 2017, early 2018, because the way that he described this incident is that she was, you know, reaching for the controls and slipped off of the seat and kind of into that footwell position.

And what we find in a subsequent discovery that Mr. Lee Roberts produced is that -- and the e-mail -- the most important -- one of the most important e-mails was one

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that Nick Fox authored all the way back in I believe it's December of 2013, potentially, or -- I think that's when it was. Maybe 2013. But, you know, he actually said to Jacuzzi, and keep in mind, Judge, you know, Nick Fox is an employee of First Street and Aithr, and he's telling Jacuzzi: Hey, look, with respect to this slipperiness issue, we ought to put it on the seat and the floor because we're having some issues with folks.

So, it's clearly an issue of the tub. They had information about it. Bradley Vanpamel's description of how she got into the footwell, that's when --

THE COURT: Okay. No, I got that one.

MR. CLOWARD: -- it would seem --

THE COURT: So, what was the other preventative measure that would come in this category?

MR. CLOWARD: The -- I would say the bath mat issue, the bath mats.

THE COURT: Oh, by the way, back up for a second. The LiquiGuard, when was that evidence produced? For my chart here.

MR. CLOWARD: So, I've been -- and I would just ask the Court, give me a little bit of allowance to be precise. I like to be precise and I know the Court likes the precision, and, so, if I'm a little wrong on some of these dates, I apologize. But I think that they were



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produced anywhere between July and August of 2019. So, at the very end of discovery or after discovery, and they were never produced by First Street to my knowledge. I double-checked the disclosures to make sure that I could make that representation to the Court. I had a paralegal that -- Ms. Barnhill helped me with that. And I don't believe that First Street ever produced any of the information with respect to the LiquiGuard, or the StepCote, or the bath mats. And, so, that was produced by Jacuzzi.

THE COURT: All right. Very good. So, LiquiGuard, bath mat, what other preventative measure was, in your opinion, not disclosed?

MR. CLOWARD: I think that the information with respect to the Kahuna Grip could have more timely disclosed so that we could have had more thoughtful discovery and thoughtful participation with the depositions of the 30(b)(6) witnesses with our experts, with, you know, really all of the folks who have participated in this case, with their experts, with the 30(b)(6) witnesses for both parties. But, quite frankly, we didn't get that information -- any of the documents relative to that produced until 2019.

Mr. Modena did testify to that. You know, he said that there was a product, you know, called Kahuna something or -- he wasn't -- I can't remember the testimony off the

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top of my head, but that was in, I believe, December 2018. You know, so well into this litigation, years into the litigation, well after Bradley Vanpamel's deposition where slipperiness was an issue and should have been produced in a timely manner such that we could have utilized that for our experts and for the depositions.

THE COURT: I got -- what's your position on when First Street obtained evidence of these preventative measures, the LiquiGuard, bath mat, and Kahuna Grip?

MR. CLOWARD: Well, the documents that have been produced, they've had this information -- we could prove to the Court that they've had this the entire time and they've been involved with the development of these products.

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You know, one of the things that is befuddling to the plaintiffs is they -- First Street says: Well, you know, we don't have some of these documents. Or: Hey, we weren't copied on these documents. You know, things of that nature. One of the documents in particular was a dealer bulletin that specifically said that they had tested the Aithr Aging in the Home, A-I-T-H-R, had tested a product and that they were pleased to announce that both Jacuzzi and Aithr had tested it, and that right there is an example of -- you know, well, what did they do to test it? How did they test it? What measures were taken to test it? Where are the other documents pertaining to that testing?



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Who else was present --

THE COURT: No. I got that. I got that.

All right. So, what's the next most critical piece of evidence in your mind, other than we have, you know, the Guild Surveys, the e-mails, and the preventative measures. What would be next in your mind?

MR. CLOWARD: I think that the Alert 911 is -- was a big deal. And, you know, Ruth Cranute [phonetic] was a -- an individual who filled out a formal request with Consumer Products Safety Commission and they have a website that you can go to if you're a consumer. You fill out the form and if it's -- if they are going to put it on their website, they send you some more information. You have to authorize for them to do that. It's a formal process. It takes some time. It takes some doing and effort by an individual to actually go through with that process, because there's back and forth communication with the individual and the Consumer Product Safety Commission.

And, so, she went to that extent, filled that out, and, in there, she said: You know, the Guardian Alert or the Alert 911, I can't remember the exact terminology she used, but, you know, it would have been useless to me that they provided. So, early on, and that was -- we obtained that in at least early -- I would say, you know, April/May-ish of 2018, before the deposition of Bill

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Demeritt, the Jacuzzi 30(b)(6).

So, we had that document in our possession. We used that to cross-examine Bill Demeritt when he said: Hey, look, Jacuzzi only knows of two incidents, both of them are being litigated by you, Mr. Cloward. Those are the only ones we know about. Well, gave him every chance and pulled that document out and said: Well, what about this? You know, this Guardian Alert. And, I think, at the time, we didn't know it -- you know, anything other than what was on the document as to what that product was.

And, so, I guess, when was it known to be relevant? I would say during Bill Demeritt's deposition when we cross-examined Bill Demeritt on that. That's when it first came out that that would be an issue.

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And as far as: When did First Street have the evidence? Well, they've always had it. They were -- you know, they, apparently, were more involved with the product than Jacuzzi.

Was it excused? Their argument is going to be: Well, you know, during the hearing, during the August 2018 hearing, Commissioner Bulla said: Well, you know, send some written discovery, I guess, if you want on that product. And my response to that would be: Well, Judge, I had had several conversations with counsel involved and it was always represented that they didn't know anything about



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it, they didn't have anything to do with it. And, so, that's why we didn't send the discovery. And, you know, that's part of my complaint is that, you know, we should -- I should be able to trust what counsel says to me and that's what's been disheartening about this case, you know, first with Josh Cools having eye-to-eye, you know, conversations of like: Well, this just doesn't make sense. It doesn't feel right in my gut. I mean, are you sure?

And the same thing applies with this product with Mr. Goodhart. I had multiple conversations with him. And it was always represented: No, we don't -- we didn't -- we don't know what it is. We don't have anything to do with it. And, then, we find out, during the deposition of Ms. Cranute, -- and, fortunately, she kept the paperwork. You know, if she hadn't kept the paperwork, this might still be an issue that we're chasing around and we're trying to find information and answers to.

But I would think that if the company is giving an Alert 911 system and part of the evidence that we have in the Guild Survey is that folks were told not to use it without -- not to use the tub without having this nearby, now that's a pretty big deal. That's a big issue. And we haven't been able to just do any discovery with respect to that. So, that would be the next on the list.

THE COURT: All right. Give me one more.

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MR. CLOWARD: Okay. Could I give you two more?

THE COURT: Sure. All right.

MR. CLOWARD: Okay. So, the -- I guess the Cunnison recording. You know, this is one that is a huge thing and, you know, for First Street to say, you know, we didn't keep certain documents or we didn't keep certain recordings, we didn't offload certain recordings, you know, Dave Modena's testimony -- or his affidavit belies that position. His affidavit says, and I'm quoting for the Court, quote:

> Mr. Fox was told by counsel to retain anything and everything related to Sherry Cunnison in Aithr's files, including all recorded calls, end quote.

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So, if you don't have these recordings, why are you telling your individual to save these recorded calls? You know, but then they come years later and say: Well, Judge, we didn't save these because we had the Lead Perfection and, so, you know, we would only save them into the -- or we would just type the notes of what it meant. Well, your affidavit from Mr. Modena belies that argument because he's instructing Mr. Fox to save all of the recorded calls.

So, -- and, obviously, there is an issue as to this other call where she dove -- had to dive under the water. First off, the documents -- their own Lead



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Perfection notes and the note from the Allstate adjuster indicates that at some point there was confusion about that issue and that the drain was what caused her to be stuck. And, you know, what does Nick Fox have to lose? What does Annie Duback [phonetic] have to lose? They don't want to get tied up into litigation. They don't want to be deposed. They don't want to be involved, yet they said that she called and she told them that she got stuck. She had to dive underneath the water.

Yet, the thing that's disheartening, again, Judge, is when we find additional information from the 911 responders, and so we file the Motion and focus on that information, they crucify me and try to make it look like my whole claim, my case is changing, and ever-changing, and I can't tell you how many times they've criticized, and been critical of me for that, and it's just not fair because the evidence shows that -- now we know that there were two calls and that there were two issues.

THE COURT: All right.

MR. CLOWARD: So, in answering the Court's questions, I guess the calls -- so, we're talking Ring Central, we're talking the -- RingCentral and Five9, those calls would -- that would be a piece of evidence. When it was known to be relevant, I would say back in 2017 during Bradley Vanpamel's deposition -- or, actually, those

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particular -- so, you would want to break those down into two components. Number one, the calls with respect to Sherry Cunnison. Those would have been relevant from day one, but the broader calls of other claimants calling in to complain about the tub and document safety issues, those would have been known to have been relevant as early as 2017, during Bradley Vanpamel's deposition when he described what took place and how she became stuck. Because you may have folks -- or we know that folks called in saying: Hey, look I was -- you know, my husband was stuck in the tub for two hours. We had to call the fire department, or I had to call my cousin to help him out, or I had to call -- you know, we had to cut the door off. You know, so there -- those other issues would have been relevant early on, Your Honor.

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When did First Street --

THE COURT: Okay.

MR. CLOWARD: -- have the evidence? When did First Street have the evidence? Well, we know for a fact that First Street had the evidence with respect to the call of Sherry Cunnison around, I believe, 2014. I believe that's when the -- it was set out in the Motion, when Mr. Goodhart, in the Motion, indicated that there was an e-mail to Nick Fox saying: Hey, save everything. They had the information at that point. Nick Fox was able to obtain it.



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According to his affidavit, he provided it by a thumb drive to Dave Modena. So they had it early, early on.

Was it excused? Absolutely not. There's no excuse to not disclose those documents.

And when was it actually produced? It was actually produced in 2020, upon plaintiff's -- so, it's never been produced by First Street. Plaintiff's efforts, we were able to obtain it. And those are the calls with respect to Sherry.

With respect to the other individuals, First Street -- I guess it depends on if you believe First Street's affidavit as to when they had the evidence. They had the evidence when folks would call in, but they claimed that they downloaded or input the information obtained in the call into their Lead Perfection System, but that's, you know, -- who knows if that's actually accurate. I mean, maybe it is, maybe it isn't. We don't know.

Was it excused? We don't believe that it's ever been excused. We believe that the Court has been pretty clear on what's relevant information and the rules are very clear on what's relevant information. It's claims and defenses. Evidence pertaining to claims and defenses, you've got to produce it. And, so, we don't believe that it's ever been excused.

When was it actually ever produced? It never has

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been produced.

THE COURT: Okay. You said you have one more.

MR. CLOWARD: Yeah, one more.

THE COURT: Well, [indiscernible] one more.

MR. CLOWARD: I appreciate that, Judge.

You know, the dealers were still an issue. You know, this was the basis of the first Motion.

THE COURT: Right.

MR. CLOWARD: And the -- I guess the -- I just wanted to highlight the prejudice that has been caused. You know, the Court gave leave to take those depositions and we attempted to take depositions, and what we found are that most of these companies are out of business. The attempts that we did make, people just didn't show up and, you know, you can see the prejudice when you see Dave Modena's affidavit and Dave Modena says: Look, a lot of these claims came in completely and solely through the dealers. We had no access to their information. We had no access to their computer systems. And, so, you know, we don't know what they're told.

Well, so, that's a whole bucket of evidence and Dave Modena even testifies that the dealers are the folks most likely to have the information. So, that's a huge bucket of evidence that's out there that nobody knows anything about. And because of the delay of First Street

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not producing that information when we requested in an interrogatory, you know, that's information that will likely never be found because those folks are out of business or they're no longer doing those -- selling those products and it's just gone.

And, so, with respect to the dealer network, we believe that they had that as early as 2011 or 2012 when the Manufacturing Agreement was signed by the parties and there was specific language in the Manufacturing Agreement.

As the Court may recall, our interrogatory cited the Manufacturing Agreement and said: Hey, on page, you know, 5, and that's not the correct page, I just don't remember the page, but, hey, on page 5, paragraph 6, the manufacturing agreement says X, Y, Z, the, quote, network of dealers. Please provide the name of the network of dealers. And they said: Well, Aithr is the only dealer. And we found that that was not true.

And, so, you know, those should have been affirmatively produced by 16.1. Had they been produced by 16.1 back in 2016/2017, we would have had a better opportunity to hopefully gather the information from those dealers, but we were not afforded that opportunity due to the delay in time.

We don't think that it was ever excused and it was produced in 20 -- I think 2018/2019. The map, but, again,





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by then, it was too late.

THE COURT: All right. And, so, what you're adding to your prior Motion on this issue is the prejudice is what's new then.

MR. CLOWARD: Correct.

THE COURT: All right. Very good. So, thank you. That's a good start for my chart. Let's go ahead then and whatever argument you had prepared to present today, you may do that now.

MR. CLOWARD: Okay. And I don't want to rehash everything. You know, we're fortunate that Your Honor carefully evaluates and reads everything, so I don't want to waste the Court's time and just rehash --

THE COURT: Well, it's -- there's a lot of material here and I am committed to being motivated to get this done right, so let's proceed.

MR. CLOWARD: Understood.

Well, I think, you know, one of the fundamental notions of the civil -- really of the justice system is the right to a speedy matter, a speedy adjudication of your issue, and we agree with the defendants that cases should be heard on the merits. And that's all that we've ever wanted. We wanted to just proceed. We wanted to be able to present our case. We've wanted to be able to know the information relative to proving our case. And one of the

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things that's important to our case is that we have to show that the product was dangerous, number one. And, number two, we have to show that they knew about the dangerousness of the product.

And, so, that's what we've attempted to do throughout this process, from as early as 2017 when we sent discovery and began fighting with Jacuzzi about these issues. And First Street has been sitting there, front seat, they've watched the slugfest. They watched all of this happen, all of these arguments about: Well, what is an incident? Well, what is prior versus subsequent? And time and time again, Jacuzzi lost and Commissioner Bulla at those hearings said -- then Commissioner Bulla at those hearings said: You know, ordinary course. And she understood what plaintiffs had to prove. They understood at that point what plaintiffs had to prove.

They know that as a -- as being in the stream of commerce, that they have the same defenses and that the plaintiff has to prove the same things against First Street that plaintiff would have to against Jacuzzi. So, at that point, they have an affirmative obligation to turn those things over.

And throughout this process, there has been a number of discovery responses -- or, excuse me, discovery requests that are directly on point, that ask for -- I



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mean, you know, for instance, this interrogatory, it's the first set of interrogatory, it's Number 11, and it's:

> Please state whether the defendant, First Street, has ever received notice either verbal or written from or on behalf of any person claiming injury or damage from his use of Jacuzzi walk-in tub, which is the subject of this litigation.

Like, it's directly on point. And their response is: We only know of, you know, Leonard Baize and Max Smith. Conveniently, plaintiffs are prosecuting Max Smith and, conveniently, Leonard Baize was one that plaintiffs found.

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So, there's been no good faith participation by First Street and their whole position, Judge, has been: Hey, there's never been an order compelling. And, so, if there's not an order compelling, then we don't have to produce it. And that's their position boiled down to its essence. And that's not what the caselaw says. That's not what the statute says. That's not what NRS 16.1 subpart 3, I believe (c), says. They have an affirmative obligation. Twenty-six -- Rule 26, NRCP 26 says that there's an affirmative obligation to seasonably supplement your disclosures and your responses.

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This discovery response was back in 2018. It's never been supplemented. And we know, from the document



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dump that took place at the end of 2019, or at the latter part of 2019, the summer and latter part of 2019. I mean, Judge, you've seen now, at this point, the problems that this tub had and the number of issues that were documented, clearly documented, yet plaintiff was -- has lost the opportunity to do further discovery on those, to depose the relevant individuals.

And, most important, plaintiff has lost the opportunity to depose the 30(b)(6). I can't compel Dave Modena to come and testify at trial as the 30(b)(6). You know, you have to be prepared during a 30(b)(6) deposition. You have to get the information. You have to get whatever concessions you're going to get. You have to authenticate the documents. You have to be very prepared to do all of those foundational requirements, so that when you find yourself in trial, and it's an out of state corporation, you don't find that you are, you know, out of luck and not able to prove your case. And we've been denied those fundamental opportunities.

You know, it goes -- and it's from all of these relevant issues. I mean, you look at the advertising issues, you look at the Alert 911 issue, you look at the dealer issue, you look at, you know, all of these issues, it's been a fight, fight, fight. There's been no good faith disclosure. And, so, we haven't been able to have

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the documents to use during -- to effectively use during the depositions, and to give to our experts, and to cross-examine their experts, and to use potentially with other lay witnesses who might have knowledge, like Audrey Martinez, for instance, or Kurt Bachmeyer.

So, there are just -- there are a lot of issues that plaintiffs believe First Street and Aithr created due to their obstructionist behavior and, you know, it's -- as I mentioned before, it's disheartening when before a deposition I reach out to opposing counsel and say, hey, are you sure about this, and the response is: Yeah, we didn't have anything to do with it. And, then, during the deposition, again, give them an opportunity. And, then, I pulled the document out and say -- or after Ms. Cranute talks about it, hey, Mr. Goodhart, here's the document, it's got First Street written all over it, now all of a sudden the story changes. You know, so, I think that we've been significantly prejudiced.

I mean, think of getting ready for trial, Judge, what would be involved in this case? To get ready for trial, we'd have to redepose pretty much all of the witnesses in the case now that we have the documents, now that we are actually in possession of, hopefully, the majority of the documents. First Street still has not produced documents. A lot of these internal documents that

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they claim, well, we looked for them, and we don't have them, and we don't know where they're at, yet Jacuzzi was able to produce them. That just doesn't make sense. How is it that Jacuzzi can produce these documents but, First Street, you can't?

So, but, let's just say that we have the bucket of information that we have and we would have to redepose the 30(b)(6)s for all of the companies, to talk to them, to authenticate documents, to have further discussion about the documents, to find out about what happened, when it happened, who was involved. I mean, you know, as -- I use the StepCote as an example earlier and, in that dealer bulletin, the dealer bulletin says that Aithr performed its own tests. That's a big issue, you know? You're claiming -- First Street is claiming: Hey, we didn't manufacture the product. That was solely due to -- that was solely Jacuzzi's responsibility. All we did was we just advertised it. Well, the dealer bulletin belies that argument in that you are at least involved in solutions and, if you are involved in solutions to the slippery issue or the issue of folks falling, then clearly you knew about it. And what is the extent that you knew about it?

And, so, those are additional things that the plaintiff has lost the opportunity to discover and, Your Honor, if the Court has anything else that it wants us to

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address in particular, but I think that our pleadings are sufficient and adequate.

We attempted to -- and I know -- and I apologize, they're long. We just wanted to make sure that the Court had all of the relevant information, all of the relevant citations, all of the relevant documents so the Court doesn't have to take anyone's word for it but can look at the documents itself and make the determination.

THE COURT: Thank you. I appreciate that. Thank you very much.

All right. So, Mr. Goodhart, I'll let you proceed however you would prefer. You can deal with the six different pieces of evidence that I asked Mr. Cloward about initially, if you want to do that, or simply incorporate that into your argument. But I wanted him to identify those pieces of evidence and those particular facts. That's just for my benefit, but yours as well. Well, I will let you proceed however you deem it most effective for you.

MR. GOODHART: All right, Your Honor. I appreciate that.

Just real quickly, going through these, and then I'll proceed. With respect to the Guild Surveys, it wasn't until July of 2019 that plaintiff sent out a Request for Production of Documents to my client and asked me to

produce any and all surveys, regardless of what it was that was being reported by the consumer.

And, again, these are customer surveys where First Street and Aithr are trying to find out: How did we do with the installation process? Are you happy with the product? What's going on? These aren't surveys designed for any type of complaint.

And, as Mr. Cloward certainly knows from a document production that was probably back in April 2019 and also again in August of 2019, in response to this Request for Production of Documents, several hundreds of pages of [indiscernible] surveys were produced for the 2013 and 2014 time frame. And these surveys would only have written information on them if there was a complaint about slipperiness or anything like that. So, it would be a virtual impossibility to search any of these documents, even if they were scanned into the system, to determine whether somebody said: Well, the tub seems kind of slippery.

But it's note that -- it would have been, those -- each and every survey, regardless of whether there was a complaint, was produced in response to the Request for Production of Documents. It was that simple. In addition to that, the Guild Survey, we produced a searchable Excel spreadsheet.

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One of the biggest issues that plaintiffs has had with Jacuzzi over the years is Jacuzzi would handpick which documents to produce. As I recall, one of the biggest issues and perhaps one of the main issues why the Court granted the Motion to Strike Jacuzzi's Answer, appeared to be that when Mr. Cloward's experts did some searches of the sales [indiscernible] records, that documents that Jacuzzi had originally set had been searched for, words and phrases had been searched for and turned up nothing. Actually turned up numerous complaints. And this is Jacuzzi.

So, we didn't hide any of that. We didn't try to hide any of that. We produced everything, as far as the surveys, when we were asked to produce them in their Request for Production of Documents. These surveys were, in fact, identified back in December of 2018 when we deposited a whole bunch of e-mails that predated Ms. Cunnison's death and that's kind of what started all of this going.

So, plaintiff was fully aware that there were surveys because we produced a couple of them that we had sent to Jacuzzi over some customers' concerns, yet they wait until July of 2019 to do a Request for Production of Documents and we produced those documents within a month.

With respect to the internal e-mails, I can represent to the Court that all e-mails have been produced

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that we are in possession of. In fact, my client, First Street and Aithr, were unable to search the e-mails in their systems because of various reasons over antiquity of the e-mail systems, and switching e-mails, and things like that. And they provided my office with all the e-mails and I had a paralegal and an associate go through the e-mails. Again, they had problems searching the e-mails and, therefore, we had to read -- they had to read well over 120,000 e-, trying to identify which ones needed to be produced. And they were identified.

So, if the e-mails become the issue, well, then, under one of the *Young* factors, the e-mails were viewed by counsel. So that cannot be used as a guide or as a sword or a hammer on my clients, First Street or Aithr.

With respect to the preventative measures that Mr. Cloward has identified, First Street has never, ever denied that they had conversations with Jacuzzi about some customer saying the tub appears to be slippery, is there anything we can do about that? And we produced e-mails to and from Jacuzzi indicating that those concerns were expressed to Jacuzzi. And, in response, Jacuzzi advised -- and, again, these e-mails have been produced. Jacuzzi advised First Street that the tub floor -- and, again, we're talking about the tub floor here. Met all the IAMPO standard resistance requirements, that it was not slippery,



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that perhaps customers could use an oil that are increasing the slipperiness. And because the -- but because of that, Jacuzzi then took a look to see whether or not there may be some type of substance they can put on the floor of the footwell. That was Jacuzzi that was doing that. Jacuzzi was analyzing it because it's their product. The last thing First Street would want to do is have a customer put something on the floor of the product or to do it themselves through Aithr or through subcontractor which would void a warranty. So, this had to be something that was directed and controlled by Jacuzzi, which the documents clearly reveal was.

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I understand Mr. Cloward doesn't like it. I understand Mr. Cloward wants to read things into documents and issues that certainly aren't there. He has every right to do so. We have had Mr. Modena here for trial and he can cross-examine Mr. Modena at trial all he wants on these issues. But the fact of the matter is we never tried to hide anything. We have never destroyed anything.

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The 911 Alert, again, as indicated in Mr. Modena's affidavit and in our Opposition, this was an add-on. This was an add that was in magazines where, if you purchased the tub, First Street would provide or the dealer would provide you with a $200 gift for free. It wasn't designed because we knew people were slipping and falling or being



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injured. No, some of the gifts were $200 dinners to a restaurant. Some of the gifts were magazine subscriptions. It was a simple: Hey, thank you for buying this tub. Here's a gift for you. And, oh, if you even allow us just to come into your home to give you the presentation, we'll give you the gift as well. There wasn't any nebulous reason behind this. Mr. Cloward wants to read conspiracies into this by saying: Well, we must have known that this tub was slippery and dangerous otherwise we would have never given people 911 Alert bracelets. That is simply not true and that's what Mr. Modena testified to about. Again, we haven't hid anything.

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With respect to the Cunnison recording and the Five9 and RingCentral, I'll deal with those in a second. As far as the dealers go, again, this issue was addressed in the very first Motion to Strike and the Court read our response and said: You know what? Maybe it could have been a little bit clearer, but you certainly, plaintiffs, could have raised that issue in a Motion to Compel. But you didn't. You accepted the answer. And the answer was restricted to who would have been selling these kind of products.

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When plaintiff asked for the dealer information, again, through -- it wasn't even through formal discovery. It was during a deposition. We complied and within a week

or two, we provided plaintiffs with all of that information. And, again, what we're dealing with is information from dealers who are not related to First Street or Aithr.

And just to give the Court some -- a little bit of a background with this as well, to make sure that it truly understands what's going on here and what the ramifications may be of striking First Street and Aithr's Answer is the Court needs to clearly understand that Aithr is not Jacuzzi.

THE COURT: Okay.

MR. GOODHART: First Street is not Jacuzzi. They are completely separate and apart organizations from each other. Jacuzzi and First Street entered into an agreement where First Street would market and advertise Jacuzzi's walk-in tub. That's it.

In that same agreement, Jacuzzi said they would design and manufacture the tub. So, with this agreement in place, First Street utilized Aithr as a dealer. Aithr was not the only dealer because there were dealers across the country. There was a geographical area. I attached that to the affidavit of Mr. Modena, which is Exhibit 1 in the Opposition. That's the information we immediately provided to the plaintiffs when we discovered through a 2.34 conference, during a deposition of our 30(b)(6) witness,

that that was what they were looking for. Up until that point in time, we didn't know because it had never been asked of us. As soon as it was asked of us, we immediately produced it.

This Ms. Cranute that plaintiffs have been talking about with respect to 911 issues, well, what he didn't tell you, Your Honor, is that Ms. Cranute lives in Florida. Florida is not Aithr's territory. Florida is Fairbanks Construction's territory. Whatever information Fairbanks Construction received as indicated in Mr. Modena's affidavit, First Street doesn't find out about it unless it is voluntarily provided to them. Fairbanks Construction did have communications with Jacuzzi about some concerns customers were having, but First Street was never involved in those communications. We know that because Jacuzzi has produced documents with communications with Fairbanks Construction. We didn't produce those documents because we do not have those documents.

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We were not included in e-mail change or exchange with those documents. And, quite honestly, it's not surprising. Again, First Street does advertising and marketing. While they're doing the advertising and marketing, they obtained customer leads. Customers call in and say: I'm interested in that product. First Street will then find out where this customer lives and go to one



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of the dealers and say: Hey, can you send a salesperson out to their home to do an in-home sales presentation?

In Las Vegas, and with respect to Ms. Cunnison, that dealer was Aithr. So, Aithr then sent a salesperson who has been provided with sales and marketing material and trained by First Street, as the marketing and advertising experts, to give a presentation. At the conclusion of the presentation, Ms. Gunnison wanted to buy this tub. Ironically, the salesperson, Mr. Benson [phonetic], said to her: You're a little large. This may not be a right fit for you. But, again, she insisted and said: No, I'm going to lose weight and I want to buy this tub. Mr. Benson even had her sign the contract saying that she appeared to be a little bit too large for this tub.

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Ms. Cunnison never provided Mr. Benson with any type of medical history, any type of history of falls, any type of history of medications that may have caused anybody to say: Hang on a second, you may not want to get this tub. I'm not going to do that for you.

Further, dealing with the advertising and marketing issues, though, that is what Aithr was responsible for and, more importantly, First Street was responsible for, marketing and advertising. Aithr would then subcontract out the installation of the tub to a subcontractor, a general contractor, who would then perform



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the installation. Neither Aithr nor First Street would ever see the tub until after it was installed, when somebody did a follow-up with the customer.

So, the issues in this case, and as plaintiffs have framed it in their Motion, deal exclusively with NRCP 16.1 and the mandatory disclosure requirement. And plaintiff, [indiscernible], you know, there's mandatory disclosure requirement to disclose all evidence regarding claims and defenses. Okay. Well, let's take a step back because that is the only issue before this Court, 16.1 violations. There's never been a discovery order. There has never been a discovery motion filed. And that is significant.

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In fact, plaintiff, even in the Reply, said: Well, we were going to file a Motion. Your Honor, here's a copy of the Motion we filed with the Discovery Commissioner, but it was rejected because of a clerical error. Rather than fix that clerical error and refile and have it decided, nothing was ever done. Nothing. So, the only issue before this Court is: What are the requirements of 16.1?

Now, as the Court will recall, plaintiff's counsel is very, very good at finding cases in other District Court Judge's chambers that supports positions that he wants to argue. I believe he cited two or three cases decided by

other judges in the Eighth Judicial District Court and attached Orders from those judges when he was going through Plaintiff's Motion to Strike Jacuzzi's Answer. So, one would think that if a Court in the Eighth Judicial District had ever struck an Answer, a terminating sanction, because they did not comply or voluntarily disclose items, it would be out there. But it's not.

Then, plaintiff, tries to cite some unpublished decisions by the Nevada Supreme Court. What's important to note, and as all the decisions cited by the plaintiff in his brief, I think there were two or three of them, not one of them did the Court strike the Answer. They all dealt with limiting the evidentiary -- the evidence that was going to be admitted at trial. Never was the Answer stricken. The only times Answers have been stricken for violations of 16.1 is where the plaintiff failed to comply with a clear and unequivocal requirement to give a computation of damages. Everybody knows what a computation of damages is and looks like. In fact, there's a form in Nevada Rules of Civil Procedure to do it.

Here, what are claims and defenses? Everybody has a difference of opinion between claims and defenses. And, because everybody has a difference of opinion between claims and defenses, we have discovery, written discovery. Plaintiff [indiscernible], I believe, over 200 Requests for

Production of Documents, over 60 or 70 interrogatories. I have the numbers in my Opposition, and I apologize if I'm not citing them correctly, and they were all responded to. If plaintiff didn't like the responses, you have the opportunity to file a Motion to Compel.

And I think the clearest example of this is the 911 Alert. And I made this argument in my Opposition and I'll make it again. If a 911 Alert, according to Mr. Cloward, was something that should have been voluntarily disclosed at the onset of the litigation, then why in the world would the Discovery Commissioner, who does this for a living, very knowledgeable in discovery abuses, order plaintiff to do a Request for Production of Documents to get that information? He did it because she knows that that type of disclosure is not mandated and required under NRCP 16.1. It's that simple.

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The plaintiffs want you to rewrite the rule and basically eliminate written discovery completely and require all parties, no matter who they are, to essentially turn over everything that could be imaginably relevant or necessary in a case, without any orders of the Court, any disputes, any Rule 2.34 conferences whatsoever. In fact, I have at least three 2.34 conferences with plaintiff's counsel and I discussed my positions with him. He discussed his positions with me. We agreed to disagree.

That's allowed. We're litigating a case where plaintiffs are seeking tens of millions of dollars. We can agree to disagree. Fortunately, we have a process where parties disagree that we go through. It's called discovery motion. Plaintiff is very, very familiar with those, going through those with Jacuzzi.

So, now, with that in mind and what this case is really about an NRCP 16.1 issue, we have to kind of take a look at the Complaint and figure out what we're looking at here. So, if you look at the Complaint, it's the Fourth Amended Complaint. Now, I attached it as Exhibit 5 to the Opposition. So, in that Complaint, at paragraph 15 and 16, plaintiff understands the role of First Street and Aithr. First Street does marketing and advertising, and Aithr does sales. All right.

First cause of action begins on page 17 and it's a negligence cause of action. So, what negligence claims are plaintiff making against First Street and Aithr? Well, if you look at paragraph 41 of page 8 of the Fourth Amended Complaint, plaintiffs are making reference to First Street and Aithr's duties relating to the marketing of the tub, which is what First Street and Aithr did. But everything else deals with product liability, manufacturing, improper design, improper testing.

But, then, we have to figure out what else is

going on here and if you look at page 12 of the Fourth Amended Complaint, under punitive damage allegation, you look at paragraph 78 through 84. Each of those paragraphs addressed advertising and marketing of the tub, which was the exclusive and sole province of First Street and Aithr. Read those together with the first cause of action for negligence and it appears to me, and I think it -- Mr. Cloward would agree that they're making a claim against First Street and Aithr in that first cause of action for improper advertising and marketing.

THE COURT: Yeah. But, Mr. Goodhart, --

MR. GOODHART: Yeah.

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THE COURT: -- if I -- I just want to make sure I understand where you're going with this. Essentially, you're saying that First Street did not have a duty to produce evidence that might have been relevant to claims that the plaintiff had directly against and only against Jacuzzi?

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MR. GOODHART: Correct.

THE COURT: Even if -- and I'm not disagreeing with you. I'm just making sure I understand your position. That even if First Street knew that it had in its possession some evidence critical to claims against Jacuzzi, one of the co-defendants, you don't have a duty under the discovery rules to produce that under 16.1?



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MR. GOODHART: We did not know that we had anything in our possession until we started producing materials and that we were then asked to produce materials by plaintiffs through written discovery.

THE COURT: Okay. All right.

MR. GOODHART: We produced every single relevant piece of information relating to marketing and advertising, which is the first cause of action for negligence in plaintiff's Complaint against First Street and Aithr.

THE COURT: Okay.

MR. GOODHART: We limited that to pre-accident marketing and advertising because we understand that Ms. Cunnison could not have relied upon any marketing or advertising that took place after she died. So, that's what we produced. That claim is still out there. There's still a negligent claim for advertising and marketing.

Mr. Cloward went through -- I counted eight different major issues and I looked through his brief and his Reply. His brief and Reply deal exclusively with strict product liability or product defect claims. That would be the second cause of action.

So, and I'm not -- I don't think the Court could do this, but, even arguably, if the Court were to find that First Street should have produced some materials under 16.1 that it did not produce on a product liability claim, then

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the Court can only strike the Answer to the product liability claim. It cannot strike the Answer to the negligent advertising and marketing claim. Because that is not an issue here because plaintiffs never brought it up because First Street and Aithr produced everything that they were required to produce in a 16.1 to the plaintiff.

When everything, and all of the e-mails have gone through, yes it took time. And that was done in December of 2018. And, again, there hasn't been a single motion with respect to advertising and marketing materials.

Now, dealing with the second cause of action for product liability, defective design, manufacture, and failure to warn, it is undisputed that the exclusive responsibility to manufacture and design the walk-in tub was the responsibility of Jacuzzi and they are a named defendant in the case.

So, with respect to the defective product claim, as it currently stands with the Court striking Jacuzzi's Answer, that claim is more or less resolved. So, I'm puzzled by what, if any, prejudice plaintiffs claim they could have suffered when the Court has already found that Jacuzzi's Answer on liability for product defects has been stricken. It's not like, you know, a jury awards plaintiff $500,000 for strict product liability and they get 500,000 from Jacuzzi and they get 500,000 from First Street.

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Again, and as Mr. Cloward identified, First Street and Aithr are on the second cause of action, and really the third and the fourth as well, simply because they're in the stream of commerce and everything will flow to Jacuzzi at some point in time. Jacuzzi is not a fly by night organization. They are a global manufacturing company with hundreds, if not thousands, of products and product lines.

So, where is the prejudice on a product defect claim, which First Street's exposure would simply be because it was in the chain of commerce because it didn't manufacture and design the product? So, -- and, again, I -- but I want to reiterate that First Street has produced everything that it has in its possession. Now, Mr. Cloward may not like it, but that is the fact of the matter.

The e-mails all went through my office, through paralegals and associates. It was 120 some thousand of them. First Street, I must admit, did not have the best record retention policy. My office still has this where you double delete an e-mail, it is gone forever. That could explain why there are e-mails showing up in Jacuzzi's production that do not show up in my production. But they showed up. Jacuzzi produced them. We've never sat here -- First Street and Aithr has never sat here and said: No, there's never been a single problem with this tub, nobody's ever slipped, nobody's ever fell. We've produced what we



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have to the plaintiff. Jacuzzi has produced what they have to this plaintiff. And this Court has stricken Jacuzzi's Answer on liability on the product defect claim.

So, what I want to get into now is Nick Fox. He's the smoking gun in this Motion to Strike First Street and Aithr's Answer. Well, I've gone through, in my Opposition, questioning many of Mr. Fox's assertions, but there's a couple more to do. Most importantly, when you read through the affidavit, which is Exhibit 21 in Plaintiff's Motion, it's readily apparent that it's nothing more than a self-serving, literally -- literally, Your Honor, fill in the blank, affidavit prepared by Mr. Cloward. There's little, if any, foundational basis for any of the comments or allegations that Mr. Fox has made.

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And what Mr. Cloward doesn't know is that there are some falsehoods in that affidavit. Perhaps the largest is in an affidavit, it has to be signed and sworn by somebody in their legal name. I'm sure that Mr. Cloward doesn't know that Nick Fox is not Nick Fox's legal name. It's Jonathan Fox. That was conveniently omitted and left out. So, it is not even signed legally by Mr. Fox.

He also claims that the general manager of Aihr and First Street, this is paragraph 3 of his affidavit, but we know for a fact he was never general manager of First Street. He was never employed by First Street. He had no



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employment whatsoever with First Street. Another falsity. And, then, we go into the affidavit and several times it makes reference to: He worked for Aihr. But, honestly, Your Honor, I do not know what Aihr is. If you look at the caption in this case, we have Aithr Dealer, Inc. as the named defendant, as it should be.

So, there's falsities in this affidavit that are readily apparent on its face. Mr. Fox has never been placed under oath by a court reporter. Mr. Fox has never undergone any type of cross-examination, yet plaintiff's counsel just wants you to take this as full volume.

Then, to top it off, and this is a killer. I've never seen this before. In the Reply, plaintiff, counsel, Mr. Cloward, submits his own sworn declaration that he talked to Mr. Fox about things I had brought up and how Mr. Fox claims that they're not true. And Mr. Cloward wants you to take that as evidence. That's hearsay, at its worst, is an affidavit of the plaintiff's counsel. It's not an affidavit of Mr. Fox.

Earlier today you heard Mr. Cloward say that -- let me get this. That Mr. Fox said he gave an affidavit or gave a thumb drive to Mr. Modena. Mr. Fox did not put that in his affidavit. You read the affidavit in Exhibit 21, I dare you to find where he said he gave Mr. Modena a thumb drive. No. That is coming from plaintiff's counsel. So





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is plaintiff's counsel now a witness to this evidence to this hearing or to this issue? Perhaps he is.

These comments are purely hearsay. But even when you look at what Mr. Cloward's put in his declaration, there's absolutely no foundation to any argument that Mr. Fox, according to Mr. Cloward, through hearsay, claims that you can make changes to Lead Perfection. If you read the affidavit of Mr. Cloward, Mr. Cloward says that Mr. Fox, at his current business, not at First Street or not at Aithr, has Lead Perfection. And that, at his current business, Mr. Fox just tried to make some changes to Lead Perfection and he could. So, of course, because Mr. Fox, through hearsay, can make changes at his current employment on Lead Perfection, that must mean everyone, including First Street, can make changes to Lead Perfection, even though it's directly contrary to a sworn affidavit signed by Mr. Modena.

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Really, Mr. Fox cannot be trusted. Mr. Fox's affidavit, the one he actually did sign, although it's Nick Fox instead of Jonathan Fox, is disputed by the affidavit of Annie Duback. And I pointed that out in my Opposition. And, then, when you look at the affidavit of Annie Duback, he was never shown a copy of the LP notes. There's no evidence of that in the affidavit. There's no foundation of it. He said that she had approximately six

conversations. But when you actually look at the LP notes, which were attached as an exhibit to Mr. Fox's affidavit, Exhibit 21, you can fully see she had more than an [sic] conversation with Ms. Cunnison.

So, when you also read her affidavit on paragraph 13, she recalls customers having some concerns with complaints, but slipperiness isn't one of those. But, then, you go to paragraph 14, she says: One of the complaints that was received was because it's too slippery. Well, does that mean one person? Because it's in a separate line. So, she received one complaint in the two and a half years that she worked as a production assistant/ production manager about slipperiness. Because it read that way. Again, without the cross-examination testimony, that affidavit is simply a self-serving affidavit prepared by counsel.

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So, we have the issue of this video of a recording. I have provided the Court with Mr. [inaudible] affidavit and I've also provided the Court with -- I believe it is Exhibit 8 to my Opposition. And Exhibit 8 is an e-mail where First Street demanded and requested that Mr. Fox produce everything they have. And, again, yes, we included a request for any recordings because, yes, LP and Five9 did record for 30 days. So, maybe it had been kept. So, Mr. Fox was instructed to make everything and send it



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over.

You have Mr. Modena's affidavit. That recording of Ms. Cunnison was never sent over. Never. To this day, my client is not in possession of that recording. So, how can we be held to produce something we have never actually had? And I just think it's very curious that a disgruntled employee of Aithr, who was terminated, all of a sudden has this recording and produces it. And, now, counsel wants to use that recording to strike the disgruntled former employer -- employee's employer, First Street.

So, one also has to ask, if my client had this information, why in the world would he hide it? Again, one of the causes of action in this case is for negligence. In our Answer, we asserted affirmative defenses of comparative fault and contributory negligence. Now, if Ms. Cunnison had, in fact, used the tub, and had, in fact, become stuck in it, well that would be evidence -- clear evidence that Ms. Cunnison knew without a shadow of a doubt that she could become stuck in the tub. And, in spite of this knowledge, continued to use the tub. That would be important evidence for us to have to establish our contributory negligence/comparative fault defenses. She was on notice, if you want to believe this. So, why in the world would we hide this type of information?

And, so, Your Honor, plaintiff wants to take this

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to the extreme of a 16.1 mandatory disclosure requirement about evidence regarding claims and defenses. Well, let me posit this to you, the Court, that -- you know, plaintiff has a negligence claim and comparative fault defenses asserted, wouldn't a plaintiff have to produce medical records of the plaintiff, pre-accident medical records, so that perhaps the defendant can determine whether or not the plaintiff might have been on medications or had some other issues -- medical issues with her which could have created the fall, the issue of being stuck in the tub? On the plaintiff's theory, that would be an affirmative obligation on the plaintiffs to produce in a 16.1 production and never would have to be asked for. Now, interestingly in this case, even though we have a negligence claim and comparative fault claim, plaintiff has never produced a single pre-accident medical record of Ms. Cunnison.

Plaintiff also has damages claimed in this case by Mike Smith, one of the heirs. Mike Smith, in his Responses to Interrogatories, said he talked to his mother frequently. Mike Smith passed away. We don't have information anymore, that testimony anymore, his deposition was not taken. They're making a claim of damages based upon a connection he had with his mother, which he is to get, wouldn't phone records be relevant to the claims? And our defense is they didn't talk that much. So, shouldn't



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under 16.1, under plaintiff's theory, have to produce on their own, without us asking, all of the phone records that support the claim they talked 6, 12, 14 times a month?

Plaintiff, in the advertising portion of it, infer that they relied or that she relied upon First Street's advertising and marketing campaign and sales presentation to buy the tub and somehow conned her into buying it. Well, if that is a claim that she is making, in order for us to defend that claim, shouldn't plaintiff have voluntarily, under 16.1, as plaintiff is arguing, negligence claim, voluntarily have produced her laptop or her computer so that we could find out what other websites she visited and obtained information from and researched? In fact, her daughter, Deborah Tamantini testified, very clearly, that in her opinion, her mother was extremely thorough and would have thoroughly researched everything on this tub before buying it.

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Where is the laptop? Why wasn't it produced? Under plaintiff's theory of 16.1 , they had an affirmative obligation to produce that without ever being asked. And where are the phone call records to show how many calls she made to First Street?

Plaintiffs are now advancing this theory that we've deleted a note of a phone call. Well, certainly evidence of that would clearly be established through phone



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records. And, again, because it's dealing with evidence regarding claims and defenses, under 16.1, that must have been voluntarily produced by plaintiffs.

So, plaintiffs are not coming to this argument with clean hands. If under their argument we have failed to voluntarily produce records, then plaintiffs have clearly also voluntarily failed to have produced records.

So, as I indicated, Your Honor, the biggest claim in defending First Street and Aithr in this case is the advertising claim in the negligence cause of action. The focus has been on that claim, because that is an independent claim to which Jacuzzi would not ultimately be responsible for. There's nothing in this Motion referencing that claim. So, even if this Court were to somehow find that 16.1 required us to voluntarily produce these items, and because we did not voluntarily produce these items you're going to strike the Answer, the Answer stricken has to be limited to the Answer to the second, third, and fourth causes of action for product defect or product liability, defective design, defective manufacturing.

And, again, as I have pointed out, the Court has already struck Jacuzzi's Answer with respect to those causes of action and, therefore, what prejudice could plaintiffs have possibly suffered because of any alleged

conduct of First Street and Aithr?

And I'm not saying this to tell the Court that we've hidden things because we have not. First Street and Aithr has produced things when they have been asked to produce things. We have supplemented our 16.1s. We have provided plaintiffs with the information they desire. We have agreed to disagree with each other. Plaintiff never filed a single Motion to Compel.

I don't know if the Court has any questions.

THE COURT: No. That was really helpful, Mr. Goodhart.

So, before we continue with the Reply, usually after about an hour and a half, I give my staff a break. Let me ask, Mr. Cloward, how much time would you like to have on reply?

MR. CLOWARD: Probably no more than maybe 10 or 15 minutes, pretty short.

THE COURT: All right. So, let me ask my staff. Does anybody need a break at this time? I'll have no problem with it if you want a break.

THE CLERK: We're good, Judge.

THE COURT RECORDER: We're good, Your Honor.

THE MARSHAL: Thanks, Judge.

THE COURT: You're okay? All right. Well, thank you. All right.



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Mr. Cloward, you may proceed.

MR. CLOWARD: Okay. So, I think the question that the Court was drilling down on and it's apparent that the response from First Street is that they don't have to produce any documents that would be relevant to plaintiff's claim against Jacuzzi for the manufacturing. That's the position that they're taking. They're trying to reinvent the Complaint and say: Hey, look, we only are responsible for the advertising claims. We don't have any responsibility on the manufacturing defect, product liability claims. And, so, we never had a duty to produce any of that information, because that's just Jacuzzi's information.

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Well, the problem with that argument, Judge, is that the claims against First Street are identical to the claims against Jacuzzi. So, therefore, the duties and obligations are the same. So, not only does Jacuzzi or does First Street have an obligation to produce documents that would be helpful in plaintiff's claim against Jacuzzi, but First Street also has an obligation to present and produce documents that would be helpful for plaintiff's claim against First Street and Aithr, which they have not done. Clearly, that's been the excuse that they've used to justify their nondisclosure and their misconduct. They've said: Hey, look. We didn't have to do that and we're, you



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know, -- we don't have to do that.

THE COURT: There is a little bit of a different though. Right? I mean, under *Ribeiro*, I know state of mind is relevant and, given their unique position as handling the advertising and marketing, that would affect their state of mind with respect to their discovery obligations on the product defect issues. Something I certainly have to consider.

MR. CLOWARD: Yeah. But I think the fact that we have product defect claims directly against them in causes of action, I think that their excuse is easily -- I guess, is easily excused. I mean, they -- it's not a strong excuse because we have active claims against them. We've been seeking the same information.

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All of the discovery has been the same. And, so, how can they come and say: Hey, look, we're only focused on the advertising, when our discovery has not been only focused on the advertising? Our discovery has been focused on the manufacturing. It's been focused on the warnings. It's been focused on the incidents. Our 30(b)(6) notice, the same thing. It's the -- you know, a lot of the discovery is identical.

And, so, I don't think that that's a very strong argument that they have. I think it's a terribly weak argument. They have to produce this stuff because we have



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active claims against them.

Regarding the, you know, -- they pose the question of: Why would we hide information regarding Sherry Cunnison, because that would help in our comparative negligence claim? Well, you would hide that because it's actual notice that this tub was not a good fit for this individual. It's actual notice that more should have been done to help her figure out whether this -- the tub was appropriate. You know, it's actual notice, Judge. It's not anything other than that.

The characterization that our Motion hinges on Nick Fox's affidavit is not true. Nick Fox's involvement in this is the small part of the years and years of litigation abuse. You know, when you have -- when you look at the information that's been produced by First Street, they try to sound as though they voluntarily produced this or, hey, we've produced this when we've been asked, or -- and that's not the case. They've been -- they produced the information when we found it, period, end of story. When we would stumble across something and we would send the information, that's when it would be produced. And that is not how discovery is supposed to happen.

For instance, a plaintiff, when they're asked, give us all medical providers. We're talking about, you know, an auto case, a personal injury case, when they say,

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hey, give us all providers, that list should be complete. It -- if the defendant stumbles upon 10 providers throughout the process at various different times, that's not how discovery works. And their argument is -- and I'm -- I tried to quote this, but it's: Hey, Judge, you know, we've never said that there were never any problems with this tub. We've never said that there weren't, you know, issues with the slipperiness. We've never this and that. We've never tried to say that there are no incidents. Horse hockey. That's exactly the position they've taken.

In written discovery, when we asked, provide us the incidents, provide us the claims, provide us this information, they would only list two. During Dave Modena's deposition: Tell us the incidents that you're aware of. Well, I only know of one, this incident where I'm sitting in the deposition right now. Oh really? Well, geez, that's odd. Well, maybe Stacey Hackney [phonetic] might know something.

And, so, they go outside and she comes back in, or they all come back in, and conveniently, they can only remember two and it's the two that we found, one I was litigating and one we found with Leonard Baize. So, for First Street to say, hey, we've never said that there's anything wrong with the tub, or we've never tried to deny that, we've always been up front and honest, that is not

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true. That is the exact position they've taken the entire time. And that's why it's been so, so prejudicial.

Further, if they knew that the product that they were distributing was defective, okay, with respect to either Ms. Cunnison or any of the other plaintiffs, but if they knew that the product was defective, that's an independent basis for punitive damages against them. So, if they're receiving information that Jacuzzi is not, for instance, if you have the First Street or the Aging in the Home -- let's say the Aging in the Home, the installers that are going and they're finding out that there are big problems with the tub, they're finding out that people are getting stuck, they're finding out that people are falling down, and they're not sharing that information with Jacuzzi, well, that right there is an independent basis of punitive damages, an independent basis of notice, independent basis of knowledge that doesn't have anything to do with Jacuzzi. So that's another reason of why their argument of, hey, we didn't turn this over because it doesn't have anything to do with Jacuzzi, is improper. There are independent arguments; there are independent pieces of evidence that would apply only to them.

And let me see. I'm just going through my notes here, Your Honor. I want to be as succinct as possible and not regurgitate arguments. Let's see.

Oh, First Street says, you know, we never had the recording of Sherry Cunnison. That's not true because Nick Fox and Annie Duback are your employees. They are First Street, Aging in the Home employees. So, you, by and through your employees, did have possession of this document. You can claim that you didn't. Maybe Dave Modena didn't know about it, if you don't believe Nick Fox's affidavit, but the fact of the matter is these employees were employed at the time in their respective positions and they did have this information.

With respect to the e-mails, you know, Mr. Goodhart has said: Hey, you know, we have these e-mails and there's, you know, 120,000. I've heard estimates of 200,000. I've heard estimates of, you know, 50 or 60,000. Who knows what the actual number of e-mails are. Number one, no privilege log has ever been produced, which is required by the rules. It's a Discovery Commissioner formal opinion that's been given. It has to be produced to privilege log. They've never produced a privilege log and I think with respect to the fifth prong of *Young*, I think the Court would need to know when the e-mails were received by First Street and if they were actually produced by First Street. And this whole claim that, hey, we couldn't search these e-mails and it took a long time, you know, I don't know how they do things over at the firm -- Thorndal

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Armstrong. I don't know how they do things, but I can tell you what. You can OCR documents by a PDF. It converts the documents. It's a process that would take maybe, with that volume of documents, to OCR it, you can send it over to Litigation Services. They can OCR it so that you can electronically search all of the e-mails --

THE COURT: I've done that. I'm familiar with that and, you know, how it works and the extent to which it's reliable. It's pretty costly to do that. Right? OCR everything, especially if you have 120,000 e-mails. And I don't know how long each e-mail is, but I'm familiar with that.

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MR. CLOWARD: It's not very costly. We had about -- I think in the trial I had in February, approximately 40,000 documents. We used a company to actually create an index of the documents, summarize the documents, and create a hot link within the documents that you click on one and it takes you to the document, and I want to say it was less than $10,000 to do that. So, it's not something that's --

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THE COURT: All right.

MR. CLOWARD: -- impractical at all.

THE COURT: You said 40,000 pages. Here, if it is 120, that's three times that. So then we're talking about something less than 30,000, but --

MR. CLOWARD: Yeah.

THE COURT: Okay. Okay.

MR. CLOWARD: The documents that have been produced -- one thing that counsel says is: Hey, we've turned over the marketing and advertising. They filed a Motion. The Motion was unsuccessful or, you know, it was kicked back. Well, the reason the documents were turned over, Judge, is because I e-mailed the Motion to Phil Goodhart and said: Hey, we're filing this Motion. When he saw that the Motion had been drafted and prepared and sent down, then the documents came. Okay? So that's how discovery has been.

I find out about the 911, ask him about it: No, we don't have anything to do with it. Hand him the document: Oh, it looks like you've got the goods. Oh, yeah, I guess -- I never said that we didn't sell that to them. You know, the story changes. That's not how discovery should work.

Regarding the dealers, they said that -- Mr. Goodhart said that: Look, you only asked for the dealer with respect to Ms. Cunnison. Well, I would like to read for the Court, for the record, the interrogatory regarding the dealer. And I quote, it says -- this is Interrogatory Number 1. The very first interrogatory that we requested. Quote:

In the Manufacturing Agreement between First

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Street and Jacuzzi, Bates stamped as JACUZZI001588 through JACUZZI001606, the document indicates that First Street desired Jacuzzi to manufacture walk-in tubs and other bath products for First Street and its network of dealers and distributers - please list all dealers and distributors within the network of First Street.

We didn't say: Hey, give us just the dealer with respect to Ms. Cunnison. That's not what it was limited to. Their response didn't limit it to that. Instead, here's their response:

Question: -- or excuse me. Answer, quote:

Objection. This interrogatory is overbroad with respect to time frame. Without waiving said objections, the only dealer or distributor within the network of First Street is Aithr. As First Street's discovery on this issue is ongoing, defendant reserves the right to amend and/or supplement this response as additional information becomes known, end quote.

What they did is when we, you know, I guess, caught them on that, then they tried to come into court and explain away this nondisclosure and said: Oh, well, we thought that that -- that what they meant was only with respect to Ms. Cunnison. That's how they justified it, Judge. And that's what they've done from day one, is

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they've -- when they get caught, they come in and they try to justify and explain away to the Court their misbehavior. Oh, well we didn't produce thousands of pages of relevant documents because plaintiff doesn't -- you know, because we weren't the manufacturer of the product, even though and ignoring the fact that plaintiff has claims against them for product liability, which are identical -- the elements are identical for them as they are with Jacuzzi. So, plaintiff has to prove the exact same thing.

Regarding the Guild Surveys, the -- it's important for the Court to understand the survey issue because First Street sits there and says: Hey, look, you know, Judge, when we were asked this, we turned it over and we gave them the information when they asked. Well, how did we find out about it? How did we find out that there were even these surveys that were important in the case? Well, we find out after Mr. Lee Roberts got involved. And, after Lee Roberts, before the deposition of Kurt Bachmeyer, realized, hey, there's been some things that should have been turned dover but they weren't turned over, so, Ben, here you go, I'm going to turn over a lot of documents, thousands of documents.

Oh, well, guess what. Guess what were in those documents. And that was in July of 2019, Judge. Some surveys. And guess what the surveys talked about. The

slipperiness issue. And, so, what did plaintiff do? Plaintiff said, in specific discovery: Hey, First Street, these are your documents. Why haven't you turned them over? Give us all the documents. That's the only reason that they produced this information.

And what if we wouldn't have -- you know, what if Mr. Roberts hadn't gotten involved and those documents hadn't been turned over? Well, guess what. Plaintiff wouldn't have had any of that information and that's the way that discovery is supposed to work, especially when we've asked about that. We have specifically -- we have specific discovery requests that are on point for those issues.

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Same thing with the StepCote and the LiquiGuard. Those things came out because of productions by Jacuzzi and they were not produced by First Street, even though First Street was in the thick of things and was involved during all of that development.

And, finally, you know, Your Honor, with regard to the 911 Alert, how can you be more clear in the text message and on the record that First Street didn't have involvement? But they gloss over that. They gloss over the fact that they flatly misrepresented their involvement with that product and, until they're going to get caught, they're just simply not going to turn anything over,



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period. That's the way that it works.

And the Court should be quite concerned when it's represented in open court, yeah, we've had maybe 200,000 e-mails and we've been kind of just sitting on them and going through them, or 120,000, however many there are. We have just been sitting -- you know, sifting through them. They've had them for a long time, apparently, and there's no privilege log and I can tell you this. They haven't produced 100,000 e-mails. If anything, they've produced maybe, maybe -- I would estimate maybe 1,000 e-mails. I don't even think that many.

And when you look at the e-mails that have been produced by Jacuzzi, Jacuzzi has produced significant e-mails that have never been produced by First Street. That should be concerning. You know, you can't have your cake and eat it too. If you're First Street, you can't say: Well, Judge, we lost -- maybe lost some e-mails, and the system is really poor, and we don't know what the system is, and it's really cumbersome, and so this -- that probably explains the nondisclosure of these e-mails, but then in the next breath say: Well, I've been in possession of 200,000 or 120,000 e-mails. Either you have the e-mails or you don't. I mean, you can't say: Hey, look, we might not have relevant information because maybe it was deleted. But then be in possession of the relevant e-mails.

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And, so, you know, at a very minimum, Your Honor, I think that our request would be that there would be a one-day evidentiary hearing regarding the e-mails, regarding these issues, regarding the other documents that were produced to find out when those were obtained by outside counsel so that the Court can make a proper assessment under the fifth prong of *Young*. And, at a very minimum, because the position has been, well, you know, we don't have to turn it over until the Court orders us, we would like an order today ordering that all relevant information with respect to the advertising, with respect to the marketing, with respect to the manufacturing, with respect to the slipperiness, with respect to other incidents, regardless of time, and regardless of, you know, any other limitation they want to make, that that -- they need to produce that information within 30 days. And that they pay for us to continue Dave Modena's deposition on all of those issues.

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But we feel like there are so many other issues that simply there's not time to address, that we've been prejudiced in such a way that the Court -- the only fair way to handle this is to strike the Answer. And I'd -- 16.13(c)(3) is therefore a reason. And their position of, look, we don't have to turn it over until there's an order, that is really thumbing the nose at that rule and is



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basically saying, look, Judge, we're never going to produce documents pursuant to this rule. And until there's an order, we're not going to do anything and we don't really care what the order's -- or what the rule says.

I mean, the rule is there for a reason, Judge. This behavior in this case with these two defendants is exactly what the rule envisioned to protect. The defendant has relevant documents, they know they're relevant, they know they're important, yet they sit there and hold on to them and it's only when a party stumbles upon the documents are they produced. When the Court looks at the documents that we've stumbled upon, it's the surveys, it was the bath mat, it's the StepCote, the LiquiGuard, it's the Alert 911, it's the -- I mean, the only reason they produced the advertising and marketing information was because Mike Dominguez was untruthful in his deposition and said Jacuzzi didn't have anything to do with the product.

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If you read my affidavit from the Motion that we submitted that the Court sent back -- that the Discovery Commissioner sent back, you know, the only reason that they turned that information over was because Mike Dominguez was not truthful about it. And, so, they were like: Well, no. That's not true. You know, and they called me up on the phone. Well, if you know that these claims are relevant, produce them. Don't only produce them when a witness is



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not truthful about it or we stumble upon it. That's not fair.

And the other question, I guess, the concern that I have is these are just the issues that we've stumbled upon. What other issues are there out there that we don't even know about?

And, so, you know, the ability of plaintiff to have a fair trial in this case is gone. And, you know, Judge, I don't like to do -- have cases decided like this. I would prefer to be in a jury trial. I think that -- you know, I hope that my reputation is such that people don't think that that's the way I like to resolve cases. I'm a trial lawyer. I like to be in trial. But it's awfully scary for me to go to trial when I think that I only have half of the information or a portion of the information. And, unfortunately, that's the position that I am in because there has not been good faith participation in the discovery process.

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And, so, with that, Your Honor, unless the Court has some other issues that it would like -- or answers that it would like me to address, I will rest.

THE COURT: Let me ask, is Mr. Roberts still on the line or Ms. Llewellyn?

MR. ROBERTS: Yes, Your Honor. I'm still on the line.



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THE COURT: All right. So, not as to substance, but is there anything that you feel compelled, at this point, that you would need to say as to, you know, procedure or logistics? Or if you need to make a couple of sentences for any reason to preserve Jacuzzi's record on anything. I'm not saying that you do. I'm just simply giving you the floor if you want to make a very brief statement on anything.

MR. ROBERTS: The only thing that I would like to add, Your Honor, is there was some discussion of the product defect claim against Jacuzzi having already been decided as a result of this Court's sanction. And, while that's true, I don't see how a sanction against Jacuzzi could have decided the product defect claim against First Street, and, therefore, I think that is still something that the plaintiffs would have to prove independently of the sanction against my client.

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THE COURT: Understood. I understand that. Thank you.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: we had, at one point, Mr. Henriod on the line as well. I don't know if he's on the line or if he needs to say anything very briefly.

All right. So, a couple of things. Given the history of this case, the volume of material presented, the

affidavits, and all of the exhibits, I don't believe that an evidentiary hearing is necessary for me at this time to resolve this. So, I'm not going to order an evidentiary hearing.

As to the request by Mr. Cloward for an additional discovery order, I'm not going to do that either. I think the discovery obligations of each of the parties are mostly clear and the rule and the prior orders and outstanding written discovery is sufficient to make it clear to everybody what they were obligated to do or not obligated to do. And if I -- it would confuse things. If I were to issue a new Order now for certain discovery to be conducted, then that would suggest that there's some period in which to comply with the Court Order. And that would also be viewed as opening up discovery and I don't want there to be any confusion on those issues in this case going farther down the road here. I need to resolve what's in front of me now and I intend to do that.

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I'm going to take this under advisement and have a decision -- there's a lot of material here and I anticipate, because I already started doing this, having a detailed opinion rather than, you know, simply cutting or pasting, or asking one party to prepare an Order. So I will need a little bit more time to do that here.

Let's see. Thanksgiving is next Thursday. Most



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likely, I'll have something right after Thanksgiving. That should give everybody enough time, but it shouldn't impact this case in any way, given that trial is not set until March 1.

Now I understand -- let's talk about that for a moment. First, is there anything anyone else needs to say before we discuss scheduling?

MR. GOODHART: Your Honor, this is Philip Goodhart for First Street and Aithr.

THE COURT: Yes.

MR. GOODHART: I believe plaintiffs did provide you with a searchable Excel spreadsheet of the Guild Surveys. Plaintiff had made an issue about that in his response.

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THE COURT: Yes.

MR. GOODHART: I would urge the Court to search that searchable spreadsheet for the words injure, injury, injured, or hazard. And the Court will find that there are zero hits for any of those terms.

THE COURT: All right. Well, I'll do that then and take into consideration the significance of whatever I find there.

MR. GOODHART: [Indiscernible].

THE COURT: I see Mr. Henriod back on the line. I'll give you an opportunity to make a short, three or



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four, please keep it to that, statement, on any, you know, procedural or logistical issues that we must discuss from your perspective or to make any statement to preserve any record.

MR. HENRIOD: Thank you, Your Honor. And I apologize. My cable went out.

THE COURT: Oh, no problem.

MR. HENRIOD: Yeah, I just wanted to raise what Your Honor does with this Motion I think may affect the jury instructions and the phasing of trial. So, timing wise, I just want to make sure that we don't get the cart before the horse, because when we had brought up the phasing issue, in light of the sanction against us, one of the arguments made by plaintiff was that they would have to prove certain things against First Street. We had suggested that maybe then the trial needed to not just be phased as to us, but be broken between the parties. And, so, if this issue were decided before the jury instruction issue and the phasing question, that might be most efficient.

THE COURT: All right. Not a problem. When's the next hearing in this case? It looks like the Motion Regarding Jury Instructions is December 7th. So that won't be a problem here.

MR. HENRIOD: Very good. Thank you, Your Honor.