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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

ROBERT CARVER, et al., Plaintiffs, Respondents, and Cross-Appellants, v. UNIROYAL, INC., et al., Defendant, Appellant, and Cross-Respondent. _____/	Case No. D028496 San Diego County Nos. N64081 & N64378 Hon. Vincent P. Di Figlia Hon. John S. Einhorn **APPELLANT'S** **OPENING BRIEF**

I.

PRELIMINARY STATEMENT

On the morning of July 7, 1993, four young men were riding in the cargo bed of a pickup truck as it sped down the left lane of the I-5 freeway. They had no seat belts or other restraint. Like most cargo beds,

this one did not even have fixed seats. Its only protection for human cargo was illusory, a camper shell bolted on top.

Reality intruded. The truck's right rear tire sustained an outer belt and tread separation but did not lose air. It continued to roll freely. Nevertheless, the owner/driver stepped down hard on the brakes and sent his truck skidding into the center divide. It flipped over, the camper shell broke off, and the four men in back were flung into the air. Jeffrey Johnstone, 25, died at the scene. (RT 1157) Robert Carver, 24, became a quadriplegic. (RT 1088) Jason Mondragon, 19, and the fourth man, not a party, miraculously escaped with less serious injuries. (RT 1144, 1146-47, 3746)

An emotional jury trial resulted in an $8.4 million verdict against the tire manufacturer, Uniroyal, Inc. But the resulting judgment can not stand. Reality was suspended at the trial in too many ways.

First, the court barred any claim of comparative fault for the plaintiffs' fateful decision to ride without seat belts in the cargo bed of a speeding truck. (RT 888-89) When a prospective juror aptly called that location a "deathtrap" (RT 1015) the court promptly discharged him for cause. (*Ibid.*) Several others met the same fate for the same reason. (RT 957-59, 963, 1013-13) The remaining panelists had to vow repeatedly that they were comfortable with the purported law barring "even 1 percent" comparative fault (RT 959) for riding without seat belts in a

cargo bed. The plaintiffs had "an absolute legal right" to do so (RT 1122) according to their opening statement, which accurately summarized the court's pretrial ruling on this subject,

Second, the court allowed sham science to pose as a learned indictment of Uniroyal's tire. It refused to perform the critical judicial screening required by California's *Kelly/Frye* doctrine, most recently articulated in *People v. Venegas* (May 11, 1998) 18 Cal.4th 47. Instead, it gave free rein to pseudoscientific theories and tests about rubber/steel bonding that have never been accepted by the courts and were flatly contradicted by scientific literature touted by plaintiffs' own experts. Under the de novo review required by *Venegas* (*id.* at 78), this Court will see for itself that this essential element of plaintiffs' case was not even admissible evidence, let alone substantial evidence as required to support a verdict in this State.

Third, the court tolerated a collusive scheme just like those condemned under Mary Carter settlement agreements. (*See, Alcala Company, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1308, 1316-17.) The plaintiffs feigned adversity to the owner/driver of the pickup truck, who was nominally a defendant. But by the time plaintiffs admitted he was not their real target (RT 3794), the pretense of adversity had already gained them extra peremptory challenges, extra cross-examination, an extra closing argument strategically positioned after Uniroyal's, and – the ultimate coup – an extra expert witness to

give so-called "defense" testimony against Uniroyal's tire as the last word at trial, when Uniroyal could not offer rebuttal. This was precisely the sort of "mischief" that Presiding Justice Kremer described in *Alcala.* (*Id.* at 1317)

Finally, the serious mental illness of the jury foreman made the liability deliberations as unreliable as the rest of the trial. Despite a long history of manic-depressive or "bipolar" disorder, he had stopped taking his prescribed medication a few years before this trial. Objective, compelling, and multifaceted evidence established a recurrence of his familiar manic symptoms during and after the liability deliberations. Even the court had to conclude that, "[u]ndoubtedly, [the foreman] suffers from a mental disease or condition." (RT 10,054) It was painfully obvious. But the court refused to accept the painfully obvious consequence that a new trial was required. Instead, it ignored the salient facts and took refuge in plaintiffs' argument that nine or more competent *voting* jurors were sufficient. (RT 10,055) Not so. As the Supreme Court confirmed only recently in *People v. Millwee* (May 18,1998) 18 Cal.4th 96, 144), due process requires twelve competent *deliberating* jurors – which is the whole point of having alternates available. It takes a competent deliberative body of twelve to justify a decision by a lesser number in civil cases.

There is simply too much to swallow in this case to declare the judgment acceptable in the eyes of the law. The court failed to apply

too many basic rules designed to ensure a reliable adjudication. Just because the trial was long, the final judgment that emerged does not merit appellate approval.

II.
ISSUES PRESENTED

A. Did plaintiffs' so-called "expert" theories and tests about rubber/steel bonding in tires constitute admissible or substantial evidence when the California courts have never held them reliable, and they were flatly contradicted by the very scientific literature put forward by plaintiffs' expert witnesses?

B. Did the trial court err by holding as a matter of law, before the jury trial commenced, that there can be no claim of comparative fault in California for riding without seat belts at freeway speeds in the cargo bed of a camper truck?

C. Did the court err, albeit unwittingly at first, by crediting the plaintiffs' pretense of adversity to the owner/driver of the pickup truck and granting those fully aligned parties extra peremptory jury challenges, extra cross-examination time, and extra and strategically positioned closing arguments and expert witnesses against Uniroyal?

D. Did the court err by holding that a lack of twelve mentally competent jurors is immaterial if at least nine of the competent ones can agree on a verdict?

III.
STATEMENT OF THE CASE

A.
Introduction

This statement will focus on the foregoing issues. The reporter's transcript exceeds 10,000 pages. Having selected only four issues to raise with this Court, Uniroyal's goal is to provide a fair summary of those facts and proceedings that are "necessary for a proper consideration of the case." (Rule 13, California Rules of Court) It would elongate this brief enormously and pointlessly to come even close to summarizing the entire factual and procedural record.

This statement also recognizes who won and lost below. It relies as much as possible on the testimony and arguments for the parties who prevailed. It also makes note when any facts material to this appeal were disputed at trial.

B.

The Parties and the Accident

Respondent Tony Sellers ("Sellers"), on paper a defendant (AA 61 [Appellant's Rule 5.1 Appendix]) was 31 years old at the time of the accident in July 1993. (RT 2527) Less than eight months earlier (RT 1167), he had bought a 1982 Chevrolet pickup truck with an 8-foot cargo bed. (RT 1372, 1389, 1391) It came with a used set of steel-belted "Laredo LT" model tires manufactured by defendant/appellant Uniroyal, Inc. ("Uniroyal"). According to plaintiffs' expert, the right rear tire could have had as much as 50,000 miles of use by the time of the accident. (RT 1632) It was manufactured in 1984 (RT 3128) and placed in service in 1985. (RT 1399)

The truck's original owners, Mr. and Mrs. David Brister (RT 1371-72), installed a camper shell over the cargo bed to "store gear in there." (RT 1392) Sellers, however, selected this vehicle "to haul people" (RT 2563), and specifically "in the rear bed." (RT 2564)

Sellers wanted to transport workers in a new business he had started in Pacific Beach. (RT 1389, 2564) He went to service stations throughout San Diego and Orange counties (RT 1352) selling the idea of issuing promotional discount coupons in the surrounding neighborhood. (RT 1164) Sellers' workers went out and sold the coupons for a commission. (RT 2483) He mostly hired "people that were young, maybe transients." (RT 1165) If they had no car available

(*e.g.*, RT 2445) or just preferred not to use it (*e.g.*, RT 2610, 5510), Sellers offered them a reduced commission rate for the privilege of riding to work in his pickup truck . (RT 2616) He would drive them "to a central disbursing point, and they would go out about the neighborhoods from there." (RT 1169)

Sellers never stopped to consider whether a cargo bed was a safe place for passengers:

> Q. Before the accident, did you ever consider whether it was safe or was not safe for people to ride in the truck bed while the truck was moving on the highway at highway speeds?
>
> A. No. (RT 2624)

Nor did he stop to read the owner's manual (RT 2573), wherein General Motors warned that it "provides a seat belt at each position designed for occupant seating" (RT 3752) and "urge[d] that people riding in the vehicle be properly restrained at all times, using the seat belts provided." (RT 3753) Nevertheless, the lead attorney for plaintiff/respondent Robert Carver ("Carver"), the one who became a quadriplegic, told the jury that Sellers was a "gentleman who was nice to [Carver] before the accident." (RT 1096)

The accident occurred while Sellers was driving Carver and five other workers from Pacific Beach to Tustin to sell discount coupons for a Mobil service station. (RT 2534-35, 2493) Two of the workers sat in front with Sellers. Plaintiff/respondent John McGarry ("McGarry"), then

27 years old (RT 2708), sat at the right front window seat. (RT ---) Malia Olds, not a party, sat in the middle. (RT —) All three wore seat belts. (RT 2583)

The four other workers accepted a ride in Sellers' cargo bed, which undisputedly lacked fixed seats and passenger restraints of any kind. Carver stretched out on a foam mat. (RT 2458-59, 2461-62) Jeffrey Johnstone, the decedent of plaintiff/respondent John Johnstone, his father,[1] sat on a small couch with nonparty Thomas Hoban. (RT 2484) Plaintiff/ respondent Jason Mondragon ("Mondragon") sat on a beach chair. (RT ---)

There is no evidence that the men who accepted a ride in the cargo bed were under any compulsion to do so. It was undisputed that they were competent adults, made a voluntary choice to work for Sellers, and willingly accepted the mode of transportation he offered them for reduced commissions. In fact, on the very day of the accident Carver had misgivings about the safety of the cargo bed and considered staying home for that reason:

> I really didn't even want to go to work that day, because I was riding in the back. (RT 2510)

Nor was there any evidence that he or the others would have been fired or fined for refusing to ride there. Carver simply put his misgivings

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[1] Hereafter, "Johnstone" will refer either to the decedent or his father as the context will clearly indicate.

aside. “Somewhere along the line someone talked me into being in a camper shell being safe, I guess.” (RT 2511) Nor did Carver ever ask Sellers about equipping the cargo bed with secured seats, seat belts, or any other form of restraint. (RT 2509-10)

After a brief stop for fuel and food (RT 2540), Sellers and his six workers headed north on Interstate 5. (RT 2541) Sellers was admittedly speeding (RT 4069), but plaintiffs’ lead counsel told the jury that “[s]peed is a red herring in this case.” (*Ibid.*) Besides, he added, Sellers “didn't know there was going to be an accident that day.” (*Ibid.*) Sellers was also passing other vehicles frequently enough that another driver described it as playing “highway tag.” (AA 551-2, RT 1853) But plaintiffs’ lead counsel told the jury that Sellers was just “driving down the road like any other normal person . . . .” (RT 4089)

In any event, a sudden danger required Sellers’ full concentration and driving skill. Near the Jefferson Street overpass in Carlsbad (RT 1992), his right rear tire sustained a separation of the tread and outer steel belt (RT 911) but did not lose air. (RT 1176, 2648, 2658-59, 2743) Sellers, however, stepped down hard on the brakes and kept them that way (RT 2148), precipitating a locked-wheel skid and a loss of control over his speeding truck. (*Ibid.*) But plaintiffs’ lead counsel told the jury that Sellers “tried to do the best he could” (RT 1121) and implored them not to “second guess” his actions. (RT 4056)

The speeding truck plunged into a thicket of oleander bushes in the center divide and began flipping over. (RT 1122, 1967) The camper shell broke off on impact with a barrier (RT 3535) and "exploded . . . into a million pieces." (RT 1817)

Carver testified that he felt a jolt (RT 2469), saw "blue skies" (RT 2470), and flew straight up out of the cargo bed. (RT 2471) He landed on his head and neck on the other side of the freeway and was rendered a quadriplegic. (RT 2473, 3746) Johnstone landed on the other side, too, but was run over and killed. (RT 1156-57, 3745-46) Mondragon and Hoban followed the same trajectory but somehow avoided such tragic consequences. (RT 3746) Luckier still were Sellers, Olds, and McGarry. Seat belts held them fast in the front seat throughout this ordeal. (RT 3743, ---)

The passengers who survived all remained or became good friends with Sellers. (RT 2612-13) He invited Carver, Mondragon, and Olds to stay with him rent-free after the accident. (RT 2612, 2704) McGarry socialized with him frequently. (RT 2710-11) Carver considered Sellers "one of his closest male friends." (RT 2483) Carver's counsel praised Sellers for letting Carver stay with him rent-free (RT 1129) and looking after him "when everyone else afterward abandoned him." (RT 4210) As for Johnstone, his father's counsel told the jury that the decedent "thought Tony Sellers was a great guy" and found it "very profoundly satisfying" to work for him. (RT 1159)

C.

Plaintiffs' "Brassy Wire" Theory Of A Manufacturing Defect

1.

Nature And Importance Of The Theory At Trial

At trial, the plaintiffs claimed that Uniroyal's tire was defective and the sole cause of their injuries. They prevailed on one theory of liability, as follows.

The sole basis of plaintiffs' damages awards was the finding of a manufacturing defect. (RT 4271) Although that claim was presented under alternate causes of action, strict liability and "negligent manufacturing defect" (RT 4236), the substance was the same. Because the jury rejected any causal significance of a separate claim, an alleged failure to warn (RT 4272), this brief will focus exclusively on the claim of a manufacturing defect.

Plaintiffs' counsel acknowledged early and often that "we felt, going in, that this was a very difficult liability case . . . ." (RT 5242; see also RT 27, 28, 343) The court said it, too: "this was a difficult case for the plaintiffs. Everybody knew that going in, and we knew it throughout the trial." (RT 10,058) Plaintiffs' counsel even invented a "doctrine of excludable causes in the law" (RT 1105) to lighten their burden – and specifically their burden of proof. Invoked dozens of times during the

trial,[2] plaintiffs' make-believe doctrine provided that Uniroyal's tire *had* to have a manufacturing defect if it was not abused by the owners; the "exclusion" of abuse would automatically establish a defect. Plaintiffs' burden to *prove* such a defect was conveniently lost in the shuffle.

But the most glaring symptom of plaintiffs' difficulty was the number of false starts and switches in their liability theories against Uniroyal. As the court observed during the trial, "the theory of this case has changed over and over and over again." (RT 3114)

By the time of trial, however, plaintiffs settled on a single theory that Uniroyal's tire had "a defective tread belt adhesion system" (RT 1523) – or, in the court's simpler language, "an improperly cooked tire." (RT 3114) This concept was introduced to the jury by plaintiffs' first and principal liability expert, Dennis P. Carlson, Jr., a self-described tire consultant and accident reconstructionist. (RT 1504) Asked to define his term "belt adhesion system," Mr. Carlson responded as follows:

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[2] Single or multiple references appear at RT 1105, 1109, 1112, 1113, 1539, 3005, 3006, 3461, 3462, 4052, 4057, 4059, 4061, 4067, 4071, 4074, 4092, 4101, 4195, 4204, and 4205. The last twelve citations contain references during closing argument, to which Uniroyal had formally objected at RT 4039-41.

> [T]he tire is made up of lots of parts. There are maybe as many as 30 parts, and they are put together in the green state, which is unvulcanized, which means the rubber has not gone through the vulcanization[3] process. And when the tire is vulcanized, all of those parts are bonded together in the molding. (RT 1523)

To that extent, at least, there was no material dispute below.

Nor was it disputed, at least in general terms, how rubber forms a bond with the steel cords (also called wires) to form the two "steel belt" layers of the tire. As Mr. Carlson testified, the rubber bonds with a brass coating placed on the steel cords:

> [I]t was discovered a long time ago that steel does not adhere to rubber, so it was discovered that [rubber] adheres to compounds that contain copper, which brass is one of them. And so they have coated the steel cords with brass . . . . In the curing process, that copper combines with sulfur in the rubber to form a copper sulfide . . . . (RT 1527)

Again, that much was undisputed. Copper sulfide is what actually creates the bond between the contiguous rubber and steel.

The crux of the dispute below was plaintiffs' contention that *all* the brass coating is supposed to be consumed – *i.e.*, completely converted into copper sulfide – in order to produce the desired

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[3] Vulcanization, which involves the application of heat, was often described at trial as the process of "curing" or "cooking" the tire.

rubber/steel bond. (RT 1536, 1648) Based on that premise, Mr. Carlson opined that proper bonding causes the steel cords to lose all trace of the yellow or "brassy" color of the brass coating and regain their original silver color. Thus, Mr. Carlson testified that a brassy appearance:

> means that the – the vulcanization process was not complete, or the adhesion process in the curing was not complete. . . . [B]rass . . . is a coppery, or what we say, yellow color. . . . [W]hen you take apart tires that are properly cured, you see the silver wire. You don't see the copper-colored wire. (RT 1527)

Not surprisingly, it was undisputed below that a portion of the steel cords in the subject tire did have a "brassy" appearance. And the plaintiffs made that fact the centerpiece of their case.[4] For example, they had a second expert say he agreed with Carlson's brassy wire theory (RT - -) and a third expert repeat it as "defense" testimony on behalf of Sellers. (RT - -) As for Uniroyal, the court rightly observed that it called "many, many witnesses" (RT 4036) to counter the brassy wire theory given its critical role in plaintiffs' case.

The closing jury arguments further confirmed the critical role plaintiffs assigned to the brassy wire theory. It was the *only* liability theory advanced against Uniroyal in the principal closing argument by plaintiffs' lead counsel. (RT 4071-77) Moreover, he confirmed its

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[4] A variety of abandoned alternative theories are summarized *post*, pp. —.

central role at trial by apologizing to the jury for bringing up this subject once again: "We have heard so much about brass that we're sick of it." (RT 4071) Even Sellers' counsel, whose expert witness advocated several other theories that plaintiffs had abandoned (see *post*, p. ---), declared in closing argument that "[o]ur theory of the case is brassy wires." (RT 4201) That theory was likewise featured in a third closing argument against Uniroyal delivered by Johnstone's counsel. (RT 4097)

2.

The Contradiction Of The Theory By Plaintiffs' Own Selected Scientific Literature

With plaintiffs' judgment against Uniroyal resting so heavily on their brassy wire theory, it is remarkable that their own selection of scientific literature flatly contradicted that theory. At a resumed deposition session of one of plaintiffs' experts, Lawrence Kashar, he produced a group of articles about rubber/steel bonding and testified that two in particular, those written by W. J. Van Ooij, presented an authoritative summary of the scientific literature on that subject. (AA 857 [Kashar's videotaped trial testimony]) Plaintiffs' principal tire expert, Dennis Carlson, likewise testified that "the articles that were attached to Dr. Kashar's deposition" were pertinent to tire failure analysis and "dealt directly with steel-to-rubber adhesion." (RT 1693-94) And plaintiffs' counsel relied on excerpts from the Van Ooij articles in questioning one of Uniroyals' witnesses. (RT 3069 *et seq.*) Copies were marked as exhibits to Kashar's deposition (AA 875, 911) and

Uniroyal includes them at the conclusion of its Rule 5.1 appendix for the Court's convenience and pursuant to judicial notice.[5]

Plaintiffs' selected literature contradicted their brassy wire theory in two ways. First, the Van Ooij articles stated unequivocally that the brass coating is *not* supposed to be completely consumed in the initial vulcanization or curing process. He wrote that "only a fraction of the brass coating is consumed under conditions of normal cure . . . ." (AA 885) (Van Ooij, "Fundamental Aspects of Rubber Adhesion to Brass-Plated Steel Tire Cords," 52 *Rubber Chemistry and Technology* 605, 625 (1979) (hereafter, "*Van Ooij 1979*")) Van Ooij explained that "the adhesive reaction between rubber and steel cord, at least as far as initial adhesion is concerned, involves only a small fraction of the coating (*i.e.*, the brass coating is not completely consumed during bonding. . . ." (AA 884) (*Id.* at 623) As Van Ooij repeated a few years later, in a second article included in Kashar's selection, only "a thin copper sulfide film forms on the brass . . . ." (AA 927) (Van Ooij, "Mechanism and Theories of Rubber Adhesion to Steel Tire Cords – An Overview," 57 *Rubber*

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[5] As stated previously, the *Kelly/Frye* issues on this appeal require an independent review of pertinent scientific literature irrespective of its inclusion in the record. (*Venegas*, *id.*, 18 Cal.4th 47, 78) Nevertheless, Uniroyal also requests judicial notice of the articles pursuant to Evidence Code section 459. Whether as court records (deposition exhibits) (Evid. Code § 452 (d)) or published scientific literature (*id.*, § 452 (h)), the articles are noticeable for their contents, not truth, because the *Kelly/Frye* issue is what the scientific community is *saying* about the brassy wire theory.

Chemistry and Technology 421, 452 (1983) (hereafter, "*Van Ooij 1983*")

Second, plaintiffs' literature contradicted their assertion that a residue of brass coating in a tire that has aged evidences weakened adhesion at that point. Van Ooij wrote that the opposite is true, that the retention of brass coating signifies that a chemical reaction that can *destroy* adhesion over time has not done so.

As noted earlier, Van Ooij explained that the desired bond requires only "a thin copper sulfide film." (*Van Ooij 1983*, *id.* at 452) In his earlier article, however, Van Ooij asserted that a thickening of that film over time, "at the expense of the brass layer" (AA 888) (*Van Ooij 1979* at 631), is the greatest threat to the rubber/steel bond in tires:

> [D]uring brass sulfidization in a complex medium there is a side reaction . . . the dezincification of the brass alloy. . . . [R]emoval of zinc from the brass surface will increase the copper content in the outermost layer. This will lead to a drastic increase of the reactivity of the brass toward sulfur. [¶] Under conditions of high moisture content, . . . [t]he resultant copper-rich brass . . . will react vigorously with sulfur or sulfur-containing polymer molecules, with formation of large quantities of cuprous sulfide which becomes gradually nonbonding with increasing thickness . . . . [S]uch a dezincification reaction is the first and major effect which leads to a degradation of adhesion in the tire. (AA 890-91) (*Van Ooij 1979* at 635-36, emphasis added)

In sum, the very condition that the plaintiffs contended was *optimum* for adhesion – the complete transformation of the brass coating into copper sulfide – in fact results in a *loss* of adhesion according to the plaintiffs' own selected literature.

D.
Proceedings Material To The Appeal

1.
The Pertinent Pleadings

The first of the several actions consolidated herein (AA 19) was Carver's, commenced by complaint filed on June 10, 1994. (AA 1) Plaintiffs' operative pleading, a second amended complaint filed on or about April 16, 1996 (AA 51 *et seq.*) asserted two causes of action against Uniroyal (and other parties). One sounded in strict product liability and the other in negligence. However, the charging allegations of the latter (AA 59, ¶ 17B) were a verbatim repetition of the principal charging allegations of the former. (AA 56, ¶ 11B)

Plaintiffs' second amended complaint also included a negligence cause of action against Sellers. (AA 61) Its only charging allegation was that Sellers was "negligent and said negligence was a cause of the injuries and damages herein alleged." (*Id.*, ¶ 21)

Uniroyal's answer (AA 20 *et seq.*) contained two affirmative defenses broadly invoking the doctrine of comparative fault as to plaintiffs' decision to ride without seat belts in a cargo bed. The Eleventh Affirmative Defense alleged that "plaintiff did not exercise due care, caution or circumspection, or any care, caution or circumspection, for his own safety, . . . and voluntarily assumed the risk of injury attendant upon his conduct . . . ." (AA 23) Equally broad was the Fifteenth Affirmative Defense, alleging that plaintiffs' own "acts, omissions, faults, negligence or culpable conduct" contributed to their injuries. (AA 24-25) By contrast, the Twelfth Affirmative Defense was limited to a plaintiff's failure "to correctly fasten or use" a seat belt actually available at his seat. (AA 23-24)

2.

Uniroyal's *Kelly/Frye* Motions

By motions in limine filed on July 15, 1996 (AA 63 *et seq.*), Uniroyal challenged the admissibility of plaintiffs' brassy wire theory (and several others) under California's *Kelly/Frye* doctrine (*see*, *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013) requiring scientific acceptance and reliability. Uniroyal sought to preclude any testimony as to "the novel scientific theory that a 'brassy' appearance to the wires making up the steel belts on a finished tire indicate the tire was not properly cured." (AA 292; see also AA 299 [Motion re: Richard Grogan]; and see AA 66, 67, 77, 78 [Motion re: Dennis Carlson] and AA 203, 206-7, 211 [Motion re: Lawrence

Kashar].) Uniroyal requested that relief based on the pertinent depositions or, alternatively, a preliminary evaluation of the prospective testimony pursuant to Evidence Code section 402 – but in either case "before that evidence goes before a jury." (RT 727) Uniroyal also challenged the bases on which each witness proposed to espouse this theory. (See *post*, pp. ---.)

The court denied Uniroyal's motions outright based on the deposition transcripts (RT 730 [Carlson and Grogan], RT 738 [Kashar]) and never granted a hearing under Evidence Code section 402. The court stated that "these motions are, in effect, advance evidentiary ruling requests which are improper." (RT 722) "I think that I've got to give you an opportunity to kind of – to try your lawsuit." (RT 730) "You're asking me to basically judge the credibility of a witness who has not even testified . . . ." (RT 737)

But the court refused to conduct an evidentiary hearing, either. It took that request under advisement (RT 738) and never granted such a hearing. Uniroyal's renewals of its *Kelly/Frye* points as to Carlson (RT 1514), Kashar (RT 2678), and Grogan (RT 3234) were all denied, as was the motion to strike the entirety of Carlson's testimony. (RT 4032) By the time Grogan reprised the brassy wire theory for the third time (*e.g.*, RT 3928) the horse was not worth another beating. Grogan testified at the end of the trial (over Uniroyal's objections; *post*, pp. ---) and subject to an imminent and firm deadline for its conclusion. (RT 3236) There

was no reason to believe the court might suddenly change its consistent position on *Kelly/Frye* at that point. It was no surprise, for example, when the court summarily denied Uniroyal's final attack on the sufficiency of plaintiffs' case by motion for a directed verdict. (RT 4048)

3.

The Rejection Of Comparative Fault For Riding Without Seat Belts In A Cargo Bed

Plaintiffs filed their own motions in limine in July 1996. Motion number 18 (AA 478 *et seq.*) to preclude all reference to the question "whether plaintiff was wearing a seat belt or shoulder harness at the time of this accident, or whether he was sitting in a seat while in the enclosed camper." (AA 482) The motion also sought to preclude any attempt to prove that "plaintiff's riding in an enclosed pick up camper [while being] driven constituted negligent behavior . . . ." (*Ibid.*)

Like Uniroyal's *Kelly/Frye* motions, plaintiffs' Motion 18 asked the court "[a]t least" to conduct a preliminary evaluation of the comparative fault evidence "outside the presence of the jury." (AA 483) Plaintiffs argued that it would be "highly improper and prejudicial" to allow the jury to hear testimony on their comparative fault "even if the court sustains an objection and instructs the jury to disregard the matters." (AA 480)

But plaintiffs upped the ante on this issue a month later. In a brief filed on August 19, 1996 (AA 487 *et seq.*), they argued that a

preliminary hearing was not even necessary because "as a matter of law plaintiff Carver is not guilty of comparative negligence for riding under the camper shell in the bed of the pickup truck where there were no seat belts available." (AA 488) Plaintiffs argued that there was no statutory prohibition against that conduct, no possible comparative fault for "going to work" in that manner (*ibid.*), and no such affirmative defense under any circumstances for riding unrestrained at a location where seat belts or their equivalent were not even installed.

The court adopted plaintiffs' analysis in full. It held that plaintiffs bore no potential responsibility for riding without seat belts in Sellers' cargo bed. It reasoned that "all of the cases do speak . . . about the use of seat belts where seat belts are available . . . ." (RT 882, see also RT 888) It held that California's mandatory seat belt law (Vehicle Code section 27315) applied only to the front seat of pickup trucks. (RT 852) Finally, it held as a matter of law that it was too much to expect "some kid who is trying to make a buck" to decline to ride in a cargo bed without seat belts at freeway speeds. (RT 889)

The court ruled that Sellers alone faced potential responsibility for the consequences of plaintiffs' location in the cargo bed. (RT ---) As for plaintiffs, the court ruled that "it would not be appropriate to instruct the jury that they could consider the failure of the plaintiffs to wear a seat belt as being their comparative negligence . . . ." (RT 888) And it enforced that ruling immediately and throughout the trial. It

restricted Uniroyal to any claim it might have – and it did not – that a particular plaintiff had advance notice of a problem specific to Sellers' truck or Uniroyal's tire. (RT ---) And aside from barring any presentation of the broader comparative fault claim (*e.g.*, in opening statement [RT ---]), the court reiterated its ruling during the trial. For example, it did so in a limiting instruction (RT 3754) when Uniroyal cited General Motors' warning in the owner's manual about passenger location and seat belt use. (*Ante*, p. ---)

Finally, the closing instructions to the jury restated the court's pretrial ruling in no uncertain terms. "As a matter of law, contributory negligence cannot be based upon failure to wear a seat belt where none are provided." (RT 4240)

4.

The Treatment Of Plaintiffs And Sellers As Adverse Parties

The plaintiffs and Sellers, the owner/driver of the pickup truck, began this trial with earnest assurances to the court that they were independent and adverse parties. The issue first arose when the court was allocating peremptory jury challenges (RT ---), a process that requires a realistic assessment of the parties' alignment. (*Post*, pp. ---.) Uniroyal argued that the plaintiffs and Sellers formed only one side in reality, and therefore sought the normal 12/12 allocation of peremptory challenges between opposing sides. (RT ---)

But the plaintiffs and Sellers claimed there were three independent sides – plaintiffs, Uniroyal and Sellers – and were therefore entitled to peremptory challenges each. (RT ---) Sellers' counsel flatly represented that "Sellers is not aligned with the plaintiffs in any way . . . ." (*Ibid.*) Plaintiffs' counsel acquiesced in that representation, and buttressed the point by emphasizing the formality of the pleadings. They argued that "Sellers is certainly a defendant in this case," "we certainly have charging allegations against him," and because "there is obviously a claim against him . . . automatically there are three sides." (RT 598-99)

The court was skeptical, but credited those representations and arguments. "Reluctantly, I think it is a three-sided case." (RT 599) It therefore allocated sixteen peremptory challenges together to the plaintiffs and Sellers and eight to Uniroyal. (*Ibid.*) And the assigned challenges were exercised in that same proportion. The plaintiffs and Sellers exercised eleven challenges between them, Uniroyal six. (RT 1060-67) But the court did give what it called a "crumb" to Uniroyal (RT 1059) in the form of third place in the exercise of the challenges. Uniroyal's counsel continued to complain of being "sandwiched" between parties who were adverse in form but closely aligned in substance. (RT 1057-58)

The claim of adversity to Sellers won plaintiffs other advantages, too. Over Uniroyal's objection, they characterized Sellers as an adverse

party in order to call him as a witness pursuant to Evidence Code section 776. (RT 2526) The court also gave Sellers' counsel independent standing, and therefore independent time, in cross-examining Uniroyal's witnesses. The court so confirmed itself when on September 24, 1996, five days into Uniroyal's case, it finally recognized that the plaintiffs and Sellers constituted "one side" (RT 3283) and henceforth restricted their total cross-examination time to the total time of Uniroyal's direct examination. (*Ibid.*)

While the record does not reveal when the court first saw through the pretense of adversity between the plaintiffs and Sellers, it certainly occurred no later than September 24, 1996. It may well have occurred much earlier, however, because of plaintiffs' lead counsel's curious habit of constantly defending and praising Sellers to the skies. (*Ante*, pp. ---) In any event, on September 24, 1996 the court effectively ruled that the plaintiffs and Sellers were fully aligned in interest and working closely in tandem. Addressing their counsel, the court stated: "It's pretty clear at this point you're on one side." (RT 3283) The court also observed that they had "the exact same interest" when cross-examining Uniroyal's witnesses. (*Ibid.*)

Not surprisingly, therefore, the court later asked plaintiffs' counsel if it would be "the end of the case" if Sellers were the only defendant the jury held liable. (RT 3794) Plaintiffs' lead counsel responded tentatively but affirmatively, stating that "common sense

would dictate [that] probable result" with the exception of a possible appeal. (*Ibid.*) Once the liability case was in the hands of the jury, however, the court was informed that none of the plaintiffs would be pursuing any damages against Sellers if Uniroyal were exonerated. (RT 4269) In other words, Sellers was not their actual target in this case.

Despite its ruling on September 24th, however, the court still allowed the plaintiffs two more significant tactical advantages not properly available to "one side" in a lawsuit. (*Ibid.*) First, the court allowed Sellers' counsel to deliver a substantial closing argument positioned after Uniroyal's. (RT 4046-48) Carver was given two hours to open, followed by Johnstone for fifteen minutes. Uniroyal then had two hours to deliver its single closing argument, followed by a one-hour argument for Sellers, a half hour rebuttal for Carver, and a fifteen minute rebuttal for Johnstone. (RT 4046)

Uniroyal's counsel objected in vain to that time allocation and order of proceeding. He reminded the court of its recent "appreciat[ion] that there are really just two sides in this case" (RT 4046), and explained that the Sellers/plaintiffs alliance would have "four hours to my two" of closing argument time and "three rebuttals" because of the positioning of Sellers' argument after Uniroyal's. (RT 4047)

The final advantage that plaintiffs won with their claim of adversity to Sellers was probably the most significant. "Sandwiching" Uniroyal once again, the court allowed an expert witness for Sellers to reprise the brassy wire theory (*e.g.*, RT 3928) and other attacks on Uniroyal's tire at the very end of the trial, when the defense case in chief was already concluded and Uniroyal had no right of rebuttal.

Uniroyal protested to no avail that such an "order of witnesses" (RT 1476) was severely prejudicial:

> My request was that we not be [sandwiched] between the two parties saying that there was a tire defect when that means we will only have one opportunity to rebut; that plaintiffs should put on their evidence, and then Sellers should put on their evidence, at least as to tire defect, before my experts testify. (RT 1476-77)
>
> At least as to tire defect, we have to be in a position where we can hear what . . . the plaintiffs' and Mr. Sellers' theories are about the tire, so that we can effectively rebut them. I cannot bring four experts out here twice to testify on tire defect. (RT 1479)

But the court's only stated rationale was that Uniroyal's counsel had deposed Mr. Grogan and could cross-examine him when he testified. (RT 1480-81)

5.

The Manic Disorder Of The Jury Foreman

While the foreman of the jury is identified in the record below (*e.g.*, RT 4265), the trial court placed a seal and protective order on his

psychiatric records (RT 10,049) and ordered that their transmission to this Court should likewise be under seal. (*Ibid.*) Accordingly, Uniroyal will refer to this juror as "the foreman" and requests the Court and the other parties to join in protecting the man's privacy. While plaintiffs' lead counsel lambasted him for disclosing the facts about his mental illness, arguing that he had forfeited his privacy by "caus[ing] risk, danger, inconvenience and expense to this judicial system and the litigants" (RT 10,047), hopefully calm and privacy will prevail on appeal.

Well familiar with his manic symptoms from many prior episodes (see below), the foreman became aware of a recurrence of those symptoms during the liability deliberations in this case. On the morning of October 8, 1996, the deliberations having concluded the evening before (RT 4270), the foreman requested a meeting with the judge "regarding the deliberations." (AA 566; RT 4295) In an explanatory note submitted the next day at the court's request (RT 4303), the foreman reported among other things that there was "in my mind an issue of urgency . . . regarding the appropriateness of my continued service on this jury . . . ." (AA 567) Although he decided not to elaborate further at the time ("not to make that an issue of my concern" [*ibid.*]), he subsequently revealed that his manic symptoms had recurred during the liability deliberations. (RT 5221-22)

The nature, extent, and timing of those symptoms came out in several stages below. Finding the foreman's initial request for a meeting

"a highly unusual thing" (RT 4298), the court contacted counsel by facsimile (AA 564) and conducted a conference call that same afternoon, October 8, 1996. (RT 4294 *et seq.*) Over the vigorous objections of plaintiffs' counsel (RT ---), the court decided to solicit a written explanation from the foreman because the liability verdict "may not have any integrity if this guy is off the wall or for any other reason." (RT 4299) Indeed.

After faxing counsel the foreman's explanatory note of October 9th (RT 4304), the court broached the question of its significance the following morning, the date set for the commencement of the damages trial. (RT 4290-91) However, the court expressed interest in nothing but possible "juror misconduct," not the foreman's mental condition. (*Ibid.*) Finding no evidence of misconduct as such, the court pronounced "the end of the matter." (*Ibid.*)

Plaintiffs' lead counsel, however, moved to discharge the foreman for alleged inattentiveness and bias. (RT 4305) When the court tentatively denied that motion on October 11th (RT 4460), plaintiffs' lead counsel requested the court to interview the foreman and "find out exactly what he meant" (RT 4461) about the concerns he had expressed on October 8th and 9th about continued service. Such an interview would presumably have brought out his history and recurrence of manic symptoms. However, the court took the matter

under advisement (*ibid.*) and did nothing further until the foreman submitted another note on October 21st, during the damages trial.

With all counsel present, the court read the latest note aloud. (RT 5221-22) Out of "unrelenting concern regarding my participation in this trial," the foreman finally revealed his lengthy history of "Bi-Polar or Manic Depressive condition" for which he had obtained psychiatric treatment and medication, tegretol, for several years. However, he "voluntarily terminated" all such treatment early in 1993 and sought only "metaphysical/spiritual treatment" when his symptoms recurred late in 1994. He felt they subsided "until my participation in this trial."

> I now suspect that there could have been a recurrence of bi-polar symptoms during the first phase of this trial . . . . It is the nature of the bi-polar condition for all concerned to be unaware of the condition until it becomes a problem.

The foreman offered the court access to his psychiatric records and his spiritual adviser, and apologized for his failure to perceive and report this problem earlier. "[I]f I could have informed the court any sooner, I would have done so."

When plaintiffs' lead counsel moved again to discharge the foreman (RT 5222) Uniroyal's counsel opposed, still believing at that point that the foreman was able to serve. (*Ibid.)* But new facts started pouring in immediately and he promptly sought a mistrial on Uniroyal's behalf. Michael Goldstein, Esq., one of Carver's counsel, reported as follows:

> Your Honor, as I was walking in just now, [the foreman] just commented to me, when he walked – he walked down the hall three or four minutes ago, and said something like, "I believe in miracles." Or something like that. As I was walking in just now, he just said, "You missed this." And I didn't think he was talking to me. He said, "Mr. Goldstein." He said, "I didn't show you my t-shirt." And he showed me a t-shirt that says, "Do you believe in miracles?" (RT 5223)

Before anyone could respond, Carver's lead counsel, Mr. Good, put one of his legal assistants under oath to expand on Mr. Goldstein's report:

> [The foreman] held up this shirt while we were going by that says, "Do you believe in miracles?" And he said, "Do you think Mr. Carver would like this shirt?" And I didn't really know he was talking to me in particular. But then he handed it to Kathy, the nurse, and told her to give it to Mr. Carver. And then he handed us a book, called Moving Violations, which appears to be a – an inspirational book about a paraplegic that did certain things like bringing his wheelchair through stretches of Middle Eastern sand. . . . And told me to give it to Mr. Carver. (RT 5225)

The shirt and book were marked as exhibits. (*Ibid.*)

Still other objective facts came out when the foreman was finally brought in for questioning. (RT 5226) Most significantly, his manic symptoms proved to have been far more acute in the October 8th time frame than the notes he then submitted revealed. He produced another document he had authored at that time, entitled "Message To The Court" (AA 632), which he hoped to read aloud to the entire

assemblage in the event he was excused from the jury as a result of his communications with the judge. (RT 5228) Having anticipated such communications as early as the morning of October 8th, when he submitted his first notes requesting a meeting, the "Message To The Court" had to be composed on or before October 7th. On that date there was another full day of liability deliberations before the verdict was delivered.

The "Message To The Court" was a classic manifestation of manic symptoms. After a paragraph of sympathy for the Johnstone family, the foreman planned to assure Carver that "I will do everything in my power to help you deal with your challenge." After recommending specific computer equipment and a change of career plans, the foreman announced

> my intention to form a foundation, tentatively to be called the Robert Carver/Jeff Johnstone Foundation (subject to the approval of those concerned). This foundation would create a Fund to be initiated and sustained by donations but as soon as practical, it would also be sustained by the sale of shares. The purpose . . . would be to help as many people as possible who are suffering from major traumatic injuries. . . .Progress might be slow it [sic] first, however, if things are managed well, at some point Mr. Carver would be living at least as well as Chris Reeve . . . and then we would expand our focus. Do I believe in miracles? Yes I do!

The foreman even penned a grandiose offer to Uniroyal. "I may have some information which will be helpful to you in future legal

action - if that is permitted. My fee to you for consultation would be $100 per hour, all of which would go to the Fund. (All my pay for jury duty will go to the Fund also.)" Next, the foreman extended an offer to the trial court to join an "association" that "[m]any in the jury have expressed an interest in forming . . . to keep our 'family' together. If this happens, I'm guessing – but I'm pretty sure, that we would be honored to have Your Honor as an honorary member." And the proposed message concluded in the same grandiose spirit: "Are there any questions?"

After reading the "Message To The Court" aloud (RT 5230-31), the trial court ordered a brief recess because it was "very, very troubled." (RT 5231) On reconvening, plaintiffs' lead counsel made a host of motions, including one to strike all the statements and documents that had emerged on this subject – even though they emerged in response to his own previous request for a searching interview of this juror. (RT 4461) Counsel also argued that the foreman's statements and documents evidenced "a secret agenda to destroy the damages aspect of this case . . . and/or perhaps the liability verdict because he did not get his way." (RT 5236-37)

At that point Uniroyal's counsel moved for a mistrial "on all phases of the case" (RT 5238-39) but the motion was denied. (RT 5241) On Uniroyal's subsequent motion for new trial, however (AA 592 *et seq.*), the nature, extent, and timing of the foreman's illness and

symptoms were documented by additional objective evidence. Notably, the foreman revealed by declaration that he decided to run for President upon his release from jury service. (AA 627) He wrote exploratory letters "to a radio personality, Don Imus, and to Ross Perot" (*ibid.*), and posted his presidential credentials on the Internet along with "a method to throw the 1996 Presidential Election into the House of Representatives." (AA 633-35) Rather than summarize that compelling evidence of serious manic symptoms, Uniroyal attaches a copy as Appendix 1 to this brief.

The foreman's declaration also reported a number of other observable events during the liability deliberations:

> I pounded the table in an attempt to get people's attention and maintain order. . . . I . . . br[ought] in a bell to ring to designate who had the floor. . . . I had [the sense] that many of the other jurors were thinking like lemmings and mullets. I communicated this feeling . . . . [¶] I brought in articles and books to share with other jurors . . .including general spiritual, religious, Christian Science and educational. . . .(AA 625-6)

True, plaintiffs' counsel obtained declarations from a number of jurors to the effect that they found nothing remarkable about the foreman's behavior. (AA 732 *et seq.*) But not a single juror disputed the objective facts documented in the foreman's declaration.

Even more significantly, though, two percipient witnesses submitted declarations testifying to their personal familiarity with the

foreman's psychiatric history, the nature of his cyclical manic symptoms, and their first-hand perception of those symptoms during the liability deliberations of this trial. Peter Gustafson, a Stanford MBA graduate (no relation to Uniroyal's counsel), served with the foreman in the Marines in 1971and remained a close friend ever since. (AA 636-7, ¶¶ 1-3) Mr. Gustafson became aware of the foreman's depressive and manic episodes as early as 1982, and it was he who steered the foreman into appropriate medical treatment for as long as that lasted. (AA 637, ¶ 5) He described the foreman's recurrent manic symptoms in detail, including the "grand plans" that are typical of manic symptoms. (*Ibid.*)

Mr. Gustafson also corroborated the timing of the foreman's manic episode both during and after the liability deliberations. He spoke with the foreman by telephone "several times in late September and early October of this year [1996]," (*id.*, ¶ 8) but specifically at the *commencement* of the liability determinations:

> I became aware that a particular phase of the trial had concluded and that he had been elected jury foreman. . . . *He talked about looking forward to the dynamics of the jury deliberations.* He was quite concerned that the jury reach a verdict that he felt was proper. He indicated that he *wished* to aid the cause of tort reform through the jury deliberations. (AA 637-8, ¶ 8; italics added)

Familiar for years with the foreman's manic symptoms, Mr. Gustafson placed their onset at that point in time: "It was quite clear

from our conversations that he had become quite excited and was entering into a hyperactive phase" (*id.*, ¶ 8) – just like the earlier times when the foreman "would become very active mentally and physically, try to hold down several jobs at a time, make purchases . . . that he could really not afford, and make grand plans (e.g., to become the first civilian astronaut to go to the moon . . .) . . . ." (AA 637, ¶ 5) (The foreman's declaration referred to conversations with Mr. Gustafson during the damages phase, but then went on to state that they prompted his notes of October 8th and 9th. (AA 626, ¶ 11) Either there were additional conversations with Gustafson in the damages phase or the foreman was confused about their timing.)

The second percipient witness, Dr. Gerald Ondash, was a board-certified internist who knew the foreman socially for approximately 20 years. (AA 640, ¶¶ 1-2) He, too, was personally familiar with the foreman's "cycle" of manic episodes, when "his mind seems to be running a mile a minute. . . . He plans new business ventures. He skips from idea to idea in rapid fashion. He is extremely creative. . . ." (AA 641, ¶ 5) Dr. Ondash detailed a number of such grandiose plans that were spinning through the foreman's mind "[d]uring the latter phases of [the foreman's] jury service." (*Id.*, ¶ 7) Among other things, he was "planning his involvement in the recent presidential campaign" (*ibid.*) as the foreman's own contemporaneous writings confirmed. (Appendix 1 to this brief)

While Dr. Ondash's declaration was not as specific about timing as Mr. Gustafson's, it nonetheless corroborated the occurrence of serious manic symptoms during or even prior to the liability determinations. That is because Dr. Ondash "sat down" with the foreman (*id.*, ¶ 8) during his observably severe manic symptoms and urged him, "as a friend, not as a medical doctor," that he "did not have a handle on his situation." (*Ibid.*) However, Dr. Ondash's intervention was rebuffed; his advice "seemed to go in one ear and out the other." (*Ibid.*) The foreman was still too much in the grip of his symptoms to listen to such advice. But that ceased to be the case no later than October 7th, when the foreman began composing notes and speeches in anticipation of revealing his disorder to the court. Accordingly, Dr. Ondash's observation of serious manic symptoms probably took place earlier than October 7th, or at least before the foreman began taking steps to reveal his condition. Indeed, Dr. Ondash's intervention may well have prompted those steps.

Finally, a board certified and highly qualified psychiatrist, Dr. Sidney Zisook, reviewed the foreman's medical records and conducted a "clinical interview . . . for approximately one and one-half hours." (AA 644, ¶4) Dr. Zisook concluded that the foreman "was clearly in a manic state during the trial." (AA 646, ¶ 13) He believed the onset was triggered by stress following the foreman's selection as a juror (*id.*, ¶ 10) – not just his selection as foreman. He believed that the manic

symptoms gradually escalated (*id.*) and reached the level of "a manic episode . . . during much of [his] time as jury foreman." (*Id.,* ¶ 14)

Dr. Zisook also stated that "Bipolar Disorder is a severe illness, and when in a manic episode the afflicted person loses judgment and perspective." (*Ibid.*) Indeed, the foreman's own declaration stated that "my judgment was impaired" during the liability determinations, and that "I clearly saw the world differently" and "became rigid in my thoughts . . . ." (AA 625, ¶ 7)

Plaintiffs' opposing juror declarations have already been described. The only other evidence bearing on the foreman's mental state was a declaration by another well qualified psychiatrist, Dr. Robert Neborsky, who agreed that the foreman suffered from bipolar disorder (AA 787-8, ¶¶ 4 & 6) Uniroyal therefore sees no reason to enlarge the record with the foreman's medical records. But Dr. Nebrosky insisted that he was never "mentally incompetent" as a result of his illness. (*Id.*, ¶¶ 6 & 8) Dr. Neborsky found no evidence of what he called "psychotic symptoms (hallucinations or delusions)" during the liability phase of the trial (*id.*, ¶ 6), and emphasized that manic symptoms are not inconsistent with pure "reasoning capacity" (AA 789, ¶ 7) Finally, he relied heavily on the plaintiffs' juror declarations about how normal and pleasant the foreman appeared to them. Dr. Neborsky opined that such an appearance was inconsistent with the "irritable" and "rude" behavior characteristic of manic patients. (AA 788, ¶ 6)

As stated at the outset of this brief, the trial court concluded that the foreman did "suffer from a mental disease or condition." (RT 10,054) However, it passed quickly and lightly over the entire competence issue, turning instead to the issue of misconduct as opposed to competency. All the court stated about the entire competency issue was this: "I'm not convinced, from any of the declarations filed, that that disease had conditions such that it affects his competency within the context of the propriety of sitting as a juror in the case." (RT 10,054) It is not even clear whether that statement meant to refer to manic illness in general or the foreman's condition in particular. But the court made no comment whatsoever about the entire body of objective and independently corroborated evidence of the foreman's serious manic symptoms.

Instead, the court passed quickly to what it regarded as "the primary issue":

> Even if the court were to conclude that he was not competent, the primary issue with respect to jury misconduct on the liability phase is a numbers game. (RT 10,054)

The court went on to hold that the foreman's illness and asserted incompetence were immaterial because his vote was not necessary to make up the requisite three-fourths majority for a valid verdict. The court found it significant that civil actions are determined by majority verdicts and a preponderance of the evidence (RT 10,055), not

unanimous verdicts and "proof beyond a reasonable doubt and to a moral certainty." (RT 10,054)

In sum, the court's primary focus and holding on this issue ignored its initial concern about the integrity of the liability verdict. It denied Uniroyal's motion for new trial on the grounds that it was "obvious" that only in criminal cases could the "competency of a single juror" possibly present a "valid question . . . as to the integrity of that verdict." (RT 10,055)

6.

Disposition

In Judge Di Figlia's absence, Judge Einhorn read the previously settled liability instructions to the jury on the morning of October 1, 1996. (RT 4229 *et seq.*) Included was the standard instruction that "[a]ll jurors should participate in all deliberations" even though "nine or more can agree on the answers. . . ." (RT 4251) The jury was excused to select a foreperson and commence deliberations at 10:23 a.m. (RT 4252) A verdict reflecting five days of deliberations (AA 529-541) was rendered on October 7, 1996, at 4:25 p.m. (RT 4270)

The material votes are recorded at AA 541. It was nine to three that Sellers was negligent (special verdict #1) but not a causal factor in any plaintiff's injuries (#2). It was ten to two that Uniroyal was negligent (#3) and a causal factor (#4), and eleven to one that there

was a manufacturing defect (#5) which was likewise a causal factor (#6). It was eleven to one that Uniroyal committed a failure to warn (#7) and ten to two that this was not a causal factor (#8). It was ten to two that neither Carver, Mondragon nor Johnstone committed any "contributory negligence (comparative fault)" (#9). The court previously held as a matter of law that McGarry, who rode in the front seat and had his seat belt fastened, was not subject to any claim of comparative fault. (RT ---)

The foreman dissented from the liability verdicts insofar as they held Uniroyal liable (RT 4277-82) and exonerated Sellers on causation grounds. (RT 4276) However, he joined in the verdict rejecting any comparative fault on the part of the plaintiffs or the decedent, Johnstone. (RT 4285)

The damages verdicts were rendered on November 7, 1996. (RT 10,006) Carver was awarded $7,621,539.59 in total damages (RT 10,007), Johnstone $600,000, Mondragon $99,140.58, and McGarry $73,560.07. (RT 10,008) A final "Judgment After Special Verdict" was entered on December 17, 1996 (AA 580), among other things taking into account a total of $165,000 in pretrial settlement payments from other parties. (AA 582)

Blank spaces were left in the judgment for costs and prejudgment interest. Able to agree on the correct amounts, the parties so stipulated and the court so ruled on March 24, 1997. (AA 844-5)

7.

Statement of Appellate Jurisdiction

The judgment of December 17, 1996, as modified by the insertion of the prejudgment interest and costs amounts on March 24, 1997, was a final judgment within the meaning of California Code of Civil Procedure section 904(a).

Carver's counsel served a notice of entry of the December 17th judgment on January 9, 1997. (AA 590) On January 22, 1997, Uniroyal timely filed and served a notice of intent to move for new trial (AA 592 *et seq.*) along with a motion for judgment notwithstanding the verdict. (AA 620-21) The court denied both motions on March 3, 1997. (RT 10,052-10,065)

Uniroyal filed a notice of appeal from the original judgment and other rulings on March 7, 1997 (AA 827-28) and an amended notice of appeal on May 23, 1997 (AA 846-47) specifying the judgment as modified by the insertion of amounts for prejudgment interest and costs. The original notice of appeal was timely pursuant to California Rules of Court, Rule 3, in that it was filed within 30 days of the denial of Uniroyal's motion for new trial. The amended notice of appeal was

timely pursuant to Rule of Court 2 in that it was filed within 60 days after the entry of the order modifying the judgment.

Carver filed a notice of cross-appeal on or about March 17, 1997 and an amended notice of cross-appeal on or about March 21, 1997. (AA 836-43 Although the original notice specified a number of nonappealable rulings, it is unclear whether the amended notice intended to abandon them by omission. Uniroyal will therefore await Carver's brief to determine if a motion to dismiss is in order.

III.

ARGUMENT

A.

THE BRASSY WIRE THEORY WAS NEITHER ADMISSIBLE NOR SUBSTANTIAL EVIDENCE OF A DEFECT IN UNIROYAL'S TIRE

The plaintiffs presented their brassy wire theory with all the scientific trappings of a litmus test: a definitive sign of defective rubber/steel bonding in a tire. While lay jurors could hardly assess the underlying scientific issues themselves, the *appearance* of scientific validity endowed the brassy wire theory with a heightened credibility. Yet no appellate court in California has ever reviewed the scientific underpinnings and level of scientific acceptance of this theory and concluded, for publication at least, that it met the *Kelly/Frye* standards of reliability. The trial court certainly conducted no such inquiry below,

and the plaintiffs, as the proponents of this theory, bear the burden of proof under *Kelly/Frye*. (*People v. Leahy* (1994) 8 Cal.4th 587, 611)

At a minimum, the erroneous admission in evidence of the brassy wire theory requires a reversal of the judgment and a remand for a new trial. Prejudice is virtually self-evident because of the central and dominant role of this theory at the trial. (*Post*, pp. ---) But the more appropriate disposition on this issue is entry of a judgment for Uniroyal. Neither the brassy wire theory nor any others mentioned in the record below can be deemed substantial evidence of a manufacturing defect. (*Post*, pp. ---)

1.

The Criteria For *Kelly*/*Frye* Screening

The seminal case of *People v. Kelly, id.*, 17 Cal.3d 24, endorsed the rule that "California courts, when faced with a novel method of proof, have required a preliminary showing of general acceptance of the new technique in the relevant scientific community." (*Id.* at 30) The plain meaning of that central *Kelly* holding bears emphasis. Methods of proof that are *novel to the courts* must be generally accepted in the pertinent scientific community before they can be accepted for use in judicial proceedings.

Thus, *People v. Stoll* (1989) 49 Cal.3d 1136 specified that a scientific theory or procedure remains "new" or "novel" for *Kelly/Frye*

purposes until its reliability has been accepted by the courts, not just the pertinent scientific community. *Stoll* held that the doctrine applies to "expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science *and, even more so, the law*." (*Id*. at 1156, italics added) And the Court's most recent *Kelly/Frye* decision, *People v. Venegas*, *id.*, 18 Cal.4th 47, held that published appellate decisions are ordinarily required to establish the legal acceptance prong of this rule. (*Id.* at ---)

A good example is *People v. Leahy, id*., 8 Cal.4th 587, which adhered to *Kelly* in California despite an easing of *Frye* for the federal courts in *Daubert v. Merrill Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579. *Leahy*, applying *Stoll*, held that a field sobriety test remained "new" for *Kelly/Frye* purposes despite its use for over thirty years by law enforcement agencies. That is because its use had not become "'routine' or settled in law" in California (*id*. at 606), let alone accepted as reliable in the relevant scientific community. (*Id*. at 610, citing *State v. Witte* (1992) 251 Kan. 313, [836 P.2d 1110)

Along with the legal novelty of a "method of proof" (*Kelly*), the Supreme Court has looked to its *appearance* of scientific grounding in determining whether *Kelly/Frye* reliability screening is required. As *Kelly* explained with regard to the voice printing technique:

> Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials. We have acknowledged the existence of a ". .

> . misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature." . . ."[S]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury . . . ." (*Id.* at 31-32, cits. omitted)

People v. Stoll, id., emphasized the appearance factor even more. Citing the proliferation of "inventions and discoveries which could be considered 'scientific. . .'" (49 Cal.3d at 1155), *Stoll* required *Kelly/Frye* screening of such a theory if it appeared to identify "some definitive truth which the expert need only accurately recognize and relay to the jury." (*Id.* at 1156) And *Leahy, id.*, following *Stoll* in this regard, held that a field sobriety test was "scientific" enough to *Kelly/Frye* screening because "[a] jury might be unduly swayed by HGN evidence solely by reason of its technical nomenclature" (8 Cal.4th at 606), and because police officers' testimony gave the test an "aura of certainty" that could "unduly and unjustifiably impress[]" a lay jury. (*Id.* at 607)

Finally, the Court's most recent *Kelly/Frye* decision, *People v. Venegas, id.,* 18 Cal.4th 47, held that "the very complexity" of technical issues "draws them under the Kelly/Frye umbrella." (*Id.* at 73)

> To . . . leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand Kelly-Frye on its head. . . . This is an instance in which the method of scientific proof is so impenetrable that it would . . . "assume a posture of mystic infallibility in the eyes of a jury. . . ." (*Id.* at 75-76)

2.

Kelly/Frye Screening Was Required Here, And The Brassy Wire Theory Fails On Its Face

Both settled factors required *Kelly/Frye* screening of plaintiffs' brassy wire theory in order to establish its admissibility in evidence. And there is no room for doubt about the outcome of that screening, which this Court can and must perform for itself, without deference to the lower court. "On appeal, a Kelly-Frye ruling is reviewed independently. The . . . core issue of the general acceptance of the new scientific technique in the relevant scientific community is scrutinized under that standard." (*People v. Ashmus* (1992) 54 Cal. 3d 932, 971; *accord*, *People v. Venegas, id.*, 18 Cal.4th 47, 85) The absence of prior legal acceptance of the brassy wire theory in California, coupled with the plaintiffs' own selection of scientific literature, compel the conclusion that this theory does not merit presentation in judicial proceedings.

First, no appellate court in this State has ever accepted the reliability of plaintiffs' brassy wire theory in a published decision. Indeed, plaintiffs cited no instance of *any* judicial acceptance of their theory, although appellate acceptance in California is the sine qua non under *Kelly/Frye*. (*Venegas, id.*,18 Cal.4th at ---) Unless and until it wins such appellate approval, the brassy wire theory remains a "novel method of proof" (*Kelly, id.*, 17 Cal.3d at 30) that is inadmissible in judicial proceedings in this State.

Nor should this Court be the first to bestow admissibility on this theory. The plaintiffs fell far short of meeting their substantial burden under *Kelly/Frye* (*Leahy, id.*, 8 Cal.4th 587, 611) to establish the general acceptance of the brassy wire theory in the pertinent scientific community. Indeed, all the plaintiffs established about the pertinent scientific community was its *rejection* of their brassy wire theory. (*Ante*, pp. ---) Although plaintiffs' so-called experts swore that their "techniques" were common in the field (*e.g.*, AA 200), *Leahy*, *id.*, 8 Cal.4th 587, squarely held that even protracted usage in the field is no substitute for competent proof of general acceptance in the pertinent scientific community. Similarly, *Kelly* held that scientific acceptance must be documented by well qualified and neutral members of the scientific community itself, not mere practitioners or advocates of the challenged technique who have inadequate credentials plus an obvious interest in a judicial finding of reliability. (17 Cal.3d at 38-39) Plaintiffs' showing fell short on all the foregoing grounds.

At the same time, however, the plaintiffs invested the brassy wire theory with an *appearance* of scientific credibility that invoked the second *Kelly/Frye* factor. The "aura of certainty" shone brightly. It emanated from the experts' show of scientific credentials (RT ---), the fancy nomenclature they used (*e.g.*, "belt tread adhesion system" [RT ---]), and the technical complexity of the subject matter (*Venegas*, *id.*, ---). Moreover, plaintiffs' counsel emphasized in closing arguments that the brassy wire theory appeared in a published book authored by one of

the expert witnesses – "so we *know* this brassiness that he's talking about is a sign of defective vulcanization . . . ." (RT 4073, emphasis added) That purported "sign" was depicted as a "definitive truth which the expert need only accurately recognize and relay to the jury." (*Stoll, id.* at 1156)

For all the foregoing reasons, this Court's independent review should result in a holding that the brassy wire theory should have been excluded before trial commenced, or at least before the presentation of this theory to the jury. "It is usually advisable" to determine preliminary fact issues out of the presence of the jury. (*California Judges Benchbook, Civil Trials* (Cal. Center of Judicial Ed. & Res., 1981), § 8.10 at p. 215) Even more emphatic is *Jefferson's California Evidence Benchbook* (CEB, 3rd ed. 1997):

> Whenever there is a substantial possibility of prejudice to a party, arising out of determining the admissibility of evidence in the presence and hearing of the jury, the judge should grant a party's request for a determination out of the jury's hearing on the question of the admissibility of proffered evidence, whether the case be civil or criminal, and irrespective of the preliminary fact question involved. (*Id.*, Vol. 1, § 23.12, at p. 390)

Witkin agrees. Only when the danger of such prejudice is "slight" is there "little need for th[e] precaution" of evaluating preliminary facts outside the jury's presence. (Witkin, *California Procedure* (3rd ed. 1986), Trials, § 1714 at p. 1673; *accord*, Kennedy & Martin, *California Expert Witness Guide* (CEB, March 1998), § 14.5 at p. 418.1)

The bottom line, however, is that it was serious error to toss this particular theory into the ring for a battle of experts before lay referees. "The *Frye* rule is deeply ingrained in the law of this state." (*People v. Shirley* (1982) 31 Cal.3d 18, 51) It "ensures that judges and juries with little or no scientific background will not attempt to resolve technical questions on which not even experts can reach a consensus." (*People v. Leahy, id.*, 8 Cal.4th ---, 603, quoting Note, "Leading Cases," 101 Harv.L.Rev. 119, 127) Those salutary principles were completely ignored below.

3.

The Error Is Reversible

The erroneous admission of evidence over a *Kelly/Frye* objection requires reversal "if it is reasonably probable the verdict would have been more favorable to defendant in the absence of the error." (*Venegas, id.*, 18 Cal.4th 47, 99, quoting *People v. Watson* (1956) 46 Cal. 2d 818, 836; *see* Code of Civil Procedure section 475; Cal. Const., Art. VI, § 13.) Here that was virtually certain. The plaintiffs struggled mightily to come up with *any* liability theory against Uniroyal (*ante*, pp. ---), and the one they finally settled on, the brassy wire theory, was not even admissible. Yet this brief has already demonstrated how that theory dominated plaintiffs' case against Uniroyal, both quantitatively and qualitatively. (*Ante*, pp. ---.) There is no need to repeat that showing here.

Prejudice is also compounded where, as here, counsel's argument highlights the erroneous ruling. (*See, e.g., Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 771) The plaintiffs' closing argument below did just that. It cited the exalted status of publication in a book as proof positive that "we *know* this brassiness that he's talking about is a sign of defective vulcanization . . . ." (RT 4073, italics added) For all the foregoing reasons, it is virtually certain that the exclusion of the brassy wire theory would have resulted in a verdict more favorable to Uniroyal – either a directed verdict from the trial court, a defense verdict from the jury, a causation verdict against Sellers with a resulting reduction of Uniroyal's percentage responsibility, or a lower total damages award.

4.

There Was No Substantial Evidence Of A Manufacturing Defect

Even assuming arguendo that the brassy wire theory was admissible evidence, it does not qualify as *substantial* evidence and therefore can not support a verdict and judgment in this State. Because no other liability theory so qualifies either, this Court should order the entry of a final judgment in Uniroyal's favor.

The relevant legal principles are well established. Testimony does not "constitute substantial evidence simply because some expert is willing to state it as his opinion." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134) "The value of [expert]

opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed." (*Id.* at 1135) When a trial court has "accept[ed] an expert's ultimate conclusion without critical consideration of his reasoning, and it appears that the conclusion was based on improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence." (*In re Marriage of Micalizio* (1988) 199 Cal.App.3d 662, 680)

The *Kelly/Frye* inquiry involves similar foundational questions, and Uniroyal need not repeat its previous analysis of plaintiffs' brassy wire theory. Two additional points should be made for present purposes, however. First, Uniroyal's *Kelly/Frye* challenges were not limited to the substance of the brassy wire theory. They also addressed the various experts' lack of sufficient personal knowledge, training, or experience to tell a jury that all the brass coating on steel cords is supposed to disappear during vulcanization for proper bond. (*E.g.*, AA 67 *et seq*. [Carlson], AA 205 *et seq*. [Kashar], AA 296 *et seq*.) [Grogan]) Neither Carlson (RT 1515) nor Kashar (AA 857), for example, consulted any scientific literature on this subject in forming their opinions in this case. Indeed, Carlson was totally unaware of the very existence of such literature (RT 1515), believing that "most of the information that is developed is developed internally in tire companies and is not published." (*Ibid.*) And Grogan hadn't bothered to read even the Van Ooij articles prior to testifying in court. (RT 3983)

Aside from the brassy wire theory, however, the trial record refers to a host of other "tire defect" theories that were either abandoned or contradicted by the plaintiffs' or Sellers' expert witnesses. Despite their mention on the record, often fleetingly, they no more qualify as substantial evidence in California than the brassy wire theory. Thus, when the trial court concluded that plaintiffs' principal liability expert, Dennis Carlson, had been "utterly destroyed . . . on cross-examination, utterly destroyed" (RT 3231), the main reason was that Carlson and his fellow liability experts repeatedly contradicted their own and each others' theories. It was necessity, not indecision, which prompted plaintiffs' counsel to change their liability theory "over and over and over again." (RT 3114)

For example, one Carlson theory that plaintiffs abandoned was that rust observed on the outer belt of the tire evidenced a preexisting defect because moisture purportedly migrated from within. That theory was abandoned, however, because it was flatly rejected by plaintiffs' own metallurgy expert, Lawrence Kashar, who agreed with Uniroyal's metallurgist that rust formed only after the accident. (AA 172-73, RT ---)

But Carlson abandoned a number of his other theories on his own. One involved alleged porosity in the rubber of the tire (RT 1547), another its alleged reversion to a pre-vulcanized state (RT 1721-22),

another a "Shore Hardness Test" (RT 1649), and another a pull-cord or strap-cord adherence test. (RT 1626-28)

The last theory abandoned by the plaintiffs, as the court specifically so found (RT 3233), was that the inner liner of the tire had a defective splice. Carlson originally advocated that theory, too (RT ---), but testified that he later concluded it did not have probable validity. (RT ---) Nevertheless – and perhaps for that very reason – the plaintiffs used their ally Sellers to present this very same inner liner theory at the end of the trial through a different expert witness, Mr. Grogan. (RT ---) The other reason for that timing, of course, was that Uniroyal was precluded from any rebuttal at that point. (*See —,* pp. —.) Even so,[6] Mr. Grogan's mere willingness to advocate the inner liner theory to a jury did not make it substantial – no more than the many other theories that kept popping up and disappearing in this case like the familiar carnival game for children.

No expert opinion, whether abandoned or not, can be accepted as substantial evidence "simply because some expert is willing to state it as his opinion." (*Pacific Gas & Electric Co. v. Zuckerman, id.*, 189 Cal.App.3d at 1134) "If the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal

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[6] Uniroyal was fully prepared to rebut Grogan's version of the inner liner theory with objective evidence of its falsity. (RT ---) Uniroyal's offer of proof can and should be weighed on the scales

significance. Obviously the word cannot be deemed synonymous with 'any' evidence." (*Estate of Teed* (1952) 112 Cal.App. 2d 638, 644) It "must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 284 (*review denied*)) In the instant case, plaintiffs' own expert witnesses provide the best evidence that none of the liability theories against Uniroyal met California's test of substantiality.

B.

THE DECISION TO RIDE WITHOUT SEAT BELTS IN THE CARGO BED OF A CAMPER TRUCK IS NOT IMMUNE FROM COMPARATIVE FAULT

An independent ground for reversal is the trial court's holding, as a matter of law, that the plaintiffs faced no comparative fault liability for their decision to ride without seat belts in the cargo bed of Sellers' truck. Only the opposite ruling would have been defensible as a matter of law – that plaintiffs were *negligent* as a matter of law for riding where they did. "[T]he ordinary motoring public recognizes the dangers of riding unrestrained in the cargo bed of a moving pickup truck ... [and] no reasonable jury could find to the contrary." (*Maneely* v. *General Motors Corp*. (9th Cir. 1997) 108 F.3d 1176, 1180)

Seat belts were equally unavailable on the roof and hood of Sellers' truck. But that would not bar comparative fault for riding at those locations, either. Plaintiffs' decision to ride unrestrained in a cargo

bed raised a substantial issue of comparative fault that should not have been removed from the jury. And the error requires a new trial on all liability issues. Only a single jury can determine the comparative fault of all parties subject to potential liability. (*Hasson v. Ford Motor Company* (1977) 19 Cal.3d 530; see further discussion below.)

1.

The Doctrine Of Comparative Fault Is Broad Enough To Encompass This Conduct

The doctrine of comparative fault is universal in California. It embraces all conduct contributing to a plaintiff's injuries. The seminal case of *Li v. Yellow Cab Company* (1975) 13 Cal.3d 804 used broad and unqualified language to describe the new regime of "pure" comparative fault the Supreme Court was introducing in California. *Li* adopted:

> a system of "pure" comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. . . . The damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering. (*Id.* at 829)

In equally broad language, Civil Code Section 1714 limits every defendant's liability to the extent the plaintiff "has, willfully or by want of ordinary care, brought the injury upon himself." (*Id.*, subd. (a))

No appellate court or statute in California has ever granted motor vehicle passengers a sweeping exemption from the comparative fault doctrine. Even under the all-or-nothing regime of contributory negligence, the California Supreme Court held as follows in *Pobor* v. *Western Pacific Railroad Co.* (1961) 55 Cal.2d 314, 324:

> the passenger is bound to exercise ordinary care for his own safety. He may not shut his eyes to an obvious danger . . . . He is normally bound to protest against actual negligence or recklessness of the driver, the extent of his duty in this regard depending upon the particular circumstances of each case and ordinarily being a question of fact for the jury.

For similar reasons, there has never been an exemption from comparative fault (or even all-or-nothing contributory negligence) for the decision whether and where to *become* a motor vehicle passenger. *Rodriquez* v. *Lompoc Truck Co.* (1964) 227 Cal.App.2d 769, 776, upheld comparative fault liability for the decision to take a knowingly dangerous ride. "Knowing the right rear tire to be flat, . . . [plaintiffs] decided . . . to continue in the disabled car to the nearest service station over 9 miles ahead." *Rodriquez* upheld an inference that the plaintiffs were "negligent in agreeing to proceed." (*Id.* at 776) (*Rodriquez* was distinguished on its facts in *Weineinger v. Bear Brand Ranch* (1988) 204 Cal.App.3d 1003, finding insufficient evidence of causation.) Similarly, *Gornstein* v. *Priver* (1923) 64 Cal.App. 249 observed that "if . . . plaintiff, solely by reason of the position which she had taken, had been bounced off the truck, she probably would have

had no remedy against the defendant, for the very good reason that in that case she would have to attribute her injury solely to her voluntary conduct." (*Id.* at 256-57)

Although the point was dictum in *Gornstein*, courts in other jurisdictions have repeatedly upheld comparative fault for riding in such a dangerous location as the cargo bed of a pickup truck. As the Ninth Circuit aptly stated in *Maneely, id.*, 108 F.3d at 1180, "[a] cargo bed is for cargo, not people." More specifically:

> The dangers of riding unrestrained in a moving vehicle are . . . obvious and generally known. . . . [¶] If the public recognizes that traveling in the passenger compartment of an automobile without a seatbelt is dangerous, it only follows as night the day that the public also recognizes that riding in the cargo bed of a pickup, where seatbelts and other occupant packaging are conspicuously absent, presents even greater risks. Anyone getting into the cargo area of a pickup could not fail to recognize that it is neither designed nor equipped to transport passengers. (*Ibid.*)

Thus, *Krieger* v. *Howell* (Idaho App. 1985) 710 P.2d 614, 615-17, upheld comparative fault on the part of a 12-year-old boy for riding in the back of a pickup truck. (*Accord*, *O'Dell* v. *Whitworth* (Mo.App. 1981) 618 S.W.2d 681, 685-686 (15-year-old boy riding on the side bed of a pickup truck; *T.F. Sturdivant* v. *Polk* (Ga.App. 1976) 230 S.E.2d 115, 118 (11-year-old girl riding in the back of a pickup truck).)

As the Ninth Circuit explained in *Maneely*, *id.*, 108 F.3d 1176, the primary danger of cargo beds is their lack of seat belts. For example, *Maneely* cited "a 1981 study by the National Transportation Safety Board reported that passengers riding in the cargo bed of a pickup truck were exposed to significantly greater risk of serious injury and death; [and] that the causes of the injuries included ejection and shifting weight in a cargo area . . . ." (*Id.* at 1179) *Maneely* also explained that a "manifest danger" of riding without seat belts was "being ejected from the vehicle during a crash or being slammed against an unforgiving hard surface of the vehicle itself." (*Id.* at 1180) Accordingly, the unavailability of seat belts in cargo beds is a powerful reason to *apply* the doctrine of comparative fault to the decision to ride there, not preclude the doctrine as a matter of law.

Moreover, to exempt cargo bed riding from comparative fault would fly in the face of a California statute specifically addressing this subject. Ever since its adoption in 1985, the Private Passenger Motor Vehicle Safety Act (Stats.1985, c. 1361) has broadly provided that "[n]o person 16 years of age or over shall be a passenger in a private passenger motor vehicle[7] on a highway unless that person is properly restrained by a safety belt." (Vehicle Code section 27315, subdivision (e); hereafter, "§ 27315") It would be extremely anomalous, therefore,

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[7] Subdivision (c) defines that term to include "any motortruck of less than 6,001 pounds unladen weight." Sellers' truck had an unladen weight of 4,473 pounds. (RT 1766)

for the California courts to march in the opposite direction and absolutely exempt such dangerous and costly behavior from the comparative fault doctrine.

Nor has the Legislature created an exception in § 27315 for cargo beds, camper shells, or "some kid trying to make a buck." (RT 889) On the contrary, it has adopted a number of narrowly drawn exceptions not applicable to the present facts. For example, the Legislature granted a specific exemption for any passenger riding in the rear seat of a public emergency vehicle. (*Id.*, subd. (g)) The Legislature could just as easily have exempted the rear compartment of a pickup truck enclosed by a camper shell, but elected not to do so. That choice should be followed here, too.

The lack of a camper-shell exemption in § 27315 is noteworthy for another reason, too. A few months after the accident in this case, the Legislature amended Vehicle Code § 23116, a more general statute on the subject of riding in the back of trucks, to exempt certain camper shell trucks from the prohibitions of *that* statute. (See further discussion in next section of this brief.) But § 27315, the paramount statute requiring seat belt use, was left unchanged in its application to camper shell trucks in the weight class of Sellers'.

Similarly, § 27315 exempts passengers under 16 years of age (*id.*, subd. (e)), passengers with disabilities or medical conditions

incompatible with seat belt usage (*ibid.*), all public employees in public emergency vehicles. (*ibid.*); persons on a route delivering newspapers (subd. (n)); and rural postal carriers. (Subd. (o)) Again, such specific exceptions argue forcefully against an additional exception for the present plaintiffs or the vehicle in question.

The Legislature's policy choices in § 27315 deserve special weight on the issue at hand. California tort law has adopted this statute as a relevant consideration for juries weighing comparative fault. In so holding, *Housely* v. *Godinez* (1992) 4 Cal.App.4th 737, 747, explained that "it was the Legislature's plain intent to allow section 27315 to play the traditional role of a statute in tort litigation, a factor to be considered by the jury in determining the reasonableness of the conduct in question." (Citation omitted) Moreover, long before the Ninth Circuit's *Maneely* decision, the California courts had declared it to be "a matter of common knowledge that seat belts reduce fatalities and minimize injuries in motor vehicle collisions." (*Von Beltz v. Stuntman* (1989) 207 Cal.App.3d 1467, 1481, citing *Greyhound Lines, Inc. v. Superior Court* (1970) 3 Cal.App.3d 356, 358-359)

In flight from the foregoing authorities, the plaintiffs below argued that there was no standard BAJI instruction or published decision applying the comparative fault doctrine to the specific subject of riding without seat belts where none are provided. But that argument is both logically flawed and incorrect on its facts.

First, the topics selected for standard BAJI instructions have never been accorded the dignity of *expressio unius.* Only statutes. It is settled that "counsel and judges should freely modify and supplement the standard jury instructions to fit the particular case." (*Estate of Mann* (1986) 184 Cal.App.3d 593, 611) (*review denied*). Moreover, the inclusion of a BAJI instruction on a more familiar danger, failing to use an available seat belt (BAJI No. 5.90), should hardly preclude comparative fault for the much greater but less familiar danger of riding at locations where passengers are not even contemplated.

Similarly, the happenstance that most seat belt cases in California have involved the failure to use available seat belts (*e.g.*, *Housely* v. *Godinez, id.,* 4 Cal.App.4th 737) hardly precludes comparative fault for the more dangerous conduct of riding unrestrained in locations not even meant for passengers. The common law would have withered and died long ago under such a wooden restriction.

But in fact, at least one reported California decision has applied the doctrine of comparative fault to a plaintiff's decision to ride without seat belts when none were provided. The plaintiff in *Von Beltz v. Stuntman, id.*, 207 Cal.App.3d 1467, was a professional stunt woman who voluntarily assumed the role of a passenger in a sports car unequipped with seat belts. She became "permanently and totally paralyzed from the neck down" in a crash. (*Id.* at 1476) The trial court instructed the jury without limitation on the comparative fault doctrine,

the jury found plaintiff 35% responsible for her injuries, and the Court of Appeal affirmed in both respects.

Just like the present plaintiffs, Von Beltz argued for absolute immunity from comparative fault on the grounds that seat belts were not "available" to her in the sense that they were not installed in the vehicle. But the Court of Appeal rejected that argument and held there was substantial evidence to support the jury's finding of comparative fault. The opinion cited evidence that Von Beltz voluntarily accepted the vehicle as it was, without seat belts, in contrast to other stunt persons in the industry who did request seat belts and had them installed. The Court of Appeal also found it significant that even stunt persons could "just say no" – that is, refuse to perform without seat belts – even though "if a stuntperson refused or hesitated to participate in a stunt, his or her employment on the movie might be terminated." (*Id.* at 1476)

Here, of course, the trial court did not even give Uniroyal the opportunity to make its case on this issue. It dismissed this entire comparative fault theory at the outset, as a matter of law, as on a general demurrer or motion for summary judgment. Thus, the question on appeal is whether Uniroyal should have been given a *chance* to develop sufficient evidence to reach the jury on its comparative fault theory. The authorities reviewed in this brief compel an affirmative answer, and any doubt must of course be resolved in favor of Uniroyal's

position. Again, it stands in the same position as if its affirmative defenses had been dismissed on a general demurrer.

Like Von Beltz, the present plaintiffs made a knowing and voluntary decision to accept a ride in a vehicle where seat belts were unavailable. (*Ante*, p. ---) Like Von Beltz, these plaintiffs made no effort to request seat belts or a safer mode of transportation. (*Ante*, p. ---) Like Von Beltz, these plaintiffs' failure to broach the safety question with their owner/driver makes it impossible to rule out the possibility of a favorable response on Sellers' part. And indeed, they were not only his work force but purportedly close friends that he cared about. Although Sellers had no extra seat belts lying around like Von Beltz's employer, he might well have agreed to substitute a properly equipped passenger van or provide for plaintiffs' safety in other ways.

For example, Sellers had not considered and rejected the idea of a passenger van; he simply never considered it before. (RT 2564) Had plaintiffs taken their own safety more seriously, they might well have prompted Sellers to substitute a safe van for an unsafe pickup truck. He had invested only $3,200 to purchase the latter. (RT 2563) Evidently a resourceful individual, Sellers might also have considered a car pooling arrangement or any number of other alternatives, such as installing seats and seat belts in the cargo bed. He had not spent a fortune in purchasing this vehicle. Nonetheless, the trial court summarily

dismissed the last mentioned option as "absurd." (RT 884) In doing so, it erroneously substituted its own judgment for that of a jury.

Finally, these plaintiffs were in a far better position than Von Beltz to raise concerns about their safety. Unlike professional stunt persons, these plaintiffs faced no threat of reprisal or termination by Sellers if they declined to ride in his cargo bed without seat belts. Carver, for example, freely considered and rejected the simple safety measure of staying home on the day of the accident rather than accepting a freeway ride in a cargo bed. (*Ante*, p. ---) And Johnstone had his own car available. (RT ---)

In sum, the universality of the comparative fault doctrine in California is a matter of statute and well established precedent. Moreover, the overwhelming weight of authority precludes any absolute exemption from comparative fault for a decision to ride without seat belts in the cargo bed of a pickup truck. This issue should not have been removed from the jury.

2.

A Criminal Statute Prohibiting Truck Drivers From Transporting Minors In The Back Has No Bearing On This Issue

A major ingredient of plaintiffs' success on this issue was their claim of "an absolute legal right" ((RT 1122) to ride where and how they did – *i.e.*, a right that supposedly preempted any and all

comparative fault liability for that conduct. This claim rested on Vehicle Code section 23116, which at the relevant time (July 7, 1993) did nothing but prohibit truck drivers from transporting minors under 12 in the back of the truck. (Stats.1984, c. 128; hereafter, "§ 23116"; copy attached to this brief as Appendix 2) Although § 23116 did not refer at all to tort law, the plaintiffs argued that its mere failure to prohibit adults from riding in the back of trucks conferred an absolute immunity from comparative fault liability for doing so.

At the outset, § 23116 is inapposite because it did not even address itself to passengers. It addressed drivers only, prohibiting them from "transport[ing] any minor under the age of 12 years in the back of the motortruck" except under prescribed conditions. (Appendix 3) Accordingly, any conceivable effect of § 23116 on the present tort action would be limited to Sellers, not the plaintiffs. A post-accident amendment effective October 8, 1993 (Stats.1993, c. 895; copy attached as Appendix 3) addressed passengers for the first time.

More fundamentally, though, neither § 23116 nor any subsequent amendments contain a hint of an intent to modify the comparative fault doctrine in civil law. While the Legislature surely has power to modify or even abrogate existing rules of common law, an intent to do so must be clearly expressed. "A court will not conclude the Legislature 'intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express

declaration or by necessary implication.'" (*Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471, 478, quoting *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 644) And the Legislature knows full well how to effectuate such an intent when it wishes to do so. For example, Civil Code section 1714 itself provided that "[i]t is the intent of the Legislature to abrogate the holdings in such cases as . . . ."

In the case of § 23116, however, there is utterly no evidence of an intent to modify tort law one way or another. In the absence of such evidence, the plaintiffs' basic premise about the significance of criminal statutes proves far too much. It would cut a broad swathe of destruction through tort law. According to plaintiffs, the bare fact that particular conduct is not criminalized by the Legislature automatically and absolutely immunizes that conduct from any tort accountability. Call it the doctrine of excludable tort rules; it belongs on the same shelf of curiosities as plaintiffs' doctrine of excludable causes. (*Ante*, p. ---)

Finally, even if the plaintiffs had complied with all pertinent statutes – § 27315 included – that would still not exempt their conduct from comparative fault liability. As the Supreme Court held in *Ramirez* v. *Plough* (1994) 6 Cal.4th 539, 547:

> Courts have generally not looked with favor upon the use of statutory compliance as a defense to tort liability . . . . This legislative or administrative minimum does not prevent a finding that a reasonable [person] would have taken additional precautions where the situation is such as to call for them. [Cits omitted]

Diehl v. *Ogorewac* (E.D.N.Y 1993) 836 F. Supp. 88 applied that principle to the specific subject at hand. An applicable statute required only front seat passengers to wear seat belts. The plaintiff, who rode in a back seat, argued that the statute limited any "seat belt defense" to front seat passengers. The court disagreed, reasoning that "the statutory duty of front seat passengers to wear seat belts is not inconsistent with any pre-existing common law duty of rear seat passengers to wear a safety belt. The question is one of reasonable care under the circumstances and does not turn upon . . . the existence of a statutory mandate." (*Id.* at 94)

So here. None of the versions of § 23116 have abrogated the universal rule of comparative fault. Plaintiffs' decision to ride without seat belts in a cargo bed should have been appraised by a jury, not immunized by the court.

3.

The Error Is Reversible Per Se And For Actual Prejudice

The trial court effectively granted a directed verdict that the plaintiffs were not at fault for their decision to ride without seat belts in the cargo bed of Sellers' truck. Rather than permit a jury trial on that issue, the court ruled on it as a matter of law at the outset. (*Ante*, pp. ---) Only as to Sellers, not the plaintiffs, was Uniroyal allowed to contend that their location and lack of restraint in the cargo bed contributed to

their injuries. And Uniroyal did present such evidence as to Sellers. (E.*g.*, RT ---)

The improper removal of an issue from the jury does not require a showing of prejudice in the ordinary sense. The prejudice was to the jury right itself, and Uniroyal's substantive right under Civil Code section 1714 and *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 to have the jury evaluate and compare its own alleged fault against the plaintiffs'. An error of this sort is not merely in the instructions or some other procedural matter. As explained in dictum in the leading case of *Soule v. General Motors Corporation* (1994) 8 Cal.4th 548, 577, some errors are deemed "structural" and reversible per se. The first such error listed in *Soule* is "the denial of the defendant's right to a jury trial . . . ." (*Ibid.*)

The point was holding, not dictum, in *Kelly v. New West Financial Savings* (1996) 49 Cal.App.4th 659. There, distinguishing the ordinary prejudice standard applied in *Soule*'s holding, the Court of Appeal held that "[d]enying a party the right to testify or to offer evidence is reversible per se." (*Id.* at 677) In *Kelly*, the trial court erroneously granted defense motions in limine that "prevent[ed] plaintiffs from offering evidence to establish their case." (*Ibid.*) Similarly, *Olivia N. v. National Broadcasting Co.* (1977) 74 Cal.App.3d 383 held it was "reversible error" per se (*id.* at 389) for a trial court to decide the chief factual issue for itself when the plaintiff had timely

exercised her right to a jury. *(Accord, National Auto. Ins. Co. v. Fraties* (19--) 46 Cal.App.2d 431; *United States v. Gaudin* (9th Cir. 1994) 28 F.3d 943)

If appellate courts were to speculate on the jury's likely resolution of the pretermitted issue and rule accordingly, that would improperly substitute an appeal for a jury trial:

> [S]uch an error cannot be harmless. . . . When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether that element existed at all. (*United States v. Gaudin, id.*, at 951)

Sullivan v. Louisiana (1993) 508 U.S. 275, ---, added that deprivations of the jury right produce "consequences that are necessarily unquantifiable and indeterminate," but nevertheless "unquestionably qualif[y] as 'structural error'" that is reversible per se.

On the other hand, the erroneous removal of the comparative fault issue below did work grave prejudice to Uniroyal. First, the trial court's comparative fault ruling significantly affected the composition of the jury and the climate of the entire trial. The ruling occasioned the dramatic discharge of prospective jurors who could not suspend their strong belief that moving cargo beds are "deathtraps" (RT ---) and that "seatbelts save lives." (RT ---) The ruling likewise invited counsel for plaintiffs and Sellers to indoctrinate the remaining jurors to the contrary (*ante*, pp. ---), and repeatedly proclaim throughout the trial that these

plaintiffs were morally and legally innocent, if not heroic, because they were traveling to *work* in a deathtrap, not skulking downtown for welfare or frolicking off to the beach. (*Ante*, pp. ---) A proper ruling on comparative fault would have substantially limited such rhetoric.

The other form of prejudice to Uniroyal was direct and economic. Uniroyal never had an opportunity to have the jury appraise and compare its own fault, if any, to the fault of the plaintiffs (among others). Thus, it never had a chance to have its liability reduced to that extent, which was its fundamental right under *Li v. Yellow Cab.* Nor can the plaintiffs be heard to speculate that their fault would have been found minimal or absent. Uniroyal was deprived of its right to have a *jury* determine that issue, not an appellate court.

4.

The Cause Must Be Remanded For A New Trial On All Liability Issues, Not Just On Plaintiffs' Comparative Fault

The question of appellate disposition thus arises. It does not suffice to remand a case like this for a limited trial on the plaintiffs' comparative fault, and then have that percentage applied to the outcome of the first trial. Two years after *Li,* the California Supreme Court expressly held in *Hasson v. Ford Motor Company, id.*, 19 Cal.3d 530, that the new regime of comparative fault in California requires the same jury to hear and decide the comparative negligence of all parties subject to potential liability:

> The task of the finder of fact will . . . be to balance the degrees of plaintiff's and defendants' negligence, if any, in order to arrive at the amount of any recovery to be assessed. This necessary balancing process, in contrast with the all-or-nothing result mandated under superseded principles of contributory negligence, clearly suggests that the questions of plaintiff's and defendants' fault are inextricably intertwined. Thus, we cannot limit any retrial to the issue of plaintiff's negligence alone. (*Id.* at 552-53)

The *Hasson* rule is logical, fair, and binding. A new trial on all liability issues is essential to vindicate Uniroyal's rights under *Li v. Yellow Cab*.

On the other hand, it is not necessary to try the damages issues again and Uniroyal does not so request. For one thing, the original damages trial was significantly longer than the original liability trial. More importantly, as plaintiffs' lead counsel rightly declared (under oath) below in moving for a bifurcation of the liability and damages trials (AA 29 *et seq.*), "[the] evidence on liability will be distinctly different from the evidence presented on the issue of damages" and a separate liability trial "makes good legal and economic sense . . . ." (AA 33) Nothing has changed in the interim.

While endorsing plaintiffs' motion to bifurcate (AA 42), Uniroyal stipulated that the liability trial must include plaintiffs' comparative fault along with all other liability and causation issues. (AA 42-44) The same should hold true at any liability trial on remand.

C.

THE INTEGRITY OF THE TRIAL WAS DESTROYED BY THE PLAINTIFFS' PRETENSE OF ADVERSITY TO THE OWNER/DRIVER, MR. SELLERS

The third serious problem with the trial below was recently addressed by this Court in *Alcala Company, Inc. v. Superior Court, id.*, 49 Cal.App.4th 1308, in an analogous context. There, too, a defendant's interests were aligned with a plaintiff's, and their common interests called for the defendant to participate in plaintiff's attack against another defendant at a jury trial. Citing the "collusive nature and potential for fraud" in that arrangement, this Court observed that its "primary mischief [is] that the fact finder will not understand the true alignment of the interests of the litigating parties and their witnesses." (*Id.* at 1316-17) That prevents the jury from accurately assessing the credibility and weight of the competing testimony and arguments at the trial.

While the plaintiff/defendant alignment in *Alcala* was generated by settlement, the plaintiff/defendant alignment in this case was just as real. And it produced mischief that this Court should no more tolerate than the mischief in *Alcala*.

Indeed, the mischief here was deeper and worse. In *Alcala*, it was a sufficient remedy to order disclosure of the settlement. Here, the plaintiffs' covert alliance with Sellers achieved much more than

disguising the true interest and bias of those parties themselves, their attorneys, and their witnesses. Here, the plaintiffs' pretense of adversity to Sellers also gained them a number of tactical advantages that severely tilted the playing field against Uniroyal.

The standard of appellate review on this issue would have been different had the court not eventually seen through the plaintiffs' collusive scheme. It did, however, and so Uniroyal's position on appeal rests on the trial court's own factual finding that the plaintiffs and Sellers were "on one side" and had "the exact same interest" in attacking Uniroyal's position. (RT 3283) While no further corroboration was needed, it followed soon afterwards in the form of plaintiffs' concession that Sellers was not a target defendant. (*Ante*, p. ---)

Accordingly, the issue on appeal is whether it was prejudicial error – though unwitting error at the outset – to treat parties who were concededly aligned with each other as if they were not. The plaintiffs' ability to hide the truth for so long must not aid them on appeal. All the pertinent rulings, even those that took place before the court saw the light, must be evaluated on appeal based on the facts as they were, not as they were misrepresented to be. A contrary approach would violate the fundamental maxim that no party may benefit from its own wrongdoing. (Civil Code section ---)

The applicable legal principles are well settled. The proper structure of a trial depends on the parties' true interests and alignment, not the formalities of the pleadings. Thus, in allocating peremptory challenges in multiparty cases, the court must "divide the parties into two or more sides according to their respective interests in the issues." (Code of Civil Procedure, section 231(c)) (*See also*, *Switzler v. Atchison T & SF R. Co.* (1930) 104 Cal.App. 138, 148-49 (*hearing denied*) (defendants must jointly exercise peremptory challenges unless they have "antagonistic interests.")

Similarly, Code of Civil Procedure section 607 ("Order of Proceedings") provides that jury trials "must proceed" in the usual order (plaintiff, defendant, rebuttal) unless there are "special reasons" to depart from it.[8] The underlying purpose of this rule is well settled: to require plaintiffs to put on their entire case before the defense case begins. (*Kohler v. Wells, Fargo & Co.* (1864) 26 Cal. 606, 613 ["A plaintiff has no right to keep back all his testimony on any material point until he draws out the testimony of the other party, and then come in with his own."]; *People v. Katz* (1962) 207 Cal.App.2d 739 [new prosecution evidence on rebuttal, "under the guise of impeachment," was "a piling on of evidence belonging to the original case."])

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[8] Within the confines of that primary order, the court may determine the "relative order" of defendants having separate defenses and separate counsel. (Code Civ. Proc. § 607, subd. (8)) Similarly, while the order of *proof* is subject to broad discretion (Evidence Code section 320), the order of *proceeding* is dictated by Code Civ. Proc. § 607.

The collusive scheme below violated the intent and underlying purpose of Code Civ. Proc. § 607. By misrepresenting Sellers as an independent and adverse party, the plaintiffs managed to "keep back" a material expert witness (*Kohler, id.*, 26 Cal. at 613) until the end of the trial, after Uniroyal had completed its defense in chief. And the ruse resulted in a similar distortion of the closing argument phase of the trial. Code Civ. Proc. § 607 provides that "the plaintiff *must* commence" the arguments (*id.*, subd. (7), emphasis added) so that the defendant knows how to respond. Here, however, the plaintiffs used their covert nominee, Sellers, to deliver a substantial closing argument attacking Uniroyal when Uniroyal had no opportunity to respond.

Prejudice is difficult to quantify in such instances, but there can be no doubt about its presence in this case. From beginning to end, from jury selection to closing arguments, the plaintiffs' pretense of adversity to Sellers skewed the fundamental structure of the trial and distorted the jury's perception of the plaintiffs, Sellers, and their respective witnesses and attorneys. *Brautigam v. Brooks* (1964) 227 Cal.App.2d 547 held it was both impossible and unnecessary to quantify the prejudice resulting from a similar situation, a defendant's last minute assertion of a contributory negligence claim. Finding that it "definitely prejudiced plaintiff in presenting her cause," (*id.* at 560), the court asked rhetorically:

> Who can say that plaintiff's counsel, had he known he would be confronted with the claim of contributory negligence, would not have handled his examination of

witnesses and general conduct of the case differently? Certainly we cannot do so. (*Ibid.*)

So here. The plaintiffs created a similar predicament for Uniroyal with consequences equally difficult to quantify. They should not be allowed to benefit from that difficulty. Indeed, their collusive scheme should be presumed prejudicial. Each of its various manifestations – and certainly when taken together – created "a 'structural defect' that affects the framework within which the trial proceeds. . . ." (*People v. Cahill* (19--) 5 Cal.4th 478, 487); *accord*, *Soule v. General Motors Corporation, id.*, 8 Cal.4th 548, 577.)

Finally, a reversal on this issue should not be general. The opinion should include specific instructions to prevent a recurrence of the problem. When it first arose below, the trial court put a band-aid on an incipient cancer. It threw Uniroyal the "crumb" of third place in the exercise of peremptory challenges. (A*nte*, p. ---) But even when the cancer was large and malignant enough to be diagnosed accurately, the court inexplicably failed to block its final assault on the integrity of the trial. Accordingly, this Court should prescribe the appropriate medicine itself. It should state plainly that the plaintiffs and Sellers must be treated as a single side against Uniroyal for all relevant purposes.

D.

THE INTEGRITY OF THE VERDICT WAS DESTROYED BY THE MENTAL ILLNESS OF THE JURY FOREMAN

The trial court's initial instinct about a mentally ill juror was correct. At the first sign of the jury foreman's distress, the court properly warned counsel that the liability verdict "may not have any integrity" if the foreman was indeed suffering from a mental illness. (RT 4299) As that was the case, beyond doubt, the pertinent authorities confirm that the foreman's illness did destroy the integrity of the verdict. Either a mistrial or a post-judgment new trial should have been granted as Uniroyal timely requested.

The California Supreme Court recently held in *People* v. *Millwee, id.*, 18 Cal.4th 96, 144 – the first time the Court has examined this issue – that there is a "due process right to a mentally sound tribunal." The plain meaning of "tribunal" is the *entire* tribunal, not just a majority. And while *Millwee* cited a number of federal cases to support its holding (*e.g.*, *Tanner United States* (1987) 483 U.S. 107 and *United States v. Hall* (4th Cir. 1993) 989 F.2d 711), *Millwee* was not the first California appellate decision on point. *Church* v. *Capital Freight Lines* (1954) 141 Cal.App.2d 246, 248, stated that:

> there can be no question but that the right to a trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors which our courts have held to be an "inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (Cit. omitted)

Millwee also recognized that the right to mentally competent jurors is secured by statute in California as well as the constitutional

guarantee of due process. Although the Legislature modified the initial eligibility criteria, substituting a more modern test of "subject of conservatorship" (Code Civ. Proc. § 203, subd. (8)) for the former test of "possession of his or her natural faculties" (*see Millwee*, *id.* at 144), neither *Millwee* nor logic suggests a legislative intent to guarantee jury service by any and all persons suffering from mental illness. The Legislature retained the traditional challenge for being "incapable of performing the duties of a juror" (Code Civ. Proc. § 228, subd. (b)) as well as the traditional right to have jurors discharged if they "become[] sick or . . . unable to perform his or her duty. . . . (*Id.*, § 233)

The dispositive ruling below, however, was the court's so-called "numbers game." (*Ante*, p. ---) It held that civil litigants have no right to twelve mentally competent jurors if at least nine of the competent ones can agree on a verdict. (*Ante*, pp. ---) That holding is irreconcilable with the applicable California statutes and authorities.

The trial court's mistake is easy to identify. It forgot about the jury's deliberative function, concentrating exclusively on the majority voting rule. But the Legislature did not make the same mistake. Code of Civil Procedure sections 220 and 233 require a full complement of twelve jurors in all civil cases, at all times, unless the parties agree otherwise. In fact, section 233 requires a mistrial if sickness or other incapacity makes it impossible to keep the jury at twelve. No party may be forced to proceed with enough jurors to make up a voting majority.

> If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged by the court as provided in this section, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may again be tried. (Code Civ. Proc. § 233, emphasis added)

Not surprisingly, therefore, the California Supreme Court held in *Griesel* v. *Dart Industries, Inc.,* (1979) 23 Cal.3d 578 (overruled on unrelated point in *Privette* v. *Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4), that civil and criminal litigants enjoy the same statutory and constitutional right to the deliberation of all twelve jurors. "The same considerations require that each juror engage in all of the jury's deliberations in both criminal and civil cases." (*Id.* at 584) (*See also*, *Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356 [plaintiff had a "constitutional right to trial by a jury consisting of 12 unbiased unprejudiced individuals . . . . [cits. omitted] The guarantee is to 12 impartial jurors."].)

In addition, *Griesel* held squarely that the majority voting rule in civil cases does not abrogate the constitutional and statutory right to the *meaningful* deliberation of all twelve jurors. "[E]ach juror [must] engage in all of the jury's deliberations in both criminal and civil cases. The requirement [in civil cases] that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them." (*Id.* at 584) As the

record in this case makes abundantly clear, a juror experiencing manic symptoms can not participate in a "common experience" (*id.*) with the other jurors. The manic juror is in a world of his own.

Griesel also underscored why the serious mental illness of a juror – let alone the foreperson – can not possibly produce a legally acceptable verdict. While the following language in *Griesel* addressed the importance of a "deliberate anew" instruction when an alternate is substituted, the language applies just as forcefully to the requirement of twelve mentally competent jurors:

> It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. (*Id.* at 584)

The participation of a seriously disturbed juror is no more reliable than the participation of a newly added alternate with insufficient "deliberate anew" instructions.

Another instructive case is *Andrews* v. *County of Orange* (1982) 130 Cal.App.3d 944, 960),[9] where a single juror concealed his prior

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[9] *Andrews* was approved in *People* v. *Nesler* (1997) 16 Cal.4th 561, 582, for the proposition that, "in reviewing an order denying a motion for new trial based upon jury misconduct, the reviewing court

occupation and bias. Even though his vote was not "crucial" mathematically to all the special verdicts, *Andrews* held that "plaintiffs were entitled to the deliberations of 12 impartial jurors and prejudice must be presumed where they were denied that right." (*Id.* at p. 960) (*See also*, *Weathers* v. *Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 111 ["the impropriety of a single juror may be sufficient to destroy the integrity of the verdict"].)

For the foregoing reasons, "the numbers game" can not protect a civil judgment rendered in violation of Uniroyal's statutory and constitutional right to the deliberations of twelve mentally competent jurors. Had the foreman's illness been discovered before the liability verdict was rendered, the court could have exercised its statutory power under Code of Civil Procedure section 233 to substitute an alternate juror. But that power expired once "the jury ha[d] returned its verdict . . . ." (*Id.*; *see also, People* v. *Green* (1995) 31 Cal.App.4th 1001, 1009.) Accordingly, the court had no choice but to grant Uniroyal's motion for a mistrial or its subsequent motion for a new trial.

We turn, therefore, to the question of competence that the trial court touched on lightly at best, and in evident confusion with the question of misconduct. In the language of *Millwee, id.*, 18 Cal.4th 96,

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has a constitutional obligation to determine independently whether the misconduct prevented the complaining party from having a fair trial." *Andrews* was prophylactically disapproved in *Nesler*, however, to the extent anything in the opinion may other intimated otherwise.

144, the competence test is whether "by reason of mental disorder or developmental disability, [the juror is] unable to understand the nature of the proceedings or to deliberate rationally." The trial court did settle the first prong of *Millwee*, concluding that "[u]ndoubtedly, [the foreman] . . . suffers from a mental disease or condition." (RT 10,054) But the court barely addressed the second prong of *Millwee*, and evidently ignored the entire body of objective evidence about the foreman's manic symptoms during the liability determinations. (*Ante*, pp. ---)

The court's only comment on the pertinent evidence was that the two psychiatrists' declarations were not probative because they "call for speculation" (RT 10,055) and that the juror declarations depicted the foreman as nothing more than "a vociferous advocate." (*Ibid.*) It is obvious, therefore, that the court ignored the entire body of objective, compelling, and uncontroverted evidence of a full-blown recurrence of the foreman's manic symptoms during and after the liability determinations. The foreman's grandiose writings and behavior, the two percipient witnesses – all that was ignored. But appellate courts may not likewise ignore such powerful and uncontroverted evidence in the record, including the foreman's own declaration to the extent it documents objective and observable facts. (*People v. Hutchison* (1969) 71 Cal.2d 342, 348) As the First District held in *DeMiglio v. Mashore* (1992) 4 Cal.App.4th 1260, 1270, "the trier of fact may not arbitrarily disregard the uncontradicted or unimpeached testimony of a witness,

unless that testimony is inherently improbable." (*Id.* at 1270) Here, as in *DeMiglio*, the powerful evidence ignored or misconstrued by the trial court precludes an affirmance of its conclusion. Just as in the case of expert testimony (*ante*, pp. ---), a determination of fact is only as sound as the foundation supporting it.

Similarly, the substantial evidence rule does not mandate a blessing of the ruling below just because the plaintiffs' psychiatrist was willing to opine that the foreman's pure reasoning power was unimpaired. Of course the foreman was reasoning. But it was uncontroverted that his reasoning process was spinning helplessly out of control and out of touch with reality. No court in California or elsewhere has ever declared such a mental state to be acceptably "competent" for a juror or a jury foreman. This Court should not be the first.

Finally, this brief has already shown that "structural" infringements of the jury right are reversible without any traditional showing of prejudice. (*Ante*, pp. --- and ---) Here, Uniroyal was held liable based on the deliberations of only eleven competent jurors, not twelve. As explained previously, the plaintiffs may not be heard to speculate on appeal that a *full* "mentally sound tribunal" (*People* v. *Millwee, id.*, 18 Cal.4th 96, 144) would have reached the same verdict. That logic substitutes an appeal for a jury trial.

Nevertheless, just on the other issues of this case, the foreman's illness and resulting behavior did prejudice Uniroyal in the traditional sense. The presumption of prejudice and the appellate court's independent review of same have already been mentioned in the context of juror improprieties (*Andrews* v. *County of Orange, id.*, 130 Cal.App.3d 944), and that reasoning applies *a fortiori* to a juror's mental illness. Here, both a board-certified psychiatrist (AA 646, ¶ 14) and a doctor of psychology (AA 681-83) corroborated the foreman's own contemporaneous (RT ---) and subsequently declared belief (AA 626) that his conduct and its accompanying mental state materially affected the entire liability deliberations. As the psychologist explained, manic assertiveness produces an unconscious reaction in others "to adopt a more extreme position themselves" in the opposite direction (AA 682, ¶ 7) Accordingly, the other jurors' denials of conscious irritatation with the foreman establish no more than that.

In sum, the jury right is a fundamental and cherished feature of American jurisprudence. As the trial court recognized at the outset but forgot in the end, the *integrity* of the jury right requires a full complement of mentally sound jurors at all times, not just enough to make up a three-fourths majority. The question ultimately presented to this Court is whether our standards have truly sunk as low as the plaintiffs successfully maintained below. Uniroyal is confident they have not. The jury right can not possibly be deemed satisfied if a foreman or any other juror is the throes of a classic outbreak of manic symptoms.

IV.

CONCLUSION

The death and injuries in this case were tragic, but coercive judgments are not the same as charitable foundations. A desire to compensate these plaintiffs as quickly and handsomely as possible can not justify the imposition of liability against Uniroyal based on the trial below. The proceedings were too unreliable in too many ways, and due in large part to the plaintiffs' own overreaching arguments.

Plaintiffs' sham scientific theories about rubber/steel bonding were never screened for reliability as required by the *Kelly/Frye* doctrine. Plaintiffs' reckless disregard for their own safety was deemed absolutely immune from the comparative fault doctrine. Plaintiffs' pretense of adversity to the owner/driver of their "deathtrap" (RT ---) materially distorted the entire structure of the trial and the jury's perceptions of bias and interest. Finally, plaintiffs' "numbers game" argument (RT ---) prevailed over Uniroyal's constitutional and statutory right to "a mentally sound tribunal." (*Millwee, id.*, 18 Cal.4th 96, 144)

The judgment below should be reversed for all the foregoing reasons. As for disposition, a judgment should be entered for Uniroyal here and now if the Court agrees that plaintiffs' ever-changing liability theories below did not amount to substantial evidence. Alternatively,

the cause should be remanded for a new trial consistent with the rules of law documented in this brief.

Dated: August 13, 1998

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