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| <p>Page 1</p> <p>1 IN THE COURT OF COMMON PLEAS<br/>2 OF CUYAHOGA COUNTY, OHIO<br/>3 -----<br/>4 JANIE COUSINS, et al.,<br/>5 Plaintiffs,<br/>6 vs Case No. 460155<br/>7 Judge Mary Boyle<br/>8 JOHN T. JACOBUS, et al.,<br/>9 Defendants.<br/>10 DEPOSITION OF JAMES W. BURKE, JR., ESQ.<br/>11 THURSDAY, JANUARY 30, 2003<br/>12 -----<br/>13 Deposition of JAMES W. BURKE, JR., ESQ., a<br/>14 Witness herein, called by counsel on behalf of<br/>15 the Plaintiffs for examination under the<br/>16 statute, taken before me, Vivian L. Gordon, a<br/>17 Registered Diplomate Reporter and Notary Public<br/>18 in and for the State of Ohio, pursuant to<br/>19 agreement of counsel, at the offices of Becker &amp;<br/>20 Mishkind, Skylight Office Tower, Suite 660,<br/>21 Cleveland, Ohio, commencing at 2:00 o'clock p.m.<br/>22 on the day and date above set forth.<br/>23 -----<br/>24<br/>25</p> | <p>Page 3</p> <p>1 -----<br/>2 (Thereupon, BURKE Deposition<br/>3 Exhibits 1 thru 3 were marked for<br/>4 purposes of identification.)<br/>5 -----<br/>6<br/>7 JAMES W. BURKE, JR., ESQ., a witness<br/>8 herein, called for examination, as provided by<br/>9 the Ohio Rules of Civil Procedure, being by me<br/>10 first duly sworn, as hereinafter certified, was<br/>11 deposed and said as follows:<br/>12 EXAMINATION OF JAMES W. BURKE, JR., ESQ.<br/>13 BY MR. MISHKIND:<br/>14 Q. State your name for the record.<br/>15 A. James W. Burke, Jr.<br/>16 Q. I will dispose of a lot of<br/>17 formalities in light of the fact that you are a<br/>18 seasoned trial lawyer and know the ritual as it<br/>19 relates to deposition testimony and questioning.<br/>20 I will just for the record indicate<br/>21 that I'm taking your deposition today because of<br/>22 the prejudgment interest matter which is pending<br/>23 before the court and your position as personal<br/>24 counsel for Mr. Jacobus.<br/>25 Do you understand that?</p> |
| <p>Page 2</p> <p>1 APPEARANCES:<br/>2 On behalf of the Plaintiffs<br/>3 Becker &amp; Mishkind Co., LPA<br/>4 HOWARD D. MISHKIND, ESQ.<br/>5 Skylight Office Tower Suite 660<br/>6 Cleveland, Ohio 44113<br/>7 216-241-2600<br/>8<br/>9<br/>10 On behalf of the Defendant<br/>11 Rawlin, Gravens &amp; Franey Co., LPA<br/>12 MARTIN FRANEY, ESQ.<br/>13 1240 Standard Building<br/>14 Cleveland, Ohio 44113<br/>15 216-579-1602<br/>16<br/>17<br/>18 -----<br/>19<br/>20<br/>21<br/>22<br/>23<br/>24<br/>25</p>   | <p>Page 4</p> <p>1 A. I do.<br/>2 Q. Today's deposition had originally<br/>3 been noticed, and then because of your<br/>4 unavailability we rescheduled it for today at<br/>5 the convenience of everybody's schedule; is that<br/>6 true?<br/>7 A. That's correct.<br/>8 Q. You had received a notice to take a<br/>9 deposition initially; true?<br/>10 A. Yes, I did.<br/>11 Q. And have you brought with you today<br/>12 what you believe to be responsive to the notice<br/>13 to take deposition?<br/>14 A. I have.<br/>15 MR. MISHKIND: I'm going to mark as<br/>16 Plaintiff's Exhibit 4 a copy of the notice and<br/>17 just ask you to take a look at it and confirm<br/>18 that that is, in fact, the notice that you<br/>19 received.<br/>20 -----<br/>21 (Thereupon, BURKE Deposition<br/>22 Exhibit 4 was marked for<br/>23 purposes of identification.)<br/>24 -----<br/>25 A. It is.</p>   |

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1 Q. Before the deposition began,  
2 Mr. Burke, you provided me with three documents  
3 that I have marked for identification as  
4 Plaintiff's Exhibits 1, 2 and 3. They appear  
5 all to be letters to Nationwide Insurance  
6 Company relative to the Janie Cousins versus the  
7 John Jacobus matter; is that true?

8 A. That's correct.

9 Q. I'm going to talk at some length  
10 about these three letters, but before I do that,  
11 besides these three letters, have you sent any  
12 other letters to Nationwide separate from the  
13 November 11, December 4, and December 23  
14 letters?

15 A. No, I have not.

16 Q. Did you ever receive responses in  
17 writing from Nationwide to your letters?

18 A. I don't have one with me. I believe  
19 at some point Teri Lefever, the adjustor, did  
20 send me something, but I note that my December  
21 4th letter asked for information promised in her  
22 letter of November 19th. So there was a letter  
23 of November 19th, and I'm sorry, I don't have  
24 that with me.

25 But there was no -- it was kind of

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1 court I had some conversations and participated  
2 in conversations with Ms. Lefever, but I don't  
3 recall independently having any conversations  
4 with her via telephone.

5 Q. Was Ms. Lefever present each day at  
6 trial?

7 A. I don't believe so. I believe she  
8 was there at the beginning of trial and I can't  
9 recall whether or not she was there at any time  
10 after that. I remember during the first day  
11 when we were having discussions as to settlement  
12 that she was there and that she was on the phone  
13 calling her superiors.

14 Q. Do you recall having any discussions  
15 with her prior to the day of trial that aren't  
16 otherwise memorialized in any of your letters?

17 A. I can't recall. I have a sense of  
18 talking with somebody from Nationwide -- and I  
19 would imagine it was her -- about the offer, or  
20 the demand, rather. And I am wondering whether  
21 or not I responded to her November 19th letter  
22 after she sent it to me. That could have  
23 been -- and I'm just not certain on that.

24 But I have the sense that I  
25 reiterated to somebody personally that which was

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1 like I'll look into this, we are round tabling  
2 it, whatever, and then she never got back to me.

3 Q. So you would have one letter  
4 somewhere back in your office from Teri Lefever?

5 A. Yes. And I'm sorry, I notice now  
6 that there was a November 19th letter to me,  
7 which I mentioned in my December 4th letter.

8 Q. Would you, when you go back to your  
9 office, either today or the next day, locate  
10 that and fax me a copy of that?

11 A. I will. And I'm sorry, I was remiss,  
12 I should have seen that.

13 Q. Aside from the three letters,  
14 Plaintiff's Exhibit 1, which is your November  
15 11th letter, 2, which is your December 4 letter,  
16 and 3, which is your December 23 letter, have  
17 you written any other letters to Nationwide?

18 A. No, I have not.

19 Q. Did you keep any record, aside from  
20 what may be memorialized in these letters,  
21 concerning conversations that you had with Teri  
22 Lefever?

23 A. You know, my recollection is I had  
24 most of my conversations with Marty Franey. I  
25 don't believe I had -- other than at court. At

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1 contained in my November 11th letter about the  
2 offer, about the demand of \$75,000.

3 Q. What was your opinion, having had an  
4 opportunity to look at the file and get a sense  
5 of what this case was all about as to the  
6 \$75,000 demand?

7 A. In more than a word -- but I thought  
8 it was a number that should have been paid. And  
9 I say that by reviewing all of the doctors'  
10 reports that I had access to, the medical  
11 reports, and especially plaintiff's doctor,  
12 Dr. Silberman --

13 Q. You mean defendant's?

14 A. I'm sorry. Defendant's  
15 Dr. Silberman.

16 -- and also based on the fact that  
17 at that point the judge was not going to allow  
18 me to get an expert for Mr. Jacobus as to the  
19 punitive, I thought that \$75,000, when it  
20 incorporated everything, was something that I  
21 wouldn't pass up. And I did assert that opinion  
22 in my letter of November 11th and then again  
23 later on.

24 Q. You have been an attorney practicing  
25 for how many years?

2 (Pages 5 to 8)

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1 A. Thirty-two.  
2 Q. You have a criminal as well as a  
3 civil practice; true?  
4 A. Yes.  
5 Q. You have handled a number of personal  
6 injury cases?  
7 A. I was an adjustor while I was in law  
8 school and I have had a personal injury practice  
9 for 32 years.  
10 Q. Which company were you with?  
11 A. The Aetna.  
12 Q. Is it fair to say that you have a  
13 fairly good sense of what cases are worth as  
14 best as any of us can have?  
15 A. I would think that having tried a lot  
16 of cases and settled a lot of cases, and having  
17 that background of setting up files for an  
18 insurance carrier who at that time was the queen  
19 of the industry, yes, I think I have a fair  
20 reading on values of cases.  
21 Q. Is it fair to say based upon your  
22 experience, both as an adjustor and as an  
23 attorney with a number of years of experience,  
24 that you viewed the nature and extent of the  
25 injuries that were documented with regard to

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1 paragraph, I would like to know when Mr. Jacobus  
2 was first advised the claim against him was not  
3 fully covered under the insurance policy.  
4 Do you see that?  
5 A. Yes.  
6 Q. Were you ever provided with an answer  
7 to that issue to your satisfaction?  
8 A. I think that's what I'm referencing  
9 in my next letter when I was promised to get  
10 that, and I don't believe in writing, I don't  
11 believe I was ever told in writing.  
12 In my December 4th letter, I indicate  
13 when may I expect to receive the information  
14 promised in your letter of November 19th. It's  
15 my belief -- and when I get you the letter it  
16 will be clear -- that Ms. Lefever indicated to  
17 me she would get that information.  
18 Somewhere along the line, whether it  
19 was verbally through Mr. Franey's office or  
20 Mr. Franey, I was told that Mr. Jacobus was  
21 advised of that after a July pretrial.  
22 Mr. Jacobus didn't have a clear  
23 recollection of being told that, but the court's  
24 records indicate that she put that on the record  
25 in July and I had no reason to disbelieve

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1 Janie Cousins and the demand of \$75,000 to be a  
2 good faith effort on the part of the plaintiff  
3 to settle the case?  
4 A. Absolutely.  
5 Q. And that \$75,000 you understood was  
6 to compensate Janie for her injuries, past,  
7 present and future; correct?  
8 A. That's correct.  
9 Q. That also included basically a waiver  
10 of any punitive damage claim, did it not?  
11 A. Yes. That was very enticing.  
12 Q. Even aside from any punitive damage  
13 claim, did you view the \$75,000 to be a good  
14 faith attempt to settle this case based upon the  
15 medical evidence, both with regard to the past,  
16 the present, and the permanency of the  
17 plaintiff's injury?  
18 A. I did.  
19 Q. Have you been afforded an opportunity  
20 to review the claim file by Nationwide?  
21 A. I was given a file from Mr. Franey's  
22 office containing the pleadings. I didn't have  
23 access to the entire -- to the claim file.  
24 Q. In your letter of November 11th,  
25 Plaintiff's Exhibit 1, you state in the second

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1 Mr. Franey's office having told him that, but he  
2 had no clear recollection of that.  
3 Mr. Jacobus -- when I say he,  
4 Mr. Jacobus really became totally aware, I  
5 think, after the October pretrial when he was  
6 told you had better get counsel. I think the  
7 import set in. I think up until that time he  
8 didn't have a true understanding of the severity  
9 of the situation.  
10 Q. When the complaint was filed in this  
11 case and there was a claim for punitive damages,  
12 to your knowledge, was Mr. Jacobus advised at  
13 that time by his insurance company that the  
14 aspect of punitive damages would be something  
15 that would not be covered under his insurance  
16 policy?  
17 A. I don't know that.  
18 Q. To your knowledge, did Mr. Jacobus  
19 ever provide you with any such information that  
20 caused you to believe that he was aware from the  
21 very beginning that he had personal exposure  
22 outside of his policy?  
23 A. When I first got into the case, I  
24 asked Mr. Jacobus to provide me with any  
25 writings from his insurance carrier, any

3 (Pages 9 to 12)

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1 correspondence he had whatsoever.  
2 I remember him searching for it and  
3 he didn't have it. He said he remembers  
4 receiving something and he didn't remember what  
5 it was, but he didn't have those documents.  
6 That's why I asked for those in my November 11th  
7 letter.  
8 Q. Did the correspondence from the  
9 adjustor include a copy of any notification?  
10 A. I don't believe it did, because my  
11 letter back to her is when might I expect to  
12 receive the information promised, and I don't  
13 believe -- specifically, I don't recall ever  
14 seeing a reservation of rights letter.  
15 Q. Now, in your letter of November 11th  
16 2002, the second page, you also indicate, I  
17 insist on reviewing at the earliest opportunity  
18 the complete adjusting file in this claim and  
19 complete litigation file of the law firm of  
20 Rawlin, Graves and Franey Co., which was hired  
21 by you to defend Mr. Jacobus. Please call me to  
22 advise me where I may view these files.  
23 I think you told me a moment ago that  
24 you may have been afforded an opportunity to see  
25 some of Mr. Franey's file.

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1 A. I believe they gave me the complete  
2 litigation file, I'm sure of that. I had  
3 everything that they had, because I had gone to  
4 the court independent of that and gone through  
5 the court's file and secured some copies of some  
6 pleadings.  
7 But Mr. Franey's office sent me all  
8 of the pleadings, I'm certain of that.  
9 Q. In terms of the adjusting file, for  
10 example, such items as the reserve that was set,  
11 and the evaluation that went into establishing  
12 the reserve, that's what's involved in an  
13 adjusting file. And you as a former insurance  
14 adjustor know full well what I'm talking about;  
15 true?  
16 A. Yes.  
17 Q. Did you ever see that?  
18 A. No, I didn't, and that's why I  
19 specifically asked for that.  
20 Q. And you asked for it and they never  
21 provided it to you?  
22 A. I was never provided it, no.  
23 Q. As you sit here right now as the  
24 personal attorney for Mr. Jacobus who has not  
25 only a compensatory award against him but a

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1 punitive damage award, have they to this date  
2 provided you with the information of how they  
3 set the reserves and how they adjusted the  
4 reserves in this case?  
5 A. No, they have not.  
6 Q. Continuing with the letter, it says  
7 in the third paragraph, or second complete  
8 paragraph on that second page, in view of the  
9 great personal -- back up.  
10 I'm interested in determining what  
11 attempts have been made by you to settle the  
12 claim against Mr. Jacobus within the limits of  
13 his insurance coverage in view of the great  
14 personal exposure he has on this claim.  
15 A couple questions on that. One,  
16 when did you learn that his insurance coverage  
17 was \$300,000?  
18 A. I learned that early on after I got  
19 involved in the case.  
20 Q. And to your knowledge, was there any  
21 other coverage that would be applicable to this  
22 claim for Mr. Jacobus through Nationwide or any  
23 other carrier?  
24 A. It was my understanding that there  
25 was not.

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1 Q. Explain to me, if you would, what you  
2 meant by, quote, in view of the great personal  
3 exposure he has on this claim.  
4 A. Well, in reviewing the claim from all  
5 aspects, the liability aspect and especially the  
6 punitive award, I had made him patently aware of  
7 the fact that he was laying out there exposed  
8 personally to coverage that wouldn't be coming  
9 from Nationwide.  
10 And also, I remember disabusing him  
11 of his notion that the plaintiff's personal  
12 injury case was not that strong. Because just  
13 before my entry to the case, the tinnitus claim  
14 became very solid in my mind in reviewing the  
15 records, from not only plaintiff's doctors, but  
16 also from the defense expert.  
17 And I explained that portion of it;  
18 that her injury claim -- in fact, I said to him,  
19 I said something about maybe the \$75,000 is not  
20 going to look good anymore. I remember having  
21 some kind of a comment to him, and he said, what  
22 does that mean to me? And I said, if they don't  
23 settle this case, you are going to be exposed to  
24 the punitive damages and we are going to go to  
25 trial.

4 (Pages 13 to 16)

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1 I remember telling him that because  
2 he wanted to know what he was going to get  
3 involved in with me as far as fees and costs of  
4 that nature.  
5 Q. Do you remember when you appeared for  
6 Mr. Jacobus' deposition, at the conclusion or  
7 perhaps at the beginning, you asked me  
8 face-to-face what the settlement -- what my  
9 settlement demand was at that time --  
10 A. That was at this office.  
11 Q. -- correct?  
12 A. I recall that, yes.  
13 Q. I think you were sitting where  
14 Mr. Franey is sitting and Mr. Jacobus was  
15 sitting where you are sitting.  
16 A. That is correct.  
17 Q. At that time, do you remember me  
18 telling you that my settlement demand of \$75,000  
19 was still open, but that as we were getting  
20 closer to trial, and experts depositions were  
21 being locked in, that it was becoming less and  
22 less likely that we could get the case settled  
23 at \$75,000?  
24 A. I remember that exact conversation.  
25 Q. But I didn't withdraw the \$75,000. I

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1 kept it open, even though I made it clear that  
2 my efforts to get the case settled had been  
3 ongoing, but had not been responded to in a  
4 manner that I felt was reasonable.  
5 A. Well, I can't -- your thinking aside,  
6 I remember you saying that to me and I remember  
7 saying to my client, that offer -- because it  
8 was reiterating what I told him before -- that  
9 offer is not going to be here long. He is not  
10 going to pay the costs of trial and then want to  
11 just settle for the \$75,000. He is not going to  
12 work backwards in this case.  
13 And I think at that time, my  
14 discussions with Mr. Franey about his defense,  
15 he was attempting to tell the same thing to --  
16 is my understanding, he was attempting to tell  
17 the same things to Nationwide, because he was  
18 aware of the fact that number was on the table  
19 at that time, but soon would be removed.  
20 Q. Did you feel that it was reasonable;  
21 in fact somewhat generous on the plaintiff's  
22 part to be willing to settle the case for  
23 \$75,000 and waive any claim for punitive  
24 damages?  
25 A. Are you talking about at the time of

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1 the deposition with Mr. Jacobus?  
2 Q. Well, at all times prior to trial.  
3 MR. FRANEY: Objection to the term  
4 generous, but go ahead.  
5 A. At the time of the deposition of  
6 Mr. Jacobus, when I left here and you said it's  
7 still on the table, I thought that -- I don't  
8 know if the word generous would be the right  
9 word, but I thought, you know, it was time to  
10 seize the day. I really thought Nationwide  
11 should at that time seize the day.  
12 Because, Howard, personally, in doing  
13 this same kind of work, there comes a time when  
14 you have problems, and you were getting ready to  
15 go to war and you have got to load all your  
16 cannons and I knew that that was going to  
17 happen.  
18 I truly was amazed that they did not  
19 come forward and settle the case for \$75,000.  
20 They meaning Nationwide, obviously.  
21 Q. Now you are Mr. Jacobus' personal  
22 attorney?  
23 A. I am.  
24 Q. And obviously you have an interest in  
25 minimizing or potentially eliminating the risk

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1 of punitive damages to your client; true?  
2 A. That was my sole purpose, correct.  
3 Q. Is what you are telling me today  
4 under oath tainted in any way in terms of the  
5 value, the compensatory value of the case,  
6 tainted in any way by virtue of the fact that  
7 your interest in representing him was to  
8 minimize or eliminate the punitive damages?  
9 A. No. And I don't want to be  
10 disingenuous. Obviously that was a major import  
11 to me. That was why I was hired, retained.  
12 But to address myself to the punitive  
13 damages, I had to have a reasonable  
14 understanding of what the compensatory damages  
15 were. As you know, you know, they kind of hinge  
16 on each other. There were horrible facts in  
17 this case.  
18 But I was impressed by the fact that  
19 her injuries were substantiated quite well by  
20 doctors from both sides. And tinnitus, like  
21 TMJ, and a lot of these injuries that are  
22 present but you can't get your fingers on, are  
23 terrible things to put -- if I was a defense  
24 counsel, to put before the jury. Because if she  
25 is believable and she is the one that has to

5 (Pages 17 to 20)

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1 tell us, tell the jury that, you don't know what  
2 the award is going to be.  
3 And I thought that \$75,000 -- and I  
4 can't remember at the time, \$15,000, whatever  
5 the specials, the medical specials were --  
6 seemed to me to be -- I'm not going to use your  
7 word generous -- but seemed to me to be really a  
8 good settlement of this case.  
9 Q. Besides Teri Lefever from Nationwide,  
10 and the adjusting crew, if you will, the people  
11 that control the dollars and cents, did you have  
12 conversations with anyone else, either above  
13 Teri or below Teri?  
14 A. I did not.  
15 Q. Continuing with the November 11th  
16 letter, you state later on, as it now stands,  
17 without the benefit of reviewing all of the  
18 above documents, having reviewed the pleadings,  
19 depositions, doctor reports, which I am now in  
20 possession of, it's my opinion that this case  
21 should have been settled for the amount demanded  
22 by plaintiff's counsel at the October 22nd, 2002  
23 settlement conference.  
24 Did I read that accurately?  
25 A. You did.

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1 Q. And did your opinion change at all  
2 prior to the commencement of trial?  
3 A. No.  
4 Q. Have you at this point commenced any  
5 type of a bad faith claim against Nationwide?  
6 A. I have not. As of this date.  
7 Q. And I won't ask you to tell me  
8 whether you are or not, because I think that  
9 probably is privileged between you and  
10 Mr. Jacobus.  
11 A. It would be.  
12 Q. I won't put you under that risk of  
13 refusing to answer something.  
14 A. I don't think Moskovitz would let you  
15 do that to me.  
16 Q. You are correct.  
17 Exhibit 2 is your letter that we have  
18 sort of alluded to dated December 4, where you  
19 have asked Teri Lefever for the information.  
20 And you believe it's the claim file and the  
21 reservation of rights, that letter that you  
22 wanted to see?  
23 A. I do.  
24 Q. Now, Exhibit 3 is your letter to Teri  
25 Lefever dated December 23rd, 2002, and that was

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1 responding to my letter of December 19, 2002;  
2 correct?  
3 A. That's correct  
4 -----  
5 (Thereupon, BURKE Deposition  
6 Exhibit 5 was marked for  
7 purposes of identification.)  
8 -----  
9 Q. I'm going to show you just for  
10 purposes of the record, is this a copy of the  
11 December 19th, 2002 letter that you were  
12 referring to?  
13 A. Yes, it is.  
14 Q. I am going to sort of address your  
15 attention to certain things, the highlighted  
16 section on here where it says, as you -- and  
17 this is a letter to Mr. Franey; true?  
18 A. That's correct.  
19 Q. As you, Mr. Burke and the court are  
20 fully aware, the case could have and should have  
21 settled a long time ago well in advance of final  
22 trial preparation or trial for the figure of  
23 \$75,000 in compensatory damages.  
24 Do you agree with that statement, at  
25 least as it relates to your view of things? I'm

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1 not going to ask you to read the court's mind or  
2 Mr. Franey's mind, but do you agree with that  
3 statement?  
4 A. From my personal standpoint and view,  
5 it was correct. It is correct.  
6 Q. And the medical evidence by way of  
7 expert reports, including the report of your own  
8 expert, Dr. Silberman, in October clearly  
9 reflected a substantial likelihood that the  
10 value of the case and ultimately a verdict in  
11 this case would exceed plaintiff's settlement  
12 demand.  
13 Did you agree with that statement  
14 based upon the evidence that existed prior to  
15 commencement of trial?  
16 A. I did.  
17 Q. And that's irrespective of what might  
18 happen with the punitive damage issue?  
19 A. Based solely on the compensatory  
20 damage claim, yes.  
21 Q. In your letter of December 23rd to  
22 Teri Lefever you indicate that because of  
23 Nationwide's failure to -- strike that.  
24 In your letter of December 23, you  
25 state, additionally, it is quite evident that

6 (Pages 21 to 24)

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1 Mr. Jacobus' total interests were not being  
2 attended to by Nationwide and its  
3 representatives. He was not properly prepared  
4 by counsel for his June 6, 2002 deposition.  
5 There was no effort made to provide an expert to  
6 testify in Mr. Jacobus' behalf on the issue of  
7 an alcoholic's ability to formulate the  
8 requisite conscious disregard for the welfare  
9 and safety of others, dash, the thrust of the  
10 punitive/exemplary damage claim against  
11 Mr. Jacobus.

12 Going back to the very beginning -- I  
13 probably didn't need to read the entire thing --  
14 but what was it you were referring to that you  
15 felt as of December 23 in writing to Teri  
16 Lefever that Nationwide and its representatives  
17 had not properly prepared your client for the  
18 June 6th deposition?

19 A. In reviewing the deposition --

20 MR. FRANEY: Could I put an objection  
21 to that question. I'll caution you not to waive  
22 attorney-client privilege when you are doing  
23 this, but go ahead.

24 A. In reviewing that deposition, in my  
25 mind, Mr. Jacobus hadn't been -- and also, after

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1 is going to come into play. We are going to  
2 object to it, but he is going to ask those  
3 questions and get these answers, so you should  
4 know the nature of your past history.

5 Not everybody remembers all those  
6 things; whether they want to forget them or they  
7 are just incapable of doing that. In my mind,  
8 had he been prepared, there would have been some  
9 questions answered more intelligently and it  
10 would have taken away the kind of appearance  
11 that he was being dishonest. And that became  
12 apparent to me immediately.

13 Q. Based upon information and belief  
14 that you had at that time, and continuing  
15 through the course of the litigation, did your  
16 opinion as to the adequacy of his preparation  
17 change at all?

18 MR. FRANEY: Objection.

19 A. No. In fact, as you recall, right in  
20 the middle of testimony that whole thing blew  
21 up. Because you had his statement under oath  
22 and then trying to explain why he didn't recall  
23 that at that time and why -- it was just  
24 horrific for him.

25 Q. When you indicate in your letter that

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1 I reviewed the deposition and spoke with  
2 Mr. Jacobus and asked him how he was prepared  
3 for this deposition and what he was able to  
4 review, i.e., the police report, any other  
5 documents, I thought it was like shooting fish  
6 for you in the deposition.

7 It was apparent to me he wasn't  
8 prepared, or at least he hadn't gone over the  
9 documents and reviewed them, because he made  
10 substantial misstatements that I don't believe  
11 were intentionally inaccurate. I think he just  
12 didn't have the information and didn't recall  
13 the information.

14 We were dealing with somebody who was  
15 impaired at the time of this incident and he  
16 would have had to review his statement to the  
17 police, the other issues as to the police report  
18 itself. He didn't have an understanding of his  
19 prior record. I mean, he was laid wide open  
20 there when he was responding and in fact  
21 misstated his previous DWI's, as you are well  
22 aware, because you utilized those like a  
23 surgeon.

24 I think that if he had been prepared  
25 and said, look, here is your past record. This

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1 there is a laundry list of other indicia of bad  
2 faith on behalf of Nationwide as well, when you  
3 refer to the term bad faith, just so I  
4 understand what you mean by that, can you give  
5 me your definition of bad faith?

6 A. An attempt to settle this case on  
7 behalf of their insured within the policy limits  
8 for an amount that was a reasonable resolution  
9 of the case.

10 Q. And did you see any demonstration  
11 prior to the commencement of trial that  
12 Nationwide ever demonstrated good faith on  
13 behalf of your insured in terms of attempting to  
14 resolve this case?

15 A. No. Well, in fact, to answer that,  
16 there came a point, as you know, where I  
17 independently offered settlement out of my  
18 client's own pocket independent of the offer by  
19 Nationwide in an attempt to settle the case.

20 Q. Why is that? Why did you do that?

21 A. Because I wanted desperately to  
22 settle this case. Because by that point, having  
23 reviewed all the documents and preparing for  
24 trial, it became clear to me that that \$75,000  
25 was pure gold to Nationwide and we were going to

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1 get clobbered both ways, both punitive and  
2 compensatory.  
3 Q. Now, in my December 19th, 2002 letter  
4 which you alluded to and it's marked as Exhibit  
5 5, I gave a deadline of January 2nd, 2003 in  
6 which the compensatory and punitive damages  
7 could be paid with a waiver of attorney fees and  
8 a waiver of prejudgment interest; true?  
9 A. Yes.  
10 Q. To your knowledge, as of January 2,  
11 2003, was there any effort made on the part of  
12 Nationwide to -- strike that.  
13 Did you feel that that offer to  
14 accept the compensatory and punitive damages,  
15 waive the attorney fees, waive prejudgment  
16 interest, was a continued demonstration of good  
17 faith on the part of the plaintiff?  
18 MR. FRANEY: Objection.  
19 A. Yes, I did.  
20 Q. Was there any effort made, to your  
21 knowledge, by Nationwide to extend any offer to  
22 me or even come close to that offer?  
23 A. My last letter, my last sentence in  
24 that letter indicates, I will await your  
25 immediate response, after I said I urge you to

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1 A. Within the question you're alluding  
2 to the fact that it hasn't happened, so I  
3 imagine that hasn't happened, you haven't had a  
4 response. I can only indicate to you,  
5 Mr. Mishkind, that I haven't had a response and  
6 I indicated to them that in my opinion this case  
7 is going to be \$100,000 at least, over all of  
8 the money we are talking about now and that  
9 doesn't include my bad faith claim against them.  
10 That's contained in this letter.  
11 You would think, to answer your  
12 question, that they would've answered my  
13 question and got back to me and responded to me,  
14 but they didn't. And so in light of the fact  
15 that they won't even respond to me, I'm not  
16 surprised they didn't respond to you.  
17 And I don't know whether or not there  
18 is anybody at Nationwide who fits the  
19 description you just made.  
20 Q. Would you agree with me that  
21 mediation of this matter makes no sense?  
22 A. I remember when Marty, when  
23 Mr. Franey told me that Nationwide wanted him to  
24 approach you -- I believe that's what he said --  
25 approach you with mediation. I think they asked

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1 accept Mr. Mishkind's proposal in this matter.  
2 I had never heard from Nationwide in  
3 response to this letter, which was the 23rd of  
4 December, and I knew the parameters which you  
5 had set, January 2nd, I believe. No, and I  
6 don't have any knowledge, I have never spoken to  
7 Nationwide or any of their representatives since  
8 this letter.  
9 Q. There was the topic not too long ago  
10 of mediating this matter. Was that brought to  
11 your attention?  
12 A. Yes, that was. I believe Mr. Franey  
13 indicated that to me. Again, I had no  
14 conversations with anybody from Nationwide.  
15 Q. This was a conversation between you  
16 and Mr. Franey about the concept of mediation?  
17 A. Yes.  
18 Q. But as you sit here right now, do you  
19 know of, short of suggesting mediation, do you  
20 know of any reason why someone with expertise  
21 and competency at Nationwide Insurance Company  
22 has been unable to pick up the telephone or  
23 write me a letter responding to the letter of  
24 December 19th, 2002, saying yes, no, or maybe in  
25 response to my proposal?

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1 him to do this. And I said to him, well, will  
2 he accept that? I mean, why would he accept  
3 that? And Marty quite frankly said, I don't  
4 know, but they have asked me to do that and I'm  
5 going to do that.  
6 In my mind, I thought what is  
7 mediation going to bring here? Either they are  
8 going to meet his demand or he is going to go  
9 forward with the collection process.  
10 Q. I only have a few more questions.  
11 A. Okay. Thanks.  
12 Q. What you have in front of you, are  
13 these pleadings?  
14 A. I brought those just to kind of  
15 refresh my recollection. I was reading them  
16 while I was having a glass of water.  
17 Q. I don't need to look at them if you  
18 tell me these are pleadings which are part of  
19 the record.  
20 A. One is a motion to continue the trial  
21 where I asked for an expert. That was not  
22 granted. Defendant's second motion for  
23 protective order, that was prior to your  
24 deposition, as to financials, and we went ahead.  
25 As you remember, we put it on the record while

8 (Pages 29 to 32)



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1 we were going ahead. My motion, the motion in  
2 limine and my motion for JNOV, that's what we  
3 have.

4 Q. Are there any other letters that you  
5 have written to Mr. Franey, to the insurance  
6 company, or to any third-party that relates to  
7 your evaluation of damages or your assessment of  
8 the value of this case aside from what you  
9 brought with you today and perhaps aside from  
10 this letter that you may have received from  
11 Nationwide?

12 MR. FRANEY: Hold on. Objection to  
13 the question about any correspondence to  
14 Mr. Franey as it invades attorney-client  
15 privilege. We are co-counsel.

16 MR. MISHKIND: With all due respect,  
17 the attorney-client privilege under Moskowitz  
18 does not apply when it relates to communication  
19 concerning valuation of the case in claims of  
20 valuation, but your objection is noted. Go  
21 ahead.

22 A. I don't have an independent  
23 recollection. If I did, I would have brought  
24 that with me. I think correspondence with  
25 Mr. Franey was of the nature of meeting,

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1 involve trial strategy that are intermixed with  
2 matters that deal with clear claims valuation  
3 which are discoverable under Moskowitz, we can  
4 have an in-camera inspection of those documents  
5 and perhaps redact that which is privileged.

6 I would rather just have an agreement  
7 you will do that rather than having to issue a  
8 subpoena to you.

9 A. I will bring my entire file and I  
10 will pull out those. It's my impression that's  
11 not going to happen, there is not going to be  
12 something in there, but I will pull that.

13 Q. I suspect if you say that, that's the  
14 case, but just in the event of --

15 Let me just check a few things and we  
16 will probably be close to done.

17 You would agree, would you not, that  
18 the purpose of prejudgment interest is to  
19 encourage litigants to make a good faith effort  
20 to settle their cases?

21 A. That's my opinion, yes.

22 Q. In your opinion, based upon the  
23 totality of the circumstances that you have seen  
24 in reviewing the file and being involved in  
25 representing Mr. Jacobus and then attending the

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1 coordinating things. I don't recall that.

2 And I will get you that letter of the  
3 19th. I'm sorry I didn't bring that.

4 Q. And I want to find out, because  
5 obviously I can take Mr. Franey's deposition,  
6 but I would rather at this particular point just  
7 be clear on the record, is there or is there not  
8 correspondence between the two of you where the  
9 discussion of settlement values or valuating the  
10 claim itself, aside from trial strategy, set  
11 forth in any letter, either in part or in total?

12 MR. FRANEY: Objection.

13 A. Mr. Mishkind, I don't recall. I will  
14 look at -- when you sent me the duces tecum, I  
15 thought it referenced Nationwide, correspondence  
16 with Nationwide. I didn't look to that. I will  
17 look to my file. If Marty has an objection, he  
18 can prepare that, but I will look at my file for  
19 correspondence to Mr. Franey, only in which I  
20 depict my estimation or our estimation of the  
21 value of the case or something in that regard.

22 Q. What I have asked you to do, if not  
23 before the hearing or at the time of the  
24 hearing, if you would bring all correspondence  
25 to and from, and if there are things that

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1 trial, attending and participating in the trial,  
2 did Nationwide Insurance Company demonstrate a  
3 good faith effort to settle this case?

4 MR. FRANEY: Objection.

5 A. I don't believe they did.

6 -----  
7 (Thereupon, BURKE Deposition  
8 Exhibit 6 was marked for  
9 purposes of identification.)  
10 -----

11 Q. I'm going to show you a letter that  
12 you may or may not have seen marked as Exhibit 6  
13 that had been sent to a Gina Scruggs at  
14 Nationwide Insurance Company.

15 First, before I show this to you, do  
16 you know who Gina Scruggs is?

17 A. No, I don't believe I do. From this  
18 case anyway.

19 Q. The letter that I'm showing you is  
20 dated --

21 A. July 31st, 2001.

22 Q. I take it you didn't realize or  
23 didn't know that Gina Scruggs at one time was  
24 the adjustor on this file?

25 A. I don't recall knowing that.

|  |  |
|--|--|
| <p>Page 37</p> <p>1 Q. Did you know -- and you can look at<br/>2 the highlighted language in the letter -- that<br/>3 at one time the settlement demand that<br/>4 plaintiffs had communicated was \$175,000.<br/>5 Do you see that?<br/>6 A. Yes, I see that.<br/>7 Q. When you got involved in the case,<br/>8 you were operating on the basis that the<br/>9 settlement demand had been reduced to \$75,000;<br/>10 true?<br/>11 A. That's correct.<br/>12 Q. Do you know what the settlement offer<br/>13 was prior to the lawsuit being filed?<br/>14 A. No, I do not.<br/>15 Q. Do you know what efforts were made by<br/>16 Nationwide to try to settle this case without<br/>17 the necessity of plaintiffs filing a lawsuit in<br/>18 this matter?<br/>19 A. Again, Mr. Mishkind, I was never<br/>20 provided that information from Nationwide and<br/>21 that's why I don't know that.<br/>22 -----<br/>23 (Thereupon, BURKE Deposition<br/>24 Exhibit 7 was marked for<br/>25 purposes of identification.)</p>  | <p>Page 39</p> <p>1 not to go to trial in this case, for whatever<br/>2 reasons he had. All lawyers want to avoid trial<br/>3 and I respect that.<br/>4 It was clear to me in reading the<br/>5 doctor's deposition -- and I didn't have the<br/>6 opportunity to see Dr. Silberman, to see the<br/>7 deposition, just the flat deposition, but<br/>8 reading the reports and stuff -- and I am being<br/>9 repetitive -- the tinnitus claim just got bigger<br/>10 and bigger and bigger, and I don't think that<br/>11 was lost on Mr. Franey.<br/>12 Someone that had the money didn't<br/>13 think it was -- I don't know. I don't know why<br/>14 they did it.<br/>15 Q. Did I cooperate in discovery?<br/>16 A. With me?<br/>17 Q. Yes.<br/>18 A. Absolutely.<br/>19 Q. Did you see any evidence from looking<br/>20 at the file that I didn't cooperate with regard<br/>21 to discovery in regard to any aspect?<br/>22 A. Not as far as my participation, no,<br/>23 none whatsoever.<br/>24 Q. Was it ever communicated to you by<br/>25 anyone from Nationwide that I failed to provide</p>  |
| <p>Page 38</p> <p>1 -----<br/>2 Q. Exhibit 7 is a letter that I sent to<br/>3 Gina Scruggs in September of 2001, and if you<br/>4 could just take a look at that and read into the<br/>5 record what I have highlighted.<br/>6 A. Please give me a call so that we may<br/>7 talk further with a view toward reaching a good<br/>8 faith settlement of this matter without the<br/>9 necessity of filing suit.<br/>10 Q. As you sit here now, you don't know<br/>11 what efforts, if any, Nationwide made to try to<br/>12 enter into good faith settlement discussions<br/>13 without the filing of a lawsuit?<br/>14 A. I do not.<br/>15 Q. In the course of reviewing this file,<br/>16 did you get the sense that certain people were<br/>17 minimizing or attempting to minimize the extent,<br/>18 the nature and the extent of Janie Cousins'<br/>19 injury?<br/>20 A. Nobody from Mr. Franey's law firm --<br/>21 and remember, that's who I had communication<br/>22 with. I don't believe anybody, especially<br/>23 Mr. Franey, minimized anything. I thought, it<br/>24 was my impression that Marty was doing,<br/>25 Mr. Franey was doing everything he could to try</p> | <p>Page 40</p> <p>1 documentation when documentation became<br/>2 available or to produce people that needed to be<br/>3 deposed?<br/>4 A. No. It appeared to me that both<br/>5 sides were doing a very professional job. I saw<br/>6 no motions to compel or anything in regard to<br/>7 any depositions or any discovery.<br/>8 Q. Did you see any evidence that --<br/>9 strike that.<br/>10 At the time that Dr. Silberman was<br/>11 videotaped, and even in his report, but<br/>12 certainly by the time his discovery deposition<br/>13 was taken and the videotape was taken, can we<br/>14 agree that going into trial there was no dispute<br/>15 from a medical causation standpoint that Janie<br/>16 Cousins' tinnitus was caused as a result of the<br/>17 motor vehicle collision?<br/>18 A. I believe that was conceded. In<br/>19 fact, I'm sure it was conceded.<br/>20 Q. There were no attempts, to your<br/>21 knowledge, during the course of discovery to<br/>22 take any depositions of any of the treating<br/>23 doctors; in other words, Dr. Fine or Dr. Knapp,<br/>24 no discovery depositions were taken?<br/>25 A. I didn't see any of those.</p> |

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1 Q. And the plaintiff wasn't examined by  
2 Dr. Silberman?  
3 A. No, she wasn't.  
4 -----  
5 (Thereupon, BURKE Deposition  
6 Exhibit 8 was marked for  
7 purposes of identification.)  
8 -----  
9 Q. The letter I sent on August 19, 2002  
10 to Mr. Christie, which is marked as Exhibit 8,  
11 have you seen that letter? Have you seen this  
12 letter before?  
13 A. You know, I think I have seen it. I  
14 received the most recent correspondence along  
15 with their file and I believe I did see that. I  
16 would have to review it.  
17 Q. And just again, the highlighted  
18 sections, while my client's injuries are  
19 anything but minor, as previously described by  
20 you -- do you know what I'm referring to when  
21 I'm referencing to Mr. Christie describing my  
22 client's injuries as minor?  
23 A. Did something happen at the pretrial?  
24 There is some recollection at the pretrial  
25 that -- I don't know whether Nationwide or

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1 Mr. Christie for Nationwide indicated that they  
2 thought, that he thought or they thought that  
3 the injuries in this case were minor. But I  
4 think that was prior to the tinnitus claim  
5 getting up to speed. I'm not sure.  
6 Q. In any event, you recall that there  
7 was some reference by the defense that  
8 plaintiff's injuries were minor. The exact  
9 timing of that you are not certain of?  
10 A. That's correct.  
11 Q. All right. And again, as of August,  
12 would you agree that I was saying to  
13 Mr. Christie from Mr. Franey's office that this  
14 case can and should be settled to avoid  
15 unnecessary exposure to Mr. Jacobus?  
16 A. That's the part I remember. That's  
17 why I remember the letter, because that spurred  
18 me on to ask the questions I asked in October.  
19 Q. This and other letters and  
20 communications were an ongoing process, at least  
21 from what you could see by plaintiff's counsel  
22 to try to get someone to negotiate in good faith  
23 with the plaintiff, true?  
24 A. From what I read, it appeared to be  
25 that, yes.

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1 Q. Now, the offer that was communicated  
2 to me on behalf of Janie Cousins prior to a  
3 couple days before trial was \$17,000. I know  
4 that you had some communication in some manner  
5 from someone that there was a \$25,000 settlement  
6 offer communicated. Do you recall that?  
7 MR. FRANEY: Objection to your  
8 question. What time period are you talking  
9 about a \$17,000 offer? You said a couple days  
10 before trial?  
11 Q. Prior to a couple days before trial,  
12 the only official offer that I had received was  
13 \$17,000, although I remember you, Mr. Burke,  
14 indicating that you thought that there was a  
15 \$25,000 offer.  
16 Do you remember something along those  
17 lines?  
18 A. I think that was when we were in  
19 chambers and we were talking about it and I said  
20 \$25,000, and you said, no, \$17,000. I don't  
21 know where I got the figure \$25,000. I  
22 obviously didn't make it up. I thought there  
23 was a \$25,000 or a \$45,000 -- I don't know why  
24 the number \$45,000, but I remember you saying,  
25 no, because it was much lower than that.

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1 Q. Okay.  
2 A. That meaning the \$25,000.  
3 Q. Sure. And then the \$45,000 offer  
4 that may have been conveyed, that was conveyed,  
5 perhaps, the day before or the day of trial.  
6 Do you recall that?  
7 A. That sounds right, but I couldn't say  
8 that with any degree of certainty.  
9 Q. And would you agree, based upon the  
10 nature of the injury, the totality of the case,  
11 that \$45,000 the day before trial to try to  
12 resolve this case, both to get the compensatory  
13 and the punitive damage claim to go away, was  
14 not a good faith attempt on the part of  
15 Nationwide?  
16 A. I knew that you weren't going to  
17 accept that. I mean, I knew that you wouldn't  
18 accept that amount.  
19 Q. Was I being unreasonable at all?  
20 A. I don't believe you were.  
21 Q. Was that a good faith attempt based  
22 upon the totality of the circumstances on  
23 Nationwide's part in your opinion?  
24 A. I don't believe an offer less than  
25 \$75,000 was even going to be possible for

11 (Pages 41 to 44)

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1 acceptance.  
2 Q. Can we agree that an offer as of the  
3 time of trial, or shortly before trial, of less  
4 than \$75,000 with the hope that everything was  
5 going to be resolved, in your opinion would not  
6 be considered to be a good faith attempt?  
7 A. I think it would be an absolute bad  
8 faith attempt.  
9 Q. Was there any attempt after the trial  
10 started, after the evidence began, to increase  
11 the settlement offer to try to get the case to  
12 go away, as far as you know?  
13 A. I don't have an independent  
14 recollection of that. I'm not saying it didn't  
15 happen, I just don't remember.  
16 I remember a hurried effort just  
17 before trial, and I remember asking you if you  
18 would accept \$15,000 towards the punitive and  
19 you came back with her demand of \$150,000. I  
20 recall that.  
21 Q. Right.  
22 A. But after opening, after voir dire, I  
23 don't know.  
24 Q. I have a number of items but I'm not  
25 going to use them with you. Let me just check

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1 in compensatory. I wasn't shocked by the  
2 \$175,000 in the punitive. I thought the trial  
3 went very well for you.  
4 Q. But certainly the verdict was low in  
5 comparison, the compensatory amount was low in  
6 comparison with what you felt, given the  
7 evidence, would have been a reasonable verdict?  
8 A. I thought, right, I thought they were  
9 going to ride -- I thought in this case  
10 compensatory damages were going to now ride on  
11 the punitive and that happens both ways.  
12 Q. Okay.  
13 A. And in this case, I just thought the  
14 number \$200,000 came to my head. I never shared  
15 that with my client. But I just, in my head, I  
16 think I shared it with people, with someone in  
17 my firm.  
18 Q. Do you know why Mr. Christie was  
19 removed from this case?  
20 A. I have no idea. I didn't know he was  
21 removed.  
22 Q. And you realize that given the  
23 punitive damage award, attorney fees, it's just  
24 a question of how the court calculates the  
25 attorney fees at this point?

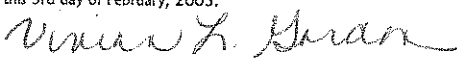
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1 one thing.  
2 What in your opinion did you view the  
3 potential jury verdict compensatory range, based  
4 upon your experience as an adjustor and as an  
5 attorney? Before the jury came back in, what  
6 kind of range did you think?  
7 A. After the trial and before the jury's  
8 decision?  
9 Q. Yes.  
10 A. I thought it was going to be more  
11 than \$118,000.  
12 Q. Before the trial started, what did  
13 you think the range, if you had to come up with  
14 a high/low kind of figure, what kind of value  
15 did you, based upon what you knew -- because we  
16 had all the evidence except for Dr. Newman.  
17 A. Yes. I didn't have Dr. Newman -- I  
18 thought Dr. Newman was great on the stand and I  
19 hadn't, I had not viewed, or I only read Dr.  
20 Silberman's report. I thought his deposition  
21 just was very good for you.  
22 I, at that point, I thought, and I  
23 was scrambling because of the punitive aspect of  
24 the case, but I think I thought that this case  
25 was going to come back around \$200,000 for you

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1 A. Initially I had to do some research  
2 on that. I now know it's the discretion of the  
3 court to do it as they see fit.  
4 Q. They can do it on a per diem basis?  
5 A. Correct.  
6 Q. With a load star or just per diem, or  
7 they can even honor the contingency contract?  
8 A. Take the percentage and carry it to  
9 the punitive, right.  
10 Q. Do you know whether the attorney fees  
11 are applied only to the punitive, or the  
12 punitive and the compensatory, or don't you  
13 know?  
14 A. I don't know. I don't know.  
15 Q. Is there anything that the  
16 plaintiffs, in your opinion, did that you would  
17 at the time of this hearing testify to  
18 demonstrated a lack of good faith in terms of  
19 the negotiation process throughout this case?  
20 A. I can only speak from the point that  
21 I entered the case to the conclusion of the  
22 case, and I saw nothing that the plaintiff did  
23 that wouldn't have been in good faith.  
24 Q. Was anything brought to your  
25 attention in discussions with anyone from

12 (Pages 45 to 48)

|  |   |
|--|---|
| <p style="text-align: right;">Page 49</p> <p>1 Mr. Franey's office or the insurance company as<br/>2 it relates to settlement discussions that would<br/>3 suggest that the plaintiffs failed to fully<br/>4 cooperate in discovery?<br/>5 A. No.<br/>6 Q. That the plaintiffs failed to make a<br/>7 good faith effort to resolve the case?<br/>8 A. No.<br/>9 Q. That the plaintiffs failed to<br/>10 adequately evaluate the risks of the liability<br/>11 issues as well as the positives and negatives of<br/>12 the case in arriving at a reasonable settlement<br/>13 demand in this case?<br/>14 A. No.<br/>15 Q. Have you had any discussions with<br/>16 anyone, Nationwide, Mr. Franey's office or any<br/>17 third-party, as it relates to the process of<br/>18 negotiation that would cause you to alter any of<br/>19 the opinions or any of the statements of fact<br/>20 that you have made during the course of this<br/>21 deposition?<br/>22 A. None whatsoever.<br/>23 MR. MISHKIND: I have nothing<br/>24 further. Thank you very much.<br/>25 Will you waive signature on this?</p> | <p style="text-align: right;">Page 51</p> <p style="text-align: center;">CERTIFICATE</p> <p>1<br/>2<br/>3 State of Ohio,<br/>4 SS:<br/>5 County of Cuyahoga.<br/>6<br/>7<br/>8 I, Vivian L. Gordon, a Notary Public within<br/>9 and for the State of Ohio, duly commissioned and<br/>10 qualified, do hereby certify that the within<br/>11 named JAMES BURKE, ESQ. Was by me first duly<br/>12 sworn to testify to the truth, the whole truth<br/>13 and nothing but the truth in the cause<br/>14 aforesaid; that the testimony as above set forth<br/>15 was by me reduced to stenotypy, afterwards<br/>16 transcribed, and that the foregoing is a true<br/>17 and correct transcription of the testimony.<br/>18<br/>19 I do further certify that this deposition<br/>20 was taken at the time and place specified and<br/>21 was completed without adjournment; that I am not<br/>22 a relative or attorney for either party or<br/>23 otherwise interested in the event of this<br/>24 action. I am not, nor is the court reporting<br/>25 firm with which I am affiliated, under a<br/>contract as defined in Civil Rule 28(D).<br/>IN WITNESS WHEREOF, I have hereunto set my<br/>hand and affixed my seal of office at Cleveland,<br/>Ohio, on this 3rd day of February, 2003.<br/><br/>Vivian L. Gordon, Notary Public<br/>Within and for the State of Ohio<br/>My commission expires June 8, 2004.<br/>-----</p> |
| <p style="text-align: right;">Page 50</p> <p>1 THE WITNESS: I will.<br/>2 -----<br/>3 (Deposition concluded at 3:10 p.m.)<br/>4 (Signature waived.)<br/>5<br/>6<br/>7<br/>8<br/>9<br/>10<br/>11<br/>12<br/>13<br/>14<br/>15<br/>16<br/>17<br/>18<br/>19<br/>20<br/>21<br/>22<br/>23<br/>24<br/>25</p>  | <p style="text-align: right;">Page 52</p> <p style="text-align: center;">INDEX</p> <p>1 EXAMINATION OF JAMES W. BURKE, JR., ESQ.<br/>2 BY MR. MISHKIND: ..... 3:13<br/>3<br/>4<br/>5 Exhibits 1 thru 3 were marked..... 3:3<br/>6 Exhibit 4 was marked..... 4:22<br/>7 Exhibit 5 was marked..... 23:6<br/>8 Exhibit 6 was marked..... 36:8<br/>9 Exhibit 7 was marked..... 37:24<br/>10 Exhibit 8 was marked..... 41:6<br/>11<br/>12<br/>13<br/>14<br/>15<br/>16<br/>17<br/>18<br/>19<br/>20<br/>21<br/>22<br/>23<br/>24<br/>25</p>   |

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