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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LISA PETERSON, individually, Plaintiff, v. TASER INTERNATIONAL, INC., a Arizona Corporation; TASER INTERNATIONAL, INC., a Delaware corporation; and DOES I through X, inclusive, Defendants.	Case No.: 2:06-CV-00145-JCM **PLAINTIFF'S OPPOSITION TO DEFENDANT TASER INTERNATIONAL'S MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT**

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

In November of 2003, Las Vegas Metropolitan Police Department ("Metro") Officer, Lisa Peterson, suffered life-changing injuries to her neck, jaw, shoulder, and back when she was shocked with a M26 Taser manufactured by Taser International, Inc. ("Taser") during mandatory Metro training. Though Taser argues it is not responsible for Officer Peterson's injuries because she was warned of the general danger of "secondary injuries" from falling, Taser did not tell Officer Peterson that Taser's "daisy chain" training procedure would subject her to an extreme risk for spinal injury over 17%. Instead, Taser minimized the risk by claiming that "[t]he risk of injury from exertion or falling, while very low, is not zero." Further, Taser did not tell Metro to stop using the Taser daisy chain even *after* Taser itself stopped using daisy chains because of

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reported training injuries. Accordingly, Officer Peterson respectfully requests this Court to deny Taser's motion for summary judgment and to grant partial summary judgment against Taser because:

- **Officer Peterson was <u>not</u> warned of the *specific* risk of spinal injury from Taser's daisy chain.** Though Taser recognized and warned of a general risk from falling, it claimed the injury rate from was only 0.25% despite having no basis for this claim and never investigating the foreseeable risk to the spine from a daisy chain shock that Taser's biomechanical expert now estimates to be 17%.

- **Although Taser knew its daisy chain was dangerous and stopped using it *before* Officer Peterson was shocked, Taser did <u>not</u> tell Metro or Officer Peterson.** As Taser's own chief instructor, Hans Marrerro, admits, Taser stopped using the daisy chain in 2002 *before* Officer Peterson was injured *because* of injuries and the lack of tactical value. If Taser had told Metro to not train with the daisy chain, Officer Peterson would not have been injured, and Taser's failure to warn of this known danger justifies summary judgment against Taser.

- **Taser's claim that over 700,000 human uses reveal no injuries of the kind suffered by Officer Peterson is untrue.** Instead, Taser's own training expert admits that no evidence supports Taser's claim, that Taser stopped recommending "daisy chain" because of training injuries, and that Taser now warns police departments to not subject police trainees to group shocks of any kind, including the daisy chain.

- **Partial summary judgment is appropriate.** Because Taser had actual knowledge of the risk of injury from its daisy chain, falsely represented the extent of the general risk, and did not warn of the specific risk from a daisy chain shock, Officer Peterson is entitled to partial summary judgment on strict liability and trial on the issue of compensatory and punitive damages.

II.

LEGAL STANDARD

Summary judgment is appropriate when a moving party demonstrates that no genuine issue of material fact exists. "Material facts" are those that might affect the outcome of the lawsuit. An issue is "genuine" if a reasonable trier of fact could possibly find in favor of the nonmoving party. If a moving party demonstrates that no genuine issue of material fact remains, then the non-moving party bears the burden to demonstrate that there is some evidence creating a genuine issue of material fact.[1] To carry this burden, the non-moving party may not stand on its pleadings, but must provide evidence consisting of declarations, admissions, evidence obtained

[1] *Celotex v. Catrett*, 477 U.S. 317, 323-25 (1986).

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through discovery, or matters judicially noticed, to establish that a genuine issue of material fact exists.[2] If the non-moving party meets this burden, summary judgment must be denied. If it does not, summary judgment is appropriate.

III.

FACTUAL SUMMARY

A. The M26 Taser.

The M26 Taser is a high-voltage electrical weapon that works by firing small projectiles with compressed air. These projectiles, which are tipped with straightened fishhooks, spear their intended victim when the weapon fires. After the hooks make contact with a victim's clothes or skin, the M26 Taser repeatedly delivers up to 50,000 volts of electricity down wires attached to the hooks into the victim. These electrical pulses arc into the victim's body, overwhelm the central nervous system, and result in uncontrollable muscle spasms so long as the trigger is depressed.

B. The Daisy Chain.

The daisy chain is a special training technique originally recommended by Taser to shock multiple officers at the same time. In a daisy chain, officers are instructed to interlock their arms at the elbow and kneel on a mat. Electrical wires from the M26 Taser are then clipped to each end of the human chain. When the M26 Taser's trigger is pulled, electricity travels down the wires causing uncontrollable muscle contractions. These uncontrollable contractions invariably cause the human daisy chain to pitch forward and fall to the ground. Taser historically demonstrated the "daisy chain" as a way to shock large groups of officers in training, but later changed its training recommendations to no longer recommend the daisy chain because of training injuries and the lack of tactical value.

C. Taser's Warnings.

At the time of Officer Peterson's injury in November 2003, Taser provided several general warnings to users of the M26 Taser about falls and "athletic-type injuries." Specifically,

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[2] FED. R. CIV. P. 56(c); *Celotex,* 477 U.S. at 324.

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within Version 10 of Taser's training materials, Taser warned the M26 Taser "causes temporary incapacitation and the inability to catch yourself as you fall," which "can be dangerous and even fatal under specific circumstances."[3] For example, "someone shot by the [M26 Taser] in a high place could be seriously injured in a fall or someone shot in a swimming pool could possible drown as they could not swim or support themselves."[4] Because of these risks, Taser cautioned that "whenever the [M26 Taser] is being used for training or demonstrations, make sure that two people are acting as handlers to support the upper arms of the person being shot . . . so that the person can be safely supported and lowered to the ground after being hit."[5] Taser also told users that M26 Taser shocks could cause: a) "athletic exertion type injuries to some people;"[6] b) a person to fall immediately to the ground;[7] and, c) "[m]ight . . .cause secondary injuries from a person falling," which was a potential issue for pregnant women.[8]

Despite these concerns, Taser reassured users that "[s]tudies have shown there are no long-term effects from being shot with Taser technology,"[9] and that the "output of the M26 [Taser] into a human body is a fraction of the dangerous level."[10] Taser represented an M26 Taser shock to be no different than "physical exertion similar to an athletic activity such as playing a game of basketball."[11] with only a 1 in 4,000 risk of injury (0.25% injury rate) that is "significantly lower than for other athletic type activities such as [defensive tactics] training."[12]

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[3] *See* Excerpt of Taser Certification Lesson Plan, Version 10, "Warnings," at ii, attached hereto as Exhibit 1.

[4] *Id.* at iii, Warnings

[5] *Id.*

[6] *Id.*

[7] *Id.* at 24, "Common Effects of EMD."

[8] *Id.* at 26, "What TASERs Might Do."

[9] *Id.* at 20,"Electrical Safety Levels," ("The key concept of this slide is that students see the electrical output of the TASER is at a fraction of the danger level on the chart – a significant safety margin"); *see also id.* at Slide 24, "Medical Safety," ("TASER weapon tests have found: no effects on heart rhythms. . .99% incapacitation in less than a second. . .**no long term effects**. . .**the electrical outputs are well within the safe levels defined by international standards**.")(Emphasis added).

[10] *Id.* at 19, "Electrical 101."

[11] *Id.* at 30, "Volunteer Exposure."

[12] *Id.*

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Thus, while the risk of injury from an M26 Taser shock was "not zero," Taser expressly told users that the risk of injury from falling was "**very low**."[13]

D. Taser's April 2003 Training Demonstration for Metro.

Before agreeing to purchase the M26 Taser, Taser provided Metro with a training demonstration in April 2003 for Metro's command staff and training experts to see the M26 Taser first hand.[14] This training demonstration was performed by former United States Marine Corp Sergeant Hans Marrero. During the demonstration, which was taped by Metro for future training purposes, Marrero explained the safety and effectiveness of the M26 Taser to Metro and demonstrated the M26 Taser several times with different training techniques that included the Taser daisy chain. Further, Marrero told Metro's command staff that the M26 Taser was so safe that it had been used on himself over thirty times and that he had even shocked his oldest and youngest sons. The video of Marrero's M26 Taser training demonstration was then incorporated by Metro into its training program and shown to officers during M26 Taser training.

E. Metro's Training & Lesson Plan.

When Metro decided to issue the M26 Taser to its officers, it relied heavily upon the training materials supplied by Taser for that purpose. In fact, the officer tasked with developing Metro's lesson plan, Sergeant Thomas Miller, testified in his deposition that Metro's lesson plan was "basically a mirror presentation of what we got with the TASER, from TASER International,"[15] and that Metro principally relied upon the materials it received from Taser.[16] Though Metro did revise its lesson plan as it was reviewed by Metro's chain of command, Sergeant Miller recalls no major revisions to the training materials supplied by Taser.[17] Rather, as former Metro Sheriff Bill Young confirms, Taser's training was "a canned program" that he "bought into as much as they had the whole thing. They had the product, the training program,

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[13] *Id.*

[14] *See* DVD of Hans Marrero Training Demonstration, which will be hand-filed with the Court as Exhibit 2.

[15] *See* Deposition Excerpt of Thomas Miller at 30:23-25, attached hereto as Exhibit 3.

[16] *Id.* at 31:1-3.

[17] *Id.* at 33:3-17.

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that they presented. They were prepared to come to your department, present this training program, get you up to speed. All you basically had to do was say yes and get some of your officers involved in their training program and buy the weapon and roll it out to your department and your community."[18]

F. Peterson's Training & Injuries.

On November 21, 2003, Officer Peterson "volunteered" to take part in a Taser daisy chain during mandatory Metro training with the M26 Taser. While Officer Peterson recalls few details about her training injury, she does remember receiving a lecture about the M26 Taser from Metro instructors and watching a video with a gentleman stating that the M26 Taser was safe enough that he had shot his young daughter with the weapon.[19] After watching a group of Metro officers undergo a daisy chain M26 Taser shock with no apparent injuries,[20] Officer Peterson took part in a second daisy chain with other officers in her training. After kneeling on a gym mat and interlocking arms with officers on either side, Officer Peterson recalls "[w]e were on our knees, our ankles were crossed, arms interlocked and then I remember feeling the jolt and then I remember – I remember the muscles being contracted. I remember hitting the mat with my head turned [to the left]."[21] Then," I felt my muscles were – I felt the impact. The muscles were contracted. I felt my head hit. I felt everything hit. I felt the impact and then that was it. I don't remember."[22]

After the impact, Officer Peterson remembers asking her captain what had happened to her because "everybody was muffled. It was like a muffling sound of everybody talking."[23] After being shocked, Officer Peterson's training group was then asked to fire the M26 Taser at a target. Officer Peterson, however, "had a hard time" and "couldn't focus on the target," because

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[18] *See* Deposition Excerpt of William David Young at 120:6-16, attached hereto as Exhibit 4.
[19] *See* Deposition Excerpt of Lisa Peterson at 85:4-8, attached hereto as Exhibit 5; *see also id*. at 87:6-12.
[20] *Id.* at 95-97.
[21] *Id.* at 104:11-25.
[22] *Id* at 106:4-8.
[23] *Id.* at 107:15-18.

her "head was cloudy and ringing."[24] After trying to fire the target, Officer Peterson again asked a fellow officer if his head was ringing or if he was in pain, but he answered no.[25]

After training, Officer Peterson returned home. When she awoke the next day, she could not move her head, her right eye was half shut, and the right side of her face was numb.[26] Despite her injury, Officer Peterson reported for duty. Her sergeant, however, refused to allow her to work until she saw a doctor, which she did that day.[27]

Officer Peterson's medical records, summarized within the mandatory disability evaluation of Officer Peterson performed by Dr. Richard Kudrewicz, M.D., reveals injuries and symptoms arising in the days immediately after Officer Peterson's injury.[28] These include pain in Officer Peterson's neck, jaw, and face that subsequently developed into headaches, dizziness, difficulty chewing, and mild neurological dysfunction.[29] MRI and x-rays after Officer Peterson's injury revealed degenerative disc disease accompanied with a cervical disc herniation at C5-C6 impinging her spinal cord and broad-based disc protusion at C6-C7.[30]

When Officer Peterson's symptoms failed to improve through conservative care, she underwent multiple surgical treatments to improve her condition, including: spinal surgery by Dr. Mark Kabins, who performed a cervical fusion of her spine; temporomandibular joint (TMJ) surgery by Dr. Mark Reed; lumber spinal fusion by Dr. Kabins; nerve blocks for chronic pain; neurological assessments that revealed mild cognitive deficits; oral arthrosporic surgery to her jaw; sacroilliac joint injections for pain; and shoulder surgery.[31] Although Officer Peterson's symptoms improved somewhat after these treatments, she was ultimately restricted from active duty because of her injuries, and currently serves only in a light-duty capacity for Metro.

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[24] *Id.* at 98:2-8.
[25] *Id.* at 108:22-109:2.
[26] *Id.* at 130:6-13.
[27] *Id.* at 130:20-131:5.
[28] *See* Disability Evaluation by Richard Walter Kudrewicz, M.D., Ltd., attached hereto as Exhibit 6.
[29] *Id.* at 1.
[30] *Id.*
[31] *Id.* at 2-8.

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IV.

ARGUMENT

A. *Orr V. Bank of America* Mandates Denial of Taser's Motion Because Taser Fails to Properly Cite Evidence in Support of Its Motion.

Orr v. Bank of America is the benchmark established by the Ninth Circuit and routinely used by the U.S. District Courts for the District of Nevada to determine whether a motion for summary judgment is supported by admissible evidence.[32]

> "A trial court can only consider admissible evidence in ruling on a motion for summary judgment. Authentication is a 'condition precedent to admissibility,' and this condition is satisfied by 'evidence sufficient to support a finding that the matter in question is what its proponent claims. We have repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment."[33]

Orr requires evidence in support of summary judgment to be authenticated as if it were presented at trial, because "[w]hile a motion for summary judgment is not a trial, if it is granted, the motion is the procedural equivalent of a trial, so great care must be taken to insure that injustice does not result from its employment."[34] Failure to authenticate evidence in federal court necessarily results in an "*Orr* Order" and dismissal of the offending motion.

Although Taser's counsel provides a commendable appendix of exhibits in support of its motion, the majority of these exhibits were initially unauthenticated, and therefore inadmissible, evidence. But because this identical issue was raised within the companion litigation to this case, *Lewandowski v. Taser International, Inc.*, Taser has subsequently filed a supplement to correct its unauthenticated evidence. It is therefore surprising that Taser does not follow the remainder of *Orr's* mandates now that *Orr* has been brought to the attention of Taser's counsel.

Orr requires more than reporter certifications. It also requires complete citation to exhibits so that opposing counsel and the Court may understand what evidence is being relied upon. Taser provides only page numbers, leaving Officer Peterson and the Court to hunt for Taser's authority through numerous multi-page citations. Under other circumstances, this would

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[32] *Orr v. Bank of America*, 285 F.3d 764 (9th Cir. 2002).

[33] *Orr*, 285 F.3d at 773.

[34] 73 AM. JUR. 2d *Summary Judgment* § 2 (2005).

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be a small burden, but given the voluminous size of Taser's "global appendix," Taser's failure to provide proper citation to its exhibits provides adequate justification to deny Taser's motion.

As the Ninth Circuit explains in *Orr*, a party's failure to cite page and line numbers "warrants exclusion of the evidence,"[35] because "judges need not paw over the files without assistance from the parties."[36] Therefore, "when a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court may in its discretion exclude the evidence."[37] Here, virtually every citation within Taser's motion fails to direct this Court and Officer Peterson to the specific evidence Taser relies upon. Without such specificity, it is difficult in most cases, and impossible in some, to determine what evidence Taser actually believes to support its position. Therefore, Taser's motion for summary judgment should be denied on this basis alone.

B. Taser Stopped Using the Daisy Chain Before Officer Peterson's Training Because of Training Injuries, but Did Not Tell Metro of the Risks.

Taser's motion should also be denied because Taser stopped using the daisy chain for training in 2002, long before Officer Peterson's training injury in November 2003. As Hans Marrero testified under oath on September 6, 2006, in the related case of *Chad Cook v. Taser International*, CV- 04-1325 PMP(LRL):

> Q. Why do you do the daisy chain?
> A. To demonstrate even if two people are fighting, sometimes police officers go to a scene where people are fighting and the officers try to, you know, break them apart and the officer gets sucked into the fight. So this is a way to tell them, hey, put a dart in this guy and put a dart in this guy and the fight's going to end pretty quick.
> Q. And I take it the daisy chain is a proper method of instruction from a Taser standpoint?
> A. No. The daisy chain, I don't do it like this anymore. I have them stand up and I shoot both one dart into this guy and one dart in this guy while they are holding each other and then drop them both. **This [Metro training demonstration] was just a demonstration for them. No, that's not what, how we actually do it.**
> . . .

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[35] *Orr*, 285 F.3d at 775.

[36] *Id.* at 775 (quoting *Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999)).

[37] *Id.* at 775.

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Q. All right. What's being shown here is [the April 2003 Metro M26 Taser Demonstration], I'm going to get into it in more detail, we'll show the videotape to you, but the officers get down on their knees and they kneel and they grasp hands together.
A. Um-hum.
Q. When did you stop doing that daisy chain type demonstration?
A. Knees?
Q. Yes sir.
A. **Oh, a long time ago**.
Q. Do you remember when?
A. **Probably 2002.** Because I had started – they still did it on their back. They didn't do it. And the reason is because I had – they're not thinking they would put a big guy with a little guy next to each other and, not a good idea, so –
Q. Why is that not a good idea?
A. Well, because the force of the big guys may, you know, take the other individual in a different way, so – there's always the possibility for that. So what I did is just told them no more daisy chains on their knees.
. . .
Q. Is that why you changed it and didn't, no longer did that method?
A. No. I changed it because there's really no tactical approach. They don't use that in the field . . .I mean, **I changed it because there's really no tactical – it got to the point there was no tactical** –
Q. Value to it?
A. **Value to it, yeah.**[38]

Marrero's testimony establishes that the daisy chain was not a recommended training technique after 2002 at the earliest, and was definitely "not how we actually do it" when Marrero demonstrated the M26 Taser in his April 2003 demonstration to Metro. Yet nowhere within Marrero's April 2003 videotaped demonstration, nor within Taser's Version 10 warnings, does Marrero or Taser tell Metro that Taser's daisy chain is no longer safe.[39]

Further, Sergeant Miller confirms that Taser taught the daisy chain to him during his instructor course with Hans Marrero as one method to shock groups of Metro officers with the M26 Taser:

Q. Can you explain to me the substance of what Mr. Marrero's recommendation was in terms of how you would then administer the Taser application to the Metro officers later when you conducted the training sessions?

A. If they wanted – it was basically up to the officers. If they wanted to be shot with probes, I'd shoot them with probes. If they wanted to go one person solo for a five-second ride with the alligator clips, we'd hook them

[38] *See* Deposition Excerpt of Hans Marrero, attached hereto as Exhibit 7, at 224-27 (emphasis added).
[39] *See* Marrero Training Demonstration DVD, Ex. 2; *see also* Version 10 Lesson Plan, Ex. 1.

> up with the alligator clips and give them a five-second ride. And if they wanted – you know, if they opted for the one-second ride, they could either do it by themself or – usually in a larger class we would have several people together, that way we could go through the class.[40]

Despite Taser's active role in teaching and demonstrating the daisy chain training method to Metro trainers, Taser's 35-page motion claims that the daisy chain was not a "training method" recommended by Taser at the time.[41] If true, then this argument directly conflicts with the testimony of Sergeant Miller, who recalls learning the daisy chain method from Taser's instructor training program. If true, this argument also ignores the fact that Taser's chief instructor, Hans Marreror, demonstrated the daisy chain procedure during his April 2003 M26 Taser demonstration for Metro's command and training staff. Taser implication that it had no involvement in Metro's use of the daisy chain contradicts the evidence of this case. And beyond its bald assertion, Taser offers no substantive evidence to support its claim. Rather, the testimonial evidence demonstrates that Taser: a) demonstrated the daisy chain for Metro's training and command staff in April 2003; b) taught the daisy chain to Metro's instructors to use during Metro training; c) stopped using the daisy chain as early as 2002; and d) never told Metro that the daisy chain was dangerous. Taser's motion must therefore be denied.

B. Taser's Repeated Attempts to Blur Strict Liability with Negligence Must be Refused by this Court.

1. Contrary to its Arguments, Taser Can Be Strictly Liable for Accidents From Defective Products under *Allison v. Merck*.

Taser's first substantive argument why it is not liable for Officer Peterson's injuries is that "the mere happening of an accident does not mean [that Taser] was negligent."[42] To support this claim, Taser principally cites the Nevada case of *Allison v. Merck & Co.* for the proposition that "[r]equiring manufacturers to warn about unknowable or unforeseeable dangers would be tantamount to making manufacturers insurers of safety or converting strict liability into absolute

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[40] *See* Miller Depo, Ex. 3, at 73:10-23.

[41] Motion at 7:19-20.

[42] Motion at 15:4-5.

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liability, and that is contrary to applicable law."[43] But Taser's use of *Allison* is misleading.

Although Officer Lewandowski agrees that *Allison* is vital to understanding Nevada law, it is important to recognize the law *Allison* discusses. *Allison* concerns strict liability, not negligence. While "mere accidents" do not necessarily create liability under negligence, *Allison* does not stand for the proposition that accidents cannot lead to strict liability. Rather, to the extent that Taser suggests that unforeseeable accidents are never compensable under strict liability, *Allison* specifically states otherwise, as Taser would recognize if it reads the remainder of the quote it cites:

> Under the law of strict liability in this state, responsibility for injuries caused by defective products is properly fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. Although manufacturers are not insurers of their products, *where injury is caused by a defective product, responsibility is placed upon the manufacturer and the distributor of the defective product rather than on the injured consumer.*[44]

Thus, nowhere within *Allison* does the Nevada Supreme Court create an exception to strict liability for accidents when they are unforeseeable. Rather, *Allison* assures that manufacturers *are* strictly liable for injuries caused by defective products.[45]

But Taser argues that "an accident happens does not mean anyone did anything wrong."[46] Again, Taser's claim it did nothing "wrong" muddies the distinction between negligence and

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[43] Motion at 17:20-23; although Taser cites two other cases, *Moore v. Medtronic, Inc*., 2006 U.S. Dist. LEXIS 44198, 6-9 (D. Nev. 2006) and *King v. Warner Lambert,* 2002 U.S. Dist. LEXIS 26094, 6 (D.Nev. 2002), these cases are not published opinions and not authority for this Court. Further, because both cases quote the identical passage from *Allison*, only *Allison* is addressed above.

[44] *Allison v. Merck & Co.*, 878 P.2d 948, 952 (Nev. 1994)(emphasis added); *see also Id.* at 954, ("The whole idea behind strict liability is that the manufacturer, not the consumer, should bear the responsibility for injuries, even when the product is ostensibly properly prepared and marketed and when the plaintiff is not in a position to prove the origin of the defect.").

[45] *Id.* (emphasis added).

[46] Motion at 15:13-17, quoting *Bedal v. Hallack and Howard Lumbar Co.*, 226 F.2d 526, 538 (9th Cir. 1955). Taser's citation to *Bedal v. The Hallack and Howard Lumber Co.* and *Carver v. El-Sabawi*, both negligence cases, to argue that "the mere happening of an accident or injury will not give rise to the presumption of negligence," offers Taser no defense to strict liability for accidental injuries caused by its defective product.

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strict liability. "[C]ulpability in the sense of fault need not be established [for strict liability]."[47] The "mere happening" of an unforeseeable accident may not rise to culpability under negligence, that inquiry is not dispositive under strict liability. Rather, *Allison* confirms that manufacturers *are* strictly liable for accidental injuries caused by defective products because:

> [P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained, and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.[48]

As the Court notes, it "could not be said any more clearly than this."[49] Therefore, Taser's argument that strict liability can never attach simply because Taser claims it is not "an insurer of its product" or characterizes Officer Peterson's injury as "accidental" finds no support under *Allison*. Instead, the relevant inquiry under strict liability is whether the M26 Taser was a defective product because of the training that Officer Peterson received in November 2003.

2. Nevada Rejects Taser's "Consumer Expectations" Analysis.

Taser next attempt to substitute negligence for strict liability arises within Taser's discussion of the appropriate test for "defectiveness" under Nevada law. Taser claims that Officer Peterson cannot establish a design, manufacturing, or warning defect under Nevada law because she fails to satisfy the "consumer expectations test" found in *Rivera v. Philip Morris* and the Second Restatement of Torts.[50] Under this test, products are "unreasonably" dangerous when "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[51] As *Rivera* explains, this "test explicitly incorporates the 'common knowledge'

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[47] *Jeep Corp. v. Murrey*, 708 P.2d 297, 303 (Nev. 1985), *superseded by statute as noted in Countrywide Home Loans, Inc. v. Thitchener*, ___ P.2d ___, 2008 WL 418001 (Nev. 2008).

[48] *Allison*, 878 P.2d at 955, quoting RESTATEMENT (SECOND) OF TORTS, §402(a), cmt c.

[49] *Id.*

[50] Motion at 16:8-14.

[51] *Id.*; *see Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005); *see also* RESTATEMENT (SECOND) TORTS §402(a), cmt. i (1965). In *Rivera*, the Ninth Circuit asserts that Nevada has adopted the strict liability formula in Section 402(a) of the Restatement (Second) of Torts, based upon language in

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doctrine, which rests upon the premise that a product is not unreasonably dangerous if everyone knows of its inherent risks."[52]

Taser suggests that Officer Peterson fails this test because she "has no evidence that the state-of-the-art Taser device had an unreasonably dangerous design,"[53] that the "M26 Taser worked as intended, and no evidence suggests the device's design rendered it unreasonably dangerous in light of its intended use as an electronic control device and law enforcement tool."[54] In other words, if the M26 Taser is not "unreasonably dangerous" in light of its intended use, it cannot be defective. To support this point, Taser argues the "standard for proving a design defect based on a theory of strict liability or negligence is the same."[55] Thus, under Taser's view, strict liability is no different than negligence, which looks to whether a product is "reasonably" or "unreasonably" dangerous to an "ordinary consumer." But this is not the law of Nevada.

Although Nevada courts do regularly consider the Restatement (Second) of Torts §402A, Nevada does not adopt the Second Restatement wholesale. In fact, the Nevada Supreme Court in *Allison* expressly rejects the consumer expectations test that Taser now advances:

> We find it very difficult to understand what *dangerous* to an extent beyond that contemplated by the *ordinary* consumer means. Does it mean that out of the millions of consumers of this vaccine we must search for the prototypical "ordinary" consumer and ask if that consumer "contemplated" the vaccine to be dangerous? If the expression has any intelligible meaning at all, it is certainly a retreat from traditional products liability principles and a move toward a negligence standard in which the consumer's choice is measured on the basis of what a reasonable and "ordinary" consumer would do under the circumstances. The more we look at the hodgepodge created by the Restatement (Second) of Torts in the area of consumer rights, the more comfortable we feel with following our precedent and the traditional principles of strict liability.[56]

Forest v. E.I. Dupont de Nemours and Co., wherein the United States District Court for the District of Nevada concluded in 1992 that "[i]n light of Nevada's explicit recognition of §402(a), particularly in failure to warn cases . . . the Restatement is authoritative in this jurisdiction." *Id.* at1150-51.

[52] *Rivera v. Philip Morris*, 395 F.3d 1142, 1151 (9th Cir., 2005).

[53] Motion at 16:21-23.

[54] Motion at 24:3-5.

[55] Motion at 23, n.13. In addition to *Forest*, Taser also cites *Papike v. Tambrands, Inc.*, 107 F.3d 737 (9th Cir. 1997) to support the argument that negligence equals strict liability argument. *Papike*, however, is a 9th Circuit case applying California law, and is not authority for this Court.

[56] *Allison*, 878 P.2d at 956, n.11.

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Therefore, in *Allison* the Court refused to consider the risk expectations of the "ordinary consumer" to determine whether Merck's vaccine failed to perform in the manner reasonably to be expected in light of its nature and intended function.[57] Though the plaintiff in *Allison* could not show that a specific design or manufacturing defect caused the injury in question, the Court accepted the injury as evidence of a defect so long as the plaintiff proved his injuries were caused by the drug because "a vaccine that causes brain damage 'obviously lacks fitness regardless of the cause of the malfunction."[58]

3. Taser's "Unreasonably Dangerous"Analysis Misstates Nevada Law.

Similarly, Taser interjects negligence concepts when it argues that strict liability cannot attach when there is no evidence that its "state-of-the-art TASER device had an unreasonably dangerous design." In *Allison*, Merck argued it should be free of product liability simply because it supplies a desirable product (a vaccine) that is not "unreasonably" dangerous (only one-in-a-million chance of severe reaction). The Nevada Supreme Court disagreed:

> Speaking of "unavoidable" danger or fault-free infliction of harm, or speaking of *reasonable* (and therefore acceptable) risk of harm, is very much alien to strict liability theory and should have no place in the Restatement provisions relating to strict liability. Mixing concepts of fault-free (unavoidable) manufacture and "reasonable risk" into the context of non-negligent, strict liability is entirely inconsistent with our products liability cases and with the law established in this state for almost thirty years.[59]

And because negligence concepts of "reasonable risk," "reasonably dangerous," and "unavoidable danger" are inconsistent with strict liability, Nevada "rejects the idea of freeing drug manufacturers from liability for defective drugs simply because they claim that the drugs are *reasonably* or *unavoidably* dangerous."[60] Thus, Taser's claim that the standards of strict liability and negligence are the same because "any test for design defect will undoubtedly

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[57] *Id.* at 952.

[58] *Allison*, 878 P.2d at 952. *Allison* is a 1994 case from the Nevada Supreme Court. Although *Rivera* is a Ninth Circuit case from 2005, its underlying authority for the "consumer expectations" test that Taser urges is *Forest* – a 1992 case from the United States District Court of Nevada. Therefore, *Allison* controls on this question of substantive state law.

[59] *Id.* at 955.

[60] *Id.* at 956.

involve a negligence-like reasonableness test" squarely contradicts Nevada law of strict liability under *Allison*.[61] And Taser's repeated protestations that the M26 Taser was "reasonably safe," or at least not "unreasonably dangerous," do not exonerate Taser from strict liability as the manufacturer of a defective product. Rather, Taser's repeated and misleading use of Nevada caselaw argues strongly in favor of denying Taser's motion for summary judgment.

C. Officer Peterson is Entitled to Partial Summary Judgment Because Taser Failed to Investigate or Warn of the Risk of Injury from a Daisy Chain Shock from a M26 Taser.

To allege strict products liability in Nevada, a plaintiff must show 1) the product has a defect that renders it unreasonably dangerous; 2) the defect existed at the time the product left the manufacturer; and 3) the defect caused the plaintiff's injury.[62] Products are defective when they fail to perform in the manner reasonably expected in light of their nature and intended function.[63] But the "concept of 'defect' is a broad one," and liability may also be imposed, even when faultlessly made, when a product is "unreasonably dangerous to place the product in the hands of the user without suitable and adequate warning concerning safety and use."[64]

Taser argues that Officer Peterson cannot conceivably establish the M26 Taser is defective because: a) she "admits" the legal sufficiency of Taser's warnings; b) Taser's warnings were adequate; and c) Taser owed no duty to Officer Peterson to warn her of the risks from a daisy chain shock. Each of Taser's claims contradict the evidence and Nevada law.

To preface its arguments, Taser again warns that "[p]roducts liability law should not punish manufacturers for unanticipated injuries from reasonably safe products."[65] But *Robinson's* analysis is not as simplistic as Taser suggests. In *Robinson*, the Nevada Supreme

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[61] *See* Motion at 16 n8.
[62] *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408 (1970).
[63] *Id.* at 413.
[64] *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 162 (1977).
[65] *See* Motion at 18:3-9, citing *Robinson v. G.G.C., Inc.*, 808 P.2d 522 (Nev. 1991); Taser again cites two unpublished opinions to support its argument – *Coulter v. E.I. DuPont de Nemours*, 1995 U.S. App. LEXIS 673, 5 (9th Cir. 1995) and *Peri & Sons Farms, Inc. v. Trical, Inc.* – which may not be cited under Ninth Circuit Court Rule 36-3(c)

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Court reversed a jury verdict and remanded the case for new trial in part because the trail court gave the improper jury instruction that adequate warnings will always shield a manufacturer from liability. Because "a warning is not an adequate replacement when a safety device will eliminate the need for the warning," the Court held that warnings do not shield manufacturers from liability when "the defect could have been avoided by a commercially feasible change in design that was available at the time the manufacturer placed the product in the stream of commerce."[66] Therefore, Taser's argument that it is entitled to summary judgment because of its general warnings is not enough for summary judgment when, as here, Taser could have avoided Officer Peterson's injuries by not demonstrating its daisy chain to Metro, which would have removed the risk of injury altogether.

1. Officer Peterson Does Not "Admit" Taser's Warnings are Sufficient.

Taser makes much hay from a statement by Officer Peterson's in her deposition that she would not have agreed to undergo an M26 Taser shock if she had been told of the risk of secondary injuries from falling. Because of her answer, Taser claims that Officer Peterson's testimony releases Taser from all liability as a matter of law. Officer Peterson's deposition, and the deposition of Taser's own experts, however, contradict Taser's one-sided representation.

Officer Peterson remembers very little of her M26 Taser training because of the nature of her spinal and neurological injuries. Rather, when pressed by Taser whether she remembered receiving any warning from Taser that falling could cause her injuries, she stated "I don't remember them saying that a fall is going to create injuries because I'll tell you this, if I did, I would never have done it."[67] Similarly, when asked if she would have agreed to undergo an M26 Taser shock if she had been told that she might receive secondary injuries from falling, Officer Peterson told Taser that "[n]o, I would not have."[68]

Taser twists these answers to argue that Officer Peterson's failure to "heed the very warning she says would have helped her decide against a voluntary exposure and avoid alleged

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[66] *Robinson*, 808 P.2d at 525.
[67] *See* Peterson Depo., Ex. 5, at 127:4-7.
[68] *Id.* at 127:8-11.

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injury insulates Taser from all liability.[69] Yet what Taser intentionally ignores is that Officer Peterson was injured while participating *in a daisy chain*. Thus, while Taser may have warned the M26 Taser "might" cause secondary injuries from falling in general, it gave no warning about the specific risk of injury from the daisy chain Taser recommended. Taser's designated training expert and corporate Vice-President of Training, Rick Gilbault, agrees that Taser's Version 10 warnings do not mention the daisy chain or warn of the risk of falling while in a daisy chain:

> Q. I want to make sure that I understood your answer to my last question. You said there is nothing within Version 10 that talks about the daisy chain procedure.
> A. No. I don't believe so.[70]
> . . .
> Q. Is there anything within Version 10 warnings that talks about the danger of falling while taking part in a daisy chain.
> A. I don't believe so. [71]

Thus, Taser's own training expert acknowledges that Taser's training materials do not mention daisy chains and do not warn of the risks from daisy chain shock. Because Officer Peterson was not given the warning that Taser claims, Taser's specious claim that Officer Peterson admits Taser's warnings are legally sufficient must be rejected.

2. Warnings That Are Never Given Are Ineffective and Inadequate by Definition, as Are Warnings that Materially Misrepresent the Risk.

It goes without saying that warnings that are never given cannot be effective or adequate. The long-winded assertions by Taser's counsel to the contrary defy logic and the testimony of Taser's own experts. Though Taser did provide basic warnings about the general risk of falling, Taser gave no warnings of the specific risk from a daisy chain shock and fall.[72] Far worse than providing no warning, however, Taser's actually misrepresents the degree of risk that police officers face from daisy chain shocks within its Version 10 training materials.

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[69] *See* Motion at 19:23-24.
[70] *See* Deposition Excerpt of Richard Guilbault at 85:23-86:2, attached hereto as Exhibit 8.
[71] *Id.* at 86:19-22.
[72] *Id.*

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. . .

a. Taser's Biomechanical Study Reveals The Risk of Spinal Injury for Women in a Daisy Chain Fall to be At Least 17%.

Gary T. Yamaguchi, Ph.D, is Taser's bio-mechanical expert with expertise in the fields of biomechanics, dynamics, and neuromuscular biomechanics. Dr. Yamaguchi was hired by Taser to conduct a "biomechanical injury analysis" of the M26 Taser.[73] To do this, Dr. Yamaguchi used a computer simulation based on crash test dummies (the "MAYDAMO" simulation) to model the risk of injury for a women of Lisa Peterson's age and weight from daisy-chain like fall.[74] In Dr. Yamaguchi's model, a single crash-test dummy is placed on its knees in a leaning position and allowed to fall forward to the floor from the effect of gravity.[75] Unlike Lisa Peterson's fall, the dummy falls by itself without interference from adjacent officers.[76] Unlike Lisa Peterson's fall, the dummy falls onto a virtual "floor" modeled with the characteristics of 2-inch automotive seat cushion foam rather than a gym training mat.[77] Unlike Lisa Peterson's fall, the dummy does not turn to the left as it falls, nor is its speed affected by muscle contractions or the weight of attached officers.[78]

Despite these shortcomings, Dr. Yamaguchi's study reveals that the risk of an AIS-2 or greater injury, which includes disc herniations without nerve root damage, is 17%, while the risk of an AIS 3 or greater injury, which includes disc herniations with nerve root damage, is 6%:

> Q. So under your model, which doesn't take into account the effect of muscle contraction and doesn't taken into account whether there's any change caused by a twisting or bending of the neck, that it still concludes that there's a 17 percent probability for an AIS 2 or greater injury from a daisy chain – or pardon me – a fall similar to the one within the model?

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[73] *See* Expert Report of Gary T. Yamaguchi at 1, attached hereto as Exhibit 9.
[74] *Id.* at 11.
[75] *See* Deposition Transcript of Gary Yamaguchi, Ph.D, attached hereto as Exhibit 10, at 191:22-192:16 ("Q. This simulation is purely of a computer modeled scalable male model and a weighted female model falling to the mat under the effects of gravity. It's not intended to simulate what necessarily occurs during a daisy chain exposure, is that correct? A. That's correct. You would have to probably add more, you know, ATDs linked together to do that. But what we were trying to do was just calculate the forces and moments within the neck and lumbar spine for a single occupant. And we don't believe that unless there was inordinate contact between the people falling forward that the foce would be that much different under a case where several people are linked together.").
[76] *Id.*
[77] *Id.* at 148:10-149:20.
[78] *Id* at 196:20-197:11.

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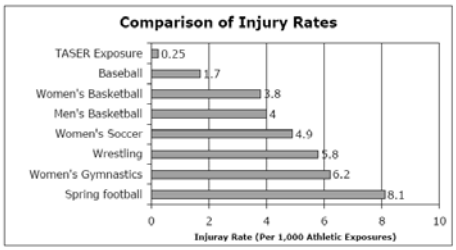
> A. The answer to that is that the dummy, without considering muscular contractions, did develop a neck-bending moment that . . .**corresponds to a 17 percent or greater chance for AIS 2 or greater injuries.**[79]

Thus, Taser's own biomechanical study reveals that falling in a Taser daisy chain subjects women like Officer Peterson to a 17% risk of disc herniation to the cervical spine. Further, Dr. Yamaguchi agrees that several factors can increase the risk of injury. For example, if the velocity of a daisy chain fall is higher than the velocity of a gravity-driven fall, the risk of injury would probably go up.[80] Likewise, if a training mat were stiffer than an automotive seat cushion foam, the injury potential would go up.[81] But even these exacerbating factors are ignored, a 17% risk of spinal injury reflects a staggering degree of risk for which Taser provided no warning.

b. Taser Told Officers The Risk of Injury From a M26 Taser Fall is Only 0.25 %.

Despite the severe risk of spinal injury found by Dr. Yamaguchi, Taser's Version 10 warnings tell police officers that a M26 Taser shock is no more risky than "physical exertion similar to an athletic activity such as playing a game of basketball."[82] In fact, in the *last* slide officers see before they are strongly recommended to volunteer, Taser expressly claims that the injury rate for M26 Taser falls to be only 1 in 4,000 – **a injury rate of only 0.25%**– that is "significantly lower than for other athletic type activities such as [defensive tactics] training."[83] Therefore, while Taser claimed the risk of injury from falling to be only 0.25%, Dr. Yamaguchi's

Volunteer Exposure



CAUTION
Subjecting yourself to the TASER involves physical exertion similar to an athletic activity such as playing a game of basketball. The risk of injury from physical exertion or falling, while very low, is not zero. **Volunteering is highly recommended, but is not mandatory.**

Version 10 Lesson Plan, Slide 30

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[79] *Id.* (emphasis added).
[80] *Id.* at 222:6-12.
[81] *Id.* at 223:3-10.
[82] *See* Ex. 1, at 30, "Volunteer Exposure."
[83] *Id.*

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investigation establishes a far higher risk of injury of 17%.

3. Nevada Law Requires Warnings to Communicate the *Specific* Risk.

The duty to warn arises when a manufacturer has reason to anticipate that some danger may result from a particular use of a product.[84] Warnings must adequately communicate *any* dangers that may flow from the use or foreseeable misuse of a product.[85] Although the adequacy of warnings is primarily a question of fact for the jury, the Nevada Supreme Court held in *Lewis v. Sea Ray Boats, Inc.*, that general warnings do not exonerate manufacturers from liability as a matter of law.[86]

In reaching its decision, *Sea Ray* relied upon two prior Nevada cases, *Fyssakis* and *Allison.*[87] In *Fyssakis*, the Court allowed a strict liability claim by a dishwasher blinded by dishwashing soap to survive summary judgment despite the manufacturer's general warning of the soap's corrosiveness because the manufacturer did not warn specifically that the soap could cause blindness.[88] In *Allison*, the Court held that Merck's general warning of encephalitis (swelling in the brain) was not adequate warning of the one-in-a-million chance of blindness, deafness, or mental retardation that might result from brain swelling.[89]

In *Sea Ray*, one owner of a boat on Lake Mead died and one owner suffered serious injury when fumes from the boat's gasoline generator powering the air conditioner were blown into the cabin by the wind. Although the manufacturer warned of the dangers from carbon monoxide from the boat's engine, it did not warn of the danger of fumes from the gasoline generator. Further, no incidents of this type resulting in death had ever been reported in connection with this boat model. Regardless, the Court held that these facts presented a jury question that required instruction on adequate warnings, even though the danger of carbon

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[84] *Oak Grove Investors v. Bell & Gossett Company,* 668 P.2d 1075, 1080 (Nev. 1983).
[85] *Fyssakis v. Knight Equipment Corp.*, 826 P.2d 570, 571-72 (Nev. 1992).
[86] *Lewis v. Sea Ray Boats, Inc.*, 65 P.3d 245, 250 (Nev. 2003).
[87] *Id.* at 251.
[88] *Fyssakis,* 826 P.2d at 572.
[89] *Allison*, 878 P.2d at 957.

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monoxide poisoning from the generator was unknown and carbon monoxide warnings were given for the boat's engine.[90]

Sea Ray requires "warnings in the context of products liabilities claims [to] be: **1) designed to reasonably catch the consumers' attention, 2) that the language be comprehensible and give a fair indication of the specific risks attendant to use of the product, and 3) that the warnings be of sufficient intensity justified by the magnitude of the risk.**[91] The *Sea Ray* Court adopted this standard from *Pavlides v. Galveston Yacht Basin, Inc.,* in which the Fifth Circuit held that an adequate warning must provide a "complete disclosure of the existence and extent of the risk involved," as a manufacturer "does not generally have the right to assume that persons using a complex product know how it is to be used."[92]

In this case, Taser's warnings do not meet *Sea Ray's* standards. Even if the position taken by Taser were true – that it warned of the risk of a daisy chain fall by providing a general warning of "secondary injuries" from falling – this general warning does not supply "complete disclosure of the existence and extent of the risk involved," because it fails to inform police officers of the extent of the risk. But because Taser's own training expert acknowledges that Taser gave no warning about the risk of daisy chain falls, this is an academic consideration. And because Taser's Version 10 warnings claim that the risk of injury from falling is far less (0.25%) than the actual risk demonstrated by Taser's biomechanical expert (17%), Taser cannot establish that its warnings gave "fair indication of the specific risks attendant to" the M26 Taser as *Sea Ray* requires. Summary judgment for Taser is therefore inappropriate.

4. Taser Failed to Investigate or Warn of the Foreseeable Risk from a Daisy Chain Fall.

Manufacturers have a duty to investigate and warn of the probability of foreseeable

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[90] *Sea Ray*, 65 P.3d at 250.
[91] *Id.*(emphasis added).
[92] *Pavlides v. Galveston Yacht Basin, Inc.* 727 F.2d 330, 338 (5th Cir. 1984)(*quoting Allman Brothers Farms & Feed Mill, Inc. v. Diamond Laboratories, Inc.*, 437 F.2d 1295, 1303 (5th Cir. 1971)).

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hazards. Taser's chief warnings expert, Adam Aleksander, Ph.D, PE, CSP, agrees:

> Q. When a manufacturer creates a new product to a market, what duty does the manufacturer have, in your opinion, to investigate the reasonably foreseeable hazards, if they have any duty?
>
> A. **Well, they have a duty, and they have to know their products well enough to foresee the reasonably hazards that go with that product.** For instance, a go-cart manufacturer should guard the equipment so that people's hair doesn't get caught in the equipment and remove their scalps or break their necks. That's an obvious example. So you have to guard against that.[93]
>
> . . .
>
> Q. Let's say that a manufacturer creates a new product, and they think there are four or five different risks. It might kill you. It might turn your hair yellow. It might do an assortment of different risks. Does the manufacturer have a duty, in your opinion, to determine the probability of those risks so they can determine whether or not they are significant or not?
>
> A. Well, they do. And that's where the major classification of warnings comes from. That's danger, warning, and caution. And that's directly related both to the probability of an injury and the severity of an injury. So the severity and the probability cross-multiplied usually give you what you call the risk. **So a manufacturer should do that, and that is how they can direct the proper use of the various labels they need.**[94]

It is undisputed that the risk of falling from an M26 Taser is foreseeable, because Taser's Version 10 training program actually warns of this risk. Again, Dr. Aleksander agrees that the risk of falling is a reasonably foreseeable hazard from an M26 Taser shock:

> Q. Would you agree that falling is, essentially, an intended consequence of Taser exposure?
>
> A. I don't know if its intended, but **it's certainly a reasonably foreseeable hazard**, yes. [95]

But despite Taser's recognition of the risk of falling from an M26 Taser shock, Taser neither warned nor investigated the likelihood of injury from a daisy chain fall. This is startling because Taser's daisy chain shock is specifically designed to cause police officers to fall without the ability to catch themselves. Taser did not investigate this risk even though Dr. Yamaguchi states in his deposition that the studies and tools to research the risk of a daisy chain fall were available

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[93] *See* Deposition Excerpt of Adam K. Aleksander, attached hereto as Exhibit11, at 41:2-15; *see also Oak Grove Investors,* 668 P.2d at 1080.
[94] *Id.* at 42:6-23.
[95] *Id.* at 57:13-18.

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to Taser before Officer Peterson's injury and that he could have done such an analysis if asked.[96]

Therefore, although Taser: a) foresaw the risk of M26 Taser falls; b) recommended a training procedure to cause unprotected M26 Taser falls; and c) possessed the capability and the duty to investigate the extent of the risk, Taser failed to do so. Again, Dr. Aleksandar helps explain the ramifications of Taser's failure:

> Q. What happens when – we are talking about a reasonably foreseeable hazard. Do you have an opinion of what the results should be if a company doesn't take the time to determine the reasonably foreseeable hazards and then goes to market?
>
> A. Well, I've been involved in cases where that has happened, and the company bears a liability then.[97]

Officer Peterson agrees. Taser's motion for summary judgment should therefore be denied for Taser's failure to either investigate or warn of the danger from daisy chain shocks when the risk of falling from an M26 Taser shock was a reasonably foreseeable hazard.

D. Because Taser Did Not Warn Officer Peterson of the Risks From a Daisy Chain Fall, it Cannot Demonstrate That Officer Peterson "Assumed the Risk."

The Nevada Supreme Court has stated that neither contributory nor comparative negligence are defenses to strict liability.[98] Rather, "the only defenses available in a strict products liability action [are] assumption of the risk and misuse of the product."[99]

1. Taser Must Provide Warnings for the Foreseeable Misuse of its Product.

Although Taser never directly argues that Metro or Officer Peterson misused the M26 Taser in training, Taser does imply a misuse of its product at times by claiming its daisy chain training method was not recommended. Yet under Nevada law, even the misuse of a product will

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[96] *Id.* at 139:9-140:1 ("Q. All of these studies exited before 2003, is that correct? A. I think that you're right, but I'll check the reference list to make sure. Q. In fact, the most recent study I see is a 2002 study. A. Yeah, I think you're right. Q. Okay. So I guess my question is that, let's say in 2002, if someone had asked you to do this same kind of study, all of the information was available to you to go out and basically you could have prepared essentially the same report in 20002 as you could have today, correct? Based on this preexisting information – A. If this case had arise in 2002, I probably could have produced this same report.").

[97] See Aleksander Depo., Ex. 11, at 71:11-20.

[98] *Young's Machine Co. v. Long*, 100 Nev. 692, 694 (1984).

[99] *Id.*

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not relieve a manufacturer of its duty to warn when the misuse is reasonably foreseeable.

In *Yamaha v. Arnoult*, the Nevada Supreme Court upheld a jury verdict against the manufacturer, Yamaha, in part because "the jury could have reasonably concluded that the warnings [Yamaha provided] were inadequate to advice the novice user of how jumping could be avoided while using the [ATV] (*i.e.* over rough desert terrain within the speed capabilities of the vehicle)," even though Yamaha provided a general warning against jumping its all-terrain vehicles, because the manufacturer's general warning against jumping did not absolve it from liability to provide a more specific warning concerning the foreseeable misuse of product.[100] As the *Yamaha* Court notes, "Nevada law requires that warnings adequately communicate *any* dangers that flow from the use *or foreseeable misuse* of a product."[101] Therefore, even if Metro's use of the daisy chain training technique were a misuse of the M26 Taser, which is disputed, Taser still possesses a duty to warn of the risks from a daisy chain shock because Taser's own chief instructor, Hans Marrero, demonstrated the daisy chain for Metro and trained Metro's head M26 Taser trainer.

2. Taser Cannot Establish Officer Peterson Assumed the Risk of a Daisy Chain shock.

Taser's only other defense to strict liability is assumption of the risk, which requires Taser to prove that: 1) Officer Peterson knew and appreciated the specific risk and danger created by the M26 Taser, 2) Officer Peterson voluntarily encountered the risk while realizing the danger, and 3) Officer Peterson's decision to voluntarily encounter the risk was unreasonable.[102] But Taser cannot meet this standard to prevail on summary judgment, as its training expert admits that Version 10 contains no warnings regarding the daisy chain shock, its biomechanical expert acknowledges a severe risk for a serious spinal injury (17%); its warnings experts notes Taser's duty to investigate foreseeable hazards, and its Version 10 warnings that

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[100] *Yamaha*, 955 P.2d at 655.
[101] *Id.* at 665 (emphasis added).
[102] *Central Telephone Co. v. Fixtures Manufacturing Corp.*, 738 P.2d 510 (Nev. 1987).

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expressly claim an injury rate far below that demonstrated by Taser's own biomechanical analysis.

Because Taser cannot establish either of the two defenses to strict product liability under Nevada law, it is not entitled to summary judgment.

. . .

E. Taser's Anecdotal Claim That 700,000 People Have Been Shocked Without Injury Is Irrelevant to Whether the M26 Taser Caused Officer Peterson's Injuries– but it Does Show That Its Change in Training Was Effective.

In one of Taser's favorite refrains, Taser claims that Officer Peterson's injuries are "soundly contradicted by more than 700,000 human uses and over 250,000 law enforcement training applications revealing no evidence or reports of the types of injuries alleged here."[103] Taser's anecdote suffers two fatal defects. First, Taser provides no evidence to support it. When Officer Peterson was injured by the M26 Taser in November 2003, Taser claimed that 40,000 people had been shocked without long-term injury to pacify volunteers.[104] Taser now claims that 700,000 people have been shocked without similar injury to pacify this Court. But Taser does not track individual exposures or injuries and its claim is no more than unsupported hyperbole:

> Q. Okay. Is there any data collection, or spread sheet, or anything that has ever been put together that has 40,000, 100,000, 200,000 people [that Taser] followed up to verify that there's no long-term injury from an exposure?
> A. **No.**[105]

The second reason Taser's claim is flawed is that it is completely untrue. Again, as Rick Guilbault, Taser's training expert and Vice-President of Training, clarifies:

> Q. The injury reports that prompted Taser to stop recommending group exposures were related to a daisy chain method of exposure, is that correct?

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[103] *See* Motion at 1:8-9.

[104] *See* Ex. 1, Slide 22, "Medical Safety," ("**There have been an estimated 40,000 volunteers who have been hit with the M26.** There are over 3,000 documented field uses of the weapon as well. It is estimated that only 20% of the field uses are reported to TASER International, hence it is estimated there have been over 10,000 field uses of the M26. **There have been no long term injuries caused by the TASER.**")(Emphasis added).

[105] See Guilbault Depo., Ex. 5, at 56:1-6 (emphasis added).

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A. Not necessarily.
Q. Okay.
A. Because, as a result of the reports we got regarding the injuries that occurred during daisy chain, we actually recommended if they were going to do group exposures, lie down rather than interlock elbows, interlace fingers and hold hands instead.
Q. Okay. So to make sure I understand, the group exposure method of having people lie down actually became the recommended method for group exposure based on reports of injuries from the daisy chain method?
A. **Correct**.[106]

Therefore, contrary to the representation of Taser's counsel, reports of training injuries from daisy chain shocks *do* exist.

Further, to the extent no injuries from daisy chain shocks have been reported recently, the reason is not that daisy chains are safe, but that Taser changed its training to no longer allow daisy chains. Therefore, while Taser's anecdotal claim that 700,000 people have been shocked without injury is not proof that the M26 Taser does not cause injury when used on a daisy chain, it is compelling evidence that if Taser had not subjected Officer Peterson to a daisy chain, she would not have been injured. Further, Taser's claim that its prior warnings were sufficient and that Officer Lewandowski has not demonstrated the feasibility of an alternative warning is belied by the self-proclaimed success of Taser's new training procedures.

F. Taser's "Bulk Supplier" Doctrine Does Not Apply to this Case and Is an Inadequate Basis for Summary Judgment.

Taser's argument it is exempt from liability for failing to warn under the "learned intermediary" doctrine, because Metro was in the best position to warn its officers about the risks of the M26 Taser, ignores case law and the evidence. Taser asserts it is a "bulk supplier" because it was not in the best position to warn Officer Peterson because it had no contact with her as a trainee and because Taser believes that Metro was best situated to warn her of the risks from using the M26 Taser. First, this argument runs directly counter to the rest of Taser's motion, in which Taser claims that it was a manufacturer on the cutting edge of technology, producing a state-of-the art product, and incapable of knowing all the inherent risks from M26 Taser shocks.

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[106] *Id.* at 70:8-23 (emphasis added).

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Either the M26 Taser is a state of the art product, which suggests that it, rather than Metro, is in the best position to warn, or it is not, which means that it should have recognized the dangers and provided adequate warnings.

Taser's argument also runs counter to the case law it cites. In *Forest v. E.I. Dupont*, the Court explained that the justification for the bulk supplier doctrine is that "in the case of bulk supplier and its vendee/intermediary *who actually manufactures the finished product,* it is almost always the case that the intermediary is in a better position to warn the ultimate consumer of dangers than is the bulk supplier."[107] Although *Forest* notes some situations arise where "bulk products are themselves complicated or finished products,"[108] the crux of the doctrine is whether the "bulk supplier was reasonable in believing that the intermediary knew of the dangers associated with the bulk product, and 2) that the bulk supplier was reasonable in relying on the intermediary to warn the ultimate user of such dangers."[109] Thus, the "major inquiry in most bulk supplier cases will concern the knowledge of the intermediary. This court believes that under the test outlined above, a bulk supplier **must show that the intermediary knew of the dangers associated with the bulk product, or should have known of these dangers.**"[110]

Taser fails to meet this standard because it cannot demonstrate that Metro knew the dangers associated with the use of the M26 Taser, particularly when Metro explicitly relied upon Taser's expertise to train Metro's officers to use the M26 Taser:

> Although LVMPD officers and trainers have tactical training experience and may be sophisticated use-of-force trainers and users in some areas with some established weapon systems, LVMPD did not possess the independent experience or background with Taser ECD weapons in late 2003 to determine the actual risks from Taser ECD shocks because of the newness of the weapon and lack of LVMPD experience and field testing with the weapon. Accordingly, LVMPD relied upon Taser's training materials and repeated representations regarding the safety and minimal risks of its weapons to train its officers.[111]

Because of the analysis requires under the bulk supplier doctrine, *Forest* notes "the issues with

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[107] *Forest v. DuPont de. Nemours*, 791 F.Supp. 1460, 1465 (D. Nev. 1992).
[108] *Id.* at 1467 n.8.
[109] *Id.* at 1465.
[110] *Id.*
[111] *See* Young Depo., Ex. 4, at 2.

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the bulk supplier doctrine make summary judgment on *any* record highly questionable."[112] And given the evidence and testimony in this case, summary judgment on the basis of the bulk supplier doctrine is unwarranted.

If these considerations were not enough, Taser fails to recognize that comparative fault of an employer is not a defense to strict liability for a manufacturer in Nevada. In *Outboard Marine Corp. v. Schupbach*, the Nevada Supreme Court specifically held a manufacturer strictly liable even though the employer was insulated from liability by a worker's compensation law and the jury found the employer at greater fault than the manufacturer for the plaintiff's injury.[113] "To date, the legislature has insulated the contributing employer and has voided indemnity absent an independent duty owing from the employer to the third party."[114] Therefore, once again, Nevada law squarely rejects the legal standard proffered by Taser.

G. Officer Peterson Can Establish Her Injuries Were Caused from M26 Taser Training in November 2003.

Taser's argument for summary judgment contends that Officer Peterson cannot establish her injuries are the result of her November 2003 training with the M26 Taser. But this ignores the testimony of Officer Peterson's treating physicians, as well as the worker's compensation disability evaluation performed on behalf of Metro by Richard Walter Kudrewicz, M.D., who reviewed all of Officer Peterson's medical records and found they were related to Officer Peterson's M26 Taser training accident with Metro.[115] Although Officer Peterson has disclosed all of her treating physicians as potential witnesses in this case, Taser has only chosen to depose Dr. Mark Kabins, who performed both of Officer Peterson's spinal surgeries. And though it is true Dr. Kabins acknowledges Officer Peterson's pre-existing degenerative disc conditions – which are synonymous with aging – Dr. Kabins also unequivocally states:

> [Officer Peterson] does clearly have pre-existing degenerative changes that render the spine more susceptible to injury and less resilient to a traumatic event . . .But

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[112] *Id.* at 1469.
[113] *Outboard Marine Corp. v. Schupbach*, 561 P.2d 450, 454 (Nev. 1977)
[114] *Id.* at 454.
[115] *See* Ex. 6, Disability Evaluation.

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> in this examiner's opinion, within a reasonable degree of medical certainty and probability, if it were not for the Taser accident of 11/21/2003, she would not have necessitated the surgery or the extended conservative care thereafter. **Therefore, the primary and proximate cause for the need for conservative care and surgery should be considered the Taser.**[116]

Therefore, Taser claim's that no evidence supports causation in this case flatly contradicts the medical records and anticipated testimony of Officer Peterson's treating physicians. Accordingly, summary judgment for Taser is inappropriate.

H. This Court Already Refused Taser's Demand to Dismiss Officer Peterson's Warranty Claim and Request of Punitive Damages.

Both of Taser's last two arguments, which demand dismissal of Officer Peterson's warranty claim and punitive damages "claim," have already been heard and decided by this Court. On February 14, 2006, Taser filed its motion to dismiss (Doc. #5), which included arguments for dismissal identical to those now advanced by Taser. These arguments were opposed by Officer Peterson (Doc. # 14), heard by this Court on April 24, 2006, and denied by order of the Court on May 18, 2006 (Doc. #25). Taser never moved for reconsideration of this Court's order and its present request for dismissal of Officer Peterson's warranty claims and punitive damages remedy, is untimely, unwarranted, and should be denied.

V.

CONCLUSION

Misstated law and overstated facts are an insufficient basis for summary judgment. Accordingly, Officer Peterson respectfully requests this Court to deny Taser's motion for summary judgment and award partial summary judgment for Taser's failure to warn under strict liability.

DATED this 7th day of November, 2008.

Respectfully submitted by:

HARRISON, KEMP, JONES

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[116] *See* Deposition Excerpt of Mark Kabins, M.D., at 23:4-16, attached hereto as Exhibit 12 (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2008, the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT TASER INTERNATIONAL'S MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT** was electronically filed and was served on the following counsel of record via the Court's electronic filing system:

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