IN THE SUPREME COURT OF THE STATE OF NEVADA

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

A.K. and K.K., minors, by and through their guardian MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D. (decedent); THE ESTATE OF KAYVAN KHIABANI, M.D. (decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN, DDS (decedent); and the ESTATE OF KATAYOUN BARIN, DDS (decedent),

Respondents.

No 75953

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id*. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District County Eighth Department 14

County Clark Judge Adriana Escobar

District Ct. Case No. A-17-755977-C

2. Attorney filing this docketing statement:

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Client(s) Motor Coach Industries, Inc. (hereinafter "MCI")

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

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Client(s) K.K. and A.K., minors by and through their guardian, Marie-Claude Rigaud; Siamak Barin, as executor of the Estate of Kayvan Khiabani, M.D. (Decedent); the Estate of Kayvan Khiabani, M.D. (Deceased); Siamak Barin, as Executor of the Estate of Katayoun Barin, DDS (Deceased); and the Estate of Katayoun Barin, DDS (Deceased)

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☒ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify)
- ☐ Divorce Decree:
  - ☐ Original
  - ☐ Modification
- ☐ Other disposition (specify):

5. Does this appeal raise issues concerning any of the following? No.

- ☐ Child Custody
- ☐ Venue

☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is a strict-liability action arising from the death of a bicyclist who swerved into the path of a moving motor coach in traffic. The district court entered judgment in favor of plaintiffs-respondents, from which defendant-appellant now appeals.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

1. Whether defendant-appellant is entitled to judgment as a matter of law.

2. Whether the district court erred in submitting a flawed verdict form to the jury which effectively excused the jury from determining whether the absence of an allegedly desirable warning—even assuming it would be heeded—was a proximate or legal cause of injuries.

3. Whether the district court erred in preventing defendant's human factors expert from testifying regarding Nevada statutes directly affecting the need for any warning about the allegedly dangerous aspect of the motor coach.

4. Whether the district court abused its discretion in denying a new trial in light of newly-discovered evidence that directly impacts the jury's determination of damages and liability.

5. Whether the district court erred in determining that the jury was not permitted to take into account that income taxes would have greatly reduced the amount of probable support plaintiffs could have received.

(Post-judgment motions remain pending in the district court. This list and articulation of issues may change as a result of the district court's resolution of those motions.)

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

One of the issues involves a verdict form that failed to permit the jury to determine the ultimate question of proximate or legal causation in a failure-to-warn case (beyond the threshold issue of whether any warning would have been heeded). To establish liability for inadequate warnings, a plaintiff must prove that the lack of

adequate warning caused his injuries. *Michaels v. Pentair Water Pool & Spa*, 131 Nev. Adv. Op. 81, 357 P.3d 387, 397 (Ct. App. 2015); *Rivera v. Phillip Morris, Inc.*, 125 Nev. 185, 192, 209 P.3d 271, 275 (2009). Here, plaintiffs prevailed because the verdict form did not allow the jury to determine whether any additional warning would have prevented the injuries, even assuming it would have been heeded. It is necessary for the Court to maintain a uniform application of the law concerning the causation analysis on a failure-to-warn claim.

13. Assignment to the Court of Appeals or Retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court under NRAP 17(a)(10) and NRAP 17(a)(11).

14. Trial. If this action proceeded to trial, how many days did the trial last?

23

Was it a bench or jury trial? Jury

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 4/17/18 (Exhibit A)

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served 4/18/18 (Exhibit A)

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☒ NRCP 50(b) Date of filing 5/7/18 (Exhibit B)

☒ NRCP 52(b) Date of filing 5/7/18 (Exhibit C)

☒ NRCP 59 Date of filing 5/7/18 (Exhibit D)

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. __, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion

The motions remain pending. The appeal is premature because tolling post-judgment motions remain pending. To avoid waiver and because the judgment would otherwise be final but for those motions, defendant filed the notice of appeal in an abundance of caution. Pursuant to NRAP 4(a)(6), the notice of appeal from the final judgment will be deemed timely upon entry of the district court's order(s) resolving the pending tolling motions.

(c) Date written notice of entry of order resolving tolling motion was served

The motions remain pending.

Was service by: N/A

☐ Delivery

☒ Mail/Electronic/Fax

19. Date notice of appeal filed 5/18/18 (Exhibit E)

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

The time limit for filing the notice of appeal from a final judgment is governed by NRAP 4(a)(1).

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☐ Other (specify)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:

This appeal is from a final judgment pursuant to NRAP 3A(b)(1). Once decisions on the pending tolling motions are entered, the Court undoubtedly will have jurisdiction under NRAP 3A(b)(1) and NRAP 4(a)(6).

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

K. K., a minor by and through guardian Marie-Claude Rigaud
A.K., a minor by and through guardian Marie-Claude Rigaud
Siamak Barin, as executor of the Estate of Kayvan Khiabani, M.D.
The Estate of Kayvan Khiabani, M.D.
Siamak Barin, as executor of the Estate of Katayoun Barin, DDS
The Estate of Katayoun Barin, DDS
Motor Coach Industries, Inc.
Michelangelo Leasing Inc. d/b/a Ryan's Express
Edward Hubbard
Bell Sports, Inc. d/b/a Giro Sport Design
SevenPlus Bicycles, Inc. d/b/a Pro Cyclery

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

Plaintiffs' claims against Michelangelo Leasing Inc. d/b/a Ryan's Express and Edward Hubbard were resolved with the August 22, 2018 "Stipulation and Order Dismissing Plaintiffs' Claims Against Defendants Michelangelo Leasing, Inc. and Edward Hubbard Only." (Exhibit F.)

Bell Sports, Inc. d/b/a Giro Sport Design's motion for determination of good faith settlement was granted on January 23, 2018, although no formal order memorializing the approval and dismissing the claims has been entered.

Plaintiffs' claims against SevenPlus Bicycles, Inc. d/b/a Pro Cyclery were settled with the January 5, 2018 "Findings of Fact Conclusions of Law and Order on Motion for Determination of Good Faith Settlement." (Exhibit G.) A formal order dismissing the claims has not yet been entered.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiffs filed their "Second Amended Complaint and Demand for Jury Trial" on November 17, 2017 for 1) strict liability: defective condition or failure to warn (MCI); 2) negligence (Ryan's Express and Edward Hubbard); 3) negligence per se (Ryan's Express and Edward Hubbard); 4) negligent training (Ryan's Express); 5) strict liability: defective condition or failure to warn (Giro and Pro Cyclery); 6) breach of implied warranty of fitness for a particular purpose (Giro and Pro Cyclery); 7) wrongful death of Kayvan Khiabani, MD (all defendants); and 8) wrongful death of Katayoun Barin, DDS (all defendants) (Exhibit H).

The motion to dismiss the wrongful death claim for Katayoun Barin was granted on January 23, 2018. A formal order dismissing this claim is forthcoming.

The remaining claims against MCI were resolved by the April 18, 2018 "Judgment" (Exhibit D).

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

See answers to Questions 16 and 21(b) above.

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

This is an appeal from a judgment upon jury verdict which purports to be a final "judgment" pursuant to NRAP 3A(b)(1). Given that designation and that appellate deadlines are jurisdictional, appellant filed this appeal out of an abundance of caution, which practice is contemplated in NRAP 4(a)(6). Pursuant to NRAP 4(a)(6), moreover, the notice of appeal from the final judgment will be deemed timely upon entry of the district court's order(s) resolving the pending tolling motions.

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal

- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Motor Coach Industries, Inc.
Name of appellant

Joel D. Henriod
Name of counsel of record

/s/ Joel D. Henriod
Signature of counsel of record

August 27, 2018
Date

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I hereby certify that this "Docketing Statement" was filed electronically with the Nevada Supreme Court on the 27th day of August, 2018. Electronic service of the foregoing "Docketing Statement" shall be made in accordance with the Master Service List as follows:

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ERIC PEPPERMAN
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Las Vegas, Nevada 89169

Attorneys for Respondents

PETER S. CHRISTIANSEN
KENDELEE L. WORKS
CHRISTIANSEN LAW OFFICES
810 South Casino Center Boulevard
Las Vegas, Nevada 89101

Attorneys for Respondents

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

ARA H. SHIRINIAN
10651 Capesthorne Way
Las Vegas, Nevada 89135

Dated this 27th day of August, 2018.

/s/ Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT A TO DOCKETING STATEMENT

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

NOTICE OF ENTRY OF JUDGMENT

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a Judgment was entered in the above entitled matter on April 17, 2018.

//

//

A copy of said Judgment is attached hereto.

DATED this 18th day of April, 2018.

KEMP, JONES & COULTHARD, LLP

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2018, the foregoing NOTICE OF ENTRY OF JUDGMENT was served on all parties currently on the electronic service list via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2.

An Employee of Kemp, Jones & Coulthard.

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

JUDGMENT

The above-captioned action having come before the Court for a jury trial commencing on February 12, 2018, the Honorable Adriana Escobar, District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its special verdict,

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IT IS HEREBY ORDERED, ADJUDGED, and DECREED that, pursuant to the jury's verdict, judgment is entered in favor of Plaintiffs, KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian MARIE-CLAUDE RIGAUD, and SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent) and as Executor of the Estate of Katayoun ("Katy") Barin, DDS (Decedent), and against Defendant MOTOR COACH INDUSTRIES, INC. ("MCI"), as follows:

KEON KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$1,000,000.00
Future Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$7,000,000.00
Loss of Probable Support:	$1,200,000.00
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.34
TOTAL	$9,533,333.34

ARIA KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$1,000,000.00
Future Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$5,000,000.00
Loss of Probable Support:	$1,000,000.00
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.33
TOTAL	$7,333,333.33

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THE ESTATE OF KATY BARIN DAMAGES

Greif and Sorrow, Loss of Companionship, Society, Comfort, and Consortium suffered by Katy Barin before her October 12, 2017 death:	$1,000,000.00
Loss of Probable Support before her October 12, 2017 death33	$500,000.00
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.33
TOTAL	$1,833,333.33

THE ESTATE OF KAYVAN KHIABANI COMPENSATORY DAMAGES

Medical and Funeral Expenses	$46,003.62

PLAINTIFFS' COMBINED TOTAL DAMAGES AWARD:	**$18,746,003.62**

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, under Nev. Rev. Stat. § 18.020, Plaintiffs shall also recover all costs reasonably and necessarily incurred in this action in an amount to be determined.

///

///

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IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, pursuant to Nev. Rev. Stat. § 17.130, Plaintiffs shall receive prejudgment interest, accruing from June 1, 2017, at the rate provided by law, on $4,546,003.62 of the combined total damages award, as this amount represents past damages for: (i) the grief and sorrow and loss of companionship, society, and comfort suffered by Keon Khiabani ($1,000,000.00); (ii) the grief and sorrow and loss of companionship, society, and comfort suffered by Aria Khiabani ($1,000,000.00); (iii) the grief and sorrow and loss of companionship, society, comfort, consortium, and probable support suffered by Katy Barin before her October 12, 2017 death ($1,500,000.00); (iv) the pain and suffering of Decedent Dr. Kayvan Khiabani ($1,000,000.00); and (v) the medical and funeral expenses incurred by Decedent Dr. Kayvan Khiabani ($46,003.62). As of April 11, 2018, the total amount of accrued prejudgment interest is $246,480.55.[1]

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs' total judgment shall bear post-judgment interest at the rate provided by law, which is currently 6.5%/year, until satisfied.

IN SUM, judgment upon the verdict in favor of Plaintiffs is hereby given for Eighteen Million Seven Hundred Forty-Six Thousand Three and 62/100 Dollars ($18,746,003.62) against Defendant MCI, with prejudgment interest, as described above, and with post-judgment interest continuing to accrue on the total judgment amount from the date this Judgment is entered until it is fully satisfied.

Dated this 17th day of April, 2018.

DISTRICT COURT JUDGE

[1] 06/01/2017 - 06/30/2017 $21,484.53(30 days @ $716.15/daily @ 5.750%/year);
07/01/2017 - 12/31/2017 $143,230.23(184 days @ $778.43/daily @ 6.250%/year);
1/01/2018 - 04/11/2018 $81,765.78(101 days @ $809.56/daily @ 6.500%/year)

Respectfully Submitted by:

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EXHIBIT B TO DOCKETING STATEMENT

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Additional Counsel Listed on
Signature Block

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent); the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

v.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/v/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

MOTOR COACH INDUSTRIES, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING FAILURE TO WARN CLAIM

Lewis Roca
ROTHGERBER CHRISTIE

Defendant Motor Coach Industries, Inc. ("MCI") renews its motion for judgment as a matter of law. NRCP 50(b).

NOTICE OF MOTION

PLEASE TAKE NOTICE that MCI will bring the foregoing motion for hearing before the Court on the **12th** day of **June**, 2018, at **9:30 a**.m., in Department XIV of the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155.

MEMORANDUM OF POINTS AND AUTHORITIES

The Court should enter judgment as a matter of law in favor of Motor Coach Industries, Inc. under NRCP 50(b) because plaintiffs did not meet their burden to demonstrate that a warning would have made a difference. Rather, the evidence conclusively demonstrates that, even if MCI had given a warning, Mr. Hubbard did not have time to heed it before the collision between the motor coach and Dr. Khiabani. A failure to warn could not have been the cause of the accident because the accident would have happened even if a warning had been given.

Plaintiffs also failed to meet their burden to establish causation because they did not propose a specific warning that should have been given, or demonstrate that any such warning would have prevented Dr. Khiabani's death.

Further, judgment as a matter of law is appropriate because MCI was not required to manufacture a motor coach that would prevent injury to bicyclists.

And plaintiffs did not prove that Dr. Khiabani's death was the result of a "wrongful act or neglect," as required by the wrongful death statute. Plaintiffs opted to pursue a strict liability theory, which does not require any proof of wrongdoing.

STANDARD FOR JUDGMENT AS A MATTER OF LAW

"'Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law.'" *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 470, 306 P.3d 360, 368 (2013) (quoting *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007)). "To overcome a motion brought pursuant to NRCP 50(a), 'the nonmoving party must have presented sufficient evidence such that the jury could grant relief to

that party.'" *Id.* Judgment as a matter of law should be entered when a party fails to present testimony to support an element of its case. *Id.* (court properly granted JMOL where there was no testimony to demonstrate that charges for medical services and goods rendered were unreasonable).

THE RELEVANT EVIDENCE

Even construing the evidence in a light most favorable to the plaintiffs, the evidence at trial demonstrates the following.

The Motor Coach Driver Testified that He Did Not See Dr. Khiabani Until It Was Too Late

The evidence at trial showed that Mr. Hubbard was driving south in a motor coach that passed Dr. Khiabani at the cutout for the city bus on South Pavilion Center, just south of Charleston Blvd. (March 1, 2018 Tr. at 140-41, Ex. A.) After passing Dr. Khiabani, Mr. Hubbard said that he didn't see him while driving 450 feet, even though he was constantly checking his mirrors. (*Id.* at 150, 156, 182-84.) He didn't see Dr. Khiabani again until just before he reached the Griffith Peak intersection. At the intersection, he saw a bicycle drift into his lane in his peripheral vision. (*Id.* at 151, 166, 180.) The moment he saw the bicycle drift into his lane, he immediately turned the steering wheel to the left in an attempt to avoid a collision. (*Id.* at 155, 191.) In his words, he immediately took "evasive action." (*Id.* at 155.)

It happened "very fast." (*Id.* at 189.) He didn't know where Dr. Khiabani came from. (*Id.* at 189-90.)

Mr. Hubbard Did Not Testify About Any Particular Warning or That a Warning Would Have Changed What He Did

In response to a single question from counsel, Mr. Hubbard testified that if he was "trained about something relative to safety, [he] heed[s] those training warnings[.]" (*Id.* at 154.) He was not asked if he would have changed his

conduct on the day of the accident if had received a warning. He was not asked if he would have taken additional precautions if he was given a warning. He was not asked a single question about any specific warning. Because plaintiffs never proposed a specific warning or explained how it should have been delivered to Mr. Hubbard, they never explained what additional information Mr. Hubbard should have been given.

The Jury Finds No Design Defect Relating to Aerodynamics and Does* Not *Find That the Failure to Warn Was the Cause of Dr. Khiabani's Death

The jury found that there was no right-side blind spot that made the coach unreasonably dangerous and a legal cause of Dr. Khibani's death. (*See* "Special Verdict," filed March 23, 2018 at 2:9.) It found that the lack of proximity sensors and lack of rear-wheel protective barriers did not make the coach unreasonably dangerous and a legal cause of Dr. Khiabani's death. (*Id*. at 2:14.) And it found that the aerodynamic design of the coach did not make it unreasonably dangerous and a legal cause of Dr. Khiabani's death. (*Id*. at 2:19.)

With regard to the failure to warn claim, the jury was asked only whether MCI failed to "provide an adequate warning that would have been acted upon." (*Id*. at 2:25.) It was not asked whether the failure to provide an adequate warning was the cause of Dr. Khiabani's death. And it was not asked whether Mr. Hubbard *could have* avoided colliding with Dr. Khiabani if he had been provided with a warning.

ARGUMENT

I. PLAINTIFFS FAILED TO PROVE CAUSATION BECAUSE IT WAS TOO LATE FOR MR. HUBBARD TO AVOID THE COLLISION WHEN DR. KHIABANI SUDDENLY APPEARED IN MR. HUBBARD'S PERIPHERAL VISION

A. Plaintiffs Had the Burden to Prove Causation

"In Nevada, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries." *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 187, 209 P.3d 271, 273 (2009). Unlike in many states, there is no presumption that a person would have heeded a warning in Nevada. *Id.*

The plaintiff must prove causation. *See Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 524, 815 P.2d 151, 156 (1991), *overruled on other grounds by Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1356 n.4, 951 P.2d 1027, 1031 n.4 (1997). As the Court instructed the jury in this case, the plaintiff in a product-liability case must prove at least "legal" causation, which means the defect must have been "a substantial factor in bringing about the injury, damage, loss or harm." NEV. J.I. 7.02 (listing elements of claim, including "the defect was a [proximate] [legal] cause of the damage or injury to the plaintiff"); NEV. J.I. 4.04A (definition of legal cause). (*See* Jury Instruction No. 24.)

B. Plaintiffs Failed to Present Any Evidence That a Warning Would Have Made a Difference

A failure to warn is not a cause of injury when it is clear that a warning would have made no difference. *Kauffman v. Manchester Tank & Equip. Co.*, 203 F.3d 831 (9th Cir. 1999) (unpublished). The plaintiff "must prove that he or she would not have suffered the harm in question if adequate warnings or instructions had been provided." *See* AMERICAN LAW OF PRODUCTS LIABILITY

§ 32:4 (3d ed.). To meet that burden, the plaintiff must prove that the warning would have altered the instrumental party's conduct. *See id.* § 34:48 (plaintiff must provide testimony "which indicates, in some way, that the plaintiff or another instrumental party would have altered conduct had an adequate warning been given"); *id.* § 32:4 & n.5 (citing voluminous cases holding that plaintiff must "show that an adequate warning would have altered the conduct that led to the injury").

Stated somewhat differently, a futile warning is not required. *See Afoa v. China Airlines Ltd.*, 2013 WL 12066087, at *2 (W.D. Wash. Apr. 12, 2013) (dismissing complaint and denying leave to amend because there was no warning that could have prevented collision from occurring); *Adesina v. Aladan Corp.*, 438 F. Supp. 2d 329, 338 (S.D.N.Y. 2006) ("If a failure to warn would have been futile, plaintiff cannot prove proximate causation."); *Lee v. Martin*, 45 S.W.3d 860, 865 (Ark. Ct. App. 2001) (no causation if "an adequate warning would have been futile under the circumstances").

The focus is on the actual circumstances. *See* AMERICAN LAW OF PRODUCTS LIABILITY § 32:4 (3d ed.) ("In approaching the proximate cause issue in warnings cases, the focus is on the effect an inadequate warning had, or if no warning was provided, the effect an adequate warning would have had if given, on the actual circumstances surrounding the accident."); *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 193 (Mo. 1992) ("[T]he traditional approach to proximate cause in failure to warn cases focuses on the effect of giving a warning on the actual circumstances surrounding the accident."). A proposed warning must provide *additional information* that the instrumental party would have, and could have, acted on under the circumstances. *See McMurry v. Inmont Corp.*, 694 N.Y.S.2d 157, 159 (N.Y. App. Div. 1999) (summary judgment property when "a warning would not have added anything to the appreciation of this hazard").

Nevada law is in accord with these principles. *See Rivera*, 125 Nev. at 191, 209 P.3d at 275 ("[T]he burden of proving causation can be satisfied in failure-to-warn cases by demonstrating that a different warning would have altered the way the plaintiff used the product or would have 'prompted plaintiff to take precautions to avoid the injury.'" (quoting *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 198 (Mont. 1993))); *see also Gove v. Eli Lilly & Co.*, 394 Fed. App'x 817, 818-19 (2d Cir. 2010) (causation not established unless there is evidence that adequate warning would have altered conduct); *Austin v. Will-Burt Co.*, 361 F.3d 862, 869-70 (5th Cir. 2004) (same as *Gove*); *Barnhill v. Teva Pharm. USA, Inc.*, 819 F. Supp. 2d 1254, 1261-62 (S.D. Ala. 2011) (summary judgment appropriate where there was no evidence that a warning would have avoided injury); *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 497 (D.S.C. 2001) (summary judgment granted because plaintiff had burden of showing that a warning would have made a difference in the conduct of person warned and plaintiff provided no evidence); *Windham v. Wyeth Labs., Inc.*, 786 F. Supp. 607, 612-13 (S.D. Miss. 1992) (same as *Gove* and *Austin*); *Udac v. Takata Corp.*, 214 P.3d 1133, 1153 (Haw. Ct. App. 2009) (jury should not have been instructed on failure to warn theory when there was no evidence that if person had been warned, he would have "altered his behavior").

Brown v. Shiver, 358 S.E.2d 862, 864 (Ga. Ct. App. 1987), is particularly useful. In that case, the court concluded that there was no causation to support a failure to warn claim because the "plaintiff could not have seen the warning in time to avoid [a] collision."

Likewise, here, Mr. Hubbard—*the person who would need to (1) have been aware of the warning, (2) have heeded it in general,* ***and (3) applied it in the particular situation***—testified that when Dr. Khiabani suddenly appeared in his peripheral vision, it was too late for him to avoid the collision. He immediately turned away from Dr. Khiabani and stopped the bus.

Unfortunately, that did not prevent the collision. A warning wouldn't have either. Even if Mr. Hubbard had received a warning before the accident (and would have heeded it), he *did not have time to heed* the warning and avoid the collision. Mr. Hubbard did not testify that a warning would have caused him to do anything differently to avoid the accident and there was no other evidence on this issue. Thus, a failure to warn could not have been the cause of the accident. *See id.*; *Powell v. J.T. Posey Co.*, 766 F.2d 131, 134 (3d Cir. 1985) ("She would have rushed to grasp Adams, warning or no warning, when he appeared to her to be falling, because that was her instinctive reaction."); *Overpeck v. Chicago Pneumatic Tool Co.*, 823 F.2d 751, 756 (3d Cir. 1987) (causation was not established when there was "no evidence to support a finding that a warning would have changed [the plaintiff's] behavior" and judgment notwithstanding the verdict was proper); *cf. Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1092 (9th Cir. 2013) (warning is meaningless when there is no time to react to it).

C. Mr. Hubbard's Consciousness of Safety Is Insufficient to Demonstrate Causation

In response to a single question from counsel, Mr. Hubbard testified that he generally heeds safety training warnings. (March 1, 2018 Tr. at 154:18-21, Ex. A.) But he was never asked about any particular warning. He was never asked about a warning that related to "air blasts." And he was never asked if he would have (or could have) changed his conduct if he had been warned.

In a case relied on by the Nevada Supreme Court in *Rivera*, the Montana Supreme Court held that cause was not established when there was no evidence establishing that a warning relating to a motorcycle's propensity to wobble would have changed the plaintiff's conduct. *See Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 199 (Mont. 1993). Evidence that the plaintiff "respected machinery and was concerned about safety" was insufficient to establish

causation even though the plaintiff later argued that he "might have rode [sic] the motorcycle differently and might not have taken it on a long trip on the highway" if he had been warned. *Id.*

Because Mr. Hubbard never testified that he would have done anything differently if he had received a warning, his testimony that he was safety conscious is insufficient to establish cause. *See id.*; 63A Am. Jur. 2d, *Products Liability* § 1137 (2d ed. 2018) ("To establish that a proper warning would have been heeded, the plaintiff may be required to present evidence of more than the user's general concern with issues of safety.").

D. The Open and Obvious Nature of the Danger Reinforces the Conclusion that a Warning Would Have Been Superfluous.

Mr. Hubbard was a sophisticated user of motor coaches, having driven motor coaches and buses for over two decades. (March 1, 2018 Tr. at 130, Ex. A.) He knew or should have known the risk of driving next to a bicyclist. *See Johnson v. Honeywell Int'l Inc.*, 101 Cal. Rptr. 549, 556 (Ct. App. 2009) ("[A] manufacturer is not liable to a sophisticated user of its product for failure to warn, if the sophisticated user knew or should have known of the risk, whether the cause of action is for negligence or for strict liability for failure to warn."). In fact, he testified that at the precise moment he became aware that Dr. Khiabani was too close to the motor coach, he took evasive action in an attempt to avoid the collision.

The obviousness of the danger and Mr. Hubbard's immediate reaction to it highlights the fact that a warning would not have made any difference here. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 223, 955 P.2d 661 (1998) (manufacturer is "not required to warn against dangers that are generally known"); *Dorshimer v. Zonar Sys., Inc.*, 145 F. Supp. 3d 339, 354 (M.D. Pa. 2015) (no duty to warn bus driver when warning would have been meaningless

because danger was open and obvious); *Calles v. Scripto-Tokai Corp.*, 832 N.E.2d 409, 417 (Ill. Ct. App. 2005) ("The manufacturer has no duty to add pointless warnings about dangers the consumer already recognizes."); *Bazerman v. Gardall Safe Corp.*, 609 N.Y.S.2d 610, 611 (N.Y. App. Div. 1994) ("[T]here is no liability for failure to warn where such risks and dangers are so obvious that they can ordinarily be appreciated by any consumer to the same extent that a formal warning would provide or where they can be recognized simply as a matter of common sense." (citations omitted)).

II. CAUSATION IS ABSENT BECAUSE PLAINTIFFS NEVER EXPLAINED WHAT WARNING SHOULD HAVE BEEN GIVEN OR HOW IT WOULD HAVE PREVENTED DR. KHIABANI'S DEATH

Plaintiffs also failed to establish causation because they did not introduce any evidence regarding what an adequate warning should have said, how it should have been presented, or (most importantly) how a proposed warning would have prevented the accident. *See Rivera*, 125 Nev. at 191, 209 P.3d at 275 (plaintiff may prove causation by showing that a "different warning" would have altered conduct); *Broussard v. Procter & Gamble Co.*, 463 F. Supp. 2d 596, 609-10 (W.D. La. 2006) (entering summary judgment where plaintiff had not offered "evidence of what warning Procter & Gamble should have provided or how such a warning would have prevented [plaintiff's] injuries"); *Thompson v. Nissan N. Am., Inc.*, 429 F. Supp. 2d 759, 781 (E.D. La. 2006) ("Plaintiffs have presented no evidence, from either of its experts . . ., of an inadequate warning, nor do they present any language of a proposed adequate warning."), *aff'd*, 230 Fed. App'x 443 (5th Cir. 2007); *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 566 (S.D.N.Y. 2005) (one element of failure to warn claim is that "a proposed alternative warning would have prevented Plaintiff's accident"); *Demaree v. Toyota Motor Corp.*, 37 F. Supp. 2d 959, 967 (W.D. Ky. 1999) (Rule 50 motion granted in part because "plaintiff failed to produce proof of what a

warning should or might have been"); *White v. Caterpillar, Inc.*, 867 P.2d 100, 107 (Colo. Ct. App. 1993) ("If the danger is open and obvious, there is no duty to warn unless there is a substantial likelihood that the proposed warning would have prevented injury to the ordinary user.").

Plaintiffs had to prove that a *particular* warning would have prevented Dr. Khiabani's death from occurring. *See Campbell v. Boston Scientific Corp.*, 2016 WL 5796906 (S.D. W. Va. Oct. 3, 2016) ("To establish proximate causation under a theory of failure to warn, the plaintiff must prove that a different warning would have avoided her injuries."); *Weilbrenner v. Teva Pharmaceuticals USA, Inc.*, 696 F. Supp. 2d 1329 (M.D. Ga. 2010) ("[A]s this is a failure-to-warn case, Plaintiffs must also show that a different label or warning would have avoided Katelyn's injuries."). They did not meet that burden.

Because there is no evidence regarding a proposed warning, there is no evidence that a warning would have prevented Dr. Khiabani's death. *See id.*; *Morton v. Homelite, Inc.*, 183 F.R.D. 657, 659 (W.D. Mo. 1998) ("[W]here a warning would not have conveyed any additional information it is appropriate for the Court to enter judgment.").

III. THE TESTIMONY OF THE HUMAN FACTORS EXPERT WAS TOO CONCLUSORY TO PROVE THAT A WARNING SHOULD HAVE BEEN GIVEN AND HE DID NOT EXPLAIN WHAT WARNING SHOULD HAVE BEEN GIVEN

Mr. Cunitz's testimony that warnings were needed did not create an issue of fact for the jury. *See Brewer v. Myrtle Beach Farms Co., Inc.*, 2005 WL 7084354, at *4 (S.C. Ct. App. Aug. 30, 2005) (expert never stated "what additional warnings are required"). His statement that MCI "needed a warning, and they did not provide one" was conclusory, perfunctory, and supported by no facts. (March 7, 2018 Tr. at 99, Ex. B.) He did not explain

what warning should have been given, how it should have been given, or how it would have avoided the accident. Plaintiffs never asked him to, and he admitted that others were more competent to do so. (*Id.* at 103-04.)

Mr. Cunitz's conclusory testimony wasn't even admissible evidence, much less evidence sufficient to support a conclusion that the lack of a warning caused harm to Dr. Khiabani. *See Hallmark v. Eldridge*, 124 Nev. 492, 501-02, 189 P.3d 646, 651-52 (2008) (expert should not have been allowed to testify when opinion was highly speculative, was not based on any reliable methodology, and had not been tested); *Rodriguez v. JLG Indus., Inc.*, 2012 WL 12883784, at *13 (C.D. Cal. Aug. 3, 2012) (expert opinion regarding warnings was inadmissible when he did not "describe the reasoning or analysis he used" to reach conclusions and testimony was "wholly conclusory"); *Dewick v. Maytag Corp.*, 324 F. Supp. 2d 894, 900 (N.D. Ill. 2004) (expert testimony was nothing more than "speculation or personal observation" because he had not tested the efficacy of a warning, "drafted alternate warnings," or offered any other reliable methodology); *Ortiz-Semprit v. Coleman Co., Inc.*, 301 F. Supp. 2d 116, 120 (D.P.R. 2004) (expert was unqualified to testify as to adequacy of warnings when he "did not perform any research or testing pertaining to the adequacy of the generator's warnings or the likely reaction of plaintiff to any additional warnings").

MCI is entitled to judgment as a matter of law because there was no evidence that Mr. Hubbard would have done anything differently and because Mr. Cunitz's testimony did not provide an adequate foundation for a finding of causation. *See Bunker v. Ford Motor Co.*, 640 Fed. App'x 661, 663 (9th Cir. 2016) (where expert testimony regarding design defect was inadmissible, there was no evidence of causation and summary judgment was properly entered).

IV. JUDGMENT AS A MATTER OF LAW ACTUALLY IS CONSISTENT WITH THE JURY'S VERDICT

Judgment as a matter of law is consistent with the jury's verdict because it *was not asked* whether an inadequate warning was the cause of damages to the plaintiffs. The jury concluded only that (i) some warning should have been given, and (ii) a warning "would have been acted upon." The jury did *not* find that Mr. Hubbard ever saw Dr. Khiabani in time to apply that warning in this case (*i.e.*, to move left and give him wider berth).

The warning claim was tied to the allegedly defective aerodynamic design, which supposedly caused air blasts. On that defective design claim, the jury found no liability: "Is MCI liable for defective design (Did the aerodynamic design of the coach make it unreasonably dangerous and a legal cause of Dr. Khiabani's death)? Yes ___ No √" (Special Verdict #4.) In other words, when the jury was actually asked whether the allegedly defective design was the legal cause of damage, the jury concluded that it was not.

If asked, the jury would have reached the same conclusion on the failure-to-warn claim. MCI's proposed verdict form would have asked the jury that very question:

> 1. Do you find, by a preponderance of the evidence, that the motor coach was defective and that the defect was a legal cause of Kayvan Khiabani's death? (Check all boxes that apply.)
>
> | ***Allegedly defective aspect of the coach*** | ***Did this make the coach unreasonably dangerous?*** | ***Was the defect a legal cause of Khiabani's Death?*** |
> |---|---|---|
> | Right-Side Blind Spot | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Absence of Proximity Sensor | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Aerodynamic Design | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Failure to Warn | ☐ Yes ☐ No | ☐ Yes ☐ No |
>
> *If you did not answer "Yes" to both "Defect" and "Legal Cause" for any alleged defect, please sign and return this form. Do not answer any further questions.*

(*See* Proposed Verdict Form Not Used at Trial, filed Mar. 26, 2018.)

V. MCI WAS NOT REQUIRED TO MAKE A MOTOR COACH THAT DOES NOT CREATE AIR DISTURBANCE IN THE FIRST PLACE

The warning claim presupposes that the motor coach's aerodynamics (*i.e.* the air disturbance it caused) rendered it unreasonably dangerous to nearby pedestrians or bicyclists. The jury found, however, that the aerodynamic design of the coach did not make it unreasonably dangerous and a legal cause of Dr. Khiabani's death. (Special Verdict #4.)

And MCI was not obligated to design a vehicle that would prevent injury to a bicyclist upon impact, so it was not required to provide a warning. A manufacturer is not required to protect "third parties or nonusers when the design defect is not the cause of the accident." *De Veer v. Landrover*, 2001 WL 34354946, *2 (Cal. App. 2001). The vehicle need not be "crash compatible" with bystanders. *Id*. at *5.

De Veer is particularly instructive. In that case the plaintiff sued the manufacturer of the vehicle that collided with her vehicle. *Id.* at *1. The plaintiff contended that "the front end of the 1988 Range Rover is defective because its overly aggressive design increased the risk of serious physical injury to other motorists, beyond those normally and reasonably expected in side-impact collisions." *Id.* at *1. Specifically, she claimed enhanced injuries because the Land Rover's "front end . . . was too stiff . . . causing her vehicle to absorb too much energy," and its "front bumper was too high," making it unreasonably dangerous to smaller vehicles in a collision. *Id*.

The California Court of Appeal rejected the plaintiff's argument that a manufacturer's duty to make a vehicle crashworthy for its occupants also requires the manufacturer to make the vehicle "crash compatible" with smaller vehicles:

> Based on De Veer's theory, automobile manufacturers are liable for enhanced injuries to third parties unless they make vehicles that are crash compatible. Taken to its extreme, as noted by Land Rover, heavy trucks would be defective unless crash compatible with buses, and both would be defective unless crash compatible with pickup trucks, vans, and SUVs. In essence, De Veer seeks not only a crashworthy vehicle but a fail-proof one.

De Veer v. Landrover, 2001 WL 34354946, *3 (Cal. App. 2001). "The mere fact that enhanced injuries in a collision between an SUV and a passenger car are foreseeable is not sufficient to extend an SUV's manufacturer's duty to occupants in the struck vehicle. Foreseeability is not synonymous with duty." *Id*. at *5.

VI. NEVADA'S WRONGFUL-DEATH STATUTE REQUIRES PROOF OF FAULT, NOT STRICT LIABILITY

Although plaintiffs could have pleaded a claim alleging MCI's culpability, instead they opted for the easier route of strict liability. But unlike a common-law claim for products liability without fault, wrongful death is a statutory action, and the Nevada Legislature did not extend that action to claims based upon strict liability. Plaintiffs did not prove that Dr. Khiabani's death was "caused by [a] wrongful act or neglect." NRS 41.085(2).

A. The Harsh Common Law: Claims Expired at Death

"At common law, actions for death did not survive the death of the injured party." *White v. Yup*, 85 Nev. 527, 532, 458 P. 2d 617, 620 (1969) (citing W. PROSSER, LAW OF TORTS 920 (3d ed. 1964)). "Consequently, there was no right of action for an injury which resulted in death." *Id.* (citing *Bolton v. Boltin*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808)).

B. The Legislative Solution: A Wrongful-Death Statute

The Legislature created a cause of action where none previously existed if death was "caused by the wrongful act or neglect of another." NRS 41.085(2). This wrongful-death statute provides the exclusive path for recovery by a decedent's estate or heirs.

C. A "Wrongful Act" Requires a Finding of Fault

1. Principles of Statutory Interpretation

"Statutes in derogation of the common law must be strictly construed." *Holliday v. McMullen*, 104 Nev. 294, 296, 756 P.2d 1179, 1180 (1988) (citing SUTHERLAND STAT. CONST. § 61.01–06 (4th ed.)). Statutes must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

2. To Avoid Superfluity, "Wrongful" Must Mean More than "Negligent"

Here, the statute's reference to both "wrongful act" and "neglect" suggests that "wrongful" is used in the sense of blameworthy. Negligent acts causing harm are already contrary to law, so the word "wrongful" cannot just mean illegal. That would make "neglect" superfluous.

3. Context Shows that Wrongful is Not Merely Illegal

In fact, another section of that same chapter recognizes the distinction between "illegal" (prohibited by law) and "wrongful" (blameworthy), expressly allowing employers to disclose information about "illegal or wrongful act[s]" committed by an employee. NRS 41.755(1)(c).

4. Strict Construction Limits Wrongful-Death Claims to Negligent or Other Culpable Conduct

In *Higginbotham v. Ford Motor Co.*, the Fifth Circuit applied strict construction to predict that Georgia would not extend its wrongful-death statute to permit recovery under a strict-liability theory. 540 F.2d 762, 771–72 (5th Cir. 1976). The next year, the Georgia Supreme Court confirmed that result. *Ford Motor Co. v. Carter*, 238 S.E.2d 361, 365 (1977).

5. There Is Contrary Authority, But It Is an Undecided Question

In candor, counsel acknowledge that many of the Nevada Supreme Court's product-liability cases arise from wrongful-death claims. *See, e.g.*, *Ford Motor Co. v. Trejo*, 133 Nev., Adv. Op. 68, 402 P.3d 649, 651 (2017); *Young's Mach. Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 24 (1984). And a California appellate court rejected a similar argument based on a similarly worded statute, although that Court applied a rule of liberal—rather than strict—construction. *Barrett v. Superior Court*, 272 Cal. Rptr. 304 (Ct. App. 1990). But counsel is unaware of any case squarely asking the Nevada Supreme Court to decide this issue.

D. By Analogy to the Statute of Limitations, Strict Products Liability is Not a Wrongful Act

That strict liability is not among the bases for a wrongful-death action is confirmed by reference to how courts interpret the identical phrase in Nevada's two-year statute limitations.

Just like the wrongful-death statute, that two-year statute of limitations applies only to actions to "recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another." NRS 11.190(4)(e) (emphasis added). For actions not otherwise provided for, the limitation period is four years. NRS 11.220.

Relying on federal cases, Judge Ellsworth concluded that strict products liability was *not* a "wrongful act" within the meaning of NRS 11.190(4)(e), so the catchall four-year limit applied. *See Williams v. Homedics-U.S.A., Inc.*, 2012 WL 7749219 (Nev. Dist. Ct. July 20, 2012). She recognized that the Nevada Supreme Court had not yet decided the issue and turned to two Nevada federal district court cases that had ruled on the issue: *Campos v. New Direction Equip. Co.*, 2009 WL 114193, at *3 (D. Nev. Jan. 16, 2009), and *Fisher v. Professional Compounding Centers of America, Inc.*, 311 F. Supp. 2d 1008 (2004). *Williams*,

2012 WL 7749219. In *Fisher*, Judge Pro concluded in a published opinion that the four-year statute of limitations applied. In *Campos*, the court concluded in an unpublished opinion that the two-year statute of limitations applied. After distinguishing the reasoning from *Campos*, Judge Ellsworth decided that based on the plain meaning of "wrongful act" the four-year statute of limitations applied. *Williams*, 2012 WL 7749219; *see also Schueler v. MGM Grand Hotel, LLC,* 2017 WL 5904446 (Nev. Dist. Ct. Oct. 23, 2017) (stating that the four year statute of limitations applies to strict products liability in accordance with *Fisher*).

It would be anomalous for the identical statutory text—death "caused by the wrongful act or neglect of another"—to carry an opposing meaning in the wrongful-death statute. *Compare* NRS 11.190(4)(e), *with* NRS 41.085(2). In both cases, the term "wrongful act" excludes actions based solely on strict liability.

E. A Wrongful-Death Claim is Still Available against Product Manufacturers who Act Negligently, Recklessly, or Intentionally

To be clear, MCI does not argue that manufacturers of defective products can never be liable under the wrongful-death statute. But the plaintiffs in those cases need to at least show a "wrongful act or neglect"—conduct that negligently, recklessly, or intentionally causes harm. Had the jury awarded punitive damages, for example, plaintiffs might have been able to argue that the jury found that kind of culpability. The jury rejected that invitation, however, instead awarding liability only on a theory that requires no proof of wrongdoing at all. That is not a wrongful act for which the Legislature has created a remedy.

CONCLUSION

Based on the foregoing, MCI respectfully requests that the Court grant its renewed motion for judgment as a matter of law.

DATED this 7th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2018, a true and correct copy of the foregoing motion was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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EXHIBIT A

EXHIBIT A

CASE NO. A-17-755977-C

DEPT. NO. 14

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

*** * * * ***

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent) and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident, et al.,

Defendants.

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE ADRIANA ESCOBAR
DEPARTMENT XIV
DATED THURSDAY, MARCH 1, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

TRANSCRIBED BY: KRISTY L. CLARK, NV CCR No. 708

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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
Larry Stokes, PhD	66	91	113	
Edward Hubbard	130	170	197	

E X H I B I T S

Number:	Marked:	Admitted:	Joint:
230		142	
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503		197	
504		197	
505		197	
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507		197	

THE WITNESS: Edward Hubbard; E-d-w-a-r-d, H-u-b-b-a-r-d.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. CHRISTIANSEN:

Q. Mr. Hubbard, what is it that you do for a living, sir?

A. I'm a bus operator.

Q. And do you work here in Las Vegas?

A. Yes.

Q. How long have you operated buses?

A. Since 1997.

Q. Where did you -- at what point in time did you come here to Las Vegas?

A. Two years ago next month, April.

Q. April the 18th, 2016?

A. April 9th, 2016.

Q. Okay. Were you operating a bus April 18th of 2017?

A. Yes.

Q. And who were you working for? Who -- who is your employer?

A. Michelangelo.

Q. What were you doing that day, sir?

bicycle lane on South Pavilion Center?

A. Yes.

Q. And you -- which lane -- there are two travel lanes we can see on that map there to your right. Which lane were you in?

A. I was in the -- I was in this lane right here (indicating).

Q. Is that the lane closest to the bicycle lane?

A. Yes, it is.

Q. Or closest to Red Rock Casino?

A. Yes.

Q. So it would be the most western -- it would be the most western southbound lane, the one immediately adjacent to the bicycle lane on South Pavilion Center?

A. Yes.

Q. And do you see that little cutout there on the map to your right, sir --

A. Yes.

Q. -- on South Pavilion Center?

Do you know what that is?

A. I believe that's for the city bus.

Q. Okay. Is that about the -- the spot where you went past or overtook the bicycle?

A. Yeah. Yeah, on -- a little bit after that,

right near that area. Right.

Q. So between the time the bike -- you turn on Pavilion Center and the time you pass the bicycle at the city cutout, is the bicyclist always in the bicycle lane?

A. Yes.

Q. And are you always in your -- the westernmost southbound lane?

A. Yes.

Q. And from -- well, let's just say from the city cutout all the way to the intersection at Griffith Peak where the incident takes place, do you stay -- up until the moment of the incident, do you stay in that same lane?

A. Yes.

Q. Okay. Do you ever see the bicyclist before -- the cutout there north of the intersection, the city transit bus stop, from the time he turns south, do you ever see him leave the bicycle lane?

A. No -- no.

Q. All right. You pass him without incident at the city cutout?

A. Correct.

Q. And then do you remember having your deposition taken, sir?

Q. You knew this bus had blind spots?
A. Correct.
Q. And because you knew that, you were -- you used a term, and I don't want to mess it up, but you were moving?
A. Yes. Moving in your seat, rocking, rocking to eliminate the blind spots.
Q. Okay. And you were doing that to be aware of your surroundings?
A. Right.
Q. And for 450 feet after passing the cyclist at the city cutout, you never saw the cyclist again?
A. No, sir.
Q. Okay. And then my recollection of your testimony is that you had entered the intersection. Fair?
Just from this point forward, sir, just from the zero line.
A. Oh, yes, yes.
Q. You're not stopping. I'm just -- it's kind of disjunctive because I have to do it every 50 feet. But you're just driving southbound?
A. Correct.
Q. It's a clear day?
A. Yes.

Q. There's nothing -- no objects impeding your view of the street in front of you?

A. No.

Q. And once you got into the intersection -- and, well, I'm going to have you do that so I put it -- you put it exactly where you want it, and I'll show you the picture you showed us at your deposition.

Out of your -- my words not yours. Out of your peripheral vision, out of the side of your eye, you saw the bike -- a bicyclist drift into your lane; fair?

A. Yes.

Q. And "drift" is your word; correct?

A. Yes, sir.

Q. And you saw that out -- not out of the windshield, as I understand it?

A. No. Not the front windshield, no.

Q. Out of sort of the side of your eye?

A. Correct.

Q. And for you to be seeing something out of the side of your eye, the bicycle had to be -- the nose of the bus had to have passed the bicycle; correct?

A. Well, approaching it, yes.

Q. Okay. And I recall -- here's, let's just show -- at your deposition you placed this -- sort of

Q. And if it was in the door, just physics would dictate that the nose of that bus had passed the bicyclist; correct?

A. Yes. Yes.

Q. All right. I remember questions being posed to you, Mr. Hubbard, in your deposition about your knowledge of aerodynamics and air blast. And my recollection is you didn't have any particularized knowledge?

A. No, sir.

Q. You never been trained relative to air blast?

MR. BARGER: Objection. Leading.

THE COURT: Sustained.

BY MR. CHRISTIANSEN:

Q. Had you ever been trained as to a possible hazard of an air blast?

A. No.

Q. And in terms of your personal habits, if you're trained about something relative to safety, do you heed those training warnings?

A. Absolutely.

Q. And you've never been told that a bus could create air displacement?

A. No, sir.

Q. You don't know, as you sit here today, you

know, ten-plus months later, Mr. Hubbard, what caused that bike, using your words, to drift into your lane?

A. I do not know.

Q. Do you know what a proximity sensor is?

A. I've heard of it, yes.

Q. This bus did not have a proximity sensor?

A. No.

Q. Anything that would have warned you earlier about the cyclist would have caused you to take evasive action earlier; fair?

MR. BARGER: Objection. Form.

THE COURT: Sustained.

BY MR. CHRISTIANSEN:

Q. Well, I'll ask it to you differently.

The second -- what did you do the second you saw the bicycle drifting in your peripheral vision?

A. I proceeded to (witness indicating) turn my steering wheel to the left to avoid hitting him, because he was that close to --

Q. You were --

A. -- the bus.

Q. You were close to him when you saw him?

A. Yes.

Q. You took -- I'll use your words again from your deposition -- evasive action?

A. Yes.
Q. And had you been alerted to the cyclist earlier, you would have taken evasive action earlier?
MR. BARGER: Objection. Leading.
THE COURT: Sustained.
BY MR. CHRISTIANSEN:
Q. I'll ask it differently.
If you -- if you would have been alerted to the bicyclist earlier, earlier than your peripheral vision, would you've taken evasive action earlier?
A. Yes.
Q. And there are no proximity sensors on this bus?
A. No.
Q. But there are blind spots on this bus?
A. Yes.
Q. And so I'm understanding you correctly, sir, the bus that you were operating and driving for that 400 feet between the pink Post-it on the map and the zero line, you were -- you did not, at any point in time before this intersection, between that 450 feet that we're discussing, see the cyclist?
A. You mean from the cutoff -- cutout?
Q. Yes, sir.
A. No, sir, I did not.

A. No, the question before that.
BY MR. CHRISTIANSEN:
Q. I don't remember. I think I said -- I'll paraphrase.
THE COURT: Would you like it read back?
MR. CHRISTIANSEN: Sure. You know what? I can read it. I got the same thing.
BY MR. CHRISTIANSEN:
Q. The question I said, "And it has been your testimony, sir, that before he drifted -- to use your words -- into your lane, he had to have been in the bike lane; correct?
A. No, I -- I never said that.
Q. You never said he was in the bike lane before you saw him?
A. No, I never said that.
Q. So we're clear, when you see him on the map that you've put the pink Post-it, he was in the bike lane at the city bus cutout.
A. Correct. Yes.
Q. And then you don't see him at all until he drifts into your peripheral vision --
A. That's correct.
Q. -- in that intersection?
A. That's correct.

your right in that bicycle lane when you passed him?
A. How far was he to -- oh, 5, 7 feet over.
Q. Okay. In the bicycle lane as you went by?
A. Correct.
Q. Okay. And now I want to step to here if you can. Sorry. I don't mean to step in front of you. Please go ahead.
Now, at some point, you passed the bicyclist back here, right, because it's not on this map?
A. Yeah, the cutoff is somewhere in here.
Q. Okay. And I think the testimony earlier was maybe it was about 450 feet back from this intersection; right?
A. Correct.
Q. All right. So the first time -- I mean, when you went past him, did you ever see him again till we get to the very end?
A. No, sir.
Q. And you were going about 25 or 30 miles an hour at that point?
A. Yes.
Q. You know how fast the bicyclist was going?
A. I don't know.
Q. I want you to, if you can, maybe assume that there's been testimony you were going about twice as

drive, what you do is -- you told the jury, you look forward, you look to the right, to the left, you look in your mirrors, and you do the rock-and-roll issue?

A. Correct.

Q. Okay. Now, rock and roll is not a dance when you're driving a bus, is it?

A. No, sir.

Q. Would you tell the ladies and gentlemen what you mean by rock and roll. What does that mean?

A. It means moving in your seat, moving around in your seat so that you can eliminate blind spots so that you can see more of your mirror.

Q. Okay. Is that how -- is that how you drive buses?

A. That's how I was trained.

Q. That's how you learned? Okay.

And so, in addition to, obviously, looking ahead, which you have to do, you're looking to the right and you're looking to the left, you're looking in your mirrors, and you're doing the rock and roll just to do --

A. Yes.

Q. -- because you talk about a blind spot?

A. Yes.

Q. And you agree with me, every bus you've ever

driven has a blind spot, doesn't it?
A. They do.
Q. And every -- have you driven big trucks? Have you ever -- like 18-wheelers and that?
A. No, sir.
Q. Okay. But even your car has a blind spot, doesn't it?
A. Yes.
Q. There's not a vehicle on earth that doesn't have a blind spot, is there?
A. Correct.
Q. That's why you, as you told us, you were looking in the mirrors, but you're also rocking and rolling to make sure; right?
A. Yes.
Q. And that blind spot is really for a split-second, isn't it? Because if you're driving and you get past somebody, you're no longer in a blind spot at all, is it?
A. Correct.
Q. Just -- just a split-second, there might be a blind spot; right?
A. Correct.
Q. All right. So I want to ask you -- I'm going to put the bus at 250 -- at 250. And I'm -- and the

angle isn't meant to be an angle. It's just the way I've set it down. Okay?

At 250, you, I presume, would be looking forward in your mirrors and doing the rock and roll?

A. Yes.

Q. All right. And you did not see a bicyclist?

A. No, sir.

Q. Clearly, when you passed him, he was in the bike lane, but, after that, you really don't know what he did; isn't that fair?

A. That's correct.

Q. And am I too close to you? I don't mean to get too close. I promise you I don't have the flu.

A. All right.

Q. So you drive on to 200, and you do not see the bicyclist; correct?

A. Correct.

Q. And without being repetitious, you're still watching, rocking, rolling, and looking in the mirrors?

A. Yes, sir.

Q. And you don't see him anywhere behind you, and you're going over twice as fast as he is; right?

A. Correct.

Q. So he's not catching up to you at all, is he?

A. I really don't know what he's doing. I know

lawyers present in front of -- we will download these so we can take a print.

THE COURT: Okay.

BY MR. BARGER:

Q. And I'm going to ask you if you can come with me if you don't mind, sir.

Now, the bicycle here is not -- I mean, that's not where it was at the time. So I'm going to have you move the bicycle out of the way. We're just talking about where the bus was. I'm going to take a picture. Okay? All right?

Thank you.

Now what I want you to do next is show me where the bicycle -- put the bicycle in there, if you will, because you said what you did out of your -- was it your peripheral vision you saw the bicycle come in and hit you?

A. No. Right here.

Q. Somewhere in there?

A. Yes, sir.

Q. This happened pretty fast; fair?

A. Very fast.

Q. I mean, faster than we want to realize, didn't it?

All right. So, when you saw the bicycle come

in, you don't know where it came from, do you?

A. No, sir.

Q. And what you told Mr. Christiansen was that you didn't see him in the bicycle lane and you would have if he had been in the bike lane because of your looking in the mirrors and your rocking and rolling and your doing that; right?

A. Yes, sir.

Q. All right. So is it your testimony -- I'm going to move this back.

Is it your testimony that, at some point back here, you never saw Dr. Khiabani in the bike lane?

A. No, sir.

Q. Is that correct?

A. That's correct.

Q. All right. And then up -- again, I'm going to ask you to move it back so --

A. I should have turned this because it was more like -- it was more like this than it was straight. You understand?

Q. Yes, sir?

A. It was more like (witness indicating).

Q. What I want you to do now is move the bus back where it was and put the bicycle at the -- where you thought it was. And you say it's kind of more

turned. I don't want to use any words. I want you to show --

A. Yeah, because he -- he was -- and he was coming in. He wasn't straight. He was coming in.

Q. All right. I'm going to take a picture of that as well.

That's when you immediately turned to the left; right?

A. Correct.

Q. All right. And we've seen the videos and all the pictures, that the bus ended up across over here; right?

A. Yes.

Q. Right. You can take your seat, sir. Thank you.

THE MARSHAL: Thank you, sir.

BY MR. BARGER:

Q. As you drive the MCI bus -- or any bus, but let's talk about this MCI bus. As you drive that, do you now -- do you now remember seeing the photographs that there -- the right front door where the passengers come in, there are windows there; right?

A. Yes.

Q. And you can see out; right?

A. Yes.

EXHIBIT B

EXHIBIT B

CASE NO. A-17-755977-C

DEPT. NO. 14

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

*** * * * ***

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent) and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident, et al.,

Defendants.

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE ADRIANA ESCOBAR
DEPARTMENT XIV
DATED WEDNESDAY, MARCH 7, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

TRANSCRIBED BY: KRISTY L. CLARK, NV CCR No. 708

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* * * * *

I N D E X

E X H I B I T S

expert on warnings.

MR. TERRY: I have no objection to his qualifications, Your Honor.

BY MR. KEMP:

Q. Now, Doctor, have you had an opportunity to review materials from Dr. Breidenthal regarding the subject of whether or not a bus causes air displacement or air blasts?

A. Yes.

Q. Okay. Now, don't tell me what Dr. Breidenthal said in those materials, but tell me, do you have an opinion as to whether or not MCI provided an adequate warning with regards to that subject matter in this case?

A. I do have an opinion about that.

Q. And what is your opinion?

A. A, that it needed a warning, and they did not provide one.

Q. Now, are there other types of things that can provide warnings that are electrical in nature?

A. Yes. There are warnings that are -- just to distinguish, there are warnings that are printed. You know, they're on a sheet of paper or a label or sign. But that's one class of warnings.

But we have -- my field always have had for

Q. Okay. So it would apply to all delivery vans that have that kind of front, all FedEx trucks that have that kind of front?
A. I don't know, sir.
Q. Have you looked to see how many different vehicles have the same characteristics and require the same warning?
A. No, sir, I have not.
Q. You have not developed a warning?
A. Correct.
Q. So you haven't developed a sticker or a warning or a print warning that satisfies what you think should have been done?
A. I was not asked to -- usually, manufacturers provide those, not me, unless they come and hire somebody like myself, which hasn't happened.
Q. And you have been retained in the case?
A. But I was not retained by a manufacturer. I wasn't retained by your client, for instance, so, no, I haven't been asked to do the job. There are other people in my field who are more than competent at doing the job as well. So --
Q. But you were retained in this case to offer an opinion about the MCI information communication?
A. Yes, that it needed a warning.

Q. And you did not draft a warning that you thought we should have given?

A. Right.

Q. And you have not drafted or come up with any training that you thought we should have given?

A. Again, that wasn't my -- A, wasn't my assignment; B, there are -- I could have done the work had I been assigned the work. Most likely, that work would be paid for and -- paid for by the manufacturer who has developed the need for that warning.

Q. Now --

A. So that's -- that's how it usually happens. And, again, they're playing -- I'm almost done. Then everybody -- any number of people in my field. There are several hundreds more than competent to do the work.

Q. Are you of the opinion that professional drivers are not aware of air displacement around the front of their bus?

A. I've not surveyed large numbers of professional drivers. I have reviewed the documents provided to me in this case, and they all revealed that those people in the bus industry, including a driver, didn't have this information. Whether that's universal or not, I can't tell you. I didn't survey the industry

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D., (Decedent); the ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN,DDS (Decedent); and the Estate of KATAYOUN BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

Case No. A755977

Dept. No. 14

MOTOR COACH INDUSTRIES, INC.'S MOTION TO ALTER OR AMEND JUDGMENT TO OFFSET SETTLEMENT PROCEEDS PAID BY OTHER DEFENDANTS (REDACTED)

Defendant Motor Coach Industries, Inc. ("MCI") moves to alter or amend the judgment[1] entered on April 17, 2018, to reflect the offset of amounts recovered from the settling defendants. NRCP 52(b), 59(e); NRS 17.245(1)(a). *A.A. Primo Builders, LLC*, 126 Nev. at ___, 245 P.3d at 1195 (quoting C. Wright, A. Miller & M. Kane, 11 Federal Practice and Procedure § 2810.1, at 121 (2d ed. 1995)) (NRCP 59(e) relief is appropriate for any "substantive alteration of the judgment"). That is assuming the Court does not grant MCI's renewed motion for judgment as a matter of law, or motion for a new trial, which are filed separately concurrently herewith.

NOTICE OF MOTION

PLEASE TAKE NOTICE that MCI will bring the foregoing motion for hearing before the Court on the **7th** day of **June**, 2018, at **8:30 a**.m., in Department XIV of the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155.

[1] A motion to alter or amend is the appropriate vehicle to apply for an offset of settlement proceeds following entry of a judgment on a jury verdict. *Rio Mar Assocs. v. UHS of Puerto Rico, Inc.*, 522 F.3d 159, 168 (1st Cir. 2008); *Duran v. Town of Cicero*, 653 F.3d 632, 642 (7th Cir. 2011); *W. Indus., Inc. v. Newcor Canada Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983); *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 673 (8th Cir. 2008).

MEMORANDUM OF POINTS AND AUTHORITIES

The judgment entered on April 17, 2018, does not apply an offset of the settlement proceeds paid by co-defendants. As MCI is entitled to that offset, the judgment must be amended.

A. Procedural History

Plaintiffs sued several defendants in this case for the same indivisible injuries to the decedent and his heirs: MCI; along with Michelangelo Leasing Inc. d/b/a Ryan's Express and Edward Hubbard; Bell Sports, Inc. d/b/a Giro Sport Design; and SevenPlus Bicycles, Inc. d/b/a Pro Cyclery. (*See* "Amended Complaint and Demand for Jury Trial," filed June 6, 2017.)

The case proceeded to trial against MCI alone because—as plaintiffs repeatedly represented to everyone besides federal Judge Boulware—they settled their claims against the other defendants. According to the papers filed and submitted in camera by the other defendants, the combined amount of that settlements is [redacted]. (*See* Exhibits A, B, and C, submitted for filing under seal.)

The judgment entered on April 17, 2018, awards $18,746,003.62 plus prejudgment interest against MCI. It does not offset that amount by the [redacted] of settlement proceeds paid by co-defendants.

B. Argument

The total amount of the judgment must be reduced to [redacted], which is the amount of the compensatory award ($18,746,003.62) minus the [redacted] offset. Moreover, prejudgment interest is eliminated by the offset because the settlement proceeds exceed the amount past damages.

1. MCI Is Entitled to an Offset of [redacted]

MCI is entitled to an offset of all settlement proceeds received from the other defendants. NRS 17.245(1)(a) provides for an offset for a prior settlement:

> When a release . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) . . . it reduces the claim against the others [tortfeasors] to the extent of any amount stipulated by the release . . . .

Accord Banks ex rel. Banks v. Sunrise Hosp., 120 Nev. 822, 843, 102 P.3d 52, 67 (2004) ("claims against nonsettling tortfeasors must be reduced by the amount of any settlement with settling tortfeasors"). This statute is part of the Uniform Contribution Among Tortfeasors Act (UCATA).[2]

The common law also prohibits double recovery: once a plaintiff settles for the full amount of her damage award, she cannot recover from other tortfeasors. *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. ___, ___, 245 P.3d 547, 549 (2010) (to prevent double recovery, a prior settlement which satisfied a damage award barred a claim against an alleged fiduciary tortfeasor, even though the UCATA did not apply); *Whittlesea v. Farmer*, 86 Nev. 347, 350, 469 P.2d 57, 59 (1970) (even before Nevada adopted UCATA, a "plaintiff may have but one satisfaction for his injuries from joint tortfeasors, the amount paid for a covenant by one of them reduces by that amount the liability of the others" (citing *Pac. States Lumber Co. v. Bargar*, 10 F.2d 335 (9th Cir. 1926))); *see also Russ v. Gen. Motors Corp.*, 111 Nev. 1431, 1435–36, 906 P.2d 718, 720–21 (1995) (at common law "the release of one tortfeasor automatically release[s] all other potential tortfeasors"); *Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524,

---

[2] Ordinarily, a joint tortfeasor who pays a judgment in excess of his equitable share of liability (as MCI does here) is entitled to seek contribution or indemnity from any other tortfeasors. *See* NRS 17.225 to 17.305; *Medallion Dev. v. Converse Consultants*, 113 Nev. 27, 31- 34, 930 P.2d 115, 118-20 (1997)). Any joint tortfeasor in a multi-defendant tort action may, however, obtain protection from claims of contribution and implied indemnity under NRS 17.245 by settling with the tort claimant in good faith. *The Doctors Co. v. Vincent*, 120 Nev. 644, 98 P.3d 681, 690 (2004). This is fair only because the non-settling defendants are then able to offset the settlement monies against the judgment. NRS 17.245(1)(a); NRS 41.141; RESTATEMENT (SECOND) OF TORTS § 885(3).

530, 706 P.2d 845, 849 (1985). *Cf. also Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 372, 212 P.3d 1068, 1084 (2009) ("the prohibition against double recovery for a single injury operates to foreclose any further recovery against Imperial Palace" under an alternative theory).

Similarly, the Uniform Joint Obligations Act (UJOA) recognizes a right to offset "[t]he amount or value of any consideration received by the obligee [plaintiff] from one or more of several obligors [defendants] . . . in whole or partial satisfaction of their obligations." NRS 101.040; *see also W. Techs., Inc. v. All-Am. Golf Ctr., Inc.*, 122 Nev. 869, 873, 139 P.3d 858, 861 (2006).

Here, the total amount of the judgment must be reduced to [redacted], which is the amount of the compensatory award ($18,746,003.62) minus the [redacted] offset.

2. The Offset Applies to Principal, and First to Past Damages

In Nevada, the offset must be applied before any prejudgment interest is calculated. *Ramadanis v. Stupak*, 107 Nev. 22, 24-25, 805 P.2d 65, 66 (1991). Prejudgment interest runs only on the remainder. *Id.* The offset, moreover, should also be applied entirely to the past compensatory damages. *See Battaglia, M.D. v. Alexander*, 177 S.W.2d 893, 898 (Tex. 2005) (when the verdict includes both past and future damages, "the settlement payments should be applied first to past damages, then to future damages").

In this case, the [redacted] amount of the settlement proceeds exceeds the $4,546,003.62 in past damages. Therefore, prejudgment interest may not be awarded.

CONCLUSION

For the foregoing reasons, the Court should offset the judgment on the jury verdict by the entire amount of plaintiffs' prior settlements, resulting in a judgment of no more than [redacted].

Dated this 7th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2018, a true and correct copy of the foregoing motion was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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EXHIBIT A

FILED UNDER SEAL

EXHIBIT A

EXHIBIT B

FILED UNDER SEAL

EXHIBIT B

EXHIBIT C

FILED UNDER SEAL

EXHIBIT C

EXHIBIT D TO DOCKETING STATEMENT

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D., (Decedent); the ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN,DDS (Decedent); and the Estate of KATAYOUN BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

Case No. A755977

Dept. No. 14

MOTOR COACH INDUSTRIES, INC.'S MOTION FOR A LIMITED NEW TRIAL (REDACTED)

Defendant Motor Coach Industries, Inc. ("MCI") moves for a new trial regarding liability for an alleged failure to warn, as well as on the element of damages. NRCP 59(a)-(b), 60(b). None of the grounds set forth in the following points and authorities, however, justify disrupting any other aspects of the jury's verdict.

NOTICE OF MOTION

PLEASE TAKE NOTICE that MCI will bring the foregoing motion for hearing before the Court on the 12th day of June, 2018, at 9:30 a.m., in Department XIV of the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155.

MEMORANDUM OF POINTS AND AUTHORITIES

Several issues necessitate a new trial on liability for the alleged failure to warn and on the element of damages. Defendant brings this motion under Rules 59 and 60. Rule 59(a) states,

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion.

And Rule 60 allows the Court to set aside a judgment because of

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application.

As shown herein, the judgment should be set aside and a new trial granted, because (1) the jury was excused from considering causation on the failure-to-warn claim; (2) Dr. Krauss was not permitted to testify regarding Nevada statutes directly affecting the need for an "air blast" warning; (3) newly discovered evidence has come to light that directly impacts the jury's determination of damages and even liability; and (4) the jury was not permitted to take into account that income taxes would have greatly reduced the amount of "probable support" plaintiffs could have received. For these reasons, MCI respectfully requests that the Court grant its motion for new trial on plaintiff's failure-to-warn claim and damages.

I.

THE JURY'S VERDICT IS UNRELIABLE BECAUSE THE ERRONEOUS VERDICT FORM ENABLED THE JURY TO FIND LIABILITY FOR "FAILURE TO WARN" WITHOUT CONSIDERATION OF CAUSATION OF THE ACCIDENT

A. Plaintiff Had a Duty to Prove that Any Failure to Warn Was a Cause of the Injury

To establish liability for inadequate warnings, a plaintiff must prove that the lack of adequate warnings caused his injuries. *Michaels v. Pentair Water Pool & Spa*, 131 Nev. Adv. Op. 81, 357 P.3d 387, 397 (Ct. App. 2015). Unlike some states, Nevada does not recognize a "heeding presumption," which "allow[s] the fact-finder to presume that the person injured by product use would have heeded an adequate warning" *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192, 209 P.3d 271, 275 (2009) (quoting *Golonka v. General Motors Corp.*, 204 Ariz. 575, 65 P.3d 956, 967 (App.2003)).

But even where there is a heeding presumption, the plaintiff still must prove that heeding an adequate warning would have prevented the plaintiff's harm:

> [T]he "read-and-heed" presumption does not completely dispose of the causation issue in a failure-to-warn case. The most the presumption does is establish that a warning would have been read and obeyed. It does not establish that the defect in fact caused the plaintiff's injury. ***The plaintiff invoking the presumption must still show that the danger that would have been prevented by an appropriate warning was the danger that materialized in the plaintiff's case***.

Kovach v. Caligor Midwest, 913 N.E.2d 193, 199 (Ind. 2009) (emphasis added).

So, in Nevada, without the heeding presumption, the causation analysis becomes a two-step inquiry. First, the plaintiff must prove that user of the product would have read and heeded the warning. *Rivera*, 125 Nev. at 193, 209 P.3d at 276 (rejecting recognition of the "heeding presumption" in Nevada). Then he must prove that heeding the warning would have avoided the injury. *Id.* at 191, 209 P.3d at 275 (requiring the plaintiff to prove that "the defect

caused the plaintiff's injury" and that an adequate warning "would have 'prompted plaintiff to take precautions to avoid the injury'" (emphasis added) (quoting *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 198 (Mont. 1993))).

B. This Verdict Form Excused the Jury from Finding Causation in Relation to the Failure to Warn Claim

Here, the verdict form omitted the crucial second step of the analysis. While four of the five "Liability" questions required the jury to find that a specific alleged design defect was "a legal cause of Dr. Khiabani's death," the fifth question addressing the failure-to-warn claim was silent as to causation. (Special Verdict at 2, App. 2). That question read, "Did MCI fail to provide an adequate warning that would have been acted upon?" (*Id.* at App. 2:25–26). This question only addresses the first, "read and heed," prong of the causation analysis. After marking "Yes" to this question, the following paragraph required the jury to find Defendant liable and determine the amount of damages, without even considering whether heeding the warning would have avoided the injury. (*Id.* At App. 3).

This omission amounts to clear error, because the jury could have determined that heeding the warning would not have prevented Dr. Khiabani's death. A warning of "air blast" risk might induce the driver of a motor coach to switch lanes to avoid passing too closely to a bicyclist. However, common sense dictates that the driver would need to see a bicyclist to know of the need to change lanes. In this case, the motor coach driver did not see Dr. Khiabani:

> Q. -- from that point when you pass the bike up through the zero line, you did not see a cyclist?
> A. Correct. Not in the bike lane, no, sir.
> Q. Not only did you not see the cyclist in the bike lane, you didn't see the cyclist in this turn lane; correct?
> A. Correct, yes.
> Q. You didn't see the cyclist at all?
> A. Correct.

(Transcript of Proceedings at 149:7–15, Mar. 1, 2018, App. 15).

So even if the driver would have "acted upon" an adequate warning, as the verdict form asked, he would not have done so in this case—i.e., he would not have switched lanes to gain clearance from a bicyclist that he did not know was next to him. The verdict form was missing a critical step of the analysis because it failed to ask the next question: "If an adequate warning were heeded, would Dr. Khiabani's death been avoided." Or perhaps, "Was the lack of an adequate warning the legal cause of Dr. Khiabani's death?"

C. The Form Proposed by MCI Would Have Required the Jury to Indicate Whether the Failure to Warn Was a Cause

MCI's proposed verdict form would have asked the jury whether any failure to warn was a legal cause of the injury:

> 1. Do you find, by a preponderance of the evidence, that the motor coach was defective and that the defect was a legal cause of Kayvan Khiabani's death? (Check all boxes that apply.)
>
> | ***Allegedly defective aspect of the coach*** | ***Did this make the coach unreasonably dangerous?*** | ***Was the defect a legal cause of Khiabani's Death?*** |
> |---|---|---|
> | Right-Side Blind Spot | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Absence of Proximity Sensor | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Aerodynamic Design | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Failure to Warn | ☐ Yes ☐ No | ☐ Yes ☐ No |
>
> *If you did not answer "Yes" to both "Defect" and "Legal Cause" for any alleged defect, please sign and return this form. Do not answer any further questions.*

(MCI's Proposed Special Verdict Form, App. 17-18.) Thus, MCI attempted to avoid exactly this situation. And, having done so, MCI also preserved its right to move for a new trial now. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 306, 322, 212 P.3d 318, 323, 333 (2009).

Put simply, since the verdict form skipped a critical predicate to liability for failure to warn—that the absence of an adequate warning *caused* the accident—the verdict is faulty. The Court should grant Defendant a new trial to remedy this error.

II.

DR. KRAUSS SHOULD HAVE BEEN ALLOWED TO OPINE ON MANUFACTURERS' APPROPRIATE CONSIDERATION OF EXISTING LAW WHEN SELECTING ISSUES ABOUT WHICH TO WARN

A new trial may be granted if there was an "[i]rregularity in the proceedings of the court . . . or any order of the court . . . or abuse of discretion by which either party was prevented from having a fair trial." NRCP 59(a)(1). An abuse of discretion can occur when the district court misinterprets controlling law. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1292 (2016); *Gunderson v. D.R. Horton, Inc.,* 130 Nev. Adv. Op. 9, 319 P.3d 606, 615 (2014) (holding that a decision made "in clear disregard of the guiding legal principles [can be] an abuse of discretion"). A new trial is also appropriate for an "[e]rror in law occurring at the trial and objected to by the party making the motion."

Defendant's human-factors expert Dr. Krauss would have provided key evidence in defense of plaintiff's failure to warn claim. Dr. Krauss would have opined that it was not necessary to warn the user of the bus of the alleged "air blasts" because it is already against the law to be close to a bicyclist. Dr. Krauss would have also testified that warning people against actions that are already illegal would result in the recipients dismissing the warnings altogether thereby reduce their effectiveness in general. Dr. Krauss' opinion was not based on or about whether Dr. Hubbard was negligent. Rather, his opinion was about what a manufacturer thinks when deciding to issue a warning. Other courts have permitted similar evidence of a manufacturer's consideration of criminal laws. And while the Court here recognized the distinction between evidence of

contributory negligence and evidence that has overlap with contributory negligence, respectfully the Court should not have drawn the line where it did and prohibited Dr. Krauss from mentioning the statute.

A. Courts Have Determined that It Is Appropriate for Manufacturers to Consider What Conduct Is Illegal

In determining whether to issue a warning, it is appropriate for a manufacturer to consider what conduct is already illegal. *Ward v. Arm & Hammer*, 341 F. Supp. 2d 499, 501 (D.N.J. 2004) (noting that citizens are charged with knowledge of the law, including criminal law and that it follows the manufacturer had no duty to warn plaintiff of that which he knew, and that which the law already charged him with knowing). Everyone is presumed to know the law. *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *see Whiterock v. State*, 112 Nev. 775, 782, 918 P.2d 1309, 1314 (1996) ("mistake or ignorance of the law is not a defense"). This is true even in a civil context. *Lucas v. Wisconsin Elec. Power Co,*, 466 F.2d 638 (7th Cir. 1972); *Hicks v. State*, 419 S.W.3d 555, 558 (Tex. App. 2013). Thus, it is reasonable for a manufacturer to consider what conduct is already against the law. *See Ward*, 341 F. Supp. 2d at 501.

Moreover, professional drivers are presumed to know the traffic laws that apply to them. *See e.g., Mallery v. Int'l Harvester Co.*, 690 So. 2d 765, 768 (La. App. 1996); *see Alfonso v. Robinson*, 514 S.E. 2d 615, 618 (Va. 1999). It is therefore reasonable for defendant to consider relevant traffic laws when determining whether to issue a warning. A manufacturer must be selective in deciding what warnings to issue. In deciding whether to issue a warning a manufacture is not required to warn a user of conduct that is already illegal. Just as a manufacture does not have to warn the user he cannot exceed the

speed limit, or drive on the wrong side or the road, it does not need to warn a user to give a bicyclist a wide berth.[1]

B. The Statute Was a Key Component of Dr. Krauss' Expert Opinion

Nevada statute NRS 484B.270 was vital to Dr. Krauss' expert opinion. The statute provided that: "when overtaking or passing a bicycle" the driver of a motor vehicle shall "pass to the left of the bicycle or electric bicycle at a safe distance, which must be not less than 3 feet between any portion of the vehicle and the bicycle." The crux of Dr. Krauss' opinion was that unnecessary warnings mislead and are ineffective[2] and a warning becomes unnecessary where there is a law prohibiting the conduct. Dr. Krauss in both his deposition and expert report emphasized the goal of warning.

> DR. KRAUSS: The whole point of a warning is to affect behavior change in a way that makes something safer or alleviate the hazard.

(Dr. Krauss Depo Tr. at 30:12–14, Nov. 9, 2017, App. 53.)

He noted that too many warnings are distracting and unsuccessful. (*Id.*) Therefore, a manufacture must be selective in determining whether to give a warning.

Dr. Krauss based his expert opinion on the success of law as a warning. He analyzed the goal in designing warnings and their effectiveness, concluding that warnings with penalties are more effective in achieving their goal.

> DR. KRAUSS: This knowledge of the law would likely increase compliance more than any warnings as there is voluminous evidence that associating an enforced penalty with failed compliance increase compliance rates.

[1] *See Ward*, 341 F. Supp. 2d at 502 (noting that requiring a manufacture to warn of criminal consequences would be analogous to requiring all automobile manufacturers to warn of the effects of illegal drag racing).

[2] (Dr. Krauss Expert Report at 8, App. 29).

(Dr. Krauss Expert Report at 9, App. 30.) Therefore, Dr. Krauss' expert opinion was that the Nevada law requiring at least three feet to pass a bicyclist would likely increase compliance more than any warning.[3]

Prohibiting Dr. Krauss from mentioning both the statute and any conclusion based on the statute effectively prevented him from testifying to his warning analysis. His warning opinion was based entirely on the existence of the statute. It was an error to prevent him from referencing the statute.

C. The Court Correctly Recognized the Law But Respectfully Erred in Excluding the Statute

The Court correctly recognized the distinction between evidence of contributory negligence and evidence that has overlap with contributory negligence. But respectfully, the Court should not have drawn the line where it did and prohibit Dr. Krauss from mentioning the statute. The Nevada Supreme Court has upheld, in a strict liability case, the introduction of evidence of another's negligence. *Young's Mach. Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 24 (1984). In *Young*, the lower court permitted the appellant to argue that the decedent's negligence was the sole proximate cause of his death but refused to instruct the jury that it could use comparative fault principles to reduce the award. *Id.* at 693. The Nevada Supreme Court affirmed the lower court's decision to permit the arguments that the decedent's negligence was the sole proximate cause of his death. *Id.*

More recently, the Nevada Supreme Court upheld a defendant's ability to introduce evidence of another's negligent conduct to demonstrate that an allegedly defective product did not cause the plaintiff's injury. *Banks ex re rel. Banks v. Sunrise Hospital*, 120 Nev. 822, 845, 102 P.3d 52, 67 (2004). The

[3] (*Id.* at 9, App. 30).

Banks Court noted that a jury's consideration of negligent conduct would not encourage the jury to "compare negligence so as to affect its award of damages."

The Court recognized the distinctions the Nevada Supreme Court has articulated in *Young's* and *Banks*; that just because evidence has some overlap with negligence does not mean it is automatically excluded. But the Court should not have excluded Dr. Krauss' expert opinion on the statute. The statute was only tangentially related to any accusation of Mr. Hubbard's negligence. As discussed above, the purpose of the statute was not to demonstrate the negligence of Mr. Hubbard but rather to show any warning would have been redundant. Dr. Krauss opined that because there is already a Nevada law that requires drivers to maintain a distance from a bicyclist, any warning would be redundant. Excluding this evidence was prejudicial to defendant and prevented Dr. Krauss from testifying as to why the defendants allegedly did not warn.

D. Any Prejudice Would Have Been Cured by Jury Instruction No. 33, Which Informed the Jury of the Limited Relevance of Any Evidence that Could Suggest Negligence on the Part of the Driver

The Court found that mentioning the statute at all would be highly prejudicial. Jury instruction number 33 would have cured any prejudice, however, by informing the jury on the limited relevance of the statute. *See Young's Mach. Co.*, 100 Nev. 693, P.2d at 24. The jury instruction warned the jury that it was "not to consider any alleged negligence on the part of the bus driver" and that any negligence "cannot insulate Defendant from liability." (Jury Instructions at No. 33, App. 88.) This would have allowed the jury to consider the statute only for its limited purpose.

E. It Was Error to Instruct the Jury on Nondelegation, which Merely Mocked MCI's Inability to Mention the Statute

In the same vein, it was also an error to instruct the jury that "[a] manufacturer cannot delegate its ultimate responsibility for assuring that its

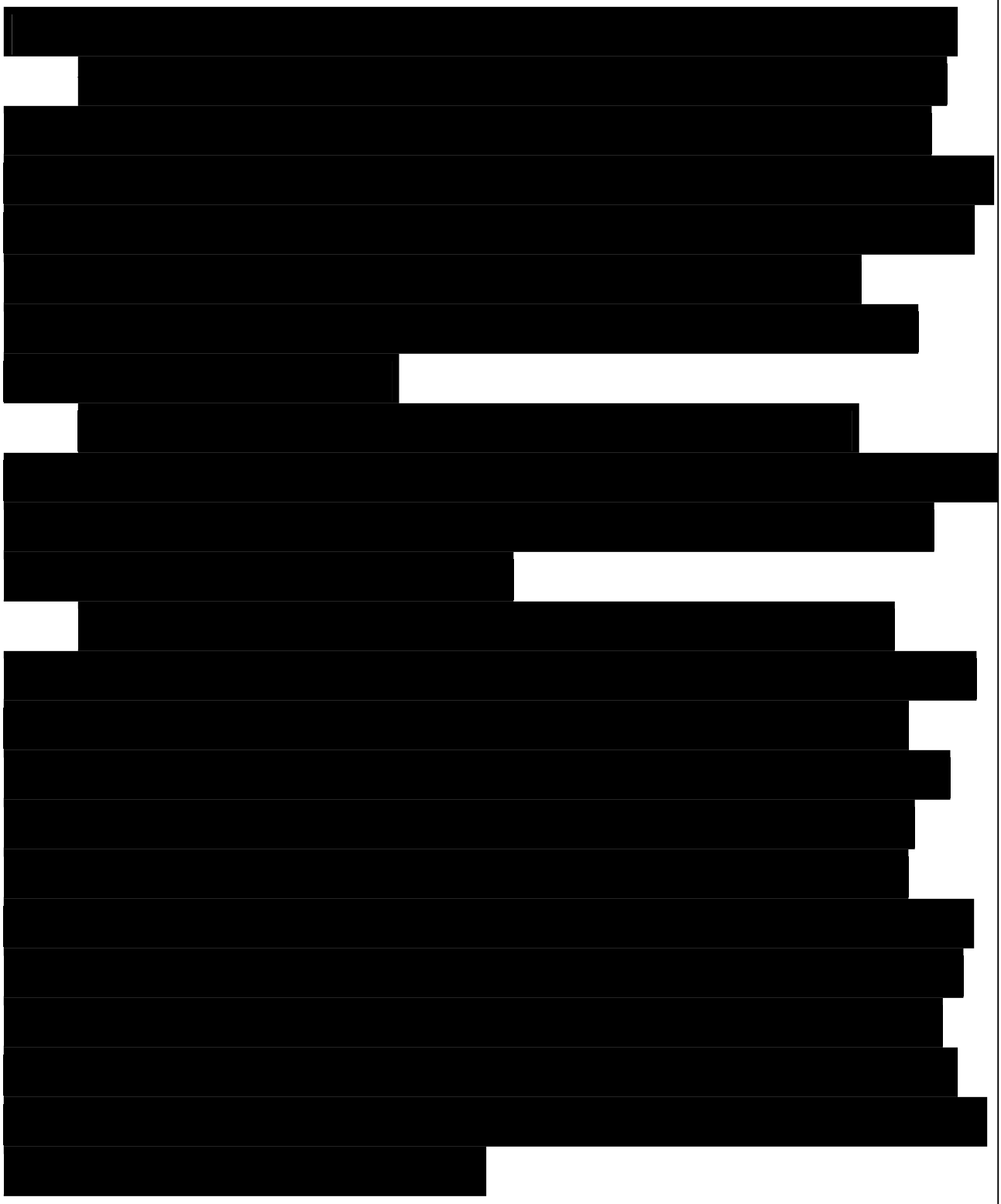
product is dispensed with all proper warnings." (Jury Instructions at No. 32, App. 87.) Although it is true that a manufacturer is ultimately responsible if the warnings it selects are inadequate, *see Allison v. Merck & Co.*, 110 Nev. 762, 779, 878 P.2d 948, 959 (1994), in respecting this Court's order that Dr. Krauss not discuss the statute, MCI never introduced any evidence that it was trying to "delegate" that duty to others. Rather, the instruction gave plaintiffs a strawman to attack: Dr. Krauss' opinion was that unnecessary warnings mislead and are ineffective, and that to avoid overload, a manufacturer may consider what warnings a user will get from other sources. (Dr. Krauss expert report pg. 8.) *See Ward*, 341 F. Supp. 2d at 502. But because the statute that *did* provide that warning was excluded from the jury's consideration, plaintiffs were able to mock MCI—and mislead the jury—to suggest that MCI had unsuccessfully tried to rely on others to provide that warning.

By drawing the jury's attention to whether the responsibility was delegated, it prevented the jury from considering what other information a user may have heard. In selecting a warning, it was reasonable for defendant MCI to consider what a user may be told by the DMV or professional training. Just as it was an error to prevent Dr. Krauss from opining on what laws a manufacturer considers in selecting its warning, it was an error to effectively instruct the jury it could not contemplate whether defendant, in selecting its warnings, considered what other sources may have already told a user.

III.

CRITICAL, NEWLY DISCOVERED EVIDENCE CALLS FOR A NEW TRIAL

[redacted]



A. Newly Discovered Evidence and Its Relevance

1. The Channel 8 News Reports Uncovered Shocking, New Evidence

[redacted]

[4] The first video segment and written article are available at George Knapp, *I-Team: Audit of UNR's School of Medicine Hidden from Public*, LASVEGASNOW.COM (last updated Apr. 16, 2018), http://www.lasvegasnow.com/news/i-team-audit-of-unrs-school-of-medicine-hidden-from-public/1120792170, App. 111 [hereinafter Arp. 13 Channel 8 Report]. The second video segment and written article are available at George Knapp, *I-Team: Confidential Memos Reveal Reasons UNR Audit Kept Secret*, LASVEGASNOW.COM (last updated Apr. 27, 2018), http://www.lasvegasnow.com/news/i-team-confidential-memos-reveal-reasons-unr-audit-kept-secret/1147000399, App. 114 [hereinafter Arp. 27 Channel 8 Report].

[5] UNR's medical staff based in Las Vegas were being transferred to the newly created UNLV medical program. (Apr. 13 Channel 8 Report, App. 111; Apr. 27 Channel 8 Report, App. 114).

[6] (Julie Ardito, *Statement from University of Nevada, Reno School of Medicine Dean Thomas L. Schwenk, M.D. in Response to KLAS-TV Report*, UNR SCHOOL OF MEDICINE (Apr. 14, 2018), https://med.unr.edu/news/archive/2018/statement-

[redacted]

2. This New Evidence Casts Doubts on the Jury's Determination of Damages and Even Liability

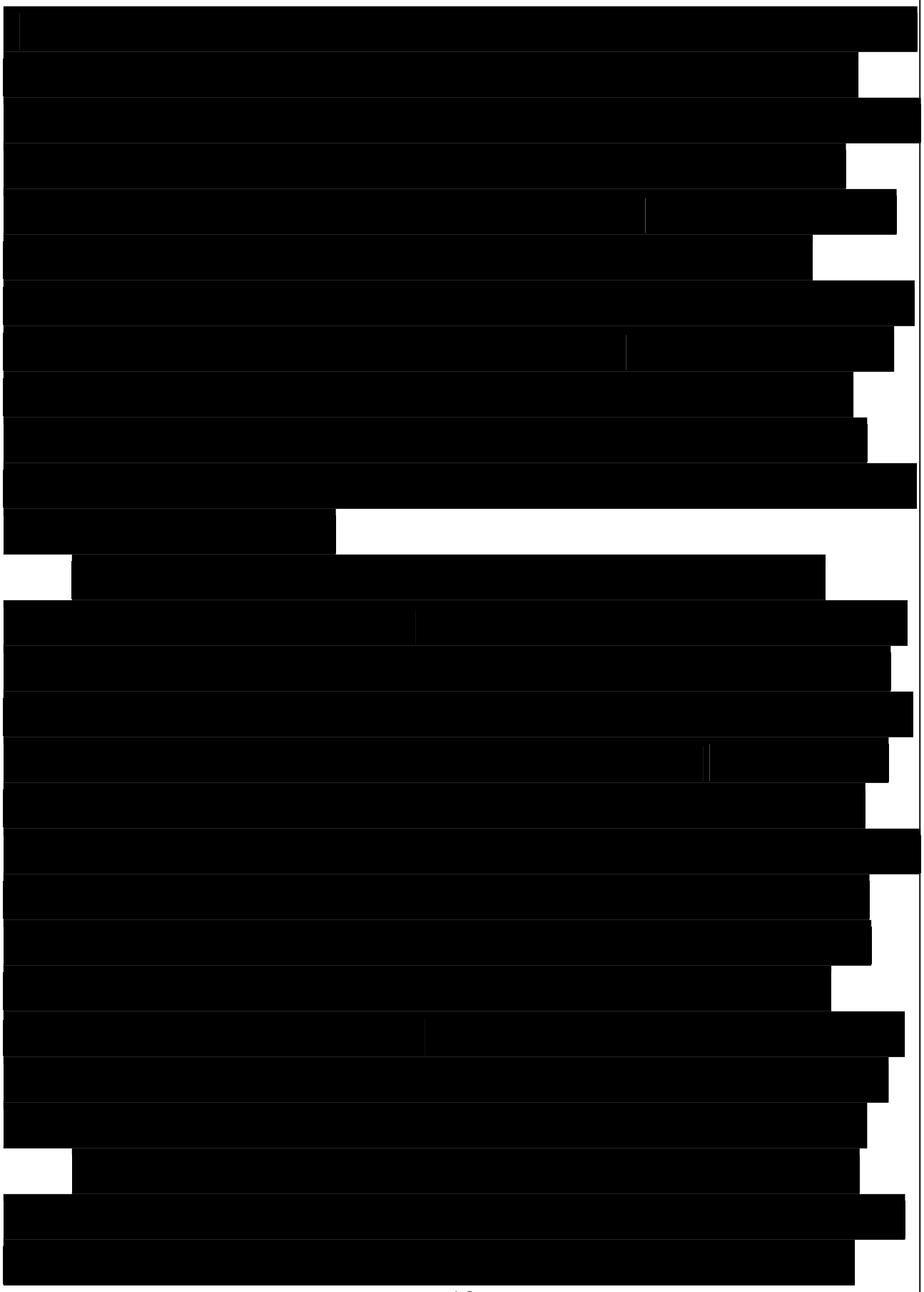
[redacted]

in-response-to-klas-tv-report, App. 121; *UNR Med Statement Regarding Coverage of Due Diligence Audit*, UNR SCHOOL OF MEDICINE (Apr. 28, 2018), https://med.unr.edu/news/archive/2018/statement-on-due-diligence-audit, App. 123 [hereinafter UNR Response]).

[redacted]

B. If Plaintiffs or Plaintiffs' Counsel Were Aware [redacted] then the Judgment Must Be Set Aside for Fraud on the Court

[redacted]



[redacted]

C. A New Trial Is Necessary Even if Plaintiffs Also Were Unaware

1. Plaintiffs Had an Affirmative Duty to Obtain and Disclose the Information, and Their Disclosures and Answer to an Interrogatory Led MCI to Believe They Had Relayed All Relevant Information

[redacted]

2. It Is Very Likely that MCI Could Not Have Discovered This New Evidence Before, and Never Would Have But for it Being Leaked to the Press

[redacted]

a. IT WAS REASONABLE FOR MCI TO TRUST PLAINTIFFS' REPRESENTATION RESPONDING TO AN INTERROGATORY

[redacted]

[redacted]

b. DEFENDANT COULD NOT HAVE BEEN EXPECTED TO SEEK DISCOVERY OF SUCH AN UNLIKELY SCENARIO

[redacted]

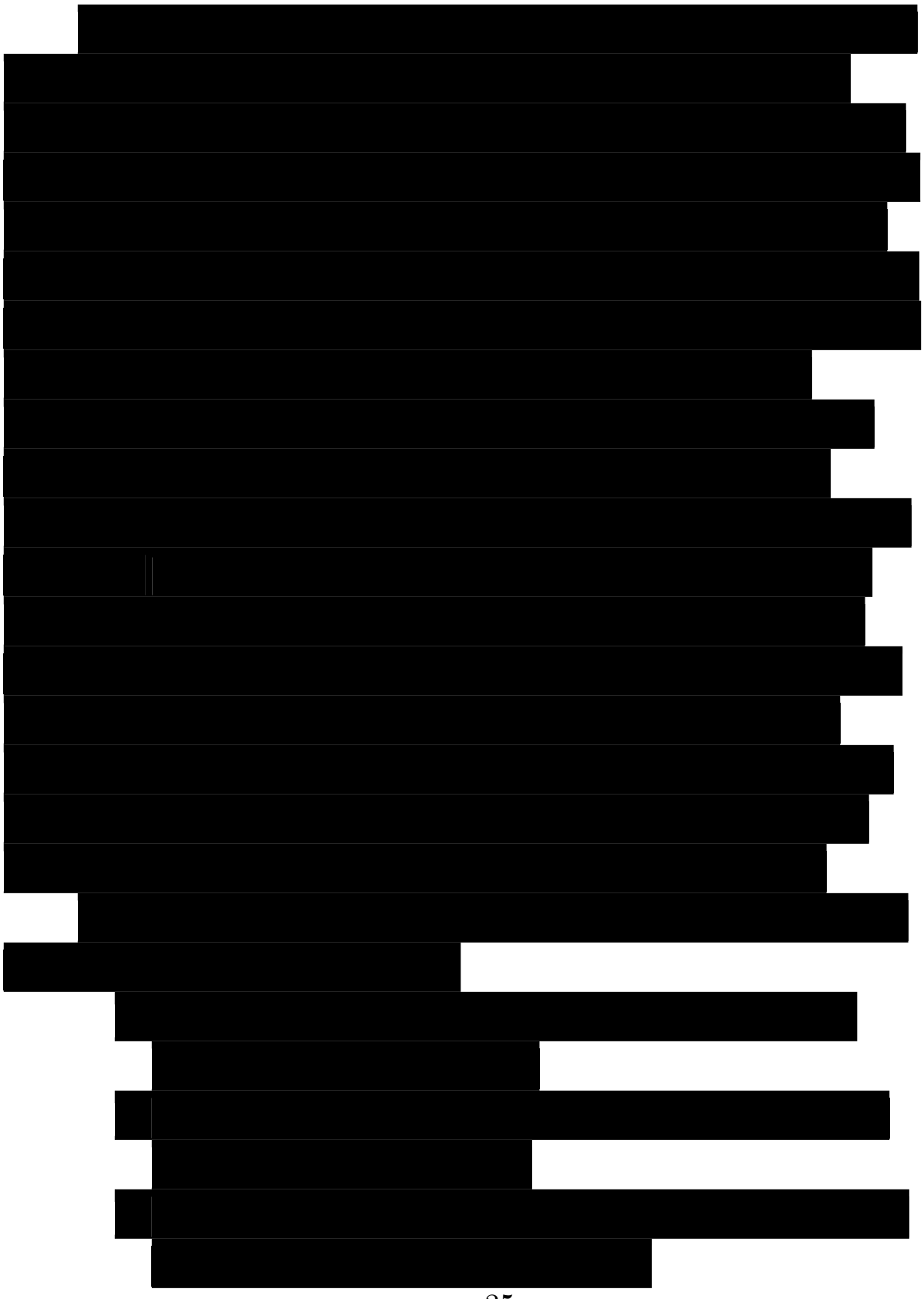
[redacted]

[redacted]

c. UNR'S RESPONSE TO CHANNEL 8'S FOIA REQUEST AND ITS SECRECY EVEN TOWARD COUNTERPARTS AT UNLV DEMONSTRATE THAT MCI LIKELY COULD NOT HAVE DISCOVERED THE INFORMATION BEFORE TRIAL

[redacted]

d. THE EXPEDITED DISCOVERY SCHEDULE DID NOT ALLOW FOR A NO-STONE-UNTURNED DISCOVERY APPROACH



IV.

IT WAS AN ERROR TO EXCLUDE EVIDENCE OF TAXES PREVIOUSLY PAID BY DR. KHIABANI

Evidence related to the impact of income taxes on the amount of loss of probable support damages arising under Nevada's wrongful death statute is admissible. Precluding such evidence was prejudicial. "Probable support damages" cannot be "probable" where the amount awarded ignores the inevitable impact of income taxes. In this case, the evidence of income tax was highly probative because Dr. Khiabani was in the very highest tax bracket. Defendant should have been permitted to introduce evidence related to the impact of income taxes on the amount of loss of probable support damages.

A. Excluding the Evidence on the Impact of Income Taxes Did Not Provide the Jury with Realistic Calculations

Nevada's wrongful death statute, NRS 41.085, sets forth the type of damages a plaintiff can recover in a wrongful death action. *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993). The statute provides, in pertinent part, that an heir may recover pecuniary damages for the heir's

"loss of probable support." In discussing loss of support damages in a wrongful death case, the gross earnings are not available for the support of the family, because gross earnings are reduced by the amount of income taxes withheld. STEIN ON PERSONAL INJURY DAMAGES § 3:8 (3d ed.) (October 2017 Update); RESTATEMENT (SECOND) OF TORTS § 914A; *Floyd v. Fruit Industries,* 136 A.2d 918, 925 (Conn. 1957).

Excluding evidence of the impact of income taxes on the loss of "probable support" resulted in a $300,000 difference per year, a figure that the jury was precluded from hearing. Plaintiffs used economic expert, Dr. Larry Stokes, to estimate the economic losses associated with Dr. Khiabani's death. Dr. Stokes used the year 2016 as the base year for his calculations.[7] Mr. Roberts, making a proffer outside the presence of the jury, questioned Dr. Stokes on the impact of income taxes. Dr. Stokes testified that the income number he used for 2016 was $909,503.[8] Dr. Khiabani's W-2 indicated that the federal tax withheld $332,302.91.[9] Further, Dr. Stokes noted that the income tax returns Dr. Stokes had in his file indicated Dr. Khiabani paid 35 percent of gross income in taxes.[10] So the amount of income Dr. Khiabani received in 2016 less the taxes he paid was approximately $619,777.

To calculate loss of probable support the jury was charged with calculating how much money Dr. Khiabani would have provided his children. Mr. Roberts noted that if the impact of income taxes was excluded, the jury could award more money in lost probable support than Dr. Khiabani would have actually had available.

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[7] (Transcript of Proceedings at 120:3–5, Mar. 1, 2018, App. 11).

[8] (*Id.* at 120:7, App. 11).

[9] (*Id.* at 121:12, App. 12).

[10] (*Id.* at 122:16, App. 13).

> MR. ROBERTS: [I]t's up to the jury to determine how much he would have provided to his children in lost support. . . . He couldn't have given his children any more than he had left in his pocket after he paid his federal taxes could he?
> DR. STOKES: Not in any current sense, no he couldn't.

(Transcript of Proceedings at 123:4–13, Mar. 1, 2018, App. 14).

Mr. Roberts further articulated this point and the danger of the jury awarding inaccurate lost probable support damages.

> MR. ROBERTS: And the fact is, if the jury isn't instructed on taxes and awarded 15 million, they will have awarded 5 million more than it would have been possible for Dr. Khiabani to pay them [the children] if he had paid his taxes.

(Transcript of Proceedings at 216:24–217:2, Mar. 20, 2018, App. 179).

Accordingly, preventing evidence of the impact of income taxes on the loss of probable support, a $300,000 difference, was prejudicial.[11]

B. Nevada Law Supports the Admission of Evidence Related to the Impact of Income Taxes on Loss of Probable Support

The Court recognized that evidence of the impact of income taxes is not admissible in certain circumstances. In *Otis Elevator Co. v. Reid*, the Court noted that tax instructions are appropriate in special circumstances. 101 Nev. 515, 521, 706 P.2d 1378, 1382 (1985). Respectfully, such an instruction was appropriate in this case. Defendant offered a proposed jury instruction on consideration of probable taxes that would have directed the jury to subtract probable income taxes and necessary personal living expenses from Dr. Khiabani's lost earning capacity.[12] It was an error for the Court to reject it.

Nevada law supports the admission of evidence relating to the impact of income taxes on loss of probable support. The Nevada Supreme Court has recognized that the Legislature, in constructing the wrongful death statute,

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[11] (*Id.* at 217:15–19, App. 180).
[12] (Defendant's Proposed Jury Instruction, Consideration of Probable Taxes (on last unnumbered page), App. 209).

"carefully chose the words 'probable support.'" *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989).

Mr. Roberts correctly argued that in a loss of probable support case evidence of the impact of income taxes is admissible:

> MR. ROBERTS: If you have a lost support case… that specifically addresses the issue, the clear majority rule is the taxation comes in. And the reason it comes in is a loss of support has to come in after personal consumption.

(*Id.* at 216:11–18, App. 179). Addressing the Court's concerns, Mr. Roberts further argued that while such evidence is not admissible in certain circumstances, it was admissible here.

> MR. ROBERTS: Personal consumption doesn't come in in a wage loss case… but if its loss of support, that's why it comes in.

(*Id.* at 216:19–23, App. 179).

Other courts have similarly recognized that evidence relating to the impact of income taxes on loss of probable support damages is admissible. *Burlington N., Inc. v. Boxberger*, 529 F.2d 284, 291 (9th Cir. 1975) ("[A]nnual gross income is such that future taxes would have a substantial effect, evidence of the decedent's past and future tax liability should be admitted if a reasonably fair and accurate estimate of his lost future income is to be assured."); *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980) ("It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family.").

Nevada law supports admitting evidence related to the impact of income taxes on probable support. Where such evidence is excluded, the jury may award more money in lost probable support than the decedent would actually have had available. Therefore, it was prejudicial for the Court to exclude the evidence of Dr. Khiabani's income taxes.

CONCLUSION

Based on the foregoing, MCI respectfully requests that the Court grant its motion for new trial on plaintiff's failure-to-warn claim and damages.

Dated this 7th day of May, 2018.

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I hereby certify that on the 7th day of May, 2018, a true and correct copy of the foregoing motion was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent); the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

v.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/v/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

NOTICE OF APPEAL

NOTICE OF APPEAL

Please take notice that defendant Motor Coach Industries, Inc. hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Judgment," filed April 17, 2018, notice of entry of which was served electronically on April 18, 2018 (Exhibit A); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.

DATED this 18th day of May, 2018.

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I hereby certify that on the 18th day of May, 2018, a true and correct copy of the foregoing "Notice of Appeal" was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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EXHIBIT A

EXHIBIT A

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

NOTICE OF ENTRY OF JUDGMENT

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a Judgment was entered in the above entitled matter on April 17, 2018.

//

//

A copy of said Judgment is attached hereto.

DATED this 18th day of April, 2018.

KEMP, JONES & COULTHARD, LLP

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2018, the foregoing NOTICE OF ENTRY OF JUDGMENT was served on all parties currently on the electronic service list via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2.

An Employee of Kemp, Jones & Coulthard.

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

JUDGMENT

The above-captioned action having come before the Court for a jury trial commencing on February 12, 2018, the Honorable Adriana Escobar, District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its special verdict,

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IT IS HEREBY ORDERED, ADJUDGED, and DECREED that, pursuant to the jury's verdict, judgment is entered in favor of Plaintiffs, KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian MARIE-CLAUDE RIGAUD, and SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent) and as Executor of the Estate of Katayoun ("Katy") Barin, DDS (Decedent), and against Defendant MOTOR COACH INDUSTRIES, INC. ("MCI"), as follows:

KEON KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$1,000,000.00
Future Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$7,000,000.00
Loss of Probable Support:	$1,200,000.00
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.34
TOTAL	$9,533,333.34

ARIA KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$1,000,000.00
Future Grief and Sorrow, Loss of Companionship, Society, and Comfort:	$5,000,000.00
Loss of Probable Support:	$1,000,000.00
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.33
TOTAL	$7,333,333.33

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THE ESTATE OF KATY BARIN DAMAGES

Greif and Sorrow, Loss of Companionship, Society, Comfort, and Consortium suffered by Katy Barin before her October 12, 2017 death:	$1,000,000.00
Loss of Probable Support before her October 12, 2017 death33	$500,000.00
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.33
TOTAL	$1,833,333.33

THE ESTATE OF KAYVAN KHIABANI COMPENSATORY DAMAGES

Medical and Funeral Expenses	$46,003.62

PLAINTIFFS' COMBINED TOTAL DAMAGES AWARD:	**$18,746,003.62**

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, under Nev. Rev. Stat. § 18.020, Plaintiffs shall also recover all costs reasonably and necessarily incurred in this action in an amount to be determined.

///

///

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IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, pursuant to Nev. Rev. Stat. § 17.130, Plaintiffs shall receive prejudgment interest, accruing from June 1, 2017, at the rate provided by law, on $4,546,003.62 of the combined total damages award, as this amount represents past damages for: (i) the grief and sorrow and loss of companionship, society, and comfort suffered by Keon Khiabani ($1,000,000.00); (ii) the grief and sorrow and loss of companionship, society, and comfort suffered by Aria Khiabani ($1,000,000.00); (iii) the grief and sorrow and loss of companionship, society, comfort, consortium, and probable support suffered by Katy Barin before her October 12, 2017 death ($1,500,000.00); (iv) the pain and suffering of Decedent Dr. Kayvan Khiabani ($1,000,000.00); and (v) the medical and funeral expenses incurred by Decedent Dr. Kayvan Khiabani ($46,003.62). As of April 11, 2018, the total amount of accrued prejudgment interest is $246,480.55.[1]

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs' total judgment shall bear post-judgment interest at the rate provided by law, which is currently 6.5%/year, until satisfied.

IN SUM, judgment upon the verdict in favor of Plaintiffs is hereby given for Eighteen Million Seven Hundred Forty-Six Thousand Three and 62/100 Dollars ($18,746,003.62) against Defendant MCI, with prejudgment interest, as described above, and with post-judgment interest continuing to accrue on the total judgment amount from the date this Judgment is entered until it is fully satisfied.

Dated this 17th day of April, 2018.

DISTRICT COURT JUDGE

[1] 06/01/2017 - 06/30/2017 $21,484.53(30 days @ $716.15/daily @ 5.750%/year);
07/01/2017 - 12/31/2017 $143,230.23(184 days @ $778.43/daily @ 6.250%/year);
1/01/2018 - 04/11/2018 $81,765.78(101 days @ $809.56/daily @ 6.500%/year)

Respectfully Submitted by:

KEMP, JONES & COULTHARD, LLP

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EXHIBIT F TO DOCKETING STATEMENT

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

STIPULATION AND ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANTS MICHELANGELO LEASING, INC. AND EDWARD HUBBARD ONLY

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I

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between Plaintiffs, by and through their counsel of record, Kemp, Jones & Coulthard, LLP and Christiansen Law Offices, and Defendants Michelangelo Leasing, Inc. d/b/a Ryan's Express ("Michelangelo") and Edward Hubbard, by and through their counsel of record, Selman Breitman LLP, that Plaintiffs' claims against Defendants Michelangelo and Hubbard be dismissed with prejudice and that Defendants Michelangelo and Hubbard be dismissed with prejudice from the above-entitled action, with each party to bear its own attorneys' fees and costs. This stipulation applies to Defendants Michelangelo and Hubbard **only**, and it does not dismiss Plaintiffs' claims against any other Defendant.

Dated this 13 day of August, 2018.

KEMP, JONES & COULTHARD, LLP

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Las Vegas, Nevada 89101
Attorneys for Plaintiffs

Dated this 16 day of August, 2018.

SELMAN BREITMAN LLP

ERIC O. FREEMAN, ESQ. (#6648)
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Attorneys for Defendants Michelangelo Leasing, Inc. d/b/a Ryan's Express and Edward Hubbard

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II

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to the forgoing stipulation, Plaintiffs' claims against Defendants Michelangelo Leasing, Inc. d/b/a Ryan's Express and Edward Hubbard are dismissed with prejudice and Defendants Michelangelo Leasing, Inc. and Edward Hubbard are dismissed with prejudice from the above-entitled action, with each party to bear its own attorneys' fees and costs. This order applies to Defendants Michelangelo Leasing, Inc. and Hubbard only, and it does not dismiss Plaintiffs' claims against any other Defendant.

Dated this 21 of August, 2018.

DISTRICT COURT JUDGE

Submitted by:

KEMP, JONES & COULTHARD, LLP

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EXHIBIT G TO DOCKETING STATEMENT

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Attorneys for Defendant,
SEVENPLUS BICYCLES, INC
d/b/a PRO CYCLERY

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

v.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20 and ROE CORPORATIONS 1 through 20,

Defendants.

CASE NO. A-17-755977-C
DEPT NO.: XIV

NOTICE OF ENTRY OF FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

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NOTICE OF ENTRY OF FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

PLEASE TAKE NOTICE that a Findings of Fact Conclusions of Law and Order on Motion for Determination of Good Faith Settlement was entered in the above-entitled Court on the 5th day of January, 2018, a copy of which is attached hereto.

DATED: January 8, 2018

MURCHISON & CUMMING, LLP

By _____

Michael J. Nuñez, Esq.
Nevada Bar No. 10703
350 S. Rampart Blvd., Suite 320
Las Vegas, Nevada 89145
Attorneys for Defendant
SEVENPLUS BICYCLES, INC
d/b/a PRO CYCLERY

PROOF OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada. My business address is 350 South Rampart Boulevard, Suite 320, Las Vegas, Nevada 89145.

On January 8, 2018, I served true copies of the following document(s) described as **NOTICE OF ENTRY OF FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT** on the interested parties in this action as follows:

SEE ATTACHED LIST

BY ELECTRONIC SERVICE: by transmitting via the Court's electronic filing and electronic service the document(s) listed above to the Counsel set forth on the service list on this date pursuant to Administrative order 14-2 NEFCR 9 (a), and EDCR Rule 7.26.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on January 8, 2018, at Las Vegas, Nevada.

Nicole Garcia

SERVICE LIST
Keon Khiabani, et. al. vs. Motor Coach Industries, et. a l.

Will Kemp Kemp, Jones & Coulthard, LLP 3800 Howard Hughes Parkway, 17th Floor Las Vegas, NV 89169 Telephone: 702-385-6000	Attorneys for Plaintiffs
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Darrell Barger, Esq. Hartline Dacus Barger Dreyer LLP 1980 Post Oak Blvd., Ste. 1800 Houston, TX 77056 Telephone: (713) 759-1990	Attorneys for Motor Coach Industries, Inc.
John C. Dacus, Esq. Brian Rawson, Esq. Hartline Dacus Barger Dreyer LLP 8750 N. Central Expressway, Ste. 1600 Dallas, TX 75231 Telephone: (214) 346-3718	Attorneys for Motor Coach Industries, Inc.
David A. Dial, Esq. Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC 3344 Peachtree Road, Ste. 2400 Atlanta, GA 30326 Telephone: (404) 876-2700	Attorneys for Motor Coach Industries, Inc.
Eric O. Freeman, Esq. Selman Breitman LLP 3993 Howard Hughes Pkwy, Ste. 200 Las Vegas, NV 89169-0961 Telephone: (702) 228-7717 Facsimile: (702) 228-8824	Attorneys for Michelangelo Leasing Inc. d/b/a Ryan's Express and Edward Hubbard
Brian K. Gibson, Esq. Littleton Joyce Ughetta Park and Kelly, LLP The Centre at Purchase 4 Manhattanville Road, Ste. 202 Purchase, NY 10577 Telephone: (914) 417-3400	Attorneys for Bell Sports, Inc.

Paul E. Stephan, Esq. Jerry C. Popovich, Esq. William J. Mall, Esq. Selman Breitman LLP 6 Hutton Centre Drive, Ste. 1100 Santa Ana, CA 92707 Telephone: (714) 647-2536	Attorneys for Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard
Michael E. Stoberski, Esq. Joslyn Shapiro, Esq. Olson, Cannon, Gormley, Angulo & Stoberski 9950 W. Cheyenne Ave. Las Vegas, NV 89129 Telephone: (702) 384-4012 Facsimile: (702) 383-0701	Attorneys for Bell Sports, Inc.
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C. Scott Toomey, Esq. Littleton Joyce Ughetta Park and Kelly, LLP 201 King of Prussia Road, Ste. 220 Radnor, PA 19087 Telephone: (484) 254-6222	Attorneys for Bell Sports, Inc.
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ORDR

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Attorneys for Defendant,
SEVENPLUS BICYCLES, INC
d/b/a PRO CYCLERY

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

v.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20 and ROE CORPORATIONS 1 through 20,

Defendants.

CASE NO. A-17-755977-C
DEPT NO.: XIV

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

///

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

This matter came on for hearing on 7th day of December, 2017, by way of Defendant SEVENPLUS BICYCLES, INC d/b/a PRO CYCLERY'S (hereinafter "SevenPlus" and/or "Defendant"), Motion for Determination of Good Faith Settlement, before Department XIV of the Eighth Judicial District Court, in and for Clark County, Nevada with the honorable JUDGE ESCOBAR presiding. PLAINTIFFS appeared by and through their attorney, WILL KEMP, ESQ. of the law firm, KEMP JONES & COULTHARD, LLP; and DEFENDANT MOTOR COACH INDUSTRIES, INC. appeared through D. LEE ROBERTS, JR., ESQ. of law firm WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC. All other appearances noted in the record. Having reviewed the papers and pleadings on file herein, and heard the oral arguments of the attorneys, the Court makes the following Findings of Fact, and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On April 18, 2017, a tour bus owned and operated by Defendant Michelangelo Leasing INC. (d/b/a Ryan's Express) collided with the bicycle operated by 51-year-old Dr. Kayvan Khiabani thereby resulting in fatal injuries.

2. The tour bus manufactured in 2008 by Defendant Motor Coach Industries, INC, was driven by Defendant Edward Hubbard. At the time of the incident, Dr. Khiabani was wearing a Giro helmet manufactured by Defendant Bell Sports, Inc.

3. Defendant SevenPlus is the retail store that sold Dr. Kayvan Khiabani the bicycle and helmet, as well as related accessories.

4. Plaintiffs filed their Amended Complaint on June 6, 2017, citing strict liability, breach of implied warranty and wrongful death against SevenPlus.

5. The settlement reached by Plaintiffs and Defendant SevenPlus in the amount of Ten Thousand Dollars ($10,000.00) was made in good faith pursuant to the factors in *Doctors Co. v. Vincent*, 120 Nev. 644, 652, 98 P.2d 681, 687 (2004), and the factors in NRS 17.245.

6. A copy of the SevenPlus insurance policy was provided to Plaintiffs for consideration during settlement discussions whereby Plaintiffs confirmed sufficient limits for the nature of the claims. Therefore, the amount of the insurance policy limits of the settlement party (SevenPlus) is not relevant to the pending settlement. The agreed amount to be paid settlement ($10,000.00) was based upon substantial negotiations between the parties and therefore not a nuisance value settlement.

7. There are four Plaintiffs in this case and no Third Party Plaintiffs. The entire settlement amount that SevenPlus have agreed to pay Plaintiffs in this matter, Ten Thousand Dollars ($10,000.00), shall be allocated entirely to Plaintiffs and Plaintiffs' Counsel. Plaintiffs and their counsel shall allocate specific settlements amongst the four Plaintiffs.

8. The financial condition of SevenPlus played a direct role in reaching the settlement between the Plaintiffs and SevenPlus; and said settlement sums shall be satisfied through insurance. The agreement to settle was based upon a careful analysis of the issues, the evidence, and the costs of further litigation between the settling Parties.

9. The settlement discussions were conducted at arms-length, without collusion or fraud and without intention to injure the interests of the non-settling parties, Motor Coach Industries, Inc, Michelangelo Leasing Inc. d/b/a Ryan's Express, Edward Hubbard and Bell Sports, Inc d/b/a Giro Sport Design. Plaintiffs determined that a settlement at this time is necessary and appropriate based upon careful consideration and consultation with its and their Counsel.

10. In accordance with *Blaine Equipment Company, Inc. v. The State of Nevada*, 138 P.3d 820 (2006), the necessary parties are before this Court and no other parties are necessary to be joined on the issues that exist in this case in order to achieve final resolution, as it pertains to SevenPlus.

CONCLUSIONS OF LAW

11. On April 18, 2017, a tour bus owned and operated by Defendant Michelangelo Leasing INC. (d/b/a Ryan's Express) collided with the bicycle operated by 51-year-old Dr. Kayvan Khiabani thereby resulting in fatal injuries.

12. The tour bus manufactured in 2008 by Defendant Motor Coach Industries, INC, was driven by Defendant Edward Hubbard. At the time of the incident, Dr. Khiabani was wearing a Giro helmet manufactured by Defendant Bell Sports, Inc.

13. Defendant SevenPlus is the retail store that sold Dr. Kayvan Khiabani the bicycle and helmet, as well as related accessories.

14. Plaintiffs filed their Amended Complaint on June 6, 2017, citing strict liability, breach of implied warranty and wrongful death against SevenPlus.

15. The settlement reached by Plaintiffs and Defendant SevenPlus in the amount of Ten Thousand Dollars ($10,000.00) was made in good faith pursuant to the factors in Doctors Co. v. Vincent, 120 Nev. 644, 652, 98 P.2d 681, 687 (2004), and the factors in NRS 17.245.

16. A copy of the SevenPlus insurance policy was provided to Plaintiffs for consideration during settlement discussions whereby Plaintiffs confirmed sufficient limits for the nature of the claims. Therefore, the amount of the insurance policy limits of the settlement party (SevenPlus) is not relevant to the pending settlement. The agreed amount to be paid settlement ($10,000.00) was based upon substantial negotiations between the parties and therefore not a nuisance value settlement.

17. There are four Plaintiffs in this case and no Third Party Plaintiffs. The entire settlement amount that SevenPlus have agreed to pay Plaintiffs in this matter, Ten Thousand Dollars ($10,000.00), shall be allocated entirely to Plaintiffs and Plaintiffs' Counsel. Plaintiffs and their counsel shall allocate specific settlements amongst the four Plaintiffs.

18. The financial condition of SevenPlus played a direct role in reaching the settlement between the Plaintiffs and SevenPlus; and said settlement sums shall be satisfied through insurance. The agreement to settle was based upon a careful analysis of the issues, the evidence, and the costs of further litigation between the settling Parties.

19. The settlement discussions were conducted at arms-length, without collusion or fraud and without intention to injure the interests of the non-settling parties, Motor Coach Industries, Inc, Michelangelo Leasing Inc. d/b/a Ryan's Express, Edward Hubbard and Bell Sports, Inc d/b/a Giro Sport Design. Plaintiffs determined that a settlement at this time is

necessary and appropriate based upon careful consideration and consultation with its and their Counsel.

20. In accordance with *Blaine Equipment Company, Inc. v. The State of Nevada*, 138 P.3d 820 (2006), the necessary parties are before this Court and no other parties are necessary to be joined on the issues that exist in this case in order to achieve final resolution, as it pertains to SevenPlus.

Accordingly, and based upon the aforementioned Findings of Fact. and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that. DEFENDANT SEVENPLUS' Motion for Determination of Good Faith Settlement filed April 24, 2015, is granted with prejudice and certified pursuant to NRCP 54(b).

DISTRICT COURT JUDGE
4th January, 2018

Respectfully Submitted By:

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SEVENPLUS BICYCLES, INC
d/b/a PRO CYCLERY

EXHIBIT H TO DOCKETING STATEMENT

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

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COME NOW Plaintiffs, KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent); by and through their attorneys, Will Kemp, Esq. and Eric Pepperman, Esq. of the law firm KEMP, JONES & COULTHARD, LLP and Peter S. Christiansen, Esq. and Kendelee L. Works, Esq. of CHRISTIANSEN LAW OFFICES, and for their claims against the Defendants, and each of them, complain and allege as follows:

THE PARTIES

1. Plaintiff minors, KEON KHIABANI and ARIA KHIABANI, are the natural children of Dr. Kayvan Khiabani (Decedent) and Katayoun "Katy" Barin (Decedent).

2. Plaintiff minor KEON KHIABANI is a citizen of the United States. Keon lives and attends school in Montreal, Canada with his duly appointed Guardians.

3. Plaintiff minor ARIA KHIABANI is a citizen of the United States. Aria lives and attends school in Montreal, Canada with his duly appointed Guardians.

4. Plaintiff MARIE-CLAUDE RIGAUD is the duly authorized Guardian of Keon Khiabani and Aria Khiabani. She is a citizen and resident of Montreal, Canada. As Guardian, MARIE-CLAUDE RIGAUD is authorized to bring this action on behalf of the Plaintiff Minors.

5. Plaintiff SIAMAK BARIN is a duly authorized Executor of the Estate of Kayvan Khiabani, M.D. (Decedent). As Executor, Siamak Barin is authorized to bring this action on behalf of Plaintiff the Estate of Kayvan Khiabani, M.D. (Decedent).

6. Plaintiff SIAMAK BARIN is a duly authorized Executor of the Estate of Katayoun Barin, DDS (Decedent). As Executor, Siamak Barin is authorized to bring this action on behalf of Plaintiff the Estate of Katayoun Barin, DDS (Decedent).

7. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times, Defendant MOTOR COACH INDUSTRIES, INC. ("MCI") was and is a corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of Nevada, including Clark County. MCI designs, manufacturers, markets, and sells

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commercial tour buses (aka Motor Coaches). Defendant MCI designed, manufactured, and sold the 2008, full-size Motor Coach involved in the incident described herein.

8. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times, Defendant MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS ("Ryan's Express") was and is a corporation organized and existing under the laws of the State of Arizona and authorized to do business in the State of Nevada. Ryan's Express is a ground transportation company that provides charter bus services for group transportation. Defendant Ryan's Express owned and operated the MCI bus involved in the incident described herein.

9. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times, Defendant EDWARD HUBBARD was and is a resident of Clark County, Nevada. Edward Hubbard is employed by Ryan's Express as a bus driver. As part of his duties and responsibilities, Hubbard operates full-size Motor Coaches and was operating the MCI bus at the time of the incident described herein.

10. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times, Defendant BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN ("Giro") was and is a corporation organized and existing under the laws of the State of California and authorized to do business in the State of Nevada, including Clark County. GIRO designs, manufactures, markets, and sells protective gear and accessories for sport activities, including cycling helmets. Defendant Giro designed, manufactured, and sold the helmet that Dr. Kayvan Khiabani was wearing at the time of the incident described herein.

11. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times, Defendant SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY ("Pro Cyclery") was and is a corporation organized and existing under the laws of the State of Nevada and authorized to do business in the State of Nevada, including Clark County. Pro Cyclery is engaged in the retail sale of bicycles and cycling accessories, including cycling helmets. Upon information and belief, Defendant Pro Cyclery sold to Dr. Kayvan Khiabani the helmet that Dr. Khiabani was wearing at the time of the incident described herein.

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12. The true names and capacities, whether individual, corporate, association or otherwise of the Defendants, DOES 1 through 20 and/or ROE CORPORATIONS 1 through 20, inclusive, are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names. Plaintiffs are informed and believe, and thereupon allege, that each of the Defendants designated herein as DOES and/or ROE CORPORATIONS is responsible in some manner for the events and happenings herein referred to, and in some manner caused the injuries and damages to Plaintiffs alleged herein. Plaintiffs will ask leave of the court to amend this Complaint to insert the true names and capacities of said Defendants, DOES 1 through 20 and/or ROE CORPORATIONS 1 through 20, inclusive when the same have been ascertained by Plaintiffs, together with the appropriate charging allegations, and to join such Defendants in this action.

13. Whenever it is alleged in this Complaint that a Defendant did any act or thing, it is meant that such Defendant's officers, agents, servants, employees, or representatives did such act or thing and at the time such act or thing was done, it was done with full authorization or ratification of such Defendant or was done in the normal and routine course and scope of business, or with the actual, apparent and/or implied authority of such Defendant's officers, agents, servants, employees, or representatives. Specifically, Defendants are liable for the actions of its officers, agents, servants, employees, and representatives.

14. All of the Defendants as named herein are jointly and severally liable to Plaintiffs for Plaintiffs' damages.

15. Plaintiffs are informed and believe, and thereupon allege, that Defendants, and each of them, jointly and in concert undertook to perform the acts as alleged herein, that Defendants and each of them had full knowledge of the acts of each co-Defendant as alleged herein, and that each Defendant authorized or subsequently ratified the acts of each co-Defendant as alleged herein, making each co-Defendant an agent of the other Defendants and making each Defendant jointly responsible and liable for the acts and omissions of each co-Defendant as alleged herein.

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JURISDICTION AND VENUE

16. This is an action for damages in excess of Fifteen Thousand Dollars ($15,000.00), exclusive of costs, interest, and attorneys' fees.

17. Venue is proper in this Court because the incident giving rise to this lawsuit occurred in Clark County, Nevada.

GENERAL ALLEGATIONS

18. On or about April 18, 2017, Dr. Kayvan Khiabani was riding his Scott Solace 10 Disc road bicycle southbound in a designated bicycle lane on S. Pavilion Center Drive near the Red Rock Resort and Casino in Las Vegas, Nevada. At the time, Dr. Khiabani was wearing a bicycle helmet designed, manufactured, and sold by Giro. Upon information and belief, Dr. Khiabani purchased the Giro helmet at the retail level from Defendant Pro Cyclery.

19. Upon information and belief, at approximately 10:34 AM, as he approached the intersection of S. Pavilion Center Drive and Griffith Peak Drive, Dr. Khiabani was overtaken by a large tour bus on his left side.

20. The bus was a 2008, full-size Motor Coach that was designed, manufactured, and sold by Defendant MCI and further identified by Vehicle Identification No. 2M93JMHA28W064555 and Utah License Plate No. Z044712. Upon information and belief, the subject bus was designed and manufactured without proximity sensors to alert the driver of adjacent pedestrians and/or bicyclists that may be difficult to see or to alert such pedestrians and/or bicyclists.

21. At the time, the bus was owned and operated by Defendant Ryan's Express and being driven by Defendant Edward Hubbard, an employee of Ryan's Express.

22. Upon information and belief, at the time that it overtook Dr. Khiabani, the bus was traversing out of the right-hand turn lane and crossing over the designated bicycle lane from the right side of Dr. Khiabani to the left side of Dr. Khiabani.

23. As it crossed over the designated bicycle lane to overtake Dr. Khiabani on the left, the bus and Decedent's bicycle collided.

24. As a direct and proximate result of this collision, Dr. Khiabani suffered catastrophic internal and external injuries, including to his head, severe shock to his nervous system, and

great pain and suffering. Dr. Khiabani was transported from the scene of the accident and ultimately died from his injuries.

FIRST CLAIM FOR RELIEF

(STRICT LIABILITY: DEFECTIVE CONDITION OR FAILURE TO WARN AGAINST DEFENDANT MCI)

25. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

26. Defendant MCI, or its predecessors and/or affiliates, were responsible for the design, manufacture, construction, assembly, testing, labeling, distribution, marketing, and sale of the subject bus.

27. At the time of the above-described incident, the subject bus was being used in a manner foreseeable by Defendant MCI.

28. As so used, and from the time the bus left the hands of Defendant MCI, the subject bus was defective, unfit, and unreasonably dangerous for its foreseeable use.

29. The subject bus was further defective and unreasonably dangerous in that Defendant MCI failed to provide adequate warnings about dangers that were known or should have been known by MCI and/or failed to provide adequate instructions for the bus' safe and proper use.

30. The aforementioned incident was a direct and proximate result of a defect or defects in the bus and/or the failure of Defendant MCI to warn of defects that were either known or should have been known or to instruct in the safe and proper use of the bus. As a result, Defendant MCI should be held strictly liable in tort to Plaintiffs.

31. As a direct and proximate result of the defective nature of the subject bus, Decedent Dr. Kayvan Khiabani suffered catastrophic personal injuries and died.

32. As a direct and proximate result of the acts and omissions of Defendant MCI, Decedent sustained past, present, and future lost wages, which would otherwise have been gained in his employment if not for his death proximately caused by this accident, far in excess of Fifteen Thousand Dollars ($15,000.00).

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33. As a direct and proximate result of the acts and omissions of Defendant MCI, the Plaintiff minors each have been deprived of their father's comfort, support, companionship, society, and consortium, and further, each has suffered great grief, sorrow, and extreme emotional distress as a result of the death of their father, to each for general damages far in excess of Fifteen Thousand Dollars ($15,000.00) and economic damages far in excess of Fifteen Thousand Dollars ($15,000.00). The minor children also seek to recover for the pain, suffering, and disfigurement of their father.

34. As a direct and proximate result of the acts and omissions of Defendant MCI, prior to her death, Katy Barin was deprived of her husband's comfort, support, companionship, society, and consortium, and further, had suffered great grief, sorrow, and extreme emotional distress as a result of the death of her husband, for general damages far in excess of Fifteen Thousand Dollars ($15,000.00) and economic damages far in excess of Fifteen Thousand Dollars ($15,000.00).

35. As a direct and proximate result of the acts and omissions of Defendant MCI, Decedent Kayvan Khiabani, MD's Estate and/or Executor Siamak Barin has incurred medical, funeral and burial expenses, and other expenses relating thereto, far in excess of Fifteen Thousand Dollars ($15,000.00).

36. As a direct and proximate result of the acts and omissions of Defendant MCI, Decedent Katy Barin, DDS's Estate and/or Executor Siamak Barin has incurred medical, funeral and burial expenses, and other expenses relating thereto, far in excess of Fifteen Thousand Dollars ($15,000.00).

37. As a direct and proximate result of the acts and omissions of Defendant MCI, Plaintiffs have suffered general and special damages in an amount far in excess of Fifteen Thousand Dollars ($15,000.00).

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38. In carrying out its responsibilities for the design, manufacture, construction, assembly, testing, labeling, distribution, marketing, and sale of the subject bus, Defendant MCI acted with fraud, malice, express or implied, oppression, and/or conscious disregard of the safety of others. As a direct and proximate result of the conduct of Defendant MCI, Plaintiffs are entitled to punitive damages in excess of Fifteen Thousand Dollars ($15,000.00).

39. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

SECOND CLAIM FOR RELIEF

(NEGLIGENCE AGAINST DEFENDANTS RYAN'S EXPRESS AND EDWARD HUBBARD)

40. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

41. Defendant Ryan's Express is vicariously liable for the wrongful acts or omissions of its employee, Defendant Hubbard, in connection with the subject accident because: (i) at the time of the subject accident, Defendant Hubbard was under the control of Defendant Ryan's Express, and (ii) at the time of the subject accident, Defendant Hubbard was acting within the scope of his employment with Ryan's Express.

42. Defendants Ryan's Express and Edward Hubbard owed a duty of care to Dr. Khiabani and Plaintiffs to exercise due care in the operation of the 2008, full-size commercial tour bus.

43. Defendants were negligent and breached this duty of care, *inter alia*: (i) by overtaking Dr. Khiabani at an unsafe speed, which, upon information and belief, also exceeded the posted speed limit; (ii) by failing to give an audible warning with the horn before overtaking Dr. Khiabani; (iii) by failing to overtake Dr. Khiabani in a reasonably safe manner; (iv) by failing to ensure that Dr. Khiabani's bicycle was safely clear before overtaking the bicycle; (v) by failing to leave at least 3 feet between any portion of the bus and Dr. Khiabani and/or his bicycle at the time that the bus overtook Dr. Khiabani; (vi) by failing to yield the right-of-way to Dr.

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Khiabani; and (vii) by entering, crossing over, and/or driving within the designated bicycle lane while Dr. Khiabani was traveling therein.

44. As a direct and proximate result of these negligent acts and omissions, Decedent Dr. Kayvan Khiabani suffered catastrophic personal injuries and died.

45. As a direct and proximate result of the negligent acts and omissions of Defendants Ryan's Express and Edward Hubbard, Decedent sustained past, present, and future lost wages, which would otherwise have been gained in his employment if not for his death proximately caused by this accident, far in excess of Fifteen Thousand Dollars ($15,000.00).

46. As a direct and proximate result of the negligent acts and omissions of Defendants Ryan's Express and Edward Hubbard, the Plaintiff minors each have been deprived of their father's comfort, support, companionship, society, and consortium, and further, each has suffered great grief, sorrow, and extreme emotional distress as a result of the death of their father, to each for general damages far in excess of Fifteen Thousand Dollars ($15,000.00) and economic damages far in excess of Fifteen Thousand Dollars ($15,000.00). The minor children also seek to recover for the pain, suffering, and disfigurement of their father.

47. As a direct and proximate result of the negligent acts and omissions of Defendants Ryan's Express and Edward Hubbard, prior to her death, Katy Barin was deprived of her husband's comfort, support, companionship, society, and consortium, and further, had suffered great grief, sorrow, and extreme emotional distress as a result of the death of her husband, for general damages far in excess of Fifteen Thousand Dollars ($15,000.00) and economic damages far in excess of Fifteen Thousand Dollars ($15,000.00).

48. As a direct and proximate result of the negligent acts and omissions of Defendants Ryan's Express and Edward Hubbard, Decedent's Estate and/or Executor Siamak Barin has incurred medical, funeral and burial expenses, and other expenses relating thereto, far in excess of Fifteen Thousand Dollars ($15,000.00).

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49. As a direct and proximate result of the negligent acts and omissions of Defendants Ryan's Express and Edward Hubbard, Plaintiffs have suffered general and special damages in an amount far in excess of Fifteen Thousand Dollars ($15,000.00).

50. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

THIRD CLAIM FOR RELIEF

(NEGLIGENCE PER SE AGAINST DEFENDANTS RYAN'S EXPRESS AND EDWARD HUBBARD)

51. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

52. When the subject bus overtook Dr. Khiabani at the time of the incident, Defendants Ryan's Express and Edward Hubbard violated Nev. Rev. Stat. § 484B.270, *inter alia*: (i) by overtaking Dr. Khiabani at an unsafe speed, which, upon information and belief, also exceeded the posted speed limit; (ii) by failing to give an audible warning with the horn before overtaking Dr. Khiabani; (iii) by failing to overtake Dr. Khiabani in a reasonably safe manner; (iv) by failing to ensure that Dr. Khiabani's bicycle was safely clear before overtaking the bicycle; (v) by failing to leave at least 3 feet between any portion of the bus and Dr. Khiabani and/or his bicycle at the time that the bus overtook Dr. Khiabani; (vi) by failing to yield the right-of-way to Dr. Khiabani; and (vii) by entering, crossing over, and/or driving within the designated bicycle lane while Dr. Khiabani was traveling therein.

53. These violations, and each of them, were a legal cause of the incident and Plaintiffs' resulting injuries.

54. Plaintiffs belong to the class of persons that the safety requirements in NRS 484B.270 are intended to protect.

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55. As a direct and proximate cause of Defendants violations of NRS 484B.270, and each of them, Plaintiffs have suffered general and special damages far in excess of Fifteen Thousand Dollars ($15,000.00), as outlined above.

56. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

FOURTH CLAIM FOR RELIEF

(NEGLIGENT TRAINING AGAINST DEFENDANT RYAN'S EXPRESS)

57. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

58. Defendant Ryan's Express owed a duty of care to Dr. Khiabani and Plaintiffs to adequately train its drivers, including Defendant Edward Hubbard, to safely operate its commercial tour busses, including the bus involved in the subject incident.

59. Defendant Ryan's Express was negligent and breached this duty of care by failing to adequately train its drivers, including Edward Hubbard, to safely operate its commercial tour busses, including the bus involved in the subject incident. Defendant Ryan's Express further breached this duty of care by entrusting the subject tour bus to an inadequately trained person (i.e., Defendant Hubbard).

60. These negligent acts and omissions, and each of them, were a legal cause of the incident and Plaintiffs' resulting injuries.

61. As a direct and proximate result of these negligent acts and omissions, Plaintiffs have suffered general and special damages far in excess of Fifteen Thousand Dollars ($15,000.00), as outlined above.

62. In carrying out its responsibility to adequately train its drivers, Defendant Ryan's Express acted with fraud, malice, express or implied, oppression, and/or conscious disregard of the safety of others. As a direct and proximate result of the conduct of Defendant Ryan's

Express, Plaintiffs are entitled to punitive damages in excess of Fifteen Thousand Dollars ($15,000.00).

63. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

FIFTH CLAIM FOR RELIEF

(STRICT LIABILITY: DEFECTIVE CONDITION OR FAILURE TO WARN AGAINST DEFENDANTS GIRO AND PRO CYCLERY)

64. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

65. Defendant Giro, or its predecessors and/or affiliates, were responsible for the design, manufacture, construction, assembly, testing, labeling, distribution, marketing, and sale of the helmet that Dr. Khiabani was wearing at the time of the above-described accident.

66. Upon information and belief, Defendant Pro Cyclery, or its predecessors and/or affiliates, were part of the subject helmet's chain of distribution and sold to Dr. Khiabani at the retail level the helmet that Dr. Khiabani was wearing at the time of the above-described accident.

67. At the time of the subject accident, and at all other times material hereto, the helmet was being used in a manner foreseeable by Defendants Giro and Pro Cyclery.

68. As so used, the subject helmet was defective, unfit, and unreasonably dangerous for its foreseeable use in that there was inadequate protection of the head by the helmet, which caused or contributed to the death of Dr. Khiabani.

69. The subject helmet was further defective and unreasonably dangerous in that Defendants Giro and Pro Cyclery failed to provide adequate warnings about dangers that were either known or should have been known by Giro and Pro Cyclery and/or failed to provide adequate instructions regarding the helmet's safe and proper use.

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70. The aforementioned death of Dr. Khiabani was a direct and proximate result of a defect or defects in the helmet and/or the failure of Defendants Giro and Pro Cyclery to warn of defects that were either known or should have been known or to instruct in the safe and proper use of the helmet. As a result, Defendants Giro and Pro Cyclery should be held strictly liable in tort to Plaintiffs.

71. As a direct and proximate result of the defective nature of the helmet and said deficiencies in warnings and/or instructions, Decedent Dr. Kayvan Khiabani suffered a catastrophic head injury and ultimately died.

72. As a direct and proximate result of the acts and omissions of Defendants Giro and Pro Cyclery, Decedent sustained past, present, and future lost wages, which would otherwise have been gained in his employment if not for his death, far in excess of Fifteen Thousand Dollars ($15,000.00).

73. As a direct and proximate result of the acts and omissions of Defendants Giro and Pro Cyclery, the Plaintiff minors each have been deprived of their father's comfort, support, companionship, society, and consortium, and further, each has suffered great grief, sorrow, and extreme emotional distress as a result of the death of their father, to each for general damages far in excess of Fifteen Thousand Dollars ($15,000.00) and economic damages far in excess of Fifteen Thousand Dollars ($15,000.00). The minor children also seek to recover for the pain, suffering, and disfigurement of their father.

74. As a direct and proximate result of the acts and omissions of Defendants Giro and Pro Cyclery, prior to her death, Katy Barin was deprived of her husband's comfort, support, companionship, society, and consortium, and further, had suffered great grief, sorrow, and extreme emotional distress as a result of the death of her husband, for general damages far in excess of Fifteen Thousand Dollars ($15,000.00) and economic damages far in excess of Fifteen Thousand Dollars ($15,000.00).

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75. As a direct and proximate result of the acts and omissions of Defendants Giro and Pro Cyclery, Decedent's Estate and/or Executor Siamak Barin has incurred medical, funeral, and burial expenses, and other expenses relating thereto, far in excess of Fifteen Thousand Dollars ($15,000.00).

76. As a direct and proximate result of the acts and omissions of Defendants Giro and Pro Cyclery, Plaintiffs have suffered general and special damages in an amount far in excess of Fifteen Thousand Dollars ($15,000.00).

77. In carrying out its responsibilities for the design, manufacture, construction, assembly, testing, labeling, distribution, marketing, and sale of the subject helmet, Defendant Giro acted with fraud, malice, express or implied, oppression, and/or conscious disregard of the safety of others. As a direct and proximate result of the conduct of Defendant Giro, Plaintiffs are entitled to punitive damages in excess of Fifteen Thousand Dollars ($15,000.00).

78. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

SIXTH CLAIM FOR RELIEF

(BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE AGAINST DEFENDANTS GIRO AND PRO CYCLERY)

79. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

80. Giro/Pro Cyclery and Decedent, Dr. Khiabani, entered into a contract for the sale of goods (i.e., the Giro helmet).

81. Defendants Giro/Pro Cyclery had reason to know of the particular purpose for which the helmet was required by Dr. Khiabani (i.e., to wear while riding his road bicycle).

82. Dr. Khiabani relied on the skill or judgment of Defendants Giro/Pro Cyclery to furnish suitable goods for this purpose.

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83. The helmet sold by Defendants Giro/Pro Cyclery to Dr. Khiabani was not fit for said purpose and, as a direct and proximate result, Plaintiffs have suffered general and special damages far in excess of Fifteen Thousand Dollars ($15,000.00), as outlined above.

84. In carrying out its responsibilities for the design, manufacture, construction, assembly, testing, labeling, distribution, marketing, and sale of the subject helmet, Defendant Giro acted with fraud, malice, express or implied, oppression, and/or conscious disregard of the safety of others. As a direct and proximate result of the conduct of Defendant Giro, Plaintiffs are entitled to punitive damages in excess of Fifteen Thousand Dollars ($15,000.00).

85. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

SEVENTH CLAIM FOR RELIEF

(WRONGFUL DEATH OF KAYVAN KHIABANI, MD

AGAINST ALL DEFENDANTS)

86. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

87. Plaintiff minors are the heirs of Decedent and are entitled to maintain an action for damages against the Defendants for the wrongful death of Dr. Kayvan Khiabani.

88. Pursuant to NRS 41.085, Siamak Barin is the Executor of the Estate of the Decedent and may also maintain an action for damages against the Defendants for special damages and penalties, including but not limited to exemplary or punitive damages as set forth in NRS 41.085(5).

89. As a result of the injuries to and death of Dr. Khiabani, Plaintiffs are entitled to damages, including, but not limited to: pecuniary damages for their grief and sorrow, loss of

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probable support, companionship, society, comfort and consortium, and damages for pain, suffering and disfigurement of the Decedent.

90. As a direct and proximate result of the wrongful death of Dr. Khiabani, Plaintiffs have been damaged in an amount far in excess of Fifteen Thousand Dollars ($15,000.00).

91. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

EIGHTH CLAIM FOR RELIEF

(WRONGFUL DEATH OF KATY BARIN, DDS

AGAINST ALL DEFENDANTS)

92. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if fully set forth herein.

93. As a direct and proximate result of the stress caused by the wrongful death of her husband, Dr. Kayvan Khiabani, Katy Barin lost her battle against cancer.

94. Plaintiff minors are the heirs of Decedent Katy Barin and are entitled to maintain an action for damages against the Defendants for the wrongful death of their mother, Dr. Katy Barin.

95. Pursuant to NRS 41.085, Siamak Barin is the Executor of the Estate of Katy Barin (Decedent) and may also maintain an action for damages against the Defendants for special damages and penalties, including but not limited to exemplary or punitive damages as set forth in NRS 41.085(5).

96. As a result of the death of Dr. Barin, Plaintiffs are entitled to damages, including, but not limited to: pecuniary damages for their grief and sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering and disfigurement of the Decedent.

97. As a direct and proximate result of the wrongful death of Dr. Barin, Plaintiffs have been damaged in an amount far in excess of Fifteen Thousand Dollars ($15,000.00).

98. Plaintiffs have been required to retain legal counsel to prosecute this action, and are therefore entitled to reasonable attorney's fees and costs of suit incurred in this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment of this Court as follows:

1. Past and future general damages in an amount in excess of fifteen thousand dollars ($15,000.00);
2. Past and future special damages in an amount in excess of fifteen thousand dollars ($15,000.00);
3. Past and future damages for the wrongful death of Dr. Kayvan Khiabani, as set forth in NRS 41.085, in an amount in excess of fifteen thousand dollars ($15,000.00);
4. Past and future damages for the wrongful death of Dr. Katy Barin, as set forth in NRS 41.085, in an amount in excess of fifteen thousand dollars ($15,000.00);
5. Punitive damages in an amount in excess of fifteen thousand dollars ($15,000.00);
6. Prejudgment and post-judgment interest, as allowed by law;
7. Costs of suit and reasonable attorneys' fees, as allowed by law, in an amount to be determined; and
8. For such other and further relief that the Court may deem just and proper.

DATED this 17th day of November, 2017.

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DEMAND FOR JURY TRIAL

Plaintiffs by and through their attorneys of record, KEMP, JONES & COULTHARD, LLP and CHRISTIANSEN LAW OFFICES, hereby demand a jury trial of all of the issues in the above matter.

DATED this 17th day of November, 2017.

KEMP, JONES & COULTHARD, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2017, the foregoing **SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** was served on all parties currently on the electronic service list via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2.

An Employee of Kemp, Jones & Coulthard

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