

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPREME COURT CASE NO.

GAVIN AND MIHN-HAHN COX,

Petitioners,

V.

THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF
NEVADA, CLARK COUNTY AND THE HONORABLE
MARK R. DENTON

Respondents.

MGM GRAND HOTEL, LLC, DAVID COPPERFIELD'S DISAPPEARING,
INC., DAVID COPPERFIELD, BACKSTAGE EMPLOYMENT AND
REFERRAL, INC. and TEAM CONSTRUCTION MANAGEMENT, INC.

Real Parties In Interest.

From the Eighth Judicial District Court, Clark County, Nevada
Case No. A-14-705164-C

**GAVIN AND MIHN-HAHN COX'S APPENDIX IN SUPPORT OF
EMERGENCY PETITION FOR WRIT OF MANDAMUS UNDER NRAP
27(E)**

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Document Description	Exhibit
Reporter's Transcript of Jury Trial, May 4, 2018	1
Photographic Exhibits of MGM Premises	2
Tweets from and regarding Chris Kenner and the Jury View	3

CERTIFICATE OF SERVICE

The undersigned certifies that on this 7 day of May, 2018, service of the foregoing **GAVIN AND MIHN-HAHN COX'S APPENDIX IN SUPPORT OF EMERGENCY PETITION FOR WRIT OF MANDAMUS UNDER NRAP 27(E)**, was served by electronic service as follows:

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REPORTER'S TRANSCRIPT OF JURY TRIAL, MAY 4, 2018

"EXHIBIT 1"

1 CASE NO. A705164

2 DEPT. NO. 13

3 DOCKET U

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DISTRICT COURT

6

CLARK COUNTY, NEVADA

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* * * * *

8 GAVIN COX and MINH-HAHN COX,)
husband and wife,)

9 Plaintiffs,)

10 vs.)

11)

12 MGM GRAND HOTEL, LLC; DAVID)

13 COPPERFIELD aka DAVIS S.)

14 KOTKIN; BACKSTAGE EMPLOYMENT)

15 AND REFERRAL, INC.; DAVID)

16 COPPERFIELD'S DISAPPEARING,)

17 INC.; TEAM CONSTRUCTION)

18 MANAGEMENT, INC.; DOES 1)

19 through 20; DOE EMPLOYEES 1)

20 through 20; and ROE)

21 CORPORATIONS 1 through 20,)

22)

23 Defendants.)

24)

25 MGM GRAND HOTEL, LLC.,)

Third-Party Plaintiff,)

vs.)

BEACHER'S LV, LLC, and DOES 1)

through 20, inclusive,)

Third-Party Defendants.)

24

25

REPORTER'S TRANSCRIPT

OF

JURY TRIAL

BEFORE THE HONORABLE

MARK R. DENTON

DEPARTMENT XIII

FRIDAY, MAY 4, 2018

REPORTED BY: KRISTY L. CLARK, RPR, NV CCR #708,
CA CSR #13529

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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
Dennis	9, 40	56	75, 78, 79	76
Funes-Navas	46, 47			

1 LAS VEGAS, NEVADA, FRIDAY, MAY 4, 2018;

2 9:18 A.M.

3
4 P R O C E E D I N G S

5 * * * * *

6
7 THE MARSHAL: All rise.

8 (The following proceedings were held in
9 the presence of the jury.)

10 THE COURT: Good morning, everybody.

11 IN UNISON: Good morning.

12 THE COURT: You may be seated.

13 JUROR NO. 4: We're missing just one. She's
14 in the bathroom.

15 THE COURT: Oh, we're missing ...

16 MR. POPOVICH: No stipulation.

17 MR. MORELLI: I'm not getting fooled this
18 time. I'm not stipulating that the jury is here.

19 THE COURT: Could counsel approach while
20 we're ...

21 (A discussion was held at the bench,
22 not reported.)

23 THE COURT: All right. Do counsel now
24 stipulate that the jury is present?

25 MR. MORELLI: Yes, the jury is present.

1 Hotel; Mr. Habersack is here, but stepped out; and
2 counsel Mike Infuso.

3 MS. FRESCH: Good morning, Your Honor.

4 Good morning, everyone.

5 Elaine Fresch for David Copperfield, David
6 Copperfield Disappearing, Inc.

7 MR. ROBERTS: Good morning, everyone.

8 Your Honor, Lee Roberts for Backstage
9 Employment and Referral.

10 MR. RUSSELL: Good morning, ladies and
11 gentlemen.

12 Good morning, Your Honor. Howard Russell for
13 Backstage Employment and Referral.

14 MR. FREEMAN: Good morning. Eric Freeman for
15 David Copperfield and David Copperfield Disappearing,
16 Inc.

17 MS. FRESCH: I'll stipulate I didn't have
18 enough coffee.

19 MR. STRASSBURG: May it please the Court and
20 the jury, Roger Strassburg, assisted by my partner Gary
21 Call, for defendant Team Construction Management.

22 THE COURT: All right. Very well. Thank
23 you. Plaintiffs having rested, defendants may proceed
24 with their respective cases.

25 MR. ROBERTS: Thank you. And, Your Honor,

1 before Mr. Popovich proceeds with MGM's case -- because
2 this may take a few days -- the defendants would move
3 for a jury view of all relevant portions of the MGM
4 premises pursuant to NRS 16.100. And we would request
5 that the jury view, if it can be accommodated by the
6 jury, take place at least 30 minutes after sunset.

7 THE COURT: All right. The motion has been
8 made, and I'll consider that outside the presence of
9 the jury. There are some things that will have to be
10 discussed and addressed in connection with that.

11 MR. ROBERTS: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. POPOVICH: Thank you, Your Honor. So
14 then MGM Grand Hotel would call its first witness,
15 Dennis Funes-Navas.

16 THE MARSHAL: Remain standing and raise your
17 right hand and face the clerk.

18 THE CLERK: You do solemnly swear the
19 testimony you're about to give in this action shall be
20 the truth, the whole truth, and nothing but the truth,
21 so help you God?

22 THE WITNESS: I do.

23 THE CLERK: Please state your name and spell
24 it for the record, please.

25 THE WITNESS: My name is Dennis Funes-Navas,

1 THE COURT: Any response?

2 MR. ROBERTS: Yes, Your Honor. Dr. Baker is
3 a human factors expert with a specialty in lighting.
4 This is what he does, is observe lighting and determine
5 if it's sufficient or unsafe. And he was there. He
6 observed the level of lighting. He noted on the video
7 that there were flashlights being used to illuminate
8 the path and, therefore, opined that the level of
9 lighting was not a factor in the accident. I think
10 that's just the type of thing that human factors people
11 do.

12 I -- I will say that I made a proposal to
13 Mr. Deutsch which he rejected, but, if the Court is
14 going to allow a jury view, then the jury is going to
15 be able to make their own assessment of the amount of
16 ambient lighting even without flashlights. And I don't
17 think it would be necessary for me to have this witness
18 get into it.

19 But if the Court is considering denying our
20 request for a jury view, then I do believe it's
21 appropriate to have a lighting human factors expert
22 opine as to whether the level of light outside on the
23 exterior area of the runaround was sufficient for
24 safety.

25 THE COURT: I think one of the points that

1 counsel made was that he hadn't done any actual testing
2 or --

3 MR. DEUTSCH: Well, two things that he
4 said --

5 MR. ROBERTS: And that's not even --

6 MR. DEUTSCH: Two things that Mr. Roberts
7 said were incorrect.

8 THE COURT: Wait a minute. Let's just go on
9 my question.

10 MR. DEUTSCH: He didn't do any testing.

11 THE COURT: Okay. But he did rely, didn't
12 he, on Mr. Ayres? Am I missing something? Did he rely
13 on Mr. Ayres' testimony?

14 MR. DEUTSCH: Are -- well, Mr. Ayres
15 testified that he did testing and that his testing
16 showed that it was .1 foot-candles.

17 MR. MORELLI: And he disagreed.

18 MR. DEUTSCH: A specific measurement. And he
19 doesn't even disagree with that. He doesn't even say
20 that that's wrong. He doesn't even say it's not
21 .1 foot-candles; he just says that -- and he doesn't
22 say in this opinion that he based it on his visit to
23 the site. His opinion in this --

24 THE COURT: The report doesn't come into
25 evidence anyway.

1 MR. DEUTSCH: I understand that. But the
2 opinion in his report is just based on the surveillance
3 only, he comes to this opinion.

4 THE COURT: What's everybody else's position
5 on this jury view situation?

6 MR. DEUTSCH: Well, we obviously feel
7 strongly against it, Your Honor, and --

8 MR. POPOVICH: Support.

9 MS. FRESCH: We all -- no, we --

10 MR. POPOVICH: That was a joint defense --

11 MS. FRESCH: That was a joint defense -- we
12 all talked, and Mr. Roberts just did it on behalf of
13 all the defense. And then of course --

14 MR. POPOVICH: Because he knew the rule
15 number.

16 MS. FRESCH: And, obviously, the jury had --
17 if you recall, the jury had requested it as well in one
18 of their questions.

19 THE COURT: Yeah, as I recall, one of
20 their --

21 MS. FRESCH: Yes, in the first -- I believe
22 after --

23 THE COURT: I think it was a statement or --

24 MR. DEUTSCH: It was.

25 THE COURT: -- "are we going to be able to,"

1 MR. DEUTSCH: I understand that. But the
2 opinion in his report is just based on the surveillance
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18 of their questions.

19 THE COURT: Yeah, as I recall, one of
20 their --

21 MS. FRESCH: Yes, in the first -- I believe
22 after --

23 THE COURT: I think it was a statement or --

24 MR. DEUTSCH: It was.

25 THE COURT: -- "are we going to be able to,"

1 whatever.

2 MR. DEUTSCH: Here's the problem, Your Honor,
3 is that the site is not at all the same anymore. The
4 entire runaround area has been redone. The incline is
5 not there anymore. The curbs have been changed. The
6 concrete on that whole area has been changed. The
7 tree's gone. All of that stuff has been changed.

8 So -- and that goes into some of the
9 arguments about Dr. Baker's later reports and also
10 Mr. Yang -- or Dr. Yang's opinions as well, which we
11 can talk about later.

12 But the whole area has been changed. We
13 don't know whether it was a full moon on the night of
14 his accident versus not a full moon. Those things all
15 matter. So to bring them there on a random night to
16 see a site that is not at all the same is -- and
17 they've seen pictures of it. They've seen 100 pictures
18 of it.

19 MR. MORELLI: They have a video.

20 MR. DEUTSCH: They have a video of it. Going
21 there does not add anything other than confusion
22 because they're going to be seeing this incline that's
23 not there. They're going to be seeing a new curb area,
24 no tree. None of it is the same anymore, none of it.
25 And if you notice, there's going to be no foundation

1 about it being the same. We have pictures. I can show
2 Your Honor the pictures. I can put them up on the
3 screen.

4 THE COURT: Okay. What's the response to
5 what --

6 MR. POPOVICH: The response is Mr. Deutsch
7 is -- and this is where we have a basic disagreement
8 is, there have been some changes, no question. The
9 area where Mr. Cox lands has not been changed. That
10 concrete has not been changed.

11 MR. DEUTSCH: We disagree with that.

12 MR. POPOVICH: And that's why I prefaced it
13 with we have a disagreement.

14 Another thing that has not changed and is --
15 and I can't -- as -- I'm basically now testifying as a
16 semiwitness, but the reality is that the photos do not
17 give you the sense of --

18 MR. DEUTSCH: Can I stop you for a second.

19 Mr. Habersack --

20 MR. STRASSBURG: Wait a minute. That's
21 not -- let him talk. I'm tired of all this rudeness.

22 MR. DEUTSCH: Mr. Habersack may be a witness
23 in this case.

24 MR. STRASSBURG: He sits there and lets you
25 talk; you should give him the same courtesy.

1 MR. DEUTSCH: Mr. Habersack may be a witness.

2 MR. STRASSBURG: I said you should stop and
3 let him talk.

4 MR. DEUTSCH: Are you done, Roger? Would you
5 ask Mr. Habersack since he may be testifying in this
6 case.

7 (Discussion was held off the record.)

8 MR. MORELLI: That's why, Roger. You see?
9 That's the reason. That's --

10 MR. DEUTSCH: You want to apologize now,
11 Roger? You want to apologize now?

12 THE MARSHAL: Counsel.

13 MR. DEUTSCH: Do you want to apologize now?

14 MR. STRASSBURG: I apologize for that
15 incident, but you do it all the time. And, for that,
16 I'm still critical.

17 THE COURT: Okay, let's -- c'mon, let's
18 settle down now.

19 MR. DEUTSCH: Thank you, Judge.

20 MR. POPOVICH: The photographs do not give
21 the correct perspective of distances. Those have not
22 changed, the distances of the interior halls from the
23 back of the stage into the hallways, the outside. And
24 I even paced off 30 paces. But until you're there, you
25 do not have a true sense of these distances to the

1 point where he has the accident. So that is, I
2 believe, a strong reason to do this.

3 As we've already done with some photographs,
4 in photographs that were taken after changes were
5 made -- for instance, the tree is out -- we've been
6 able to explain that --

7 THE COURT: Certainly, differences can be
8 pointed out.

9 MR. DEUTSCH: Well, let me show Your Honor
10 the differences, because the main issue in this case
11 is --

12 MR. STRASSBURG: Judge.

13 MS. FRESCH: Your Honor, could we finish
14 making all our points about --

15 MR. STRASSBURG: Could we possibly have a
16 turn?

17 THE COURT: Everyone is talking at the same
18 time, so I'm sure that the record is going to be --

19 MR. STRASSBURG: I know. Isn't she tired of
20 it?

21 THE COURT: I think Ms. Fresch started to
22 talk before you did.

23 MS. FRESCH: Yes. I just wanted to inform
24 Your Honor that, with respect, the platform is still
25 there. The -- the dragon can be brought in. It's

1 not -- it's not stored there at this moment, but I've
2 already verified that can be brought in.

3 The stage area and the entire interior
4 hallways, nothing of that -- until when they get out to
5 the theater door, none of that has changed. That is
6 all exactly the same. I verified that. I mean, if we
7 had to have someone say.

8 But there are a few changes, as Mr. Popovich
9 just mentioned. Otherwise, on the route, even going
10 back into the theater, nothing has changed. There's
11 one -- apparently, one little change in the kitchen
12 area, which is really not even germane. So that --
13 that -- that -- you know, it's very much all the same
14 except for what Mr. Popovich said.

15 So I strongly would request for that view.

16 THE COURT: Now -- okay. Go ahead,
17 Mr. Roberts.

18 MR. ROBERTS: Thank you, Your Honor. With
19 regard to this issue of change, I direct the Court to
20 Eikelberger v. State, 83 Nev. 306; 429 P.2nd 555.

21 And, in that case, the -- the court allowed a
22 jury view over the objection of the property owner.
23 The owner contended that the condemned property had
24 drastically changed by the removal of structures and
25 buildings which were there when the suit started and

1 that there was some other differences. The court
2 pointed out that witnesses had fully explained the
3 changes in the appearance of the surrounding area, so
4 the court said the fact that you've got changes isn't
5 important as long as the changes are explained to the
6 jury.

7 As Mr. Popovich pointed out, there's still
8 very significant unchanged things that are important
9 for the jury to be able to have to view the testimony
10 in context, mainly the distances involved and the
11 general appearance outside.

12 Thank you, Your Honor.

13 MR. DEUTSCH: Your Honor --

14 THE COURT: Now I think Mr. Strassburg has
15 something to say.

16 MR. DEUTSCH: Oh, yeah. I forgot.

17 MR. STRASSBURG: And, Judge, I'd like to
18 include you in the scope of my apology. I don't
19 usually lose my temper.

20 MR. DEUTSCH: Second time in two weeks.

21 MR. STRASSBURG: Team wants a jury view of
22 the distance from the location of the jobsite. The
23 241 feet across the expensive carpet to the doors, that
24 hasn't changed. That distance is important. We also
25 want a jury view of the area called the airlock between

1 the two security -- the security doors and the location
2 where the dumpster rested.

3 THE COURT: Okay.

4 MR. DEUTSCH: Your Honor, our -- our position
5 is that they already put in a diagram for a
6 demonstrative showing 17 feet, 25 feet, 32 feet. I
7 don't think that we need to waste everyone's time, the
8 court's money, to explain 17 feet or 20 feet. We're
9 not talking about numbers that everyone doesn't
10 understand.

11 THE COURT: I'm not sure if it's the court's
12 money. I think it might be the parties' money.

13 MR. DEUTSCH: Well, obviously, our -- my
14 client's money, then, for sure.

15 But -- but the -- to show distances that --
16 that we all, like -- we're not talking about anything
17 that's crazy. They've already put in evidence that
18 this hallway is 17 feet long and this one's 22 feet
19 long and this one is 30 feet long. So to suggest that
20 someone needs to see what something is for -- to
21 identify 17 feet is ridiculous.

22 But the more important part --

23 THE COURT: I don't think it's ridiculous.

24 MR. DEUTSCH: Well, can I just show
25 something, Your Honor?

1 THE COURT: Sure.

2 MR. DEUTSCH: I think it's unnecessary.
3 "Ridiculous" might be the wrong word.

4 So this is what the area looked like on the
5 night of the accident. Okay?

6 THE COURT: What do you see? You see a
7 little -- you don't see the whole thing; you just see.

8 MR. DEUTSCH: Well, no, no, no. I mean, we
9 have a zillion pictures that are in evidence, Your
10 Honor, that I could show you.

11 MR. CALL: What exhibit is that?

12 MR. DEUTSCH: This is --

13 THE COURT: I'll tell you. I'd sure like to
14 see it.

15 MR. DEUTSCH: This is 93.

16 Well, I just want to show your Honor these
17 photos, and then -- this is 93. These are the hallways
18 that we're going to go out there at night to see, these
19 pictures. Okay?

20 So there's plenty of pictures of all these
21 interior hallways that the jury's already seen that he
22 runs through. These are all in evidence already. So
23 there's nothing about these hallways that the jury's
24 going to see that matters.

25 What -- what's relevant and why the jury

1 could potentially be prejudiced by this, Your Honor, is
2 that the conditions -- while the conditions inside may
3 be very much the same, inside is really only a tiny
4 piece of this case. The relevant piece of this case is
5 outside. And there's two things about outside that, on
6 the night we go, we can't explain away to the jury, one
7 of which is the lighting conditions outside. We don't
8 know if there was a cloud over -- we don't know any of
9 those things about how dark it was.

10 THE COURT: So you're saying a view should
11 never have been done or what?

12 MR. DEUTSCH: I'm saying, in a case where an
13 issue is the lighting conditions and the area has
14 changed, a view should not be done.

15 THE COURT: But don't you think you can point
16 that out to the jury?

17 MR. DEUTSCH: No, I don't think so, Your
18 Honor, because I think if we go there and we say to the
19 jury, "You're here to look at this area outside, but
20 you're not allowed to take into account the darkness or
21 lightness of it, and you're not allowed to take --
22 whether it's light or dark out here, you can't take
23 that into account."

24 THE COURT: Okay.

25 MR. DEUTSCH: And that would be -- Your

1 Honor, if -- if -- do you believe that a jury would be
2 able to go out there and wipe from their mind the
3 condition -- the lighting conditions out there at that
4 moment? They wouldn't be able to. They wouldn't.

5 And we know that the lighting conditions are
6 different because it's a different night. And this is
7 what the area looks like now. This is what the area
8 looks like now. The area now outside looks like -- so
9 that's what it looked like on the day of the accident.
10 This picture is in evidence. So the jury has gotten to
11 see this. And not only have they gotten to see this,
12 but they --

13 MR. ROBERTS: That's ten months after the
14 accident happened.

15 MR. DEUTSCH: Yeah, but it's the same -- but
16 the site is the same exact as it was on the night of
17 the accident. They've already measured for the jury
18 and explained the distance from here to here. That's
19 already been measured. They're going to have an expert
20 who's going to come in in a half hour and tell the jury
21 what the measurement is from here to here because he
22 measured that. That's a big part of his testimony. So
23 this picture shows them everything they need to know
24 about that.

25 Now, let's look what it looks like now.

1 MR. STRASSBURG: So, Judge, they just want
2 to --

3 MR. DEUTSCH: I'm not done, Roger. Roger,
4 I'm not done.

5 MR. STRASSBURG: If you can't beat them, join
6 them.

7 MR. DEUTSCH: So this is what --

8 MR. STRASSBURG: You're right.

9 THE COURT: That right there tells me --

10 MR. DEUTSCH: Was that -- well, that one
11 wasn't in evidence, thankfully. Let's see.

12 Just trying to find the best one. This is
13 what it looks like now. The whole corner of that whole
14 incline, all of this curb -- all of this curb has been
15 redone. This has been redone. All of this here has
16 been redone. Everything about this -- and all -- this
17 area right here --

18 MR. MORELLI: And the tree is gone.

19 MR. DEUTSCH: -- the conditions of the
20 lighting on this night, which -- the fact that there
21 was a huge tree hanging over the area could have
22 affected the amount of light that people were getting
23 in this area. And this whole area, even where Mr. Cox
24 says he fell -- which is somewhere over here -- or
25 where their expert is going to come in and say he fell,

1 which is where this cone is -- that whole thing was
2 covered by a tree. We know that because of the
3 security video. We know that the tree extended from
4 the end all the way up to the point -- because you can
5 barely see Mr. Cox's head. So that whole area is
6 covered by a tree.

7 So the lighting conditions at that area,
8 regardless of the moon and the ambient light, are
9 totally different because of that tree. The entire
10 curb and incline is totally different. So there's
11 nothing gained by going that the jury doesn't already
12 know. The only possibility is that they'll be
13 prejudiced against the plaintiffs because they're going
14 to see what lighting conditions are like on a night
15 that wasn't the same without the tree. And they're
16 going to see that this entire area was done over again.

17 And that is -- there is a potential for
18 prejudice there when there's nothing gained by the
19 defendants by going there. Letting the jury see what
20 17 feet is instead of 30 feet, we could go out into the
21 hallway, Your Honor, with Ms. Bonney's measuring tape
22 and measure 30 feet if that's what they're concerned
23 about. We've been told that Ms. Bonney brings the
24 measuring tape everywhere she goes.

25 THE COURT: How about the place where the

1 fall occurred?

2 MR. DEUTSCH: The place where the?

3 THE COURT: The fall occurred.

4 MR. DEUTSCH: Well, the place where the fall
5 occurred is -- is -- is this right here. And the place
6 the fall occurred is -- depending on whose side of this
7 you want to believe. Mr. Cox believes -- his
8 recollection was -- is that he was turning the corner,
9 and therefore it was somewhere over here. The
10 defendants are going to bring in an expert to say, "No,
11 Mr. Cox is a liar. He doesn't know. He fell where the
12 cone is."

13 So under either version of the events, he
14 fell somewhere between this cone and this corner.
15 Everything from this spot to that cone is different,
16 including the lighting conditions because of the tree,
17 and it's a different night, and because that entire
18 concrete area -- the incline, the curb -- has all been
19 changed.

20 So the three things that really are relevant
21 in this case -- what the lighting conditions were at
22 the point, what the incline -- the condition of the
23 ground was at this point -- all of those things have
24 changed.

25 The distances between 10 feet and 15 feet,

1 it's irrelevant. Nobody needs to get on a bus to go
2 see how far 12 feet is. But the prejudice to us by
3 having them speculate, well, the lighting must have
4 been kind of the same as it was that night and, like,
5 this doesn't look so bad, that -- even if you tell
6 them, you won't be able to shake them --

7 MR. MORELLI: The pictures --

8 MR. DEUTSCH: Right. You won't -- you shape
9 their memory. And, you know, we tried to put in some
10 pictures that happened after the accident. And Your
11 Honor said that it's not relevant because it's
12 different. This is very different. This is very
13 different. And if there is any possibility that the
14 jury could be confused or prejudiced, unless they could
15 show some substantial reason why it's necessary to see
16 it -- and the only reason they have given is to say
17 that they need to explain to the jury what distance is?

18 If that's the only reason, let's walk into
19 the hallway with a tape measure, and we'll show them
20 what distance is. Distance is the only reason they've
21 given, Your Honor, for why they need to go there.

22 MR. MORELLI: Why didn't the photos tell
23 that?

24 MR. DEUTSCH: We'll go into the hallway and
25 we'll measure distance. And they could see how far

1 30 feet is. We have a map that they drew, Your Honor,
2 that shows this hallway. I don't know where it went.
3 There was a pad that they used during opening
4 statement.

5 MR. POPOVICH: No, it's not over there. It's
6 back here. I didn't actually -- he's going to
7 contradict a couple of them by a foot.

8 MR. DEUTSCH: Who cares? We'll stipulate
9 that you missed it by a foot. I mean, it doesn't
10 matter.

11 THE COURT: All right. Anything else?

12 MR. POPOVICH: Yes, couple things. Where --
13 can -- can you override it? Yes.

14 So we're going to show you --

15 MR. DEUTSCH: She's the boss.

16 MR. POPOVICH: -- Exhibit 93-89, Your Honor.
17 And if you can see below the cone, there is an
18 expansion joint running across.

19 MR. DEUTSCH: This one.

20 MR. POPOVICH: I'm not sure how well the
21 color -- well, maybe I should put on my glasses.

22 MR. DEUTSCH: You can see it. You could see
23 it.

24 MR. POPOVICH: So there is different
25 coloration between the concrete that is below the

1 expansion joint -- and I say "below," meaning higher on
2 the picture but lower in elevation -- as compared to
3 the part where the cone is. It will be Dr. Baker's
4 position that, where Mr. Cox came to rest on the
5 ground, center mass, which is basically where his heart
6 is, is where that cone is. And the position is, is
7 that has not changed since the time of the accident.

8 Now, another factor is, no, we're not just
9 asking for this for distances. That is an important
10 part, but the lighting is an issue. And we have
11 already talked amongst this group that, because there's
12 the possibility the dumpster was casting a shadow into
13 the area, we can -- with 24 hours' notice, we can get a
14 same-size dumpster in the place where it was --

15 THE COURT: Okay.

16 MR. DEUTSCH: And plant a tree?

17 MR. MORELLI: And you could plant a tree?

18 MR. POPOVICH: I'll stand up with --

19 MR. DEUTSCH: No, that's my job, Jerry.

20 Don't take my tree job.

21 MR. POPOVICH: You would do it better.

22 So we think we can explain the differences,
23 and we think it's important.

24 MR. DEUTSCH: May I just comment one thing,
25 Your Honor, about what he said about the change in the

1 sidewalk? Just one -- one piece.

2 So, if you notice, it's our position that the
3 entire thing has been changed. If you notice, Your
4 Honor, in this photograph, there's a drain that's been
5 put into the sidewalk. Okay?

6 You can -- may I -- may you flip back,
7 Ms. Bonney?

8 MR. ROBERTS: Actually, no. Because I'm
9 still using this picture, and it's our turn.

10 MR. DEUTSCH: Oh, I'm sorry. Go ahead. I
11 didn't know. I didn't know.

12 THE COURT: Go ahead.

13 MR. DEUTSCH: I didn't know you had something
14 to say. Go ahead.

15 MR. ROBERTS: Your Honor, the -- the -- first
16 of all, moon phase, it was a waxing -- a waning gibbous
17 on November 12th, 2013.

18 MR. DEUTSCH: We've already talked about
19 that.

20 THE COURT: Six months.

21 MR. ROBERTS: Tomorrow night is the same
22 phase.

23 THE COURT: Six months difference in time
24 between --

25 MR. ROBERTS: There -- there will be less

1 moonlight next week than there was on the day of the
2 incident.

3 The point that Mr. --

4 THE COURT: How do you know that? I don't
5 know.

6 MR. ROBERTS: Because there are moon phases
7 that the government publishes that the Court can take
8 judicial notice of. And we can also look at the moon
9 when we're there.

10 But the -- the point that Mr. Deutsch has
11 made is all of the changes can be adequately explained
12 to the jury. The jury's entitled to see the distances
13 in the context of the walk-around and in the context of
14 the theater.

15 And the differences can be explained to the
16 jury and argued to the jury. The picture -- and the
17 reason I wanted it up, Your Honor, is Dr. Baker's going
18 to testify this is a picture that he took. This is
19 part of what he's going to show the jury.

20 So the jury will have already seen this
21 picture of the changed conditions. And so what --
22 how -- what additional prejudice can arise from the
23 fact that they're going to see the actual changed
24 conditions instead of a picture of the changed
25 condition?

1 The rule is not if there's any possibility of
2 prejudice, you can't do it; the question is, is it more
3 probative than prejudicial. And as the Court knows,
4 back to 1885, the Nevada Supreme Court has found that a
5 jury view is not evidence, but it does provide context
6 for the jury to understand the evidence that they've
7 heard in this courtroom.

8 And if we're going to start excluding
9 everything that doesn't match, well, we've got witness
10 testimony that the surveillance video is darker than
11 the actual conditions. So does that get excluded?

12 We've got pictures --

13 MR. DEUTSCH: I would like --

14 MR. ROBERTS: -- taken with flash that
15 Mr. Deutsch has put into evidence. Do those get
16 excluded because they're lighter than it would be at
17 night?

18 The jury can understand these things. The
19 jury can understand them when they're explained to them
20 as ably as Mr. Deutsch just did. And the probative
21 value of having the jury view the scene at which all of
22 these events occurred greatly outweigh any prejudice
23 which can be easily and simply explained away.

24 MS. FRESCH: And, Your Honor, just one more
25 point.

1 Beyond the outside -- I mean, there has been
2 so much testimony about the platform and the portion of
3 the runaround from the platform to the outside. And
4 that is critical. And the only way you can really put
5 that into context in this case is to see it in person,
6 because otherwise it's too difficult.

7 And that is a critical point. They've spent
8 a lot of time on that part. It's not like we just
9 started out with Mr. Cox going out that door. So
10 there's two portions to this that are very important.
11 I just didn't want that to be overlooked.

12 MR. DEUTSCH: May I? Is everyone done,
13 Roger?

14 MR. STRASSBURG: I'm good. I think that
15 it -- the point has been adequately explained.

16 MR. DEUTSCH: So this is -- this is -- I
17 don't agree with a couple of things that was said.

18 One -- Ms. Bonney, will you flip me back
19 here. Oh, you did. Thank you.

20 Okay. So the first point is, I don't
21 necessarily agree that this photo should come in with
22 Dr. Baker. That's part of my additional motion with
23 respect to Dr. Baker. Dr. Baker does this analysis.
24 One of his opinions is that -- he does this analysis
25 where he claims that he was able to go to the security

1 place, he put a sticky on the screen, and then he had
2 someone go outside and stand where the sticky showed
3 him in live video, and therefore he could measure where
4 Mr. Cox is. He wants to testify about that, okay.
5 I'll cross-examine him about it.

6 He also then gives some testimony, though,
7 about -- that the place this cone, I believe from his
8 report, represents that location where he claims
9 Mr. Cox fell.

10 MR. POPOVICH: That's correct.

11 MR. DEUTSCH: I don't think it does, but I'll
12 save that for cross-examination.

13 He also then says that there's -- he measures
14 with a level and says that's 1 degree of -- you know,
15 there's 1 degree of upslope, I guess, at that location.

16 The problem is -- and this is where our --
17 our fight -- our wager came in -- is that if you notice
18 in this -- it's my belief that this entire thing -- and
19 if you look at the pictures, you could tell that this
20 entire curb has been changed. That's very clear from
21 the pictures.

22 I believe the entire thing has been changed.
23 And -- and the piece of evidence that I can show you
24 that has been changed is that, in this photograph --
25 and this brought me to my "My Cousin, Vinny" reference

1 this morning. I asked -- when I was telling
2 Mr. Popovich about this, does the defense case on this
3 issue hold water, is that there is -- and I'll find the
4 best picture -- there is a drain installed in the
5 concrete right there.

6 Now, in order to get that drain in there,
7 this whole thing would have had to have been taken out.
8 If you look at the photographs from the night of the
9 accident -- or from, you know, the old concrete area --

10 MR. STRASSBURG: There's a drain there in
11 403.

12 MR. DEUTSCH: Oh, you mean it's covered by
13 dust? Okay. If that's what you're saying, then maybe
14 we can go with that, Roger. Let's take a look. Did
15 you have one in particular that you were referring to,
16 Roger?

17 MR. STRASSBURG: 403.

18 MR. DEUTSCH: Let's look at these. So I
19 think there might be one here. So here's the
20 photographs -- I'm just trying to find the best one,
21 Your Honor. I'm sorry. Oh, I think I might have --

22 MR. POPOVICH: There's only one.

23 MR. DEUTSCH: No, there's a couple. There's
24 a couple that you can see.

25 So here's one from that area, the same exact

1 location. There's no drain identified in that picture.
2 There's more, though. Let me continue along.

3 MR. CALL: Look at 181-93.

4 MR. DEUTSCH: 181?

5 Let's see 181. There you go, 181. There is
6 no drain there at all anywhere. And if we look in the
7 pictures --

8 THE COURT: What's that white thing there?

9 MR. DEUTSCH: Well, that white thing is just
10 a piece of paper, Your Honor.

11 THE COURT: That's on the other side. Okay.

12 MR. DEUTSCH: There's no drain -- you're
13 saying that this right here is a drain?

14 MR. ROBERTS: How did you know where I was
15 talking about?

16 MR. DEUTSCH: Because I got -- because
17 that's -- that's the area where the drain would be.
18 But that ain't no drain. Okay?

19 And let's look at the pictures from the night
20 of the accident. Let's look at the pictures from the
21 night of the accident.

22 MR. RUSSELL: 403-8, you can see it.

23 MR. ROBERTS: Eight.

24 MR. DEUTSCH: This is 403. There ain't no
25 drain.

1 MR. STRASSBURG: It's in the tire track.

2 MR. DEUTSCH: There is no -- okay. So if the
3 defendants are taking the position that the drain was
4 there but you can't see it in this photo because it's
5 covered with dust, we'll let them put the picture in
6 evidence.

7 MR. STRASSBURG: It's --

8 MR. RUSSELL: Hang on a second. Ms. Bonney
9 is going to bring it up and highlight it.

10 MR. DEUTSCH: It's not there, Judge. It
11 doesn't take a rocket scientist, as Mr. Cox said, to
12 see that that drain is not there. It's not -- that's
13 not even in the same place. It's not even close to the
14 same area.

15 MR. RUSSELL: Yeah, it's right here.

16 MR. DEUTSCH: No, this is where you guys say
17 he fell, over here between the two -- can you take that
18 away for a second, Ms. Bonney?

19 You guys say that there's two whatever --
20 what did you call them, Jerry?

21 MR. POPOVICH: Expansion --

22 MR. DEUTSCH: Expansion joints. One here and
23 one here. You say that it stopped at this expansion
24 joint and everything above that expansion joint was
25 left the same. If you look at the drain, the drain is

1 between the two expansion joints. Now you're circling
2 something over here, which is about a foot from the
3 door.

4 MR. POPOVICH: Your Honor, can I address
5 Mr. Deutsch's last comment?

6 Where the new expansion joint is is above
7 both of the old expansion joints; meaning, yes, the
8 concrete down by the curb line has changed all the way
9 up through -- not to -- this expansion joint up into
10 this area.

11 MR. DEUTSCH: But that's -- that area is not
12 where their expert puts Mr. Cox.

13 MR. POPOVICH: Well --

14 MR. DEUTSCH: The drain is here. The drain
15 is here.

16 MR. POPOVICH: No.

17 MS. FRESCH: No.

18 MR. DEUTSCH: Let's look again. I'm not --
19 look, we'll put it up on the screen and the judge can
20 decide, but I think it's pretty --

21 MR. POPOVICH: Mr. Deutsch, count the panels.
22 One, two, three, four, and --

23 MR. DEUTSCH: Let's do that.

24 MR. POPOVICH: -- and the drain is
25 approximately around the fourth or fifth, depending on

1 your --

2 MR. DEUTSCH: Let's do that. And if I'm
3 wrong, I'm wrong. But let's do that. Let's do that.
4 Let's count the panels. Count the -- so --

5 MR. MORELLI: Wrong picture.

6 MR. DEUTSCH: I'm getting there.

7 MR. POPOVICH: Ultimately -- while
8 Mr. Deutsch is looking for the pictures, ultimately,
9 Your Honor, Dr. Baker was there and measured before the
10 changes and measured after, and he can tell us the
11 relative position.

12 MR. DEUTSCH: I have no problem. I said
13 that. I have no problem with him testifying where he
14 said --

15 MS. FRESCH: He never lets anyone finish.

16 MR. POPOVICH: But he can -- he can break the
17 tie about whether the expansion joints and the -- after
18 the new construction are in the same location as the
19 old.

20 MR. DEUTSCH: Well, it's not about that.
21 It's about the fact that -- look, there we go. That's
22 a picture. One, two, three -- am I up on the screen?

23 MR. POPOVICH: Can't even see the drain.

24 MR. DEUTSCH: The drain is right here. Okay?
25 One, two, three -- it looks like it's somewhere in line

1 with either the third or fourth expansion panel. I
2 mean, third or fourth wall panel, as you put it, from
3 here. One, two -- it's either here or here. It's kind
4 of hard with the perspective, but somewhere in there.
5 We agree with that?

6 MR. POPOVICH: Some -- I would say
7 approximately the fourth, give or take.

8 MR. DEUTSCH: Okay. So third or fourth. So,
9 now, let's go to those photographs, the one.

10 MR. POPOVICH: 403-8.

11 MR. DEUTSCH: 403 -- 403-8. One, two, three,
12 four. Where -- where is the drain?

13 MR. POPOVICH: Right there.

14 MR. DEUTSCH: Where? Covered in dust?

15 MR. STRASSBURG: Blow it up.

16 MR. POPOVICH: I -- I've never denied dust,
17 if you recall. Right there.

18 MR. DEUTSCH: I don't know.

19 MR. POPOVICH: About the fourth panel.

20 MR. DEUTSCH: Let me look on my screen. Let
21 me powwow, but I don't think so.

22 MR. ROBERTS: While they're conferring,
23 Judge, I think the Court should consider that a jury
24 member asked for a view.

25 THE COURT: I remember.

1 MR. ROBERTS: Just as juries are now allowed
2 to ask questions, if the jury wants a view, I think
3 that that ought to weigh in favor of it to the extent
4 it --

5 THE COURT: Maybe I should poll the jury as
6 to whether a view is --

7 MR. DEUTSCH: Your Honor, I don't think the
8 jury should have any say --

9 THE COURT: I'm concerned about the time.
10 You know? Because we're talking about a half hour
11 after sunset, so I'm not sure --

12 MS. FRESCH: Your Honor.

13 MR. ROBERTS: That would be about 8:00, Your
14 Honor.

15 MS. FRESCH: Your Honor, I can address that,
16 that Mr. Copperfield is -- his shows are going forward
17 next week, as they are right now. But I've already
18 worked out that his show ends -- the 7:00 show ends
19 right about 8:30. I've already talked about it that --
20 and the next show starts at 9:30.

21 THE COURT: I was talking about the juror
22 times.

23 MS. FRESCH: Oh, I thought -- but we can do
24 it right in between shows. We can get them in and out.
25 It will be quite easily done. So in between the two

1 shows, all the logistics of that is quite easy to be
2 done.

3 MR. DEUTSCH: Your Honor, your preliminary
4 instructions in this case -- and every time you say to
5 the jury -- leave -- don't go visit the scene because
6 things might have changed.

7 THE COURT: But the jury view is a different
8 concept.

9 MR. DEUTSCH: Your Honor --

10 THE COURT: It's part of the trial.

11 MR. DEUTSCH: Obviously, the jury's going to
12 say we want to go because they're going to think it's
13 exciting to go backstage at Copperfield.

14 THE COURT: Some people may have difficulty
15 with the time.

16 MS. FRESCH: It's the time if they could do
17 it, he's talking about.

18 THE COURT: These jurors have been here for
19 quite a while. Okay? They have participated in this
20 case. Some, if not all, have expressed an interest in
21 having a view. I grant a view. Okay? We grant a
22 view.

23 It has to be set up with court administration
24 in the appropriate way. Plaintiffs' counsel are very
25 able, I'm sure, to point out any differences in

1 pictures or whatever. And --

2 MR. DEUTSCH: Can we go during the daytime,
3 Your Honor, and that way the lighting is not at issue
4 at all? If they're only going for the issue of the
5 distances and things, we could take out the prejudice
6 of -- with respect to the lighting conditions --

7 THE COURT: That makes sense.

8 MR. DEUTSCH: -- and go during the daytime.

9 THE COURT: What do you think?

10 MR. ROBERTS: Your Honor, Court's Exhibit
11 No. 4, the juror who requested the view specifically
12 requested to go after the sun goes down.

13 THE COURT: Well --

14 MR. ROBERTS: That's part of the question.

15 MR. DEUTSCH: But, Your Honor -- but, Your
16 Honor, that means -- that actually is very telling. It
17 means that he wants to go to see the lighting
18 conditions, which means even if we tell him "ignore the
19 lighting conditions because they're different," he's
20 not going to. So if they wanted to go see the
21 distance --

22 THE COURT: You can't say that.

23 MR. DEUTSCH: Your Honor, there was a tree
24 there. There was a dumpster there. There was a tree
25 covering the whole area. It was a different time of

1 year. There might have been clouds. There might have
2 been -- we don't know.

3 So the lighting conditions are different. So
4 if they want to go -- if they're being honest with the
5 Court, which is they want to show it for distances and
6 stuff, then they should have no objection to going
7 during the day. If they're saying we want to go so the
8 jury could see how dark or not dark it is outside,
9 that's a different story.

10 But they've been up here for a half hour
11 saying it has nothing to do -- we could tell the jury
12 to disregard the darkness and we could tell the jury to
13 disregard that because we just want to go there to see
14 what the -- what the distances are. If that's why
15 we're going, let's go during the day. It doesn't take
16 up any of the jurors' extra time. We could go when
17 it's light out. And there's no potential for prejudice
18 with respect to lighting conditions.

19 THE COURT: And is it Dr. Baker, is that his
20 name or --

21 MR. ROBERTS: Dr. Baker, yes.

22 THE COURT: He could then testify relative,
23 then, to the lighting conditions.

24 MR. ROBERTS: He could. And he was there for
25 a runaround. He did go to the scene, unlike

1 Mr. Deutsch represented.

2 But, Your Honor, I specifically did request
3 it after the sun went down because the scene looks
4 differently at nighttime.

5 MR. DEUTSCH: That's my point.

6 MR. ROBERTS: And it is generally the same.
7 Mr. Deutsch can talk about a tree, but there's nothing
8 that he can show that would prove that the conditions
9 today are materially different in any way than the
10 conditions they were on the night of the runaround.

11 And the reason that they are so violently
12 opposed to it is they've been misrepresenting to the
13 jury throughout this whole trial about how dark it was
14 out there. And he doesn't want the jury to see the
15 truth.

16 MR. DEUTSCH: So it's amazing, Your Honor.
17 Suddenly we now have gone from we could tell them that
18 the lighting conditions are different, we're not going
19 there for the lighting conditions, we're just going to
20 show the distance. And now, suddenly, when we said,
21 okay, let's go during the day, suddenly the only reason
22 they want to go is because of the lighting conditions.
23 It's incredible.

24 MR. ROBERTS: Actually, Your Honor, if you
25 will recall, I said I'll withdraw my request to have

1 Dr. Baker testify to the lighting conditions if the
2 jury can go see it in the dark themselves. I was
3 completely honest with that up front, which is why
4 we're talking about the jury view right now.

5 MR. DEUTSCH: But, Your Honor, it doesn't
6 take away -- going in the light or dark doesn't take
7 away from my argument that Dr. Baker is not able to
8 give the jury scientific testimony about his opinion on
9 the light conditions from an observation on a different
10 night, when they moved to preclude us from putting in
11 videos from a different night because they said they
12 weren't similar.

13 THE COURT: Mr. Strassburg, you have
14 something to say?

15 MR. STRASSBURG: Judge, we've looked at many
16 photographs.

17 THE COURT: What's that?

18 MR. STRASSBURG: We've looked at many
19 photographs purporting to show nighttime conditions. I
20 remember examining a witness about pedestrians out on
21 the sidewalk, photographs taken at night. We've heard
22 testimony that flash photos can darken the background.
23 They're -- we believe that flash photos also overexpose
24 the foreground. There is a large amount of misleading
25 light-level evidence in the case already. I think a



PHOTOGRAPHIC EXHIBITS OF MGM PREMISES

"EXHIBIT 2"



PLTFS' PROPOSED EXHIBIT
NO 84 000020



PLTFS' PROPOSED EXHIBIT
NO. 93.000030



PLTFS PROPOSED EXHIBIT
NO. 14-000022

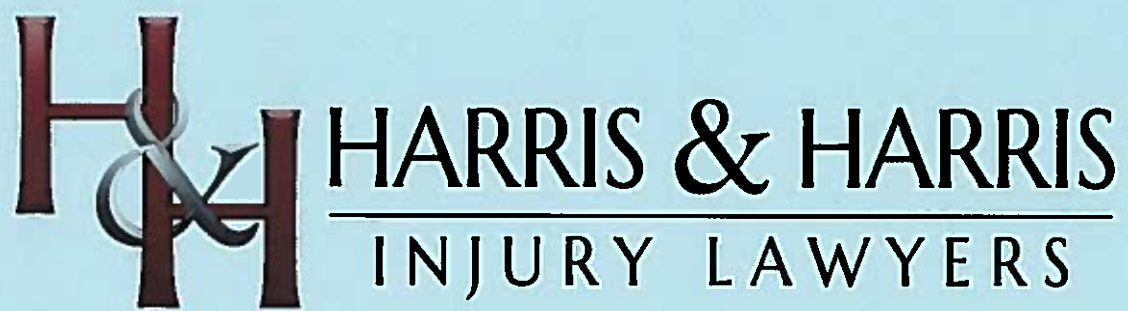


PLTFS' PROPOSED EXHIBIT
NO. 93 000033





PLTFS' PROPOSED EXHIBIT
NO. 93.000020



TWEETS FROM AND REGARDING CHRIS KENNER AND THE JURY VIEW

"EXHIBIT 3"



Chris Kenner
@ChrisKenner



I have so much stuff to do before Tuesday night I think my mind might explode... Fuck that... bring it on. I am drinking coffee because, Coffee is for closers.

5/5/18, 5:27 AM from Nevada, USA

11 Likes



Alexander May @AlexanderMay_1 · 2h



Replying to @ChrisKenner

Just let them watch the show while they're there ;)



5/5/18, 5:27 AM from Nevada, USA

11 Likes



Alexander May @AlexanderMay_1 · 2h



Replying to @ChrisKenner

Just let them watch the show while they're there ;)



pesci @pesci4td · 5h



Replying to @ChrisKenner
Field Trip!



Jill Sturdivant @jthac21 · 12h



Replying to @ChrisKenner

I'll get it done 🍊 🍊

