

Case No. 78701

**In the Supreme Court of Nevada**

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

KEON KHIABANI; ARIA KHIABANI, MINORS, by  
and through their Guardian MARIE-CLAUDE  
RIGAUD; SIAMAK BARIN, as Executor of the  
Estate of KAYVAN KHIABANI, M.D.; the Estate of  
KAYVAN KHIABANI; SIAMAK BARIN, as  
Executor of the Estate of KATAYOUN BARIN,  
DDS; and the Estate of KATAYOUN BARIN, DDS,

Respondents.

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**APPEAL**

from the Eighth Judicial District Court, Clark County  
The Honorable ADRIANA ESCOBAR, District Judge  
District Court Case No. A-17-755977-C

**APPELLANT'S APPENDIX  
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98	Jury Trial Transcript	03/19/18	36 37	8842–9000 9001–9075
35	Motion for Determination of Good Faith Settlement Transcript	12/07/17	9	2101–2105
22	Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)	10/27/17	3	589–597
26	Motion for Summary Judgment on Punitive Damages	12/01/17	3	642–664
117	Motion to Retax Costs	04/30/18	47 48	11743–11750 11751–11760
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61	Motor Coach Industries, Inc.’s Answer to Second Amended Complaint	02/06/18	14	3474–3491
90	Motor Coach Industries, Inc.’s Brief in Support of Oral Motion for Judgment as a Matter of Law (NRCP 50(a))	03/12/18	32 33	7994–8000 8001–8017
146	Motor Coach Industries, Inc.’s Motion for a Limited New Trial (FILED UNDER SEAL)	05/07/18	51	12673–12704
30	Motor Coach Industries, Inc.’s Motion for Summary Judgment on All Claims Alleging a Product Defect	12/04/17	6 7	1491–1500 1501–1571
145	Motor Coach Industries, Inc.’s Motion to Alter or Amend Judgment to Offset Settlement Proceed Paid by Other Defendants (FILED UNDER SEAL)	05/07/18	51	12647–12672
96	Motor Coach Industries, Inc.’s Opposition to Plaintiff’s Trial Brief Regarding Admissibility of Taxation Issues and Gross Versus Net Loss Income	03/18/18	36	8823–8838
52	Motor Coach Industries, Inc.’s Pre-Trial Disclosure Pursuant to NRCP 16.1(a)(3)	01/19/18	12	2753–2777

120	Motor Coach Industries, Inc.'s Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	05/07/18	48 49	11963–12000 12001–12012
47	Motor Coach Industries, Inc.'s Reply in Support of Its Motion for Summary Judgment on All Claims Alleging a Product Defect	01/17/18	11	2705–2719
149	Motor Coach Industries, Inc.'s Reply in Support of Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants (FILED UNDER SEAL)	07/02/18	52	12865–12916
129	Motor Coach Industries, Inc.'s Reply in Support of Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	06/29/18	50	12282–12309
70	Motor Coach Industries, Inc.'s Response to “Bench Brief on Contributory Negligence”	02/16/18	19	4728–4747
131	Motor Coach Industries, Inc.'s Response to “Plaintiffs’ Supplemental Opposition to MCI’s Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid to Other Defendants”	09/24/18	50	12322–12332
124	Notice of Appeal	05/18/18	49	12086–12097
139	Notice of Appeal	04/24/19	50	12412–12461
138	Notice of Entry of “Findings of Fact and Conclusions of Law on Defendant’s Motion to Retax”	04/24/19	50	12396–12411
136	Notice of Entry of Combined Order (1) Denying Motion for Judgment as a Matter of Law and (2) Denying Motion for Limited New Trial	02/01/19	50	12373–12384
141	Notice of Entry of Court’s Order Denying Defendant’s Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other	05/03/19	50	12480–12489

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40	Notice of Entry of Findings of Fact Conclusions of Law and Order on Motion for Determination of Good Faith Settlement	01/08/18	11	2581–2590
137	Notice of Entry of Findings of Fact, Conclusions of Law and Order on Motion for Good Faith Settlement	02/01/19	50	12385–12395
111	Notice of Entry of Judgment	04/18/18	42	10365–10371
12	Notice of Entry of Order	07/11/17	1	158–165
16	Notice of Entry of Order	08/23/17	1	223–227
63	Notice of Entry of Order	02/09/18	15	3511–3536
97	Notice of Entry of Order	03/19/18	36	8839–8841
15	Notice of Entry of Order (CMO)	08/18/17	1	214–222
4	Notice of Entry of Order Denying Without Prejudice Plaintiffs’ Ex Parte Motion for Order Requiring Bus Company and Bus Driver to Preserve an Immediately Turn Over Relevant Electronic Monitoring Information from Bus and Driver Cell Phone	06/22/17	1	77–80
13	Notice of Entry of Order Granting Plaintiffs’ Motion for Preferential Trial Setting	07/20/17	1	166–171
133	Notice of Entry of Stipulation and Order Dismissing Plaintiffs’ Claims Against Defendant SevenPlus Bicycles, Inc. Only	10/17/18	50	12361–12365
134	Notice of Entry of Stipulation and Order Dismissing Plaintiffs’ Claims Against Bell Sports, Inc. Only	10/17/18	50	12366–12370
143	Objection to Special Master Order Staying Post-Trial Discovery Including May 2, 2018 Deposition of the Custodian of Records of the Board of Regents NSHE and, Alternatively, Motion for Limited Post-Trial	05/03/18	51	12495–12602

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39	Opposition to “Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians of Bicyclists (Including Sudden Bicycle Movement)”	12/27/17	11	2524–2580
123	Opposition to Defendant’s Motion to Retax Costs	05/14/18	49	12039–12085
118	Opposition to Motion for Limited Post-Trial Discovery	05/03/18	48	11761–11769
151	Order (FILED UNDER SEAL)	03/26/19	52	12931–12937
135	Order Granting Motion to Dismiss Wrongful Death Claim	01/31/19	50	12371–12372
25	Order Regarding “Plaintiffs’ Motion to Amend Complaint to Substitute Parties” and “Countermotion to Set a Reasonable Trial Date Upon Changed Circumstance that Nullifies the Reason for Preferential Trial Setting”	11/17/17	3	638–641
45	Plaintiffs’ Addendum to Reply to Opposition to Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)”	01/17/18	11	2654–2663
49	Plaintiffs’ Joinder to Defendant Bell Sports, Inc.’s Motion for Determination of Good Faith Settlement on Order Shortening Time	01/18/18	11	2735–2737
41	Plaintiffs’ Joint Opposition to Defendant’s Motion in Limine No. 3 to Preclude Plaintiffs from Making Reference to a “Bullet Train” and to Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	01/08/18	11	2591–2611

37	Plaintiffs' Joint Opposition to MCI Motion for Summary Judgment on All Claims Alleging a Product Defect and to MCI Motion for Summary Judgment on Punitive Damages	12/21/17	9	2129–2175
50	Plaintiffs' Motion for Determination of Good Faith Settlement with Defendants Michelangelo Leasing Inc. d/b/a Ryan's Express and Edward Hubbard Only on Order Shortening Time	01/18/18	11	2738–2747
42	Plaintiffs' Opposition to Defendant's Motion in Limine No. 13 to Exclude Plaintiffs' Expert Witness Robert Cunitz, Ph.D. or in the Alternative to Limit His Testimony	01/08/18	11	2612–2629
43	Plaintiffs' Opposition to Defendant's Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	01/08/18	11	2630–2637
126	Plaintiffs' Opposition to MCI's Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	06/06/18	49	12104–12112
130	Plaintiffs' Supplemental Opposition to MCI's Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	09/18/18	50	12310–12321
150	Plaintiffs' Supplemental Opposition to MCI's Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants (FILED UNDER SEAL)	09/18/18	52	12917–12930
122	Plaintiffs' Supplemental Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	05/09/18	49	12019–12038

91	Plaintiffs' Trial Brief Regarding Admissibility of Taxation Issues and Gross Versus Net Loss Income	03/12/18	33	8018–8025
113	Plaintiffs' Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	04/24/18	42	10375–10381
105	Proposed Jury Instructions Not Given	03/23/18	41	10207–10235
109	Proposed Jury Verdict Form Not Used at Trial	03/26/18	42	10298–10302
57	Recorder's Transcript of Hearing on Defendant's Motion for Summary Judgment on All Claims Alleging a Product Defect	01/23/18	12	2818–2997
148	Reply in Support of Motion for a Limited New Trial (FILED UNDER SEAL)	07/02/18	52	12755–12864
128	Reply on Motion to Retax Costs	06/29/18	50	12269–12281
44	Reply to Opposition to Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)"	01/16/18	11	2638–2653
46	Reply to Plaintiffs' Opposition to Motion for Summary Judgment on Punitive Damages	01/17/18	11	2664–2704
3	Reporter's Transcript of Motion for Temporary Restraining Order	06/15/17	1	34–76
144	Reporter's Transcript of Proceedings (FILED UNDER SEAL)	05/04/18	51	12603–12646
14	Reporter's Transcription of Motion for Preferential Trial Setting	07/20/17	1	172–213
18	Reporter's Transcription of Motion of Status Check and Motion for Reconsideration with Joinder	09/21/17	1 2	237–250 251–312
65	Reporter's Transcription of Proceedings	02/13/18	16 17	3818–4000 4001–4037
66	Reporter's Transcription of Proceedings	02/14/18	17 18	4038–4250 4251–4308

68	Reporter's Transcription of Proceedings	02/15/18	18	4315–4500
69	Reporter's Transcription of Proceedings	02/16/18	19	4501–4727
72	Reporter's Transcription of Proceedings	02/20/18	20 21	4809–5000 5001–5039
73	Reporter's Transcription of Proceedings	02/21/18	21	5040–5159
74	Reporter's Transcription of Proceedings	02/22/18	21 22	5160–5250 5251–5314
77	Reporter's Transcription of Proceedings	02/23/18	22 23	5328–5500 5501–5580
78	Reporter's Transcription of Proceedings	02/26/18	23 24	5581–5750 5751–5834
79	Reporter's Transcription of Proceedings	02/27/18	24 25	5835–6000 6001–6006
80	Reporter's Transcription of Proceedings	02/28/18	25	6007–6194
81	Reporter's Transcription of Proceedings	03/01/18	25 26	6195–6250 6251–6448
82	Reporter's Transcription of Proceedings	03/02/18	26 27	6449–6500 6501–6623
83	Reporter's Transcription of Proceedings	03/05/18	27 28	6624–6750 6751–6878
86	Reporter's Transcription of Proceedings	03/07/18	29 30	7045–7250 7251–7265
88	Reporter's Transcription of Proceedings	03/09/18	30 31	7424–7500 7501–7728
89	Reporter's Transcription of Proceedings	03/12/18	31 32	7729–7750 7751–7993
99	Reporter's Transcription of Proceedings	03/20/18	37 38	9076–9250 9251–9297
100	Reporter's Transcription of Proceedings	03/21/18	38 39	9298–9500 9501–9716
101	Reporter's Transcription of Proceedings	03/21/18	39 40	9717–9750 9751–9799



102	Reporter's Transcription of Proceedings	03/21/18	40	9800–9880
103	Reporter's Transcription of Proceedings	03/22/18	40 41	9881–10000 10001–10195
104	Reporter's Transcription of Proceedings	03/23/18	41	10196–10206
24	Second Amended Complaint and Demand for Jury Trial	11/17/17	3	619–637
107	Special Jury Verdict	03/23/18	41	10237–10241
112	Special Master Order Staying Post-Trial Discovery Including May 2, 2018 Deposition of the Custodian of Records of the Board of Regents NSHE	04/24/18	42	10372–10374
62	Status Check Transcript	02/09/18	14 15	3492–3500 3501–3510
17	Stipulated Protective Order	08/24/17	1	228–236
121	Supplement to Motor Coach Industries, Inc.'s Motion for a Limited New Trial	05/08/18	49	12013–12018
60	Supplemental Findings of Fact, Conclusions of Law, and Order	02/05/18	14	3470–3473
132	Transcript	09/25/18	50	12333–12360
23	Transcript of Proceedings	11/02/17	3	598–618
27	Volume 1: Appendix of Exhibits to Motion for Summary Judgment on Punitive Damages	12/01/17	3 4	665–750 751–989
28	Volume 2: Appendix of Exhibits to Motion for Summary Judgment on Punitive Damages	12/01/17	4 5	990–1000 1001–1225
29	Volume 3: Appendix of Exhibits to Motion for Summary Judgment on Punitive Damages	12/01/17	5 6	1226–1250 1251–1490

1 experience it for .14 seconds?

2 A. It would be somewhat shorter, because  
3 instead of having a relative speed of 25 minus 8,  
4 which is what my calculation was for my first report  
5 in Exhibit 1, it would be 25 minus zero. So 25  
6 minus 8 is 17, versus 25, so it would be shorter by  
7 the factor of 17 over 25. So it would be two-thirds  
8 of .14. Maybe .09 seconds, something like that. It  
9 would be a shorter interval.

10 Q. So the force would be the same, but the  
11 interval would be different?

12 A. No. The force depends on the relative  
13 wind, and the relative wind on the cyclist depends  
14 on the cyclist's speed.

15 And so you'd get a different force on  
16 the cyclist if the cyclist was stationary versus if  
17 the cyclist was moving over the ground.

18 Q. So if the cyclist is moving over the  
19 ground, in broad terms, does his velocity add or  
20 subtract from the wind coming around the bus?

21 A. Adds.

22 Q. So he gets more if he's moving than if  
23 he's stationary?

24 A. More force, but the duration also  
25 changes, as we've just been describing.

1 Q. But the force changes because you add  
2 his speed?

3 A. Yeah.

4 Q. To the speed of the wind, for lack of a  
5 better term?

6 A. Yeah. We did this little thing with the  
7 vector addition or subtraction of all these arrows  
8 (indicating), and that's what you have to do to  
9 figure out what's happening to the cyclist.

10 Q. Now, if you wanted to -- but again, it  
11 is still relative wind, right? Speed of relative  
12 wind?

13 A. Correct.

14 Q. So if you determined that if the bus is  
15 moving at 25 and the bike is moving at 15, and so  
16 those are added together, roughly, for a value of  
17 40 -- more or less?

18 A. I'll let you finish your question.

19 Q. -- can you reach the same point by just  
20 driving the bus at 40 and having the bike stationary  
21 relative to the ground?

22 A. No. It's more complicated than that.  
23 Let me back up again.

24 This number 40 that I came up with was a  
25 plausible estimate for the kind of acceleration that

1 has to occur in a streamline that comes pretty close  
2 to that right front corner when the bus has a  
3 relative wind of 25.

4 And the relative wind on the cyclist is  
5 a somewhat complicated function of that vector, the  
6 speed of the bus, and the speed of the cyclist.

7 If you compared that with a stationary  
8 cyclist -- i.e., stationary with respect to the  
9 ground, not moving, just sitting there on the  
10 ground -- and a bus that's going faster, you're  
11 changing both the magnitude and the direction of the  
12 resultant vectors, and so it wouldn't be -- it  
13 wouldn't be equivalent. It would be different.

14 Q. How much different?

15 A. Well, I'd have to go through and do  
16 the calculation. I can't tell you off the top of  
17 my head.

18 Q. Okay. In your analysis of what occurred  
19 then, when you describe what happens if the bike is  
20 in the area that is affected by the turbulence or  
21 the separation of the boundary layer from the bus,  
22 then the bike rider experiences a force that pushes  
23 him away from the bus?

24 A. Initially.

25 Q. And then as that -- as the reattachment

1 occurs, or he passes the point of reattachment, that  
2 force disappears?

3 A. Almost. I'm sorry, the physics is  
4 complicated, but I'm just telling you what I -- the  
5 way I see it.

6 Because of this deflection as  
7 illustrated by this one streamline that we've been  
8 talking about (indicating), the cyclist is going to  
9 see a breeze with a strong sideways component on  
10 him, if he's at this particular point.

11 As the bus passes, that's equivalent to  
12 the cyclist moving aft, and at these little dots  
13 that I made further downstream not only is the flow  
14 headed back towards the bus because you're in this  
15 reattachment area, but also these streamlines are  
16 curved. And it turns out, streamlines curve for a  
17 reason. The reason why they curve is because you  
18 always have low pressure on the inside of the turn  
19 and high pressure on the outside. Think of a  
20 tornado. You have tornadoes in Texas. I grew up in  
21 Kansas. Tornadoes have very low pressure in their  
22 core. Hurricanes have low pressure in their core.  
23 The flow is turning always towards the region of low  
24 pressure.

25 The fact that these streamlines are

1 curved implies -- requires -- that the pressure is  
2 lower on the inside of the turn than the outside.

3 So -- so if you had a body here with  
4 some volume -- and I allude to this in my second  
5 report -- there would be a sideways force to this  
6 body just due to the nonuniform static pressure  
7 field here. These streamlines are curved. So you  
8 have curved streamlines and -- and it's maybe more  
9 obvious to see -- you have this flow approaching the  
10 bus.

11 So to make that long story slightly  
12 shorter, first the force on the cyclist is pushing  
13 him away from the bus, and then towards the bus.

14 Q. So what the bicyclist experiences, if I  
15 understand correctly, there's a force that pushes  
16 him away, and then that force disappears and there's  
17 a force pulling him in?

18 A. I would say the sequence is away,  
19 towards, and then eventually these streamlines  
20 settle down and become parallel to the bus again,  
21 they're straight, there's no curvature, so there's  
22 no transverse pressure gradient. And if the cyclist  
23 were in this position far aft, eventually that  
24 sideways force goes away.

25 Q. Now, in terms of this particular

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1 event --

2 MR. KEMP: I think you guys are  
3 miscommunicating. You said disappears, and he says  
4 goes away. There's always force. It's just not  
5 exposed to the cyclist. Do you understand what I'm  
6 saying?

7 MR. TERRY: No. Not a clue.

8 MR. KEMP: Go ahead. There's a constant  
9 air blast, and it is going like this (indicating),  
10 and the force, you said disappears, he says goes  
11 away. It doesn't expose the cyclist anymore. It's  
12 not hitting the cyclist, because the bus is passing  
13 him. The bus is still creating the --

14 MR. TERRY: I apologize. I meant to  
15 make it clear I'm talking about from the viewpoint  
16 of the bicyclist. I'm not talking about just from  
17 the viewpoint of the bus, because the bus is always  
18 creating the disturbance you're talking about. I  
19 apologize. If it is not clear, then let me do it  
20 again.

21 MR. KEMP: Disappearance seemed to be --

22 BY MR. TERRY:

23 Q. So what I'm talking about is I'm talking  
24 about from the perspective of the single individual  
25 who's on his bike. What that individual experiences

1 is, as he encounters the bus moving past him, he  
2 experiences, if he's in the area of turbulence, the  
3 force to the outside. And then as the bus passes  
4 and there is a reattachment, he experiences a force  
5 that pulls him in. And when the flow lines are  
6 parallel to the bus, probably no force at all.

7 A. Essentially correct. Let me just tweak  
8 a couple of things, make sure that things are  
9 absolutely clear.

10 Q. You really are a professor, aren't you?

11 A. Does it show?

12 Q. Oh, God.

13 A. There would still be aerodynamic drag on  
14 the cyclist. If he was trying to pedal here, there  
15 would still be power he has to supply to the pedals  
16 to overcome the aerodynamic drag.

17 When I said, no, the force goes away, I  
18 meant the sideways force. I was limiting my  
19 comments to just the sideways force.

20 And the other slight tweak is the only  
21 turbulence in this problem is really in the shear  
22 layer at the boundary of the separated zone. These  
23 streamlines out here could be totally what we call  
24 potential flow, totally nonturbulent. But because  
25 they're tilted, they would still exert sideways



1 forces on the cyclist as I've described.

2 Q. Okay. Now, when you were talking  
3 earlier about the work you did in connection with  
4 your master's and you were talking about reaching  
5 the point where there was no drag at all and the  
6 magic number was one-eighth of something -- am I  
7 generally in the right area?

8 A. Very good.

9 Q. -- do the flow lines for that, even when  
10 the drag is reduced to zero, still have curve?

11 A. They do.

12 Q. On this -- do you mind if we double  
13 up on the--

14 MR. KEMP: No, no.

15 BY MR. TERRY:

16 Q. On the same page, using this as a model,  
17 could you draw a rounded object where there is no  
18 turbulence separation like this? If that is the  
19 right term.

20 MR. KEMP: By "rounded," optimum  
21 rounded?

22 MR. TERRY: Yes, optimum rounded.  
23 Sorry.

24 THE WITNESS: My counsel doesn't have  
25 anything to worry about.

1 MR. KEMP: Especially --

2 MR. TERRY: Not with the three of us.

3 THE WITNESS: So if the body has a  
4 corner radius, R -- and, again, we looked at the  
5 axisymmetric shape in the tunnel, but these results  
6 would have a fairly direct carryover to a  
7 boxy-looking bus. The bus isn't axisymmetric, which  
8 its cross-sections aren't circular, but still the  
9 essential physics are about the same.

10 But I'll sketch this as the flat-headed  
11 torpedo, but now with rounded shoulders. And the  
12 critical parameter here is R over D, this  
13 dimensionless ratio of corner radius to body  
14 diameter.

15 And there was a cut here, and there was  
16 a load cell inside that just measured the force on  
17 the front part of this torpedo. We didn't look at  
18 the base drag or the drag on the sides far  
19 downstream. We only measured the aerodynamic force  
20 on the so-called forebody.

21 And the streamlines -- the stagnation  
22 streamline I've already drawn. Other streamlines  
23 might look like that (indicating). The further you  
24 get away from the body, the less the streamlines are  
25 disturbed by the presence of the body. The effects

1 die off as you go further away.

2 But very near the body, of course, the  
3 streamlines have to be deflected a lot. They have  
4 to get out of the way.

5 The critical difference in the effect of  
6 the rounding is associated with how much overspeed  
7 there is in the shoulder regions and how much tilt  
8 of the streamlines there are in these overspeed  
9 upstream -- corner upstream shoulder regions.

10 BY MR. TERRY:

11 Q. But the fact remains that even in the  
12 rounded body there is a stagnation point in the  
13 center of the body?

14 A. Correct.

15 Q. And then the air pressure builds up and  
16 the air has to move across the front of the body?

17 A. Correct.

18 Q. And it does increase in velocity?

19 A. Correct.

20 Q. And then it does stream around, and  
21 then -- but it just doesn't detach?

22 MR. KEMP: As much.

23 THE WITNESS: Well, it doesn't detach as  
24 much, or, if  $R$  over  $D$  is greater than the magic  
25 value of about .8, it doesn't detach at all. The

1 boundary layer stays attached the whole way around  
2 the corner. And you get the high pressure always in  
3 the stagnation region and then you get leading edge  
4 suction at the shoulders. And as I said, those two  
5 effects almost perfectly cancel, and, rather  
6 incredibly, the forebody drag almost vanishes when  
7  $R$  over  $D$  is bigger than an eighth or so.

8 BY MR. TERRY:

9 Q. For the individual that is standing on  
10 the ground at the corner as the bus passes, does he  
11 experience any change in wind?

12 A. Yeah. There would be less overspeed in  
13 this case, potentially, and for sure less flow  
14 deflection. The effective width of the body without  
15 the separation zones is narrower than if you had the  
16 additional effective width of these separated  
17 regions.

18 Q. But there's still an effect on the side  
19 of the bus?

20 A. These streamlines still have to get out  
21 of the way of the body. So there is a sideways  
22 component -- if I draw a tangent, for example, right  
23 there, there is still a sideways component to the  
24 wind vector at that point on that streamline. It's  
25 just that it's less than if you've got these sharp

1 corners, or rather sharp corners, and the  
2 appreciable separated regions.

3 Q. But the truth is that there still has to  
4 be some disturbance as the body moves through the  
5 atmosphere?

6 A. Correct.

7 Q. And that disturbance does affect things  
8 around the body; it's just that the disruption is  
9 different if you have the perfect as opposed to the  
10 less rounded?

11 A. Yes. There's less disturbance if you  
12 have good corner radius.

13 Q. There's less disturbance and it doesn't  
14 go out as far laterally, or does it?

15 A. It doesn't go out as far, and there's  
16 less disturbance everywhere, I would say.

17 Q. Okay. Can you quantify that for the bus  
18 involved in this occurrence?

19 A. Well --

20 MR. KEMP: Wait a second. You mean  
21 assuming the bus had the optimum corner?

22 BY MR. TERRY:

23 Q. Yeah. Can you take a look at this bus  
24 and say: Okay, I've looked at this bus. I've  
25 looked at the rounded corners. They are not

1 optimum. And because of that, if they were optimum,  
2 this is what would happen. And because they're not  
3 optimum, this is what has happened.

4 Can you do that?

5 A. It's possible in principle, because this  
6 is all potential flowed to get these streamlines  
7 very accurately, if the boundary layer stays  
8 attached everywhere.

9 You could do it numerically. Computers  
10 can handle that. I have not made that calculation,  
11 but it's possible to do that.

12 Q. But you have not done it?

13 A. Correct.

14 Q. So you cannot tell me, if you will, that  
15 this particular bicyclist, Dr. Khiabani, would not  
16 have experienced X if the corner had been different?

17 MR. KEMP: What does "X" mean?

18 MR. TERRY: Whatever it is.

19 MR. KEMP: Are you trying to compare one  
20 bus to the other bus?

21 BY MR. TERRY:

22 Q. I apologize. I'm not trying to use the  
23 diagram. Okay?

24 A. Okay.

25 Q. We know we have the J bus that was

1 involved that you have seen pictures of. Right?

2 But you have not done anything to test, wind tunnel  
3 or otherwise, how that bus would interact with the  
4 atmosphere as it's moving down the road at 25?

5 A. Correct.

6 Q. You can give me a general description,  
7 but you don't have any specific data for it?

8 A. That's correct.

9 Q. You don't know exactly where  
10 Dr. Khiabani was at any particular time during the  
11 event when he fell off the bicycle?

12 A. Correct.

13 Q. So based on the limited information that  
14 you have available and the absence of test data, can  
15 you tell me that if the corners on the bus involved  
16 in this occurrence were changed, there would have  
17 been a difference affecting Dr. Khiabani?

18 A. I can tell you there absolutely would be  
19 a reduction in the side forces. There's no  
20 ambiguity about that.

21 Q. But can you tell me that it would have  
22 made a difference for Dr. Khiabani?

23 A. No, I can't tell you that.

24 MR. TERRY: Can we take a couple of  
25 minutes?

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1 MR. KEMP: Sure.

2 (A recess is taken.)

3 BY MR. TERRY:

4 Q. In your report at paragraph 8 -- first  
5 report, paragraph 8, you say that, "The magnitude of  
6 the instantaneous aerodynamic side force on the  
7 cyclist from the bus will depend" -- and then you  
8 list certain features. Right?

9 A. Correct.

10 Q. The first is the corner radius of the  
11 bus?

12 A. Yes.

13 Q. Do you know what that is?

14 A. For the subject bus?

15 Q. Yes.

16 A. No, I don't.

17 Q. The speed of the cyclist and the speed  
18 of the bus. Do you know what those are?

19 A. I don't have any direct knowledge of any  
20 of that, no.

21 Q. Did you evaluate whether or not the  
22 speeds you were given were accurate or correct?

23 A. No independent evaluation.

24 Q. The ambient wind speed. Do you know  
25 what that was?



1 A. I haven't made any independent  
2 evaluation. I was told.

3 Q. Six-mile-an-hour crosswind?

4 A. A six-mile-an-hour figure, uh-huh.

5 Q. By the lawyer?

6 A. I think Mr. Pepperman told me that.

7 Q. Did you have any meteorologic  
8 information from any source?

9 A. No.

10 Q. The speed of the cyclist, you don't know  
11 that, right?

12 A. I don't have any independent knowledge.

13 Q. Ambient wind speed, do you know that?

14 A. Nope.

15 Q. The ambient direction?

16 A. No independent knowledge.

17 Q. And the proximity of the bus to the  
18 cyclist?

19 A. No independent knowledge.

20 Q. You go on to say that, "The side force  
21 will increase with increasing relative speeds and  
22 proximity." Correct?

23 A. Correct.

24 Q. When you talk about the "relative  
25 speeds," is that if either increases, or the bus

1     **increases, or both increase, bus and bike?**

2           A.       What I had in mind was really the  
3     relative wind on the cyclist and the relative wind  
4     on the bus. I wasn't specifically thinking of the  
5     relative -- well, perhaps I was thinking of the  
6     relative speeds of the cyclist and the bus.

7           But in general, as relative wind speeds  
8     increase, the forces increase. I think I could have  
9     said it more artfully that way.

10          Q.       Okay. Now, in terms of the speed of the  
11     bus and the speed of the bike, if the speed of the  
12     bus increases, does the relative wind speed increase  
13     by a function of whatever the increase is?

14          A.       Are you asking for the relative wind on  
15     the bus or on the cyclist?

16          Q.       On the cyclist.

17          A.       I think in general the speed of the  
18     bus -- the increasing speed of the bus would  
19     correspond to an increasing relative wind on  
20     the cyclist.

21          Q.       How about an increasing speed of the  
22     cyclist?

23          A.       Probably the same. I would always want  
24     to redraw my little --

25          Q.       The vector diagram?

1 A. -- the vector diagram to walk it  
2 through, but ...

3 Q. Generally, the speed of the wind on the  
4 bicyclist would increase if his speed relative to  
5 the bus increased?

6 A. Yes, I think that's a fair statement.

7 Q. Okay. And then you end with proximity.  
8 That's the -- how close they are together?

9 A. Correct.

10 Q. Lateral separation?

11 A. Correct.

12 Q. Is there a function, like one foot,  
13 two foot? Is there a graph? Can you tell me how  
14 the linear separation affects the wind?

15 A. Not in a simple way. It depends on the  
16 details that we've been describing of the separated  
17 zone, how big it is. Yeah, I don't have a simple  
18 figure for you.

19 Q. But the farther you move the bike  
20 laterally from the bus, the less influence there is  
21 in this instantaneous aerodynamic side force?

22 A. Yes, I would agree with that.

23 Q. And can you tell me, taking into account  
24 the assumptions that you made in your first report,  
25 what lateral separation would be necessary to reduce

1 the instantaneous aerodynamic side force to zero?

2 A. Well, to get it absolutely down to zero,  
3 the separation would have to be arbitrarily large.  
4 I mean, these streamlines are perturbed a little  
5 bit, theoretically, out forever. In practice, of  
6 course, beyond a certain point you could never even  
7 measure the slight deflections of those streamlines.

8 Q. Okay. In terms of the analysis that you  
9 did, you measured the side force in terms of foot  
10 pounds. Is that the right --

11 A. I didn't measure anything.

12 Q. I'm sorry. You calculated them in terms  
13 of --

14 A. Pounds of force.

15 Q. -- pounds of force?

16 A. Uh-huh.

17 Q. Can you tell me how far you have to go  
18 laterally before the pounds is .5 pounds?

19 A. No.

20 Q. Do you know at what point the side force  
21 is no longer a significant factor for a bicycle? Do  
22 you have that kind of expertise?

23 A. No.

24 Q. Do you bike ride yourself?

25 A. Beg your pardon?

1 Q. Are you a bike rider?

2 A. I am.

3 Q. Is there a point at which you're not  
4 concerned about side force, and can you put that in  
5 terms of pounds?

6 A. Well, as you've already asked, I'm not  
7 an expert. It may depend on whether the cyclist is  
8 holding on with one hand or two. It may depend on  
9 the abilities of the cyclist. It may depend on  
10 whether the cyclist is surprised or not.

11 Q. But in terms of measuring the  
12 instantaneous aerodynamic force in terms of pounds,  
13 can you tell me how far a lateral separation before  
14 you get to a pound measurement that should not be a  
15 significant factor for a bike rider?

16 A. No.

17 Q. In your second report, at Point 6, you  
18 refer to aerodynamic testing of various bus  
19 geometries in the MCI wind tunnel, right?

20 A. Yes.

21 (Exhibit 4 marked.)

22 BY MR. TERRY:

23 Q. Is this what you were looking at  
24 (indicating)?

25 A. Yes.

1           Q.           Okay. You make the notation that they  
2           were able to reduce the drag coefficient of the  
3           front of the bus, and refer to Proposal 1 and  
4           Proposal 2?

5           A.           Well, that's almost right. They didn't  
6           measure just the drag in the front.

7                       In my earlier discussion of this 1974  
8           experiment, I truly only measured the forebody drag.

9                       In the wind tunnel experiments in  
10          Exhibit 4, they measured the drag on the entire bus,  
11          but they would only modify certain parts of the bus  
12          at a time.

13                      So what I'm referring to here is -- and  
14          I'll quote from my own report -- "By modifying only  
15          the shape of the front of the bus, the drag  
16          coefficient was reduced."

17                      So they measured the drag of the whole  
18          bus, but they only changed, in this particular case,  
19          just the shape of the front of the bus.

20          Q.           Now, in terms of our area of concern  
21          here, which is Dr. Khiabani at the right front  
22          corner of the bus, is that the only area that  
23          matters?

24          A.           Yes.

25          Q.           Do you know which of the two proposals

1 the engineers at MCI thought was better?

2 A. I think you're referring to Proposal 1  
3 and Proposal 2. I think Proposal 2 was slightly  
4 better than Proposal 1, if memory serves, but they  
5 were both much better than their standard CG3.

6 Q. Can I see the exhibit?

7 A. Of course.

8 Q. You make a reference to this specific  
9 table, correct?

10 Would you show that to Mr. Kemp.

11 MR. KEMP: No.

12 MR. TERRY: I only brought one copy.

13 BY MR. TERRY:

14 Q. Is that the table you make reference to?

15 A. I think it is.

16 Q. I've highlighted in yellow what I'd like  
17 you to take a look at.

18 A. Yes, I see it.

19 Q. Which proposal did they go with, or did  
20 they like better?

21 A. "They" being the author of this report  
22 or MCI?

23 Q. I'm sorry. The attending MCI engineers.

24 A. Well, I think --

25 Q. They refer to, in the sense that I've

1 highlighted, the attending MCI engineers preferred  
2 one of them. Which one did they prefer?

3 A. Proposal 2.

4 Q. Is Proposal 2 better with respect to the  
5 front end of the bus, the area of the concern for  
6 Dr. Khiabani?

7 A. Better than what?

8 Q. 1.

9 A. Marginally, yes.

10 Q. You conclude in paragraph 6 by saying,  
11 "It appears that MCI did not use the optimum  
12 combination, Proposal 2, with the beveled aft end in  
13 the accident bus." Correct?

14 A. Correct.

15 Q. Did the failure to use the beveled aft  
16 end in the accident bus have anything to do with the  
17 accident involving Dr. Khiabani?

18 A. No.

19 (Exhibit 5 marked.)

20 BY MR. TERRY:

21 Q. I'm going to show you what has been  
22 marked as Exhibit Number 5, which I'll represent to  
23 you to be an article published in that journal.

24 MR. TERRY: Do you need a copy,  
25 Mr. Kemp?



1 MR. KEMP: No.

2 BY MR. TERRY:

3 Q. Have you ever seen that before?

4 A. I can't recall. I saw something. It  
5 might have been simply Dr. Funk's report. I don't  
6 believe I've seen this before, but that may just  
7 be confusing it with something I saw in  
8 Dr. Funk's report.

9 Q. I'm going to refer you to page 2. Is it  
10 Bernoulli?

11 A. Bernoulli.

12 Q. Do you see the formula there for  
13 Bernoulli's theorem, or principle?

14 A. Yes.

15 Q. Is that a correct statement of the  
16 formula?

17 A. Well, the equation itself has two typos  
18 in it, and the short answer is no. It's completely  
19 wrong. Not even partial credit.

20 Q. Now, I assume that in your business you  
21 are familiar with Bernoulli's principle?

22 A. Oh, yeah.

23 Q. You have identified or discussed the  
24 instantaneous aerodynamic effect on the bike rider  
25 by using aerodynamics, not Bernoulli's principle;

1    **that is a separate entity, correct?**

2           A.       No, I wouldn't put it that way.

3                   Bernoulli's principle is part of  
4   aerodynamics. I wouldn't separate the two.

5           Q.       Okay. But Bernoulli's principle  
6   operates within a stream, not effects on objects  
7   outside the stream, correct?

8           A.       I'm trying to be precise in my answer.  
9   Students typically screw up applications of  
10   Bernoulli's principle.

11                  Bernoulli's principle only applies if  
12   the flow is steady and if there's no friction or  
13   dissipation.

14                  Often people make the mistake of trying  
15   to apply Bernoulli's principle when there's  
16   turbulence and dissipation, and that's completely  
17   wrong.

18                  If you have no stream -- no dissipation  
19   along a streamline, Bernoulli's principle, assuming  
20   it's steady flow, would apply along that streamline.

21                  If you had neighboring streamlines which  
22   have the same initial what we call total pressure,  
23   or stagnation pressure, then the Bernoulli constant  
24   -- the term on the right-hand side of this equation  
25   that has the typos -- would be the same for both.

1                   So Bernoulli's equation can apply only  
2    along one streamline or it can apply throughout an  
3    entire flow field, depending on the initial value of  
4    Bernoulli's constant and whether or not there's  
5    dissipation.

6                   I apologize for the long answer.

7           Q.       That's all right.

8                   Would you use Bernoulli's principle to  
9    describe what happens when the bus moves through  
10   the air?

11          A.       In places, yes.

12          Q.       Where would you use it?

13          A.       Where there's no turbulence or  
14   dissipation. Outside the shear layer.

15                   But within the boundary layers and  
16   within this turbulent shear layer it would be wrong  
17   to use Bernoulli's equation.

18          Q.       Now, have you done any analysis of  
19   whether or not there are bus accidents where bike  
20   riders get caught up in this turbulence?

21          A.       No.

22          Q.       Do you know if there are such accidents?

23          A.       I don't have direct knowledge of a  
24   specific accident. I've felt trucks and buses pass  
25   me when I'm riding my bike on the city streets, but

1 fortunately I didn't have an accident.

2 Q. Did you feel force sufficient to cause  
3 you to become unstable?

4 A. No, I don't think I ever fell down as a  
5 result of a vehicle passage.

6 Q. In your own personal experience, do you  
7 have an idea how far laterally you would have to be  
8 from the bus or the truck?

9 A. I would not ascribe any -- the short  
10 answer is no, I don't have a good feeling for how  
11 close you have to be to get into trouble.

12 Q. In terms of riding bicycles yourself,  
13 are you cognizant of the fact that there are buses  
14 and trucks on the roads that you travel?

15 A. Yes.

16 Q. What do you do, in connection with those  
17 trucks and buses? Do you avoid them? Do you drive  
18 next to them? How do you deal with them?

19 A. Well, I try to stay off busy streets  
20 that have trucks and buses. Fortunately, I can get  
21 to work on a paved old railroad track. But I have  
22 several friends who have had bicycle accidents of  
23 various types, and, you know, being on -- being  
24 passed by a big vehicle at high speed can be plenty  
25 dangerous.

1 Q. What is high speed?

2 A. Well --

3 Q. Highway speed?

4 A. I don't -- it could be less than that.

5 I mean, these aerodynamic forces are significant  
6 even at pretty modest speeds.

7 I wouldn't normally think of 25 miles an  
8 hour as terribly high speed, but according to my  
9 estimates it's easy to get side forces of a  
10 magnitude of ten pounds, and a ten-pound force  
11 laterally is, I think, substantial.

12 Q. Now, are you aware that there are some  
13 states that have enacted laws directing drivers to  
14 maintain a certain lateral separation from bicycles  
15 as they overtake them?

16 A. No.

17 Q. You live in Washington state?

18 A. (Nods head in the affirmative.)

19 Q. Does Washington state have a  
20 three-foot law?

21 A. I have no idea.

22 Q. Have you ever been consulted by people  
23 who were trying to set, as a matter of law, the  
24 lateral separation that should be maintained between  
25 vehicles and bikes, to see how far it should be?

1 A. No.

2 Q. Do you have an opinion as to whether  
3 or not the law that says it's got to be three feet  
4 is adequate?

5 A. No.

6 Q. No opinion at all, one way or the other?

7 A. No.

8 Q. Do you plan on doing any additional work  
9 in the case?

10 A. If asked.

11 Q. Has anyone suggested to you that you're  
12 going to be asked?

13 A. No.

14 Q. So if I understand it, then -- and I'm  
15 trying to be fair, just so that we're clear. As I  
16 understand it, then, what you have done is you have  
17 evaluated air flow over a bluff body, like a bus,  
18 and identified areas where turbulence can be  
19 created?

20 A. Well, that's part of it, yes.

21 Q. And then where the reattachment point  
22 occurs, correct?

23 A. Correct.

24 Q. In terms of this accident, this bus,  
25 this doctor, however, you have not evaluated the

1    **specifics of where those areas would have occurred**  
2    **on this bus on this day?**

3            A.            I guess it depends on what you mean by  
4    "specifics."

5            The critical area is right around this  
6    right front shoulder. And as we've discussed, I  
7    made an estimate, and I think it's a very plausible  
8    estimate, probably conservative, for the kind of  
9    magnitude of side forces that are possible in that  
10   area, even for a 25-mile-an-hour bus.

11           But beyond that, I haven't -- I haven't  
12   mapped out this flow field.

13           Q.           And you don't have any idea where  
14   Dr. Khiabani was?

15           A.           I personally, yeah, have no direct  
16   knowledge of where he was.

17           Q.           And you have no idea whether or not he  
18   experienced side forces sufficient to cause him to  
19   lose control?

20           A.           Well, I wasn't there, but according to  
21   the reports I read, he was quite close to the bus  
22   when the bus passed him, according to witness  
23   accounts. And I would expect my estimate to be a  
24   reasonable estimate for the magnitude of forces that  
25   he could have experienced.

1 Q. Is it your operating assumption that  
2 Dr. Khiabani was located next to the bus, with the  
3 lateral separation that he had when he came in  
4 contact with the bus?

5 A. No. As I said earlier, I didn't make  
6 any specific assumption of his initial proximity as  
7 the front corner of the bus passed. I estimated a  
8 velocity vector and calculated the loads on him  
9 based on some plausible assumptions, and that didn't  
10 explicitly require an estimate of the proximity.

11 Q. So in terms of -- do you know where he  
12 came in contact with the bus?

13 A. Well, according to one of the reports I  
14 saw, there was a mark, I think it was just behind  
15 the right front wheel, which was ascribed to, I  
16 think, the end of his handle bar.

17 Q. Do you know how he got there?

18 A. No.

19 Q. Do you know where he started from as the  
20 bus overtook him?

21 A. No.

22 Q. Okay. So based on the information that  
23 is available to you, you cannot put Dr. Khiabani in  
24 any of the areas of turbulence or instantaneous  
25 aerodynamic force that you have identified for me on



1 the diagram which we have marked as Exhibit  
2 Number 3, can you?

3 A. I wouldn't say that. According to the  
4 witness accounts, if he was within three feet or  
5 less of the bus, I would expect my estimate to be a  
6 plausible indication of the magnitude of the side  
7 forces that he would encounter.

8 Q. So which witness accounts have you  
9 reviewed?

10 A. This might take a little bit of time to  
11 dig out.

12 Q. That's all right.

13 A. I don't think I have those reports with  
14 me, so I can't tell you off the top of my head.

15 Q. Did you actually have witness  
16 statements?

17 A. You're asking about my memory. I can't  
18 recall if they were witness statements or someone  
19 referring to the witnesses' opinions. I don't know.

20 Q. Is it -- and I apologize, I know that  
21 I've asked you this. I just want to make sure.

22 Is it your understanding, based on your  
23 source, that the witnesses reported that  
24 Dr. Khiabani was in the bike lane when the bus  
25 overtook him?

1           A.           I cannot recall what the witnesses said  
2           about the location with respect to the bike lane and  
3           the cyclist.

4           Q.           So in terms of interpolating  
5           Dr. Khiabani's actions on the ground on that day  
6           with the diagram that you have drawn, you cannot  
7           do that?

8           A.           Correct.

9                       MR. TERRY: All right, sir. I think  
10          that's all I have.

11                  MR. KEMP: Just a couple clarification  
12          points.

13                               EXAMINATION

14          BY MR. KEMP:

15          Q.           Starting with Exhibit 3, the bus on the  
16          top -- I don't know, top -- I don't know if top's a  
17          good description -- the bus to the left is intended  
18          to be the bus in this case. Right?

19          A.           Well, not exactly. I was drawing this  
20          with perfectly sharp corners.

21          Q.           And the bus to the right is the more  
22          rounded corners?

23          A.           Correct.

24          Q.           So if I understand it, your opinion is  
25          that the side forces would be about ten pounds in

1     **this case? That's your estimate?**

2                     MR. TERRY: Objection. Form.

3                     THE WITNESS: Yes.

4     BY MR. KEMP:

5             **Q.             And how did the ten pounds relate to the**  
6     **40-mile-per-hour that you reference in paragraph 5?**

7             A.             Yeah, the 40-mile-an-hour number comes  
8     from a plausible estimate of how much the flow  
9     accelerates as it goes around the corner. Even  
10    though the free stream speed with respect to the bus  
11    is 25, I'm assuming, there's this local  
12    acceleration. So this 40-mile-an-hour number is due  
13    to this acceleration.

14            **Q.             And that would be the side force?**

15            A.             Well, the 40-mile-an-hour vector then  
16    has to be modified or other vectors have to be added  
17    or subtracted to it to account for the speed of the  
18    bike. So there's a little bit of manipulation  
19    involved. But eventually, at the end of that  
20    process, you can draw a vector which has a magnitude  
21    and a direction, and from that I got the magnitude  
22    of the side force on the cyclist.

23            **Q.             And what is your estimate of the**  
24    **magnitude of the side force on the cyclist in this**  
25    **case at, say, the three-foot mark?**

1 MR. TERRY: Objection. Form.

2 THE WITNESS: About ten pounds. Excuse  
3 me. That's the magnitude of the total change of the  
4 side force on the cyclist. I estimated there was  
5 perhaps a one-pound side force from the cyclist's  
6 right due to the ambient wind, and then nine pounds  
7 to the left from the bus passage. So a total  
8 oscillation of about ten pounds.

9 BY MR. KEMP:

10 Q. And in terms of wind speed, what would  
11 that be?

12 A. Well, it would be a little bit more than  
13 34 miles an hour, because the 34-mile-an-hour figure  
14 that I quote in Exhibit 1 is at an angle of  
15 37 degrees, so you have to resolve the transverse  
16 component of that side force to get this nine-pound  
17 thing.

18 So it would be -- that would take me a  
19 minute to work it out, but it would be at a speed  
20 somewhere above 34 miles an hour.

21 Q. So basically your opinion is that  
22 there's an air blast or side force of approximately  
23 35 miles per hour at the three-foot-and-in level?

24 MR. TERRY: Objection. Form.

25 THE WITNESS: I'm a little reluctant to

1 give a specific proximity number, but I think as  
2 long as the proximity distance is small compared  
3 with, say, the -- a half-width of the body, then --  
4 then the local forces in this vicinity are going to  
5 be about the same.

6 And so, yeah, I think when the cyclist  
7 is close, within -- and three feet is not excessive,  
8 yeah, I think my estimate is a plausible estimate  
9 for the magnitude of that side force.

10 BY MR. KEMP:

11 Q. And that would be about 35 miles per  
12 hour; is that correct?

13 MR. TERRY: Objection. Form.

14 THE WITNESS: Or slightly more, because,  
15 remember, the velocity vector on the cyclist is not  
16 perpendicular to the cyclist, but at an angle, so  
17 you have to resolve that component.

18 BY MR. KEMP:

19 Q. In general, why, if the bus is going  
20 25 miles an hour, is the side force or air blast  
21 35 miles an hour?

22 MR. TERRY: Objection. Form.

23 THE WITNESS: It's fundamentally because  
24 the flow accelerates around the streamline, and the  
25 streamline is tilted. So not only is the speed

1 greater here than the free stream speed of 25 miles  
2 an hour, but there's a sideways component to the  
3 wind.

4 BY MR. KEMP:

5 Q. Now, earlier we talked about the side  
6 force disappearing. Would I be correct that the  
7 side force is constant as the bus is moving forward?

8 A. Part of the time. Of course, before the  
9 bus encounters the cyclist there's no side force  
10 from the bus. And then there's a peak in the side  
11 force, more or less right where the cyclist is by  
12 the front corner. In fact, even a little bit in  
13 front of the front corner you can see these  
14 streamlines start to turn, even before you get to  
15 the front face of this bluff body.

16 And then the force goes the other way  
17 and there's an attractive force towards the bus, and  
18 then finally the side force goes away again. So  
19 there's an oscillation.

20 Q. There's always some sort of side force,  
21 there's just more side force with the cyclist in the  
22 vicinity?

23 A. Well, there's not a side force when the  
24 bus and cyclist are far apart, except for any  
25 ambient wind effect. The bus would have really no

1 effect on the cyclist until the bus got right on top  
2 of the cyclist.

3 Q. If there's no side force, where does the  
4 air go?

5 A. I'm not sure I understand your question.  
6 If we're talking about the side force on  
7 the cyclist --

8 Q. No, no. I'm just talking about, is  
9 there always a side force -- taking the cyclist out  
10 of it, there's always a side force coming off of a  
11 moving bus. Correct?

12 A. Right. In the vicinity of the front of  
13 the bus that's certainly true.

14 Q. I use the term "air blast." Is that  
15 term referred to before with regards to the side  
16 forces?

17 A. Yes.

18 Q. Now, with regards to the difference if  
19 you'd made the optimum rounded corners, would the  
20 side force be less?

21 A. On the cyclist, yes.

22 Q. And you've estimated the side force is  
23 about 35 miles per hour. What is a reasonable  
24 estimate for how much less it would have been if  
25 you'd had optimum corners?

1           A.           I think you're including a velocity  
2           there. I don't have a hard figure for you because I  
3           haven't made theses in detail, but it would be a lot  
4           less.

5           Q.           And by "a lot less," can you quantify in  
6           terms of 50 percent less --

7           A.           Well, I hesitate to give a specific  
8           number without making the calculation ahead of time,  
9           but it might be a factor of two or three less.

10          Q.           Two or three times as less?

11          A.           Or even more. It's really much -- going  
12          to this optimum shape really minimizes these  
13          disturbances.

14          Q.           If it's two times as less, it would go  
15          from 35 to 17 and a half?

16          A.           No. The aerodynamic forces goes to the  
17          square of the relative wind speed.

18          Q.           If it's two times, what would that be,  
19          using 35 miles an hour?

20          A.           Well, it would be about 70 percent  
21          of 35.

22          Q.           And if it's three, what would it be?

23          A.           It would be about -- I have to do the  
24          math in my head here. It would be quicker if I just  
25          do it on paper.



1           If the force is one-third, then the  
2   square root of that is 1 over the square root of  
3   about 1.7. That's about 1.3. So if I'm doing the  
4   math right, it would be about 30 percent less.

5           I can tell you if it was one quarter,  
6   then the velocity would be exactly one-half, because  
7   the aerodynamic loads go like a square of the speed.

8           Q.       So basically --

9           A.       Let me just interrupt. Sorry.

10           But that's the total aerodynamic force,  
11   and you have to resolve the component. So it gets a  
12   little more complicated than that.

13           Q.       But in general what you can say is if  
14   they used the optimum rounded corner it would be  
15   somewhere between 50 and 70 percent less of an  
16   air blast?

17           MR. TERRY: Objection. Form.

18   BY MR. KEMP:

19           Q.       Is that fair?

20           A.       I'm hesitant to become that specific on  
21   it without doing the calculation. It would be  
22   dramatically less, perhaps a factor of two or even  
23   more. But I don't want to name a narrow range  
24   without doing the calculation.

25           Q.       I don't think we need an exact

1 calculation. Can you say it would be 50 or  
2 60 percent less?

3 MR. TERRY: Objection. Form.

4 THE WITNESS: I wouldn't be surprised if  
5 it was, yeah, a factor of two, or even more, less  
6 side force. In fact, I would expect it to be at  
7 least a factor of two less. Maybe dramatically  
8 more.

9 BY MR. KEMP:

10 Q. And so quantifying the air blasts again  
11 at 35 miles per hour, have you examined devices that  
12 produce similar air blasts to that?

13 A. Yes.

14 Q. And what kind of devices are those?

15 A. It's called the AirZooka.

16 Q. And in general, what type of air blast  
17 does that produce?

18 A. That produces a toroidal vortex ring,  
19 and I measured it that the speed was about --  
20 coincidentally, about 33 miles an hour over a  
21 five-meter distance, I roughly timed it. And so  
22 that's roughly comparable to the kind of speeds  
23 we're talking about here.

24 Q. And the AirZooka is a toy that makes air  
25 blasts?

1           A.           Yeah, it's a toy that makes a vortex  
2     ring. You pull on the back side, it's flexible,  
3     it's a spring, and it snaps and it pushes air out of  
4     a round aperture and makes a toy vortex ring.

5           Q.           You said that's 33 miles an hour, and  
6     the discussion we had with regard to the J4500 is  
7     35 miles an hour; is that correct?

8                       MR. TERRY: Objection. Form.

9                       THE WITNESS: Right. Those are the  
10    numbers we have been talking about.

11   BY MR. KEMP:

12          Q.           So the AirZooka would be substantially  
13    similar to the air blast that would come off the  
14    J4500 in this case?

15                       MR. TERRY: Objection. Form.

16                       THE WITNESS: Yes.

17   BY MR. KEMP:

18          Q.           And the opinions you've given are to a  
19    reasonable degree of aerodynamic certainty?

20          A.           Yes.

21          Q.           And you were asked whether you have  
22    figured out exactly what the air blast was and the  
23    poundage. Have you figured out approximately what  
24    it was?

25          A.           Yes.

1 Q. And that's the 35-miles-an-hour figure  
2 you've given us?

3 MR. TERRY: Objection. Form.

4 THE WITNESS: Yes.

5 BY MR. KEMP:

6 Q. And also the ten-pounds figure?

7 MR. TERRY: Objection. Form.

8 THE WITNESS: Yes.

9 BY MR. KEMP:

10 Q. And again, both of those numbers, the 35  
11 and the ten, that's to a reasonable degree of  
12 aerodynamic certainty?

13 MR. TERRY: Objection. Form.

14 THE WITNESS: Yes.

15 MR. KEMP: I don't have any further  
16 questions.

17 EXAMINATION

18 BY MR. TERRY:

19 Q. Perhaps I misunderstood the diagram that  
20 you did for Exhibit Number 3. Is that a square bus  
21 with square corners?

22 A. Square bus or square axisymmetric  
23 flat-headed torpedo.

24 I was originally, when I drew it,  
25 thinking of this 1974 experiment where I had the

1 flat-headed torpedo, so it's an axisymmetric body,  
2 where I then systematically varied the corner radius  
3 as I drew.

4 Q. But the one to the left as you're  
5 looking at it is square, the corners are squared?

6 A. Correct.

7 Q. And the J bus that was involved does not  
8 have squared corners?

9 A. Correct.

10 Q. So this is not a replica or intended to  
11 be a diagram of the J bus?

12 A. Correct.

13 Q. Now, this bus over here, where you do  
14 have the rounded corners, does the wind still  
15 accelerate from the stagnation point to the sides?

16 A. Yes.

17 Q. And does the wind still create side  
18 forces at the corners?

19 A. Yes.

20 Q. That's not something you can do away  
21 with if you're going to move a large object down the  
22 road through the atmosphere?

23 A. You can't eliminate it completely.

24 Q. Have you done any kind of studies to  
25 determine what rounding the corners on the J bus did

1 with respect to the air that moves around the bus as  
2 it goes down the road?

3 A. No.

4 Q. So you can't draw any specific,  
5 straight-line examples from the J bus to the one  
6 that's on the right, as you're looking at it, of  
7 Exhibit Number 3?

8 A. I wouldn't agree with that. We can  
9 infer on the basis of the drag measurements in the  
10 wind tunnel report where they had an improvement in  
11 the drag coefficient just by changing the front end.

12 The fact that they drastically reduced  
13 the entire bus drag coefficient by changing the  
14 shape of the front end says that there was a lot of  
15 room for improvement; i.e., the front end of  
16 their -- their standard bus had relatively sharp  
17 corners such that there had to be appreciable  
18 separation.

19 Once you round the corners enough so  
20 that you avoid boundary separation, further rounding  
21 doesn't reduce the drag any further. So the fact  
22 that their drag coefficient dropped so dramatically  
23 says that they had to have sufficiently sharp  
24 corners for this loss of leading edge suction.

25 Q. That's in the standard bus?

1           A.           Correct. The one that was tested,  
2   STD CJ3.

3           Q.           But you don't know what the front end of  
4   this bus was?

5           A.           That's correct.

6                       MR. TERRY: That's all I have.

7                               EXAMINATION

8   BY MR. KEMP:

9           Q.           You don't know exactly what the front  
10   end of this bus was, but you've seen pictures of the  
11   bus, correct?

12          A.           Yes, I've seen pictures. And to my  
13   eye -- again, I haven't seen the geometry, but to my  
14   eye, it's not rounded enough to reach this  
15   best-practice shape.

16          Q.           And when you said "relatively sharp  
17   corners," is that how you would describe the bus in  
18   this case, the J4500?

19          A.           Yes.

20          Q.           So the drawing in Exhibit 3 on the left  
21   would be more comparable to the J4500 than the  
22   drawing on the right?

23          A.           Yes.

24          Q.           And if you had to do another drawing  
25   similar to the one on Exhibit 3 for the J4500, it

1 would be basically the same drawing as we have on  
2 the left?

3 MR. TERRY: Objection. Form.

4 THE WITNESS: It would be basically the  
5 same. I would put a little bit of a rounding on the  
6 front end, which would probably reduce the size of  
7 the separating its own a little bit, but not as much  
8 as with this optimum sketch.

9 MR. KEMP: Nothing further.

10 EXAMINATION

11 BY MR. TERRY:

12 Q. Do you know which of the fronts that are  
13 referred to in Table 61 of the aerodynamic study is  
14 on the J bus?

15 A. I do not.

16 Q. Are you really prepared, as an expert  
17 witness, to reach opinions about the drag  
18 coefficient of the J bus on the basis of looking at  
19 pictures?

20 A. I'm comfortable expressing an opinion  
21 about whether or not I think the corner radius is as  
22 fairly large value of about an eighth the diameter.

23 In the terms of the precise drag  
24 coefficient the subject bus generates, that depends  
25 upon detailed information of the front of the bus



1 that I haven't seen yet. Perhaps it hasn't been  
2 produced yet.

3 Q. So based on your review of the picture,  
4 it doesn't look as rounded as the optimum that you  
5 found when you did your master's work?

6 A. Correct.

7 Q. Do you have any data about whether or  
8 not the boundary layer separates on the J bus?

9 A. No. The only data are the wind tunnel  
10 measurements, which measure drag, not explicitly  
11 whether the boundary layer separates.

12 Q. If the boundary layer does not  
13 separate, do you have the area of turbulence that  
14 we've talked about?

15 A. No. If the boundary layer doesn't  
16 separate, then the flow stays attached and you have  
17 this sort of minimal disturbance in these front  
18 corners and you have very, very low drag.

19 Q. In terms of looking at buses across the  
20 nation as they run up and down the highways, are you  
21 aware of any events that have been caused by  
22 turbulence at the right front corner of a coach?

23 A. No.

24 MR. TERRY: That's all I have.

25 MR. KEMP: Okay.

ROBERT BREIDENTHAL, JR. - 11/03/2017

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2 (The deposition concluded at 11:19 a.m.)

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I, ROBERT BREIDENTHAL, JR., deponent herein,  
do hereby certify and declare the within and  
foregoing transcription to be my deposition in said  
action; that I have read, corrected and do hereby  
affix my signature to said deposition under penalty  
of perjury.

ROBERT BREIDENTHAL, JR., Deponent

ROBERT BREIDENTHAL, JR. - 11/03/2017

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## 1 CERTIFICATE OF REPORTER

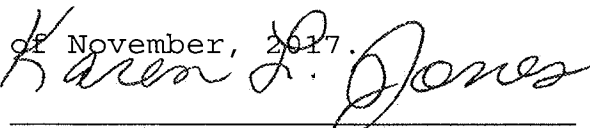
2 STATE OF NEVADA )  
3 )SS:  
4 COUNTY OF CLARK )

5 I, Karen L. Jones, a duly commissioned and  
6 licensed Court Reporter, Clark County, State of  
7 Nevada, do hereby certify: That I reported the  
8 taking of the deposition of the witness, ROBERT  
9 BREIDENTHAL, JR., commencing on Friday, November 3,  
10 2017, at 9:16 a.m.

11 That prior to being examined, the witness was,  
12 by me, duly sworn to testify to the truth. That I  
13 thereafter transcribed my said shorthand notes into  
14 typewriting and that the typewritten transcript of  
15 said deposition is a complete, true and accurate  
16 transcription of said shorthand notes.

17 I further certify that I am not a relative or  
18 employee of an attorney or counsel of any of the  
19 parties, nor a relative or employee of an attorney  
20 or counsel involved in said action, nor a person  
21 financially interested in the action.

22 IN WITNESS HEREOF, I have hereunto set my  
23 hand, in my office, in the County of Clark, State of  
24 Nevada, this 12th day of November, 2017.

25   
KAREN L. JONES, CCR NO. 694

33

33

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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

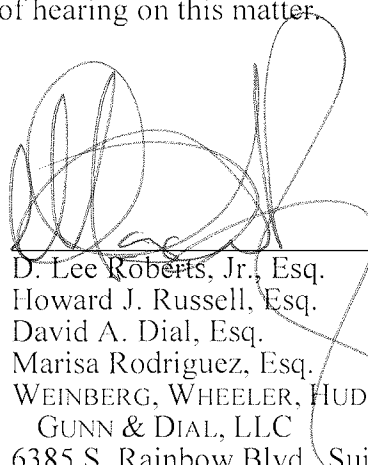
Dept. No.: XIV

**DEFENDANT'S MOTION IN LIMINE  
NO. 13 TO EXCLUDE PLAINTIFFS'  
EXPERT WITNESS ROBERT CUNITZ,  
Ph.D., OR IN THE ALTERNATIVE, TO  
LIMIT HIS TESTIMONY**

Defendant Motor Coach Industries, Inc. ("MCI"), by and through its attorneys of record, hereby requests that the Court exclude testimony or opinions from Plaintiffs' expert witness, Robert Cunitz, Ph.D., because his opinions are inadmissible under Nevada law. Alternatively, MCI requests that the Court preclude Dr. Cunitz from opining that Mr. Hubbard would have "given bicycles greater clearance" or driven the subject coach "differently" than he did the day of the accident because there is no evidence to support such opinion—such speculative testimony is inadmissible.

This Motion is made and based upon EDCR 2.47, the attached Declaration of Howard J. Russell, Esq., the following Memorandum of Points and Authorities, the pleadings and papers on file herein, and any argument presented at the time of hearing on this matter.

DATED this 7<sup>th</sup> day of December, 2017.



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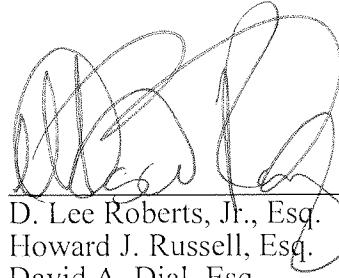
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NOTICE OF MOTION

PLEASE TAKE NOTICE that **DEFENDANT'S MOTION IN LIMINE NO. 13 TO EXCLUDE PLAINTIFFS' EXPERT WITNESS ROBERT CUNITZ, Ph.D., OR IN THE ALTERNATIVE, TO LIMIT HIS TESTIMONY** will come on for hearing in the above-entitled Court on the **18th** day of **January** **2018** at **9:30 AM** a.m./p.m. before Dept. XIV of the above-entitled Court.

DATED this 7<sup>th</sup> day of December, 2017.



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**MEMORANDUM OF POINTS AND AUTHORITIES**

*"Where the opinion of an expert is based on erroneous assumptions of fact or law, the evidence is incompetent and insufficient to support a verdict."<sup>1</sup>*

**Introduction**

Plaintiffs' human factors expert witness, Roberts Cunitz, Ph.D., must be excluded because his opinions are inadmissible under Nevada law. Dr. Cunitz opines that the subject coach was unreasonably "dangerous" because MCI did not warn Ryan's Express that at a certain *unidentified* speed, the coach allegedly presented a hazard because of the air it displaced while moving<sup>2</sup> and because MCI did not tell Ryan's Express to train its coach drivers that keeping a certain *unidentified* distance, while passing bicyclists, mitigated the risk of accidents. Dr. Cunitz concludes this alleged "danger" was a substantial cause in Dr. Khiabani's injuries and death. In sum, Dr. Cunitz opines that MCI's alleged failure to warn<sup>3</sup> was a substantial cause of the accident. This opinion is flawed.

First, Dr. Cunitz's opinion incorrectly assumes that Ryan's Express and Mr. Hubbard did not know a moving motor coach can displace air. This is contradicted by the testimony of Mr. Hubbard and representatives of Ryan's Express. Second, Dr. Cunitz's opinion incorrectly assumes that had MCI given any information to Ryan's Express about air displacement, that Ryan's Express would have changed the training it provided to Mr. Hubbard. The evidence demonstrates this type of training was already incorporated into Ryan's Express training.

Third, Dr. Cunitz's opinion assumes that, had Ryan's Express training included any additional information about air displacement, Mr. Hubbard would have driven differently the day

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<sup>1</sup> *United States v. 319.88 Acres of Land, More or Less, Situate in Clark Cty., Nev.*, 498 F. Supp. 763, 766 (D. Nev. 1980)

<sup>2</sup> Dr. Cunitz adopted the term "air-blasts" from Plaintiffs' aerodynamics expert witness, Robert E. Breidenthal, who uses the term to refer to the wind displaced by a moving vehicle.

<sup>3</sup> Notably, when asked what the "warning" would look like, Dr. Cunitz indicated he had not designed a warning. (Deposition Transcript of Robert Cunitz, attached as Exhibit "1", at 45:19-23).

1 of the accident. Mr. Hubbard *never* offered such testimony. Finally, Dr. Cunitz's opinion is based  
 2 on the incorrect assumption that Mr. Hubbard testified that "had adequate warnings and training  
 3 materials been provided by the [MCI,]" that he "would have given bicycles greater clearance during  
 4 passing maneuvers." This testimony *never* took place.

5 Under Nevada law, expert testimony based on assumptions is deemed unreliable and, thus  
 6 inadmissible. *See Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008). The same  
 7 must follow for expert testimony that is based on assumptions known to be incorrect, as is the case  
 8 here. As such, Dr. Cunitz's testimony must be excluded from trial.

9 In the alternative, and at a minimum, Dr. Cunitz's testimony must be limited. He must not  
 10 be allowed to testify that MCI's alleged failure to warn caused the accident because, as explained  
 11 above, there is not evidence to support such opinion.

#### 12 Statement of Facts

##### 13 **A. Dr. Cunitz's Report & Opinions**

14 Robert Cunitz, Ph.D., is Plaintiffs' human factors expert witness. (*See* Plaintiff's Fourth  
 15 Supplemental Expert Disclosure, attached as Exhibit "2"). Dr. Cunitz authored a report where he  
 16 first adapts Dr. Breidenthal's descriptions of the "air blasts"<sup>4</sup> that can be generated by moving  
 17 vehicles. (*See* Expert Witness Report of Robert J. Cunitz, dated 10/05/17, p. 3, attached as Exhibit  
 18 "3").

19 With Dr. Breidenthal's report as a foundation, Dr. Cunitz opines that:

- 20 1) the coach "at foreseeable speeds represents a known or knowable threat to bicyclist  
 21 being passed in close proximity;<sup>5</sup>"

---

24 <sup>4</sup> As a preliminary note, "air blast" is not a commonly used or known term. Robert E.  
 25 Breidenthal, Plaintiffs' aerodynamics expert witness, uses this term to refer to the wind displaced  
 by a moving vehicle.

26 <sup>5</sup> Notably Dr. Cunitz does not know what speed would represent a threat or what safe  
 27 proximity is while a coach is passing a cyclist.

- 2) “a bicyclist would be challenged beyond human capabilities and response times to adapt to being strongly pushed sideways away from the bus and almost instantly later being pulled in the opposite direction toward the side and the rear wheels of the bus;”
- 3) a “fast and close bus is Dangerous as it threatens the stability of the bicyclist and, if the bicyclist falls, poses an additional threat of running over the fallen bicyclist with its rear wheels;”
- 4) a “bus’s distance and speed with respect to a bicyclist being passed by the bus is controlled primarily by the knowledge, training, and thus the behaviors of the bus driver;” and,
- 5) 5) “if safe passing speeds and clearance distances are to be maintained, the bus driver must be adequately warned and trained [and] [s]ince the danger is not obvious appropriate warnings and training material must be provided by the manufacturer to bus purchaser and operators who then can pass the information on to their drivers.”

(*Id.*, at 2-4).

Stated differently, Dr. Cunitz opines that at a given *unidentified* speed, it is a hazard for a coach to pass a cyclist and that the risk of an accident can be mitigated by maintaining a certain *unidentified* distance. Dr. Cunitz then opines that because MCI did not warn Ryan’s Express<sup>6</sup> of this alleged hazard (*i.e.*, that coaches displace air when they move) and because MCI did not inform Ryan’s Express that keeping a certain distance would mitigate the risk of an accident, that the subject coach “created an unreasonable danger.” (*Id.*, at 3).

Finally, Dr. Cunitz concludes that this alleged danger was “a substantial cause of [Dr. Khiabani’s] injuries and death.” (*Id.*). Notably, Dr. Cunitz bases this conclusion on his incorrect understanding of Mr. Hubbard’s deposition testimony. That is, Dr. Cunitz’s report states, Mr. Hubbard testified that “had adequate warnings and training materials been provided by the manufacturer . . . that he would have given bicycles greater clearance during passing maneuvers.”

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<sup>6</sup> Ryan’s Express is the owner of the coach and employer of Mr. Hubbard, driver of the coach.

(*Id.*, at 4). This testimony *never* took place. (*See* Deposition Transcript of Edward Hubbard, attached hereto as Exhibit “4”).

**B. Mr. Hubbard’s Deposition Testimony Related to Air Displacement by Moving Vehicles**

At Mr. Hubbard’s deposition, Plaintiffs’ counsel asked him questions related to air displacement created by moving buses. First, as it relates to Mr. Hubbard’s knowledge of this phenomenon, he initially indicated he was familiar with it:

**Q.** Do you have any sort of understanding that a bus, if it’s moving at 30, 35 miles an hour, will cause air blasts or air disturbances at the front of the bus? Have you ever heard of that?

**A.** Yes.

*Id.* at 76:11-15. It was only when Plaintiffs’ counsel started calling this phenomenon “air blasts” and asking specific aerodynamic questions did Mr. Hubbard deny knowing specifically how much of an “air blast” there would be under certain circumstances, or how frequently:

**Q.** If a J4500 is moving forward at 30, 35 miles an hour, is it your understanding that there are no air blasts, some air blasts, air blasts on some occasions?

**A.** I don’t -- I don’t know, sir.

*Id.* at 76:23-77:2.<sup>7</sup>

Second, Mr. Hubbard was presented with an improper hypothetical of what he would do if he found out buses generated air blasts. Specifically, he testified as follows:

**Q.** Assuming today you got a bulletin from the manufacturer of the bus that said, our bus creates a 10-foot air blast on the front, would you take that into account when you were driving the bus tomorrow, the next day, on?”

**A.** Yes, sir.

*Id.* at 80:19-81:1 (emphasis added).

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<sup>7</sup> Although Plaintiffs’ counsel may not have been aware at the time, this line of questioning is wholly irrelevant since Plaintiffs’ own expert estimates the motor coach was traveling at 25 MPH (not 30 or 35).

1 Q. So if you knew that there were either air blasts or suction in  
2 the rear tires, you would -- you would take that into account in how  
3 you drive the bus?

4 A. Yes.

5 *Id.* at 83:19-24.

6 Mr. Hubbard's testimony demonstrates he was familiar with the phenomenon of air being  
7 displaced by moving vehicles. Further, he testified that had he received any type of warning about  
8 the alleged air blasts, that he would "take that into account." It is an enormous and unsupported  
9 speculative leap for Dr. Cunitz to state that Mr. Hubbard testified that "had adequate warnings and  
10 training materials been provided by the manufacturer . . . that he would have given bicycles greater  
11 clearance during passing maneuvers." (See Exhibit 3, at 4).

12 **C. Ryan's Express Deposition Testimony Related To Its Training and Air  
13 Displacement by Moving Vehicles**

14 Mary Weatherell, Ryan's Express safety director, testified:

15 Q. Okay. Have you seen air blasts from buses or trucks caused  
16 bicyclists or pedestrians to wobble?

17 A. I personally have not seen it.

18 Q. Have you heard of that?

19 A. Yes, sir.

20 Q. And is that something you train the drivers that is a potential  
21 hazard that the air blast from the front of the bus could cause a  
22 bicyclist you are overtaking to wobble.

23 A. Yes, sir.

24 Q. I mean you recognize that as a potential hazard, right?

25 A. Yes, sir, because you have a large vehicle going down the  
26 road, you know, that's why you allow as much space as you  
27 can and, you know, slow down and take all the precautions  
necessary.

(Deposition Transcript of Mary Weatherell, attached as Exhibit "5", at 34:20-35:09).

William Bartlett, Ryan's Express person most knowledgeable also provided the following  
related testimony:

1 Q. Okay. All right. Now, earlier you talked about common  
 2 sense or common practice or something? What was your  
 3 phrase?

4 A. What we always recommend with our drivers is, if there is a  
 5 bicycle traveling on the right side where the coach would pass  
 6 it, that, if possible, they always give the lane of travel to the  
 7 bike and move over if they can.

8 Q. So if someone didn't do that, that would be a violation of what  
 9 you trained them to do?

10 A. Yes.

11 Q. And would you consider that to be -- well, strike that. What is  
 12 the reason for that?

13 A. To avoid any collision.

14 Q. Okay. It's recognized that bicycles can hit pebbles and  
 15 wobble and whatever?

16 A. It's possible.

17 Q. I mean, you recognize that as a potential hazard?

18 A. It is possible.

19 Q. Okay. My question though is you recognize that as a potential  
 20 hazard?

21 A. It's possible for that to happen.

22 Q. Okay. And that's why you want to move over to the far left  
 23 lane?

24 A. To be safe, yes, sir.

25 (Deposition Testimony of William Bartlett, attached as Exhibit "6", 52:24-53:25).

26 This testimony demonstrates Dr. Cunitz's opinion is based on pure speculation. He opines  
 27 that MCI should have given some type of warning about the alleged air blast, but considering  
 that Ryan's Express already knew about this phenomenon, and already trained its drivers to give  
 clearance to a cyclist, it is rank speculation to say that any warning by MCI would have changed  
 how Ryan's Express trained Mr. Hubbard.

28 ///

29 ///

**Argument and Citation of Authority**

**A. Legal Standard for Motions in Limine**

Pursuant to EDCR 2.47, “[u]nless otherwise provided for in an order of the court, all motions in limine to exclude or admit evidence must be in writing and filed not less than 45 days prior to the date set for trial and must be heard not less than 14 days prior to trial.” The trial court has broad discretion in determining the admissibility of evidence and such discretion will not be reversed on appeal absent palpable abuse. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005).

The scope of a motion *in limine* is rather broad, applying to “any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial.” *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339, 342 (Ct. App. 1987). “The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize sidebar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence.” *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.*, 140 Cal. App. 4th 327, 371-72, 44 Cal. Rptr. 3d 426, 462 (2006) *citing Kelly v. New West Federal Savings*, 49 Cal.App.4th 659, 669-70, 56 Cal.Rptr.2d 803 (1996). Such a motion can also be advantageous in avoiding what is obviously a futile attempt to “unring the bell” should the court grant a motion to strike during proceedings before the jury. *Blanks v. Shaw*, 171 Cal. App. 4th 336, 375, 89 Cal. Rptr. 3d 710, 741 (2009) (citation omitted).

**B. Standard for Admission of Expert Witness Testimony**

The admissibility of expert testimony in Nevada is governed by NRS 50.275:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the

1 scope of such knowledge.  
 2 NRS 50.275 provides three requirements that must be satisfied before an expert can testify: (1) the  
 3 expert is qualified; (2) the expert's specialized knowledge must assist the trier of fact; and, (3) the  
 4 expert's testimony must be limited to matters within the scope of the expert's specialized  
 5 knowledge. *See Hallmark*, 124 Nev. at 498, 189 P.3d at 650. Nevada courts have wide discretion  
 6 in determining the admissibility of expert opinions based on legal, rather than scientific, principles.  
 7 *See Higgs v. State*, 125 Nev. 1043, 18, 222 P.3d 648, 659 (2010).

8 Under the second factor, the expert's testimony must assist the trier of fact in understanding  
 9 the evidence or determining a fact in issue. *See Hallmark*, 124 Nev. at 500, 189 P.3d at 651. Here,  
 10 Dr. Cunitz's opinions are inadmissible because they are unreliable and will not assist the trier of  
 11 fact. "An expert's testimony will assist the trier of fact only when it is relevant and the product of  
 12 reliable methodology." *Id.* (emphasis added). As to the "reliability" component of the analysis,  
 13 the Nevada Supreme Court has set forth a list of factors to consider:

14 [Whether the opinion is] (1) within a recognized field of expertise; (2)  
 15 testable and has been tested; (3) published and subjected to peer  
 16 review; (4) generally accepted in the scientific community (not  
 always determinative); and (5) based more on particularized facts  
 rather than assumption, conjecture, or generalization.

17 *Id.* at 500-01, 189 P.3d at 651-52.

18 Here, Dr. Cunitz's opinion will not assist the trier of fact because it is not reliable as it is  
 19 based on incorrect assumptions and non-existent testimony. As detailed above, Dr. Cunitz's  
 20 opinion incorrectly assumes:

- 21 • that Ryan's Express and Mr. Hubbard did not know moving motor coaches displace air;
- 22 • that had MCI given any warning to Ryan's Express, that it would have changed the training
- 23 it provided to Mr. Hubbard;
- 24 • that Mr. Hubbard would have driven differently the day of the accident;
- 25 • that Mr. Hubbard testified that "had adequate warnings and training materials been provided
- 26 by the [MCI,]" that he "would have given bicycles greater clearance during passing
- 27 maneuvers."

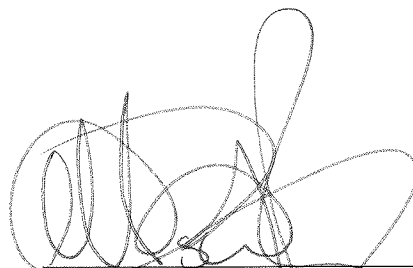


As such, Dr. Cunitz's testimony should be excluded.

### Conclusion

For the foregoing reasons, MCI respectfully requests that this court exclude Plaintiffs' expert witness, Robert Cunitz, Ph.D., from testifying because his opinions cannot assist the trier of fact because they are not reliable. Alternatively, MCI requests that the Court preclude Dr. Cunitz from opining that Mr. Hubbard would have "given bicycles greater clearance" or driven the subject coach "differently" then he did the day of the accident because there is no evidence to support such opinion.

DATED this 7<sup>th</sup> day of December, 2017.



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001813

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of December, 2017, a true and correct copy of the foregoing **DEFENDANT'S MOTION IN LIMINE NO. 13 TO EXCLUDE PLAINTIFFS' EXPERT WITNESS ROBERT CUNITZ, Ph.D., OR IN THE ALTERNATIVE, TO LIMIT HIS TESTIMONY** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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An Employee of WEINBERG, WHEELER,  
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**DECLARATION OF HOWARD J. RUSSELL, ESQ.**

1. I am Howard J. Russell, Esq. I am over the age of 18 and competent to testify to the matters herein.
2. I am counsel of record for Motor Coach Industries, Inc. ("MCI") in this matter and have personal knowledge of the matters set forth herein.
3. On December 7, 2017, pursuant to EDCR 2.47, I emailed Plaintiffs' counsel a proposed list of motions in limine that MCI sought to resolve prior to seeking Court intervention.
4. On December 7, 2017, I had a telephone conference to discuss these proposed motions with Plaintiffs' counsel, Kendeleo Works, Esq.
5. We discussed these proposed motions, and the issues raised, in good faith, but we could not reach agreement on these issues, thereby necessitating the motions.

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

DATED this 7<sup>th</sup> day of December, 2017.



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DISTRICT COURT

CLARK COUNTY, NEVADA

22 KEON KHIABANI and ARIA KHIABANI,  
23 minors by and through their Guardian, MARIE-  
24 CLAUDE RIGAUD; SIAMAK BARIN, as  
25 Executor of the Estate of Kayvan Khiabani, M.D.  
26 (Decedent); the Estate of Kayvan Khiabani, M.D.  
27 (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

**APPENDIX OF EXHIBITS TO  
DEFENDANT'S MOTION IN LIMINE  
NO. 13 TO EXCLUDE PLAINTIFFS'  
EXPERT WITNESS ROBERT CUNITZ,  
Ph.D., OR IN THE ALTERNATIVE, TO  
LIMIT HIS TESTIMONY**

Marisa Rodriguez, Esq., a resident of the State of Nevada, declares as follows:

I am a licensed attorney currently in good standing to practice law in the state of Nevada and before this Court.

I am an attorney in the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, 6385 South Rainbow Boulevard, Suite 400, Las Vegas, Nevada 89118, and am counsel representing Defendant Motor Coach Industries, Inc., in this action.

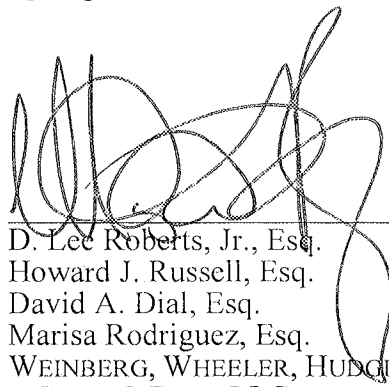
I have personal knowledge of the matters contained in this declaration and am competent to testify regarding them.

The exhibits below are true and correct copies as noted:

<u>Exhibit</u>	<u>Description</u>
1	Selected Pages from Deposition of Robert Cunitz, PhD – 10/12/2017
2	Plaintiffs' 4 <sup>th</sup> Supplemental Expert Witness Disclosures Pursuant to NRCP 16.1(a)(2) – 10/05/2017
3	Report of Robert Cunitz, PhD – 10/05/2017
4	Deposition of Edward Hubbard – 09/20/2017
5	Selected Pages from Deposition of Mary Witherell – 08/24/2017
6	Selected Pages from Deposition of William Bartlett – 09/08/2017

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

DATED this 7<sup>th</sup> day of December, 2017.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of December, 2017, a true and correct copy of the foregoing **APPENDIX OF EXHIBITS TO DEFENDANT'S MOTION IN LIMINE NO. 13 TO EXCLUDE PLAINTIFFS' EXPERT WITNESS ROBERT CUNITZ, Ph.D., OR IN THE ALTERNATIVE, TO LIMIT HIS TESTIMONY** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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# EXHIBIT 1

# EXHIBIT 1

1 DISTRICT COURT  
2 CLARK COUNTY, NEVADA  
3

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

8 Plaintiffs, )

) Case No.  
) A-17-755977-C  
) Dept. No.  
) XIV

9 vs.

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

16 Defendants. )  
17

18  
19 DEPOSITION OF ROBERT CUNITZ, Ph.D.

20 LAS VEGAS, NEVADA

21 THURSDAY, OCTOBER 12, 2017  
22  
23

24 REPORTED BY: HOLLY LARSEN, CCR NO. 680, CA CSR 12170  
25 JOB NO.: 425047

ROBERT CUNITZ, PH.D. - 10/12/2017

Page 2

1 DEPOSITION OF ROBERT CUNITZ, Ph.D., taken at  
2 3770 Howard Hughes Parkway, Suite 300, Las Vegas,  
3 Nevada, on Thursday, October 12, 2017, at 9:06 a.m.,  
4 before Holly Larsen, Certified Court Reporter, in  
5 and for the State of Nevada.

6

7 APPEARANCES:

8 For the Plaintiffs:

9 KEMP, JONES & COULTHARD  
10 BY: ERIC M. PEPPERMAN, ESQ.  
3800 Howard Hughes Parkway  
Seventeenth Floor  
11 Las Vegas, Nevada 89169  
702.385.6000  
12 e.pepperman@kempjones.com

13

14 For Motor Coach Industries, Inc.:

15

HARTLINE DACUS BARGER DREYER, LLP  
16 BY: DARRELL L. BARGER, ESQ.  
800 North Shoreline Boulevard  
Suite 2000, North Tower  
17 Corpus Christi, Texas 78401  
361.866.8000  
dbarger@hdbdlaw.com

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19

20

21

22

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25

1 number of years, but a lot of years.

2 Q. Over 30 years probably?

3 A. He's an experienced bus driver, I  
4 appreciate that.

5 Q. Driving transit buses in New York City for  
6 years, passing lots of pedestrians on bicycles;  
7 correct?

8 A. I don't know what the numbers are.

9 Q. I know, but you saw that he did that?

10 A. So he said.

11 Q. So I wanted to talk to you about basically  
12 your opinion -- and I don't want to drag this  
13 deposition on forever. But in your opinion, in a  
14 nutshell, you think there should be a warning or  
15 training because of the air blast wind effect?

16 A. Yes, sir.

17 Q. That's your opinion, that's the end of it?

18 A. That's the heart of it, yes, sir.

19 Q. And you haven't designed a warning?

20 A. Correct.

21 Q. And you haven't come up with any proposed  
22 training that you would tell somebody?

23 A. Correct.

24 Q. And you don't intend to do so?

25 A. I have no intention at the moment. I'm

# EXHIBIT 2

# EXHIBIT 2

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ERIC PEPPERMAN, ESQ. (#11679)  
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7 CHRISTIANSEN LAW OFFICES  
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8 Las Vegas, Nevada 89101  
Telephone: (702) 240-7979

9 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**

12 **COUNTY OF CLARK, NEVADA**

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

17 *Plaintiffs,*

18 *vs.*

19 MOTOR COACH INDUSTRIES, INC.,  
20 a Delaware corporation; MICHELANGELO  
LEASING INC. d/b/a RYAN'S EXPRESS, an  
21 Arizona corporation; EDWARD HUBBARD, a  
Nevada resident; BELL SPORTS, INC. d/b/a  
22 GIRO SPORT DESIGN, a California  
corporation; SEVENPLUS BICYCLES, INC.  
23 d/b/a Pro Cyclery, a Nevada corporation;  
DOES 1 through 20; and ROE  
24 CORPORATIONS 1 through 20.

25 *Defendants.*

Case No. A-17-755977-C

Dept. No. XIV

**PLAINTIFFS' 4th SUPPLEMENTAL  
EXPERT WITNESS DISCLOSURES  
PURSUANT TO N.R.C.P 16.1(a)(2)**

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**PLAINTIFFS' FOURTH SUPPLEMENTAL EXPERT WITNESS DISCLOSURES**

**PURSUANT TO N.R.C.P. 16.1(a)(2)**

COME NOW, Plaintiffs, by and through their attorneys of record, WILL KEMP, ESQ., and ERIC PEPPERMAN, ESQ. of the law firm KEMP JONES & COULTHARD, hereby give notice pursuant to N.R.C.P. 16.1(2) that it may call the following expert witnesses at trial of the above-captioned action:

1. Robert J. Cunitz, Ph.D.  
411 Ridgely Ave  
Annapolis, Maryland 21403

Dr. Cunitz is expected to testify consistent with his report which is attached hereto as Exhibit 1, including, but not limited to, testifying as to the warnings and/or lack of proper warnings, manufacturer recalls, human factors, consumer expectations of the dangers of propane tanks, his knowledge of the facts and circumstances concerning the subject litigation, his investigation and opinions in an expert capacity, and all matters related thereto. All disclosures required by NRCP 16.1(a)(2)(B) are contained within his report and/or various exhibits attached to the report.

2. Geoffrey Russell Loftus, Ph.D.  
Department of Psychology  
Guthrie Hall, Room 134  
University of Washington  
Seattle, WA 98195-1525

Dr. Loftus is expected to testify consistent with his report which is attached hereto as Exhibit 2, including, but not limited to eyewitness testimony the Rashomon effect, his knowledge of the facts and circumstances concerning the subject litigation, his investigation and opinions in an expert capacity, and all matters related thereto. All disclosures required by NRCP 16.1(a)(2)(B) are contained within his report and/or various exhibits attached to the report.

3. James Green, P.E.  
GE Engineering, PLLC  
120 Kalmia Drive  
Asheville, NC 89904

James Green is expected to testify consistent with his report which is attached hereto as Exhibit 3, including, but not limited to the accident reconstruction, his knowledge of the facts and circumstances concerning the subject litigation, his investigation and opinions in an expert capacity,

KEMP JONES & COULTHARD, LLP  
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Las Vegas, Nevada 89169  
(702) 385-6000 • Fax (702) 385-6001  
kjc@kempjones.com

1 and all matters related thereto. All disclosures required by NRCP 16.1(a)(2)(B) are contained within  
2 his report and/or various exhibits attached to the report.

3 DATED this 5 day of October, 2017.

4 KEMP, JONES & COULTHARD, LLP

5 

6 WILL KEMP, ESQ. (#1205)  
7 ERIC PEPPERMAN, ESQ. (#11679)  
8 KEMP, JONES & COULTHARD, LLP  
9 3800 Howard Hughes Parkway, 17<sup>th</sup> Floor  
10 Las Vegas, NV 89169

11 -and-

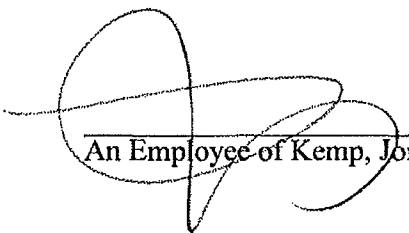
12 PETER S. CHRISTIANSEN, ESQ. (#5254)  
13 KENDELEE L. WORKS, ESQ. (#9611)  
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001829

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of October, 2017, the foregoing **PLAINTIFFS' 4th SUPPLEMENTAL EXPERT WITNESS DISCLOSURES PURSUANT TO N.R.C.P 16.1(a)(2)** 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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# EXHIBIT 3

# EXHIBIT 3

**Expert Witness Report of Robert J. Cunitz, Ph.D. CHFP**

**Khiabani v Motor Coach Industries, Inc.**

**October 5, 2017**

**I. Background**

I am president of Consumer Usage Laboratories that specializes in evaluating human factors and psychological issues as they relate to product safety and product safety labeling and warnings. I received my Ph.D. in Psychology from the University of Maryland in 1970, was head of the Human Factors Section at the National Bureau of Standards and thereafter became Board Certified as a Human Factors Professional in 1993. My experience is more fully set forth in my Curriculum Vitae attached hereto as Exhibit A. The history of cases in which I have provided testimony is attached hereto as Exhibit B.

**II. Materials Reviewed**

- a. Amended Complaint and Demand for Jury Trial
- b. Giro Owner's Manual
- c. Accident Video 20170418\_103810
- d. AMR Medical Records with Declaration of COR
- e. Behind The Scenes - Bell Helmets Test Lab Video
- f. CCFD Medical Records.
- g. Charles W. Powell Eng. Report - Darrington v. Giro Sports Design—2005
- h. Clark County Coroner Medical Records Produced by Subpoena
- i. Clark County Coroner's Photos – Scene
- j. CycleEye alerts bus driver\_x264 Video
- k. Death Certificate - P00001
- l. Duluth Barge heading out. (Soaking a few bystanders)-A5J7p6xVTbY Video
- m. GIRO + MIPS Video
- n. James Green Report on S1 Guard
- o. P-01216 (1-180) Caldwell Inspection Photographs taken 8-9-17
- p. P00353-P00382 Photos of Helmet taken by KJC
- q. Pedestrian and Cyclist Detection System\_short\_x264 Video
- r. Red Rock Video
- s. Traffic Crash Report – unredacted
- t. UMC Medical Records with COR Cert
- u. Volvo Cyclist Detection With Full Auto Brake\_x264 Video
- v. Deposition of Aaron Bradley with Ex 0001
- w. Deposition of David Dorr with Exhibits
- x. Deposition of Brad Ellis
- y. Deposition of Erika Bradley with Exhibits
- z. Deposition of Christopher Groepler with Exhibits

- aa. Deposition of Edward Hubbard
- bb. Deposition of Jeffrey Justice
- cc. Deposition of Zach Kieft
- dd. Deposition of Samantha Kolch
- ee. Deposition of Luis Sacarias
- ff. Deposition of Terry McAfee
- gg. Deposition of Robert Pears with Exhibits
- hh. Deposition of Michael Plantz with Exhibits
- ii. Deposition of Shaun Harney with Exhibits
- jj. Deposition of Mary Witherell with Exhibits
- kk. Deposition of William Bartlett with Exhibits
- ll. Report of Robert E. Breidenthal

### III. Factual Background

On April 18, 2017, Dr. Kayvan Khiabani was riding his bicycle southbound in a designated bicycle lane on S. Pavilion Center Drive near the Red Rock Resort and Casino in Las Vegas, Nevada.

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. The bus was a 2008, full-size Motor Coach Industries, Inc. Model J4500. The subject bus was designed and manufactured with limited driver ability to visualize the right side of the bus and without proximity sensors or sufficient visual aids to alert the driver to the proximity and location of adjacent pedestrians and bicyclists. At the time, the bus was owned and operated by Defendant Ryan's Express (Michelangelo) and was being driven by their employee, Edward Hubbard. At the time that it overtook Dr. Khiabani, the bus was traveling at sufficient speed to pass the bicycle and was traversing out of the right-hand turn lane and crossing over the designated bicycle lane from the right side of Dr. Khiabani to his left side. As it crossed the designated bicycle lane to overtake Dr. Khiabani on the left, the bus and Dr. Khiabani's bicycle collided, apparently behind the area of the bus's right front wheel.

David Dorr, a Motor Coach Industries sales and service manager for almost two decades, was unaware that a J4500 model bus at 35 to 45 mph would generate substantial disturbances of the air around the front edge and sides of the bus ("air blast") sufficient to be dangerous to bicyclists in the proximity of the bus. Neither the Purchase and Sales agreement for the bus nor other associated documents warned about this phenomenon. Ryan Express's General Manager, Christopher Groepler, and its Safety Director, William Bartlett, were also unaware of this "air blast" danger and were not otherwise warned of the issue. Mr. Bartlett did not cause their drivers to be trained with respect to this danger. Importantly, their driver, Edward Hubbard had no knowledge of the problem and has testified in his deposition (pp. 80-83) that had he known of the danger, he would have driven his bus differently and given bicyclists much wider clearance from the side of any bus that he was driving.

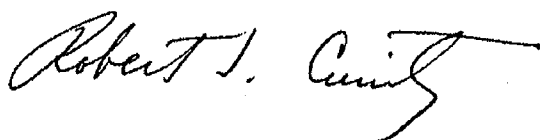
The report of Robert E. Breidenthal described the physics and aerodynamics that generate these "air blast" forces and the effects such forces would have on a bicyclist being passed in close proximity by a square fronted bus at speed. His report makes clear the nature and extent of the danger to bicyclists.

#### IV. Opinions and Conclusions

- a. The J4500 Motor Coach Industries bus at foreseeable speeds represents a known or knowable threat to bicyclists being passed in close proximity. Based on the report of Robert E. Breidenthal, the lateral forces created by the movement of the bus through air are substantial and rapidly changing in direction from outward to inward as the bus passes. Breidenthal concludes that such forces increase with the square of the speed.
- b. As a Human Factors Professional, it is my opinion that such forces would be surprising and so rapidly changing that even skilled bicyclists would be challenged beyond human capabilities and response times to adapt to being strongly pushed sideways away from the bus and almost instantly later being pulled in the opposite direction towards the side and then rear wheels of the bus.
- c. The Danger created represents a combination of Hazard and Risk. Specifically, the Hazard is the air blast forces first pushing away from and then rapidly reversing towards the side of the bus. The faster the bus moves through the area, the greater the forces generated. The Risk is related to a bicyclist's proximity to the moving bus. Risk is lessened the further the passing bus is from the bicyclist. At some distance, the Risk disappears. So, simply, the faster the bus moves, the greater the Hazard. The closer it is to a bicyclist, the greater the Risk. A fast and close bus is Dangerous as it threatens the stability of the bicyclist and, if the bicyclist falls, poses an additional threat of running over the fallen bicyclist with its rear wheels.
- d. Since, it is clear from the Breidenthal report that the Danger can be mitigated if substantial clearances are maintained while passing a bicyclist. A bus's distance and speed with respect to a bicyclists being passed by the bus is controlled primarily by the knowledge, training and thus the behavior of the bus driver.
- e. It is my opinion, within a reasonable degree of scientific certainty, that if safe passing speeds and clearance distances are to be maintained, the bus driver must be adequately warned and trained. Since the danger is not obvious, appropriate warnings and training materials must be provided by the manufacturer to bus purchasers and operators who then can pass the information on to their drivers.
- f. The driver, ultimately, must have this information and must know how to pass safely.
- g. In the present case, as the sales manager for the manufacturer, the general manager and safety director of the operator, and the driver of the bus were unaware of the nature and extent of the Danger, the Hazard should have been identified by the manufacturer, the Risk evaluated, and warnings issued.

- h. Within a reasonable degree of scientific certainty in my field of Human Factors, it is my opinion that the failure of Motor Coach Industries, Inc. to warn of the Hazard and the means to reduce Risk, created an unreasonable Danger on the highways where it is foreseeable that buses will be passing bicyclists such as Dr. Khiabani.
- i. This Danger was, in my opinion, a substantial cause of his injuries and death. Had adequate warnings and training materials been provided by the manufacturer, the bus driver, Mr. Hubbard, has testified that he would have given bicycles greater clearance during passing maneuvers and Dr. Khiabani would not have been exposed to the oncoming Danger.

I expect to testify concerning the principles and uses of warnings as described in *Warnings: A Human Factors Perspective*, attached as Exhibit C. I also expect to review the results of other expert reports and testimony as it is made available to me.



Robert J. Cunitz, Ph.D. CHFP



**EXHIBIT A**

Robert J. Cunitz, Ph.D., CHFP

President

Consumer Usage Laboratories, Inc.

411 Ridgely Avenue

Annapolis, Maryland 21401

Robert J. Cunitz, born New York, New York, 1940. Licensing and Certification: Psychologist, District of Columbia, 1972 (inactive) and Maryland, 1973 (inactive); Certified Human Factors Professional, Board of Certification in Professional Ergonomics, 1993. Education: Preparatory, Lehigh University (B.A., 1962); Advanced, Lehigh University (M.S., 1964); Doctoral, University of Maryland (Ph.D., 1970). Science and Academic Honor Societies: Sigma Xi, Psi Chi. Memberships: American Psychological Association (Division of Applied Experimental and Engineering Psychology), Human Factors and Ergonomics Society, Potomac Chapter of the Human Factors and Ergonomics Society, System Safety Society (Senior Member and Representative to: Engineers Committee on Three Mile Island, 1979-1980; American Association of Engineering Societies, Engineering Affairs Council, 1980-1983; and American National Standards Institute, Z535 Committee on Warning Signs and Colors, 1983- ), American Society of Safety Engineers (Professional Category), American Society for Quality Control - Product Safety and Liability Prevention Committee, 1977- , National Safety Council, Diving Safety Review Board, 1984- , and American Association for the Advancement of Science, 1965-. Academic and Research Positions: Trinity College, Montgomery College, Howard University, National Bureau of Standards, and Consumer Usage Laboratories.

Consumer Usage Laboratories, Inc., is a Maryland Corporation founded in 1976 which specializes in human factors psychology as it relates to safety. Services for attorneys include investigation, consultation and expert testimony. Services for industry include preparation and testing of product warnings and labels, consultation and expert testimony.

## DR. CUNITZ'S PUBLICATION LIST

"The 'slow wave' of the cortical evoked response in man and the focus of attention", M.S. Thesis, Lehigh University, 1964.

"Voluntary control of microsaccades during fixation," Science, (with R.M. Steinman, et al.), 1967, 155, 1577-1579.

"Monocular fixation of targets near the absolute foveal threshold," (with R. M. Steinman), Eastern Psychological Association Spring Meetings, 1967.

"Do microsaccades occur during reading pauses?" Eastern Psychological Association, Spring Meetings, 1968.

"Fixation of targets near the absolute foveal threshold," Vision Research, (with R. M. Steinman), 1968, 8, 277-286.

"Comparison of saccadic eye movements during fixation and reading," Vision Research, (with R. M. Steinman), 1969, 9, 683-693.

"Relationship between slow drift and smooth pursuit eye movements," Ph.D. Dissertation, University of Maryland, 1970.

Design of experiments for measuring helicopter aural detectability (with Adcock & Ollerhead), Wyla Laboratories, TM70-3, 1970.

"Physiological and psychological effects of noise," Testimony at EPA public hearings, 10/27, 28/71, Boston, published in Report to the President and Congress on Noise, EPA, February 1972.

"LEAA police equipment survey of 1972," Communications Equipment and Supplies, Vol. II (with E. Bunten), NBS 73-211, 1974.

"Behavioral suppression by 383 Mhz radiation," IEEE Transactions on Microwave Theory and Techniques, (with Galloway & Berman), 1975, 313-316.

"Swimming Pool, Slide Safety Standard Evaluation--Pilot Study of the Attractive Nuisance Hypothesis For Slides Over Deep Water", (with A. M. Ramey and V. J. Pezoldt), Human Factors Section, Product Systems Analysis Division, Center for Consumer Product Technology Institute for Applied Technology, National Bureau of Standards, July, 1975.

"Subjective responses to acoustic environments," Environmental Design Research Association Conference, Blacksburg, Virginia, Invited paper, April 18, 1973.

"Human factors test facility for home safety," System Safety Society Second International Conference, San Diego, July, 1975.

The NBS Human Factors Laboratory: A study plan, CUL-TR1, August, 1976.

Swimming pool safety: walls and fences, doors and gates (with R. Weiner), CUL-TR2, The National Swimming Pool Institute.

"The use of system safety philosophy in the development of a swimming pool slide safety standard," (with Weiner & Paulick), Alexandria, Virginia, October, 1977, Proceedings of the System Safety Society, 1977.

"Montgomery County Noise Control Advisory Board. Local Noise Control," Invited address to the Maryland Speech and Hearing Association, Fall Meeting, October, 1977.

"Ethics: Are you unknowingly performing unethical human research as a result of your safety endeavours?" Invited paper, System Safety Society, Third International Conference, Alexandria, Virginia, October, 1977. Published in the Proceedings and republished in Hazard Prevention, Journal of the System Safety Society, 14, 3, 1978, 16-22.

"Human factors in design", Invited address to the Washington Metropolitan Area Construction Safety Association, October, 1978.

"An inadequate metric," Hazard Prevention, Journal of the System Safety Society, 15, 3, 1979, 6.

"Consumer perceptions of food grading: 1979 Focus Group Interviews" (with A. R. Cunitz), James V. Clark & Associates/CUL, January, 1980.

"Psychologically effective warnings," Hazard Prevention, Journal of the System Safety Society, 1981, 17, 3.

"Asbestos Warnings", (with Judith S. Freedman, MLS) CUL-TR3, Consumer Usage Laboratories, Inc., 1982.

Swimming Pools-A Guide to their Planning, Design and Operation, 4th Ed., (warnings section), M. Alexander Gabrielson, Ed. Council for National Cooperation in Aquatics, 1983, Member of Editorial Committee.

"Cessna seat-slips," (letter to the Editor), Aviation Safety, August, 1983, Vol. III.

"Problems in the perception of overhead power lines," (with Lorna Middendorf), 6th International Conference of the System Safety Society, Houston, Texas, 9/28/83.

"Product liability reform," (letter to the Editor), Professional Safety, October, 1983.

Human Factors, Certified Safety Professional Refresher Guide, American Society of Safety Engineers, October, 1984.

"Problems in the perception of overhead power lines," Hazard Prevention, Journal of the System Safety Society, (with L. Middendorf), 1985, 21, 3.

"No Diving" Sign - U.S. Patent D-287,031, December 2, 1986.

"Human factors expert as a witness--techniques and approaches," (with Foy R. Devine, Esq.), Presented to the 9th Annual Southern Methodist University School of Law's Personal Injury and Products Liability Symposium, Orlando, Florida, Feb. 24-25, 1988.

"Demonstration: direct examination of a human factors expert in a power line contact case," (with Foy R. Devine, Esq.), Presented to the 9th Annual Southern Methodist University School of Law's Personal Injury and Products Liability Symposium, Orlando, Florida, Feb. 24-25, 1988.

"Extracting Testimony From The Human Factors Expert Witness," (with Foy R. Devine, Esq.), Presented to the 32nd Annual Meeting of the Human Factors Society, Anaheim, California, October 24-28, 1988.

"Sparkling Wines and Warnings," Hazard Prevention, Journal of the System Safety Society, (with Frederick Koenig, Ph.D.), 21,1, 1989, 12-14.

"Warnings: A Human Factors Perspective", July, 1990. Prepared and accepted as a chapter for a book entitled Handling Product Warning Litigation. The book was edited by Leonard Ring, Esquire, for Wiley Law Publications but was not completed prior to his death in 1994.

"Human Factors in Construction Cases", Presented to Washington State Trial Lawyers Association Continuing Legal Education Program, Seattle, Washington, August 25, 1994. Proceedings contain "Warnings: A Human Factors Perspective".

"Warnings: A Human Factors Perspective", Presented to Virginia Trial Lawyers Association, 38<sup>th</sup> Annual Convention, The Greenbrier, April 3-5, 1997.

"Air Conditioner Cord Warning Label" - U.S. Patent D-393,487, April 14, 1998.

VIDEO TAPES

Failure to Warn - A Design Defect? Sponsored by National Center for Technology in Law, 1981

The Man-Machine Connection, Sponsored by National Center for Technology in Law, 1981

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## Exhibit B

DECEMBER 5, 2013 DEPOSITION TESTIMONY  
DELORES E. CIPRIANO; BERTHA E. TRIANA, et al. v TAKEDA PHARMACEUTICALS AMERICA, INC., et al.  
DISTRICT COURT OF CLARK COUNTY, NEVADA  
A-13-680922-C; A-13-680556-C

DECEMBER 9, 2013 DEPOSITION TESTIMONY  
SHERRY ROWLAND v CRANE CO., et al  
DISTRICT COURT OF ASSUMPTION, LOUISIANA  
NO. 33,956 DIV A

JANUARY 16, 2014 DEPOSITION TESTIMONY  
RICHARD FISHER v KAWASAKI HEAVY INDUSTRIES, LTD; KAWASAKI MOTORS CORP U.S.A., et al.  
DISTRICT COURT OF NUECES COUNTY, TEXAS  
2011DCV-6167-A

JANUARY 23, 2014 DEPOSITION TESTIMONY  
JAMES F. MOORE, and his wife LINDA S. MOORE v OYJ PARTEK ABP, et al  
SUPERIOR COURT FOR NEW CASTLE COUNTY, DELAWARE  
N12C-05-139

MARCH 13, 2014 DEPOSITION TESTIMONY  
SAGEL and BRENDA SIMON v CALAVERAS ASBESTOS, LTD, et al.  
SUPERIOR COURT FOR LOS ANGELES, CALIFORNIA  
NC520591

APRIL 7, 2014 TRIAL TESTIMONY  
DELORES E. CIPRIANO; BERTHA E. TRIANA, et al. v TAKEDA PHARMACEUTICALS AMERICA, INC., et al.  
DISTRICT COURT OF CLARK COUNTY, NEVADA  
A-13-680922-C; A-13-680556-C

MAY 20, 2014 DEPOSITION TESTIMONY  
GEORGE A. DONNER & CHRISTINE L. DONNER v ALCOA, INC.  
CIRCUIT COURT FOR JACKSON COUNTY, MISSOURI  
4:12-CV00431-SOW

OCTOBER 27, 2014 DEPOSITION TESTIMONY  
ANDRES RIVERA, as parent of Alan Rivera, a minor v VOLVO CARS OF NORTH AMERICA, LLC, et al.  
DISTRICT COURT OF SANTA FE COUNTY, NEW MEXICO  
D-101-CV-2012-02979

JANUARY 1, 2015 DEPOSITION & TRIAL TESTIMONY  
ASBESTOS LITIGATION 022015 J&C TRIAL GROUP LIMITED TO: STEWART, RUSSELL & BRANUM, HOWARD  
SUPERIOR COURT FOR NEW CASTLE COUNTY, DELAWARE  
CA09C-06-246  
CA10C-080228

MARCH 4, 2015 TRIAL TESTIMONY  
GEORGE A. DONNER and CHRISTINE L. DONNER v ALCOA, INC.  
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
4:12-CV-00431-SOW

APRIL 23, 2015 TRIAL TESTIMONY  
RICHARD A. FISHER v KAWASAKI HEAVY INDUSTRIES, LTD., et al  
DISTRICT COURT OF NUECES COUNTY, TEXAS  
2011DCV-6167-A

APRIL 30, 2015 DEPOSITION TESTIMONY  
GEORGE F. DECOU; JOANN PASSER as Special Administratrix of the Estate of MAURICE J. IORIO, et al  
v TAKEDA PHARMACEUTICALS AMERICA, INC., et al.  
DISTRICT COURT OF CLARK COUNTY, NEVADA  
A-13-683446-C XXX  
A-14-697468-C XVII

SEPTEMBER 11, 2015 TRIAL TESTIMONY  
GEORGE F. DECOU; JOANN PASSER as Special Administratrix of the Estate of MAURICE J. IORIO, et al  
v TAKEDA PHARMACEUTICALS AMERICA, INC., et al.  
DISTRICT COURT OF CLARK COUNTY, NEVADA  
A-13-683446-C XXX  
A-14-697468-C XVII

OCTOBER 29, 2015 DEPOSITION TESTIMONY  
JASON H. MALASHOCK V POLARIS INDUSTRIES, INC., CHESTERFIELD VALLEY POWER SPORTS, INC., AND  
POLARIS POWERSPORTS, INC.  
CIRCUIT COURT OF ST LOUIS COUNTY, MISSOURI  
14SL CC01034

JANUARY 29, 2016 DEPOSITION TESTIMONY  
CIEARRA CAMARATA, an infant, by and through her legal guardian and natural mother, CYNTHIA  
CAMARATA v POLARIS INDUSTRIES, INC.  
UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK  
6:14 CV - 00975 (GTS/TWD)

FEBRUARY 23, 2016 DEPOSITION TESTIMONY  
FRANCIS W. CATALDO and DEBORAH CATALDO V METROPOLITAN LIFE INSURANCE COMPANY, et al.  
SUPERIOR COURT FOR COMMONWEALTH OF MASSACHUSETTS  
15-2761

MAY 25, 2016 DEPOSITION TESTIMONY  
DONNA WALLS V FORD  
SUPERIOR COURT OF NEW CASTLE COUNTY, DELAWARE  
S13C-12-026

JUNE 15, 2016 TRIAL TESTIMONY  
DONNA F. WALLS, individually and as the Executrix of the Estate of JOHN W. WALLS, JR., deceased,  
and Collin Walls as surviving child V THE FORD MOTOR COMPANY  
SUPERIOR COURT OF NEW CASTLE COUNTY, DELAWARE  
C.A. No. 14C-01-057

JULY 12, 2016 DEPOSITION TESTIMONY  
JILL ST. GERMAINE v BOMBARDIER RECREATIONAL PRODUCTS INC., ET AL.  
SUPERIOR COURT OF NEW HAVEN, CONNECTICUT  
NNH - CV - 11 6022208 - S

AUGUST 29, 2016  
WILLIAM LITTLE v FORD MOTOR COPANY  
UNITED STATES DISTRICT COURT OF GEORGIA, ATLANTA DIVISION  
1:16-cv-00931-ELR

SEPTEMBER 8, 2016 DEPOSITION TESTIMONY  
OMAR LEOPOLDO RODRIGUEZ and GIOVANNI JOSE PARGA TORRES, minors, by and thru their co-guardians  
HUGO HOMBERTO ROBLES and YOLANDA ROBLES, et al. v WORTHINGTON CYLINDER CORPORATION, et al  
DISTRICT COURT OF CLARK COUNTY, NEVADA  
A699935 XXVI

NOVEMBER 17, 2016 DEPOSITION TESTIMONY  
WARREN et al v ALLEGHENY LUDLUM et al  
CIRCUIT COURT OF FAYETTE COUNTY, ALABAMA  
CV-2003 -142.02

JUNE 22, 2017 DEPOSITION TESTIMONY  
DANIEL H. JOHNSON, SUSAN H. JOHNSON, and MICHAEL A. CLACK, v AMERIGAS PROPANE INC., and GREG  
MONTGOMERY  
STATE COURT OF GWINNETT COUNTY, GEORGIA  
15C-00663-3

AUGUST 8, 2017 DEPOSITION TESTIMONY  
MICHAEL THOMAS VAN HOECKE & MICHELE N VAN HOECKE v VICTAULIC COMPANY, FERGUSON ENTERPRISES &  
HENDERSON ENGINEERS, INC  
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
1516-CV26395

AUGUST 17, 2017 TRIAL TESTIMONY  
CIEARRA CAMARATA, an infant by and through her legal guardian and natural mother, CYNTHIA  
CAMARATA v POLARIS INDUSTRIES, INC.  
US DISTRICT COURT NORTHERN DISTRICT OF NEW YORK  
6:14-cv-00975-GTS-TWD



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**EXHIBIT C****WARNINGS: A HUMAN FACTORS PERSPECTIVE<sup>1</sup>**

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July 1990

The design of products for use and sale in today's environment requires the expertise of professionals in a broad range of disciplines. This is true for even the most basic of products. It is not unusual to find metallurgists, computer specialists, plastics experts, safety engineers, lawyers, ergonomists, chemists, advertising executives, market researchers, and materials scientists all involved in the development of something as simple as a new safety razor.

Safety has become an important element in product development and design for ethical, legal, and economic reasons. Product related injuries and deaths are a function of both physical and behavioral factors. Physical forces are involved whenever someone is injured or killed. Typically, energy is released on human tissue at too high a rate, is not dissipated completely, and the tissue is damaged. Also, whenever someone is injured or killed, someone has acted or failed to act. This behavioral component, the human action or inaction, must be understood and controlled if products are to be used safely.

People routinely interact with most products throughout the products' life cycle (i.e., design, manufacture, transportation, distribution, sale, installation, use, removal and disposal).<sup>2</sup> The prediction and control of the behavior of people as they interact and deal with products in the use environment is the purview of the human factors professional, particularly the human factors or engineering psychologist. Understanding and controlling these interactions is crucial to the safe use of products in the real world. The human factors professional works to develop understanding and control of human product interactions by bringing a broad range of insights, skills and techniques to bear on the task.

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<sup>1</sup>This paper was prepared and accepted as a chapter for a book entitled Handling Product Warning Litigation. The book was edited by Leonard Ring, Esquire, for Wiley Law Publications but was not completed prior to his death in

<sup>2</sup>The concept of product life cycle derives from the field of System Safety.

A major determinant of the human behavior associated with the use of any product is the knowledge the user has about that product's characteristics. What does the user believe to be the product's purpose? What does the user know about the hazards and risks associated with the product's use? What does the product demand of the user with respect to the user's knowledge of the product's functions and dangers? People learn about these matters in a variety of ways: most importantly from the product's advertising, packaging, labeling, instructions and warnings.

Product safety information is an integral part of the product's design. It is as important for its safe and effective use as any of the product's physical elements. Unadvertised products are difficult to sell: their availability and purpose remains unknown to potential purchasers. Products without packaging and labeling as to identity, function, and purpose rarely move from the shelves. Products without instructions are difficult to use effectively. And dangerous products without warnings cannot be used safely. The software must accompany the hardware. As far as the user is concerned, the product is incomplete and defective if the information systems are missing. Further, for the user the product is unreasonably dangerous if the safety information systems, the warnings necessary for its safe use, are missing. The danger is unreasonable, in part, because the absence of warnings implies safety.<sup>3</sup>

#### WHAT IS A WARNING?

Formally, a warning is a safety critical message. The providers of warnings are usually those individuals or corporations who have created dangerous products or situations. Recipients of warnings are usually those entities, individuals or groups, who may be harmed by the dangerous aspects of the product or situation or who may, through their actions or inactions, cause others to be harmed.

An instruction is not a warning. Warnings, however, do contain a special class of instructions designed to permit one to avoid harm to oneself or others. Also, warnings are differentiated from instructions in that warnings are designed to inform one of the danger in the first place. Also note that not all instructions are safety related. A safety related instruction is not a warning unless it is accompanied by information describing the danger or negative consequences. Thus, for example, the instruction STOP by itself would not be a warning but STOP OR I'LL SHOOT meets both tests and clearly is a safety critical message.

Warnings can take many forms. Product warnings may be printed directly on product containers or may be provided in the form of adhesive backed labels, placards, stencils, decals, tags, etc. Owners and instruction manuals often carry warnings. Television, radio, newspapers, and magazines are employed to announce warnings to the public, particularly in the form of product recalls. Warnings are sent through the mail in the form of letters, safety notices and brochures. Shipping invoices and material safety data sheets (MSDs) carry warnings. Training

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<sup>3</sup>The implication of safety when warnings are absent is particularly onerous if the product appears safe to the layman's eye: the false sense of security engendered is both misleading and dangerous,

programs and materials can contain warnings.<sup>4</sup> Warnings can be verbal or can take the form of buzzers, bells, whistles, sirens, flashing lights, and illuminated annunciator panels. Speech synthesizers in aircraft and vehicles provide warnings of an immediate nature. Video tapes, computerized data bases, and laser CD technologies are used to distribute safety critical information.

## WHY WARN?

In Western cultures warnings support an ethical concern for personal autonomy, i.e., the concept of self determination. They inform one of the presence of danger so that personally relevant choices can be made with respect to the danger. Warnings also serve as safety devices, i.e., messages designed to alert or realert people to the presence of danger and to modify and control their behavior in situations where they may get hurt or may hurt others. Finally, warnings are used to limit corporate liability. These multiple functions are discussed below:

**1. Inform:** Warnings provide the opportunity to make personally relevant choices. Our society believes that individuals are autonomous and are, therefore, responsible for the consequences of their own behavior. That is, one is expected to learn about alternative courses of action, to choose from among these alternatives, and to live with the results of one's choices. The ability to make such informed choices depends on the ability to gain personal knowledge of the consequences of one's actions. The ability to gain such knowledge is fundamental to the concept of personal autonomy.

These ideas developed in simpler times. However, our day-to-day environment is now technically sophisticated. The products and procedures commonly encountered in the course of one's daily life often involve arcane chemical, electrical, or mechanical principles. The hazards and risks presented are frequently beyond the limits of common knowledge.

It is inappropriate for a manufacturer to assume that everyone is as familiar with his product as he is. For example, LP gas is widely used in the United States and elsewhere as a fuel for heating and cooking. The product's physical characteristics are not widely known outside the LP gas industry, e.g., LP gas is heavier than air and will pool or puddle in low places such as basements if a leak develops. Similarly, the conditions under which the ethyl mercaptan stenching system commonly fails are not well known, i.e., adsorption, absorption, and oxidation in tanks, lines, soil, wall and floor surfaces, human anosmias (odor insensitivity) and odor masking. These characteristics combine daily in the United States to produce devastating explosions and fires without the advance notice that consumers would normally expect. It is not reasonable to assume that each propane user or visitor to a household in which propane is used is familiar with all of these technical subjects, i.e., is competent in the fields of physics, surface chemistry, organic chemistry and the psychophysics of human smell. Such an assumption is at variance with the ordinary limits of common knowledge which, although including the fact that the gas can burn

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<sup>4</sup>Training media include textbooks, films, workbooks, videos, simulators, computers, etc., all of which can be used as a means to promulgate warnings.

and explode, does not normally involve an understanding that it could do so without the warning usually provided by the malodorant when a gas leak occurs.

Rather, consumers expect to gain a basic understanding about technologically complex products from the manufacturers and sellers of such products. We particularly desire and expect product information concerning health and safety issues. The information is expected in the form of informational and safety related product labeling and accompanying literature, manuals, tags, etc. We expect to be told about these matters so we can make informed choices with respect to the health and safety aspects of the products we purchase. This information makes such informed choices possible.

The concept of warnings as providing an opportunity for choice is not at all unlike that which our society has developed with respect to informed consent in a medical or human research subject<sup>5</sup> context. The basic elements of informed consent were established during the Nuremberg war crime trials after the Second World War and have been well accepted in the United States for many years.<sup>6</sup> Simply, someone put at any risk by another person must be told of the danger in such a way that they are able to intellectually and emotionally appreciate the potential for harm. They also must be in a position to make an uncoerced personal choice with respect to whether or not they wish to deal with the disclosed danger. If these conditions are met, fully informed, free choice is available and the responsibility for the outcome shifts from the entity creating the dangerous situation to the informed individual freely agreeing to deal with the danger. The situation with respect to product related threats to one's safety parallels these concepts. A properly designed and presented warning will give its recipient full knowledge of the danger and, thus, the opportunity to choose. If no warning is provided, that opportunity is lost and true harm to a basic human right, the right of self determination, has been effected.

**2. Change Behavior:** Warnings are used to control and/or modify human behavior.<sup>7</sup> In this context, warnings are used as an agent of behavioral change, i.e., the safety critical message works to cause people to act safely in situations where, foreseeably, they might not act safely. The desired behavioral effect may be either positive or negative. For example, a warning may be designed to promote a particular behavior such as the wearing of personal protective clothing. Conversely, a warning may prohibit a particular behavior such as touching an energized electrical component. In this latter sense, a warning may be thought of as a behavioral guard in that its purpose is to separate people from contact with hazards.

<sup>5</sup>Ethical concerns associated with supplying informed consent to human participants in a research setting have been expressed both in practice and regulation for many decades. See Ethics: Are You Unknowingly Performing Unethical Human Research as a Result of Your Safety Endeavors? by Robert J. Cunitz in Hazard Prevention, Volume 14, No.3, pp16-22, 1978 for a discussion of the topic and a presentation of the policy of the U.S. Department of Commerce in that regard at the time. Additional discussion may be found in Informed Consent in Human Experimentation: The Scientist's Responsibility - The Subject's Right, an article authored by Mary Cipriano Silva in Trial, December, 1980, pp37-41.

<sup>6</sup>An excellent discussion of these matters may be found in Chapter V. Volume 1 of a Sourcebook on Asbestos Diseases: Medical, Legal and Engineering Aspects published in 1980 by Garland STPM Press, New York, and written by George A. Peters and Barbara J. Peters.

<sup>7</sup>Any introductory psychology textbook will provide a discussion of the theories and methods of Behavioral Psychology whose goals are typically described as the prediction and control of human behavior.

The behavior to be promoted or prohibited must be identified so that an appropriate instruction to avoid harm may be fashioned. This requirement implies that the entity preparing the warning has foreseen the dangerous act or anticipated the required safety related behavior. Such foresight can be based upon the tools of safety engineering including analyses of prior incidents, injuries and near misses, as well as prediction of untoward incidents beforehand through the use of hazard/risk analyses and similar analytic methodologies.

It is usually the goal of those who would provide warnings to control safety related behavior in a consistent, i.e., reliable, way. In other words, it is desirable that a warning suitably control behavior every time it is necessary to do so. However, it is not realistic to expect completely consistent results with even the best fashioned warnings as they must work in the real world of competing circumstances, motivations and ordinary human variability. Therefore, if safety professionals desire to use warnings as safety devices, they should only do so when other, more reliable safety measures are unavailable. For example, a permanent barrier guard should be used to protect a contact hazard when it is technically and economically feasible to do so. Such a guard will almost certainly be a more reliable safety measure than even the best crafted DO NOT TOUCH warning sign.<sup>8</sup>

If warnings meant to control behavior are chosen as a primary safety device, one can turn to the well established technology of behavioral modification and human learning for guidance in the preparation of effective warnings. Almost any Introductory Psychology text will provide the basics. Examine the chapters on sensation and perception to gain an understanding of the way in which our visual, auditory, tactile and olfactory systems process information. Review the sections on physiological, sensory and perceptual processes to understand what is minimally necessary to attract attention to a warning message. Study the chapters on learning to appreciate the differences between long term and short term memory and the implications of such differences for the design and presentation of effective warnings. Use the basic information on motivation, behavior modification and reinforcement to understand the methodology of behavior change.<sup>9</sup>

These techniques of the perceptual, motivational and learning sciences must be employed in the design, preparation, testing, and presentation of adequate and effective warnings. It is important to use such techniques because behavioral change can be difficult to bring about, particularly in the face of well established and practiced habits. A poorly crafted warning is less than likely to change behavior. On the other hand, a well designed warning which uses appropriate techniques to attract attention, provides appropriate levels of motivation consistent with the level of danger present, and which provides practical and understandable instructions for the avoidance of harm, can be expected to change the behavior of most people most of the time. The job should not be given to amateurs if safety is of primary concern and safe behavior is to be elicited with an acceptable degree of reliability.

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<sup>8</sup>Such considerations support the often cited safety hierarchy of first eliminating hazards, then guarding if hazard elimination is not feasible, and then warning as a last resort.

<sup>9</sup>The literature in psychology with respect to these basic processes is well established and not particularly controversial. Present day research is directed more towards understanding the fundamental biological, physiological and psychological processes underlying these well observed behavioral phenomena as opposed to establishing the existence of these phenomena in the first place.

**3. Reminder:** Warnings also deliver safety critical messages for the second or subsequent times. In other words, warnings are often used to remind people of safety critical information already known to the individual. This use is quite ordinary and exceedingly important in that it alerts one to the fact that one is about to encounter a previously encountered danger and allows one to recall what appropriate precautions are necessary in such circumstances.

Psychologists have identified several types of human memory. Memory is usually characterized as either long term memory or short term memory. Short term memory involves those events with which one is presently dealing or has just dealt. These are thoughts and perceptions which are immediately stored and available and which are involved within present, conscious awareness. These short term memories may be examined through a variety of techniques to gain an appreciation of that to which someone is presently attending. Similarly, there are memories of events longer past. Some, but not all, of present experience is transferred from current awareness to longer term mental storage. This latter long term memory store is comprised of that which was learned (experienced) in the past and which was committed, for whatever reason, to more or less permanent mental storage. It is generally available and can be studied if the appropriate associations are triggered which permit retrieval from the mind's storage facilities. Acquired knowledge is, thus, variously available.

In a safety critical situation what one is thinking about at the moment is obviously more important than what one knows if one were asked to recall that knowledge. When warnings have been previously encountered, when the danger is known in the sense that one could, if asked, recall the fact of the danger and appropriate safety precautions, a warning can serve to alert and remind the individual of the danger and of what to do or not do to avoid harm. Since, in general, we can only attend to one thing at a time (see the psychological literature on selective attention and the narrowness of the visual cone of sight),<sup>10</sup> an attention getting warning is often necessary and is commonly used to bring a safety critical situation to mind and thus to permit an informed choice and behavior consistent with safety.

**4. Limit Liability:** Corporate motivation for the use of warnings is ethical and financial in nature. Most well motivated corporate employees have a positive ethical and moral interest in producing safe products and, as needed, providing warnings with respect to product related dangers which remain in a product when it enters into the stream of commerce. Additionally, and importantly, corporations are financially motivated to make profits through the sale of products. Among the costs of products which must be paid before profits are to be had are those associated with product liability arising out of personal injury claims.

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<sup>10</sup>For example see *The Slow Wave of the Cortical Evoked Response in Man and the Focus of Attention*, the M.S. Thesis of Robert J. Cunitz, Lehigh University, 1964; *Sensory Processes* by Matthew Alpern, Merle Lawrence and David Wolsk. Brooks/Cole Publishing, Belmont, CA, 1967; and *Perception* by Daniel Weintraub and Edward Walker, Brooks/Cole Publishing, Belmont, CA, 1966.

Warnings can be and are used to limit liability. Two mechanisms are involved. The first is simply that when adequate and effective warnings are provided, the product is safer and fewer people are hurt. The second mechanism involves the effect of warnings on a plaintiff's attorney contemplating a failure to warn claim when faced with a complete, prominent warning which the plaintiff has read and understood. The presence of an adequate and effective warning on the product which was ignored by the injured party is a strong deterrent to the filing of a lawsuit. It is obviously difficult for even the most skilled of plaintiff's attorneys to counter an assumption of the risk or contributory negligence defense in such circumstances.

#### WHEN TO WARN

Warnings are provided when there is danger (a threat of harm) remaining in a product or situation despite engineering and other efforts to eliminate the danger. Warnings must be provided when known or knowable hazards exist in a product or situation and it is foreseeable that people will be at risk, i.e., exposed to the hazards. In such circumstances, the product or situation is dangerous and engineering or other efforts have not been successful in eliminating or reducing the injurious potential of the hazards or in eliminating or reducing the exposure of people to the hazards.

Note that engineering and other safety efforts must be undertaken before one resorts to warnings. This is a consequence of the comparative reliability's of engineering as opposed to behavioral controls for the safety of products and situations. A well informed safety engineer understands this basic comparison and acts accordingly. A permanent physical barrier which does not interfere with the utility of the product or situation is obviously more reliable in its function than even the best of warnings presented to the most well intentioned, motivated and alert of human beings.

This is not to suggest that warnings should never be used. As a practical matter, most products and processes of any social value are likely to present some threat of harm to users or others. One clearly must first do the best safety engineering possible to eliminate or reduce hazards and risks. If, nevertheless, a product or situation remains dangerous, warnings must be used to inform the individuals at risk and others who can make a difference of the danger so that they can make appropriate choices. Warnings must also be provided so that people are caused to act safely with respect to the product or situation. Finally warnings must be provided if the entities creating the danger are to be properly protected from suit.

#### WHO TO WARN

Warnings are used by many different individuals and entities who can make a difference in the safe use of a product or who have a right-to-know of the danger present.<sup>11</sup> If one starts with the principle that one should avoid hurting people if one can<sup>12</sup> and that if one endangers another human being you must inform that individual beforehand so that he or she may make a personally appropriate decision with respect to the danger, one will know who to warn. Obviously, the specific individuals or entities to be alerted will vary from one situation to another.

It is important to identify the specific individuals or entities who are to be warned in any particular situation. A basic approach is to identify anyone who will have physical contact with the product or situation or who has decision making authority concerning such products or situations. This would include such individuals as manufacturing employees, shipping personnel, trucking and other transportation workers, warehousemen, wholesalers, repackagers, distributors and retailers. Also, it may be appropriate to warn purchasing agents, tool or supply room attendants, foremen, employee training personnel, licensing authorities, and other cognizant government officials. Ultimately, one must warn those who are potentially endangered by the product's hazards or the dangers of the situation as it is to these people that a duty to warn most surely exists.

It is possible, but difficult, to rely on others to provide a warning. If one expects others to pass on warnings, they must be fully informed of the danger and appropriately motivated to accurately pass the warning along. Contracts, sanctions and other devices should be used to ensure that safety critical messages pass through the chain of supply and distribution.<sup>13</sup> Such mechanisms are commonly used, for example, in the sport parachute industry to ensure that product users are fully apprised of hazards and risks by the retailer.<sup>14</sup> Warnings may be attached to products after they are first sold or they may be put in place when a foreseeable danger is created with respect to a particular product. Such an approach is employed with respect to automobile tire sealers and reinflators which are now sold with labels containing warnings concerning the explosive nature of the inflating gases.<sup>15</sup> These labels are designed to be transferred to the tire and rim assembly after the explosive mixture has been introduced into the tire.

#### EFFECTIVE WARNINGS

<sup>11</sup>The concept of right-to-know can be viewed from a moral/ethical as well as a legal point of view. The discussion here is with respect to the former with the observation that the legal standard generally reflects societal concerns.

<sup>12</sup>The avoidance of harm to others where feasible is the most basic principle of safety engineering; see the writings of attorney Harry Philo who has often discussed the ramifications of this principle in the legal arena.

<sup>13</sup>This principle was proposed by the author in *Donahue v Phillips Petroleum Company* and was accepted by the Eight Circuit Court of Appeals for the United States District Court for the Western District of Missouri on January 26, 1989.

<sup>14</sup>For example, ParaFlite, Inc., a New Jersey manufacturer of parachutes for skydiving, contractually requires that its dealers obtain signed informed consent forms from retail parachute purchasers. Their franchise is forfeit if the procedure is not followed.

<sup>15</sup>For example, Fix-A-Flat.



Warnings inform, control behavior, remind, and limit liability. Their effectiveness should be evaluated with respect to each of these goals. A warning which meets these goals must, at a minimum, meet criteria derived from basic and well known psychological principles of perception, motivation and learning. A warning not meeting these criteria is unlikely to adequately and fairly inform the reader of the danger present, is unlikely to control behavior in an effective way, and will not properly protect a corporation from suit. An effective warning will, of necessity, attract attention at a time and place when the recipients must be alerted to the danger, when personally appropriate decisions must be made, and when safe behavior is required. Finally, an effective warning will motivate individuals to modify their behavior, tell the individuals how to modify their behavior, and tell the individuals or their rescuers, what to do if they are injured.<sup>16</sup>

The criteria for effective warnings are:

**1. Present When Needed:** The effectiveness of a warning is inversely related to the interval between the moment in time when the warning is delivered and the moment in time when the recipient must make appropriate informed decisions and act in an appropriately safe manner. The longer this temporal interval, the less likely the warning will be able to influence choices and actions. Thus, a warning given a year before it is required is less likely to change behavior than one given only five minutes before. It follows, then, that a warning given a few seconds before it is needed, is even more likely to elicit a desired or safe response.

The temporal relationship between stimulus and response is a well studied psychological phenomenon. References to the early research of Watson and Pavlov on this topic dating back more than a half century are found in all introductory psychology texts. This literature describes the strength of the association between stimuli and responses as a function of the length of time between them. The research, regardless of experimental approach, clearly shows a declining associative strength as the temporal interval increases. In other words, if the warning is thought of as a stimulus for the safe response, the warning is best provided just before the safe behavior is required. This is not to suggest that people have no memory for what they have learned in the past, but rather it is a recognition of the characteristics of that memory and of the realities of human information processing and selective attention mechanisms.

**2. Present Where Needed:** Stimuli can be effective only when they impinge upon the sensory receptors. If they are blocked from doing so, perception cannot occur and the mind will be unable to process the information provided. A safety critical message, therefore, should be physically present at the point of danger to be most effectively perceived. Alternate locations rely on memory for effectiveness and, therefore, cannot be as salient a stimulus for decision making and behavioral control. Warnings buried in owner's manuals stored in file cabinets or glove boxes have low effectiveness compared to labels and warnings placed on the operating controls and displays of a tool or vehicle. Further, if the warning is presented as a visual message, it preferably must lie within the observer's cone of vision (normally defined as a cone shaped volume whose apex is located at the eye and whose

<sup>16</sup>See Psychologically Effective Warnings, by Robert J. Cunitz which was published in Hazard Prevention, Volume 17, No.3, the May/June issue of 1981 for an earlier discussion concerning the uses of warnings and criteria for effective warnings.

radials diverge 15° from the line of sight). Due to the acuity characteristics of the peripheral retina, stimuli outside this cone are not seen clearly. Thus, for example, signs and lights on the control and display panel of a vehicle immediately in front of the operator are far more effective than those present in peripheral vision only.<sup>17</sup>

Placing warnings at the point of danger can significantly limit the number of a person may have to deal with at any one time. For example, a complex product such as an automobile, will need to carry many different warnings concerning the various hazards associated with vehicle subsystems (e.g., battery, fan, fuel). Most people would have significant difficulty dealing with all of these warnings at once. Present memory is not large enough to include a multiplicity of safety critical data. The warnings, however, can be spread out and applied only to the point of danger with respect to each subsystem. Thus the vehicle operator or mechanic would have to deal with only a few warnings at any one time, a psychologically far simpler task.<sup>18</sup>

An important exception to these principles exists for fungible products such as liquids, powders, pellets, and chips which cannot be directly labeled. These products require warnings on their containers or packages as that is the best alternative available. Also, there are many hazardous products of this type commonly sold in bulk and which, foreseeably, may be repackaged or transferred to smaller containers. It is critical that such smaller containers also carry warnings appropriate for the danger presented.

**3. Attract Attention:** Effective warnings attract attention to themselves. People cannot perceive an unattended stimulus and they cannot respond to stimuli they do not perceive. In order to deal with the many stimuli which at any one moment impinge upon our sensory receptors, man has developed the ability to selectively attend, in a serial fashion, to one stimulus at a time. We, in a sense, take snapshots of the world around us at the rate of two or three a second. An attended stimulus not only produces a change in the state of our primary sense organs, but is processed and interpreted by our brain. A stimulus which is different from the background of stimuli has the capability, at least some of the time, of attracting our attention. The important perceptual characteristic defining attention-getting stimuli is that they stand out from the noisy background of other stimuli. All human sensory systems respond maximally to dynamically changing stimuli and minimally to static stimulus displays. Thus, attention getting stimuli are louder, brighter, flashier, and more colorful and dynamic than other stimuli. Our experience can modify this rule in the sense that we can learn to be more sensitive to certain stimuli which we have come to associate with danger. As a result of this perceptual learning phenomenon, standardized warning colors (e.g., red, yellow and black stripes), shapes (e.g., oval, triangle), signal words (e.g., DANGER, WARNING,

<sup>17</sup>See, for example, Wesley Woodson's description of the various limits of the human visual system in Chapter 4 of Human Factors Design Handbook, McGraw Hill, New York, 1981. Such data are routinely compiled in human factors design guides and compilations of anthropometric data such as Henry Dreyfuss's Measure of Man first published by New York's Whitney Library of Design in 1960 and Humanscale 7/8/9 by Niels Diffrient, Alvin Tilley and David Harman, MIT Press, 1981.

<sup>18</sup>See the work of George Miller with respect to The Magical Number Seven Plus or Minus Two: Some Limits on Our Capacity for Processing Information, published in Psychological Review. 1956, Volume 63, pp81-97.

CAUTION), flashing lights and sounds (e.g., siren, bell) can take on greater attention-getting ability than other colors, shapes, words and sounds.<sup>19</sup>

Standardized designs enhance the conspicuity of a warning even if the targeted individual is not actively searching for safety critical information. Various standards exist for the design, format, layout and colors to be employed in written warnings, labels, signs, and tags. The most prominent of these standards are the American National Standards Institute's (ANSI) Z535.1, Z535.2, Z535.3, Z535.4 and Z535.5 which are the latest versions of the Z35 warning sign standards first published in 1941. These standards define the terms DANGER, WARNING and CAUTION and provide advice about appropriate colors, shapes and formats for use with each signal word. The standards also provide some approved pictographs and guidelines for developing and testing new pictographs to assure prompt and accurate recognition. The use of standardized and familiar warning designs clearly enhances warning effectiveness by promoting prompt recognition of the warning and its message even when the individual to be warned is otherwise engaged. Standardization allows people to transfer stimulus-response skills learned in one situation to another. It also reduces the number of stimulus-response associations that must be learned and allows people to make the same correct response in many different situations.

**4. Motivate Behavioral Change:** Motivation is a general term referring to conditions which affect the readiness of an individual to start upon or continue a sequence of behavior. For example, one is motivated to eat when hungry and drink when thirsty. Warnings address a basic human need, i.e., survival without injury.<sup>20</sup> Thus, an effective warning will answer the why should I obey? question. The warning must be short, explicit, and easily understood.

The warning should carry an intensity commensurate with the level of danger present. Strong warnings are inappropriate if the threat of harm is small. Weak warnings are inappropriate when the danger is great. One should not raise anxieties unnecessarily as the effectiveness of the warning to inform and control behavior will needlessly diminish.<sup>21</sup> On the other hand, choices must be honestly informed and appropriate safety related behavior sufficiently motivated.

The language employed should be carefully reviewed. For example, The statement "TO AVOID DEATH" is far more effective than the statement "TO AVOID PERSONAL INJURY" which is in turn more effective than the

<sup>19</sup>There is a substantial literature in the areas of sensation, perception and attention. See contemporary textbooks in Sensory and Perceptual Psychology such as the Handbook of Perception and Human Performance (2 volumes) by Kenneth R. Boff, Lloyd Kaufman and James P. Thomas, John Wiley & Sons, New York, 1986 for an up-to-date review of these topics. The basics, however, were well established many years ago: for example see Experimental Psychology by Robert S. Woodworth and Harold Schlosberg, Henry Holt, New York, 1956.

<sup>20</sup>See the work of A.H. Maslow on various categories of human needs in Motivation and Personality, Harper, New York, 1954.

<sup>21</sup>It is generally believed that the relationship between arousal and performance follows an inverted U shaped relationship such that some level of arousal is needed for peak performance but higher and lower levels are associated with diminished performance.

statement "TO AVOID THE POSSIBILITY OF PERSONAL INJURY" which is still stronger than a message such as "DO NOT TOUCH..." which contains no motivational content, whatsoever. The consequences must be clear and readily understood by the individual being warned. Behavior will not change if the consequences of failing to respond are remote or hidden, if no one is told what happens if, or the reason why.

Explicit and honest warnings spelling out the consequences also provide the basis for informed consent. Simply, such a message lets the recipient know and appreciate what can go wrong and gives that individual the opportunity to make a personally appropriate choice. Withholding or concealing information concerning consequences, or failing fully to describe the potential negative outcomes, in a very real sense robs individuals at risk of their right-to-know of a serious threat of personal harm and of the opportunity to control their own destinies.

**5. Tell How to Avoid Harm:** A clear, concise, and complete instruction must be provided. The instruction WATCH YOUR STEP is not as explicit, for example, as STEP DOWN, USE ONLY WITH ADEQUATE VENTILATION does not define adequate nor does it convey to the reader how to achieve adequacy. KEEP AWAY FROM HEAT, SPARKS, AND OPEN FLAME does not alert the product user to such hidden ignition sources as shattered light bulbs and water heater pilot lights. The instruction should be practical and not conflict with the motivational state of the product user. For example, an instruction to USE FULL FACE SHIELD accompanying a consumer product to be used in the home and marketed in the neighborhood hardware store is unlikely to be complied with unless the shield is packaged with the product or the retailer is required to make specific inquiry regarding the availability of such personal protective devices. Similarly, a command DO NOT REMOVE GUARD is unlikely to be heeded when the guard must be removed to service rotating machinery and such servicing is a required, routine activity. Motivational conflict reduces the chances that the guard will stay in place. Instructions detailing how to avoid harm must be developed with a full understanding of the physical and psychological context of product use. The effectiveness of the message is directly dependent upon the user's understanding and interpretation of the message contents and his or her desire to follow the preferred guidelines. Communication of imperatives does not, therefore, take place in a vacuum, since the characteristics of the message receiver and the circumstances in which the message is received cannot be ignored.

**6. Provide First Aid Information:** Up-to-date, and tested, treatment instructions must be provided if analysis shows that prompt first aid can ameliorate the effects of foreseeable injury.

**7. Other considerations:** Warnings need to be durable and to remain legible throughout the product's life cycle. The warnings are obviously necessary as long as the danger exists. Technology for producing long lasting labeling has existed for many years: it is not unusual to find manufacturer's markings and identification on machinery a hundred or more years old. If necessary, provisions can be made to maintain or replace warnings for particularly long-lived products or for products used in destructive environments. After all, if one can change oil in an engine on a regular basis, a warning can be renewed when it wears out or is otherwise damaged.

Warnings need to be sufficiently large (a minimum letter size of 10 to 24 minutes of arc visual angle for 90% and 100% population legibility respectively) to be read under difficult lighting conditions.<sup>22</sup> Signal words are normally twice as large as the accompanying text to assist in the attraction of the readers attention to the message. For the same reason, effective warnings will be distinct (stand out) from their backgrounds. Boxing, distinctive typography (usually bold Helvetica like typefaces) and warning colors (appropriate safety colors as defined in the ANSI Standards) should be used for this purpose. Warnings must be printed with sufficient contrast to assure readability. Again, the ANSI standards should be consulted for guidance in this regard. Warnings may require independent illumination depending upon foreseeable circumstances of use.

Simple, blunt, explicit language is more effective than long sentences replete with polysyllabic words. Longer warnings require greater behavioral effort and, therefore, are not as likely to be read in their entirety by some segments of the target audience. Reading difficult is a function of sentence length, word length, and word familiarity. The language level and the words employed should be appropriate for the expected audience. Thus, products intended for physicians can carry very different language than more broadly distributed consumer products whose users are likely to include both college graduates and the functionally illiterate. Various computer programs such as RightWriter are available to measure the reading skills required to understand any English text. These programs can be used to verify that appropriate language levels have been chosen for the warning message.

Readily recognized pictorials (pictographs or symbols) can effectively cope with certain of the language and literacy problems encountered with respect to broadly distributed consumer and industrial products.<sup>23</sup> The ANSI Z535.3 standard establishes criteria for safety symbols and provides a number of pretested symbols of known efficacy. Airlines routinely use pictorials to portray complex emergency aircraft exit instructions. Symbols are widely used on our public highways.<sup>24</sup> Testing such as prescribed in the Z535.3 standard is necessary to ensure the comprehensibility, attention getting characteristics, motivational value, and clarity of pictorials.

Some warnings are provided by systems designed to sound an alarm of some sort when a dangerous condition develops. These are active as opposed to passive warning systems and they are different in character from written warning systems. Sensory modality (auditory, visual, olfactory, and tactile) and the characteristics of the environment and the receiver (human target of the warning alarm) must be considered when designing active warning systems. Warnings can take the form of annunciator panels with words or pictographs (symbols), odors, buzzers, flashing lights, shaking sticks, etc. The background stimulus environment and sensory and task loading on primary tasks should also be considered so the warning alarm stands a good chance of getting through when needed. Special characteristics of the target population, such as age, native language, training and experience are important in the design and evaluation of such systems so one is reasonably assured that the alarm's meaning will be understood. In complex systems, such as aircraft, nuclear reactors, etc., sophisticated warning systems

<sup>22</sup>See Letter Size and Legibility by Sidney L. Smith in Human Factors, Volume 21, No.6, 1979, pp661-670 for a review of approximately one hundred research articles on this topic.

<sup>23</sup>In general see the works of Neil D. Lerner of COMSIS, Silver Spring, Maryland and Belinda L. Collins of the National Institute of Standards and Technology, Gaithersburg, Maryland who are two of the better known researchers in this area.

<sup>24</sup>See the Manual on Uniform Traffic Control Devices ANSI D6.1. 1978.

employing computer diagnostics and synthesized speech have been effectively employed. The cost of such warning devices is now quite reasonable so they may be applied to far less complex systems.

Errors of commission in a warning system are known as false alarms. This is a situation in which no danger is present and the alarm signal sounds anyway. Chronic false alarms destroy warning effectiveness and must be guarded against. False alarms invite non-response at worst and slow response at best. Similarly, errors of omission (the failure to alarm when a dangerous condition develops) must be avoided. These failures to alarm are particularly dangerous in that a false sense of security may develop in the absence of an alarm. Obviously, credibility suffers as warning validity and reliability deteriorate.<sup>25</sup>

#### MEASURING EFFECTIVENESS

The ability of a warning to inform one of danger, control behavior, remind, and limit liability should be evaluated whenever possible. The basic criteria for such an evaluation have been provided above. Warnings that do not meet such simple criteria stand no chance of doing their job. On the other hand, it is certainly possible to use market research techniques such as in-depth interviews, focus group interviews, multi-dimensional scaling, surveys and unobtrusive observation for the purpose of further evaluating warnings that at a minimum do meet these basic criteria. Such techniques are used to improve, refine, and fine-tune warnings.

These market research techniques were originally developed to measure the effectiveness of marketing messages: competent practitioners can be found in every major city and many product manufacturers either already employ their own marketing professionals or retain outside marketing firms. The market research firms can be asked to evaluate whether a warning message gets through in the same way they evaluate whether an advertising message gets through. Market research companies are highly competitive so costs for testing product warnings should be modest. Systematic evaluative efforts are certainly far superior to simply asking the engineers down the hall whether they like the warning or asking corporate counsel whether the proposed warning meets legal requirements or is sufficient to protect the company from lawsuit. Neither the engineer nor the lawyer is likely to have the appropriate perspective or experience to answer these questions fully.

The techniques described above are quite satisfactory if one wishes to evaluate the ability of a warning to effectively inform people that danger is present and to determine whether a veridical understanding of the danger has been communicated. Unfortunately, outside the realm of the laboratory or group interview situation, it is very difficult to measure the actual effectiveness of a warning in changing behavior. This is true for both ethical and practical reasons.

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<sup>25</sup>See Cry Wolf: The Psychology of False Alarms by Shlomo Breznitz and published by Lawrence Erlbaum Associates, Hillsdale, New Jersey, 1984.

Human experimentation in the real world requires the fully informed consent of the research participants (subjects). Simply, a researcher cannot put a research subject at risk without their being fully aware of the hazards to which they are to be exposed and without their being able to agree to go along or to refuse without coercion of any sort. Professional societies including the American Psychological Association support this principle as do most government agencies and university research departments.

Since warnings in the real world address real safety concerns, it is not possible to permit subjects to be exposed to a dangerous situation without warning them of the known danger. This ethical constraint rules out the use of matched control groups in which one group is warned of the danger and the other is not. It also eliminates experimental designs which rely on observing behavior, introducing a warning and observing changes in behavior, and removing the warnings to determine that the observed changes were caused by the warnings alone.

A simple procedure in which a warning is introduced and behavioral changes observed is incapable of ruling out other causes for the observed changes. For example, there have been substantial changes in American smoking habits over the years since cigarette packages began to carry warnings about the known and suspected dangers of smoking. However, it is not possible to show that the printed warnings have been the sole agent of change; other factors such as a general change in health habits, social disapproval, government and public service media messages were, undoubtedly, influential in effecting the observed changes.<sup>26</sup>

Laboratory studies, on the other hand, suffer from the artificial situation created in the laboratory and the subjects' reasonable and accurate belief that there is no real danger in the situation. Laboratory studies can, however, be quite useful in examining the basic principles for the preparation of effective warnings. In fact, the criteria for effective warnings presented in the preceding sections are based on many decades of psychological laboratory research in such fields as sensory and perceptual psychology, learning, motivation, memory, physiological psychology and human factors psychology, including research aimed directly at the topic of warnings and concerned with such issues as choice of signal words, letter size, pictographs, etc.<sup>27</sup>

The technology to provide effective warnings is well established and the ability of such warnings to inform people of dangerous situations, elicit safe behaviors, remind and limit corporate liability is certain

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<sup>26</sup>Thus, correlation is not causation: a basic of any introductory statistics course.

<sup>27</sup>See the work of Kenneth R. Laughery and his students at Rice University for an example of fine laboratory research in the areas of the effectiveness of warnings and basic warning design criteria.

# EXHIBIT 4

# EXHIBIT 4



1 DISTRICT COURT  
2 CLARK COUNTY, NEVADA

3 KEON KHIABANI and ARIA )  
4 KHIABANI, minors by and )  
5 through their natural ) CASE NO.:  
6 mother, KATAYOUN BARIN; ) A-17-755977-C  
7 KATAYOUN BARIN, )  
8 individually; KATAYOUN )  
9 BARIN as Executrix of )  
10 the Estate of Kayvan )  
11 Khiabani M.D. )  
12 (Decedent), and the )  
13 Estate of Kayvan )  
14 Khiabani, )  
15 M.D. (Decedent), )  
16 )  
17 Plaintiffs, )  
18 )  
19 vs. )  
20 )  
21 MOTOR COACH INDUSTRIES, )  
22 INC. A Delaware )  
23 corporation; )  
24 MICHELANGELO LEASING )  
25 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 California )  
corporation; SEVENPLUS )  
BICYCLES, INC. D/b/a Pro )  
Cyclery, a Nevada )  
corporation; DOES 1 )  
through 20; and ROE )  
CORPORATIONS 1 through )  
20. )  
Defendants. )  
)

22  
23 VIDEOTAPED DEPOSITION OF EDWARD HUBBARD  
24 LAS VEGAS, NEVADA  
25 WEDNESDAY, SEPTEMBER 20, 2017

25 REPORTED BY: KAREN L. JONES, CCR NO. 694  
JOB NO.: 417421

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1 DEPOSITION OF EDWARD HUBBARD, taken at Kemp,  
2 Jones & Coulthard, located at 3800 Howard Hughes  
3 Parkway, 17th Floor, Las Vegas, Nevada, on  
4 Wednesday, September 20, 2017, at 10:01 a.m., before  
5 Karen L. Jones, Certified Court Reporter, in and for  
6 the State of Nevada.

7

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Page 3

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17 Also Present: JP Muritta, Videographer

18

19

20

21

22

23

24

25

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2 WITNESS: EDWARD HUBBARD

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BY: Mr. Kemp 36

5 BY: Mr. Christiansen 193

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Exhibit 4 Thermo Fisher Scientific: 2017 95

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CMD Americas Sales Meeting

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Exhibit 6 Copy of Photograph 131

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Exhibit 7 Copy of Photograph 135

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Exhibit 8A Copy of Photograph 189

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Exhibit 8B Copy of Photograph 189

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Exhibit 8D Copy of Photograph 189

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Exhibit 8E Copy of Photograph 189

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Exhibit 8G Copy of Photograph 189

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Exhibit 8H Copy of Photograph 189

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Exhibit 9 State of Nevada Traffic 199

Accident Report

25

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1 LAS VEGAS, NEVADA; WEDNESDAY, SEPTEMBER 20, 2017

2 10:01 A.M.

3 -oOo-

4

5 THE VIDEOGRAPHER: This is the beginning  
6 of Media Number 1 in the deposition of Edward  
7 Hubbard in the matter of Khiabani versus Motor Coach  
8 Industries, held at Kemp Jones & Coulthard on  
9 September 20th, 2017, at 10:01 a.m.

10 The court reporter is Karen Jones. I am  
11 J.P. Murrieta, the videographer, an employee of  
12 Litigation Services.

13 This deposition is being videotaped at  
14 all times, unless specified to go off of the video  
15 record.

16 Would all present please identify  
17 themselves, beginning with the witness.

18 THE WITNESS: Edward Hubbard.

19 MR. STEPHAN: Paul Stephan, Selman  
20 Breitman, representing Mr. Hubbard and Michelangelo.

21 MR. FREEMAN: Eric Freeman, representing  
22 Michelangelo Leasing and Edward Hubbard.

23 MR. TOOMEY: Scott Toomey on behalf of  
24 Bell Sports, Inc.

25 MR. PEPPERMAN: Eric Pepperman,

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1 Plaintiff.

2 MR. CHRISTIANSEN: Pete Christiansen,  
3 Plaintiff.

4 MR. KEMP: Will Kemp for Plaintiff.

5 MR. TERRY: Michael Terry, MCI.

6 THE VIDEOGRAPHER: Will the court  
7 reporter please swear in the witness.

8 Whereupon,

9 EDWARD HUBBARD,  
10 having been first duly sworn to testify to the  
11 truth, the whole truth and nothing but the truth,  
12 was examined and testified as follows:

13 EXAMINATION

14 BY MR. TERRY:

15 Q. Could you tell us your name, sir.

16 A. My name is Edward Hubbard.

17 Q. And where do you reside, Mr. Hubbard?

18 A. 6250 Hargrove Avenue, Las Vegas, Nevada.

19 Q. Are you employed?

20 A. Yes, sir.

21 Q. By whom are you employed?

22 A. Silverado Stages.

23 Q. And what do you do for Silverado Stages?

24 A. Charter bus driver.

25 Q. You know that we are here because of an

1 incident that occurred on April 18th, 2017?

2 A. Yes.

3 Q. And you were operating a bus on that  
4 occasion, correct?

5 A. Yes, sir.

6 Q. Had you operated buses before that day?

7 A. Yes, sir.

8 Q. When did you first start operating  
9 buses?

10 A. I started operating buses here in  
11 Las Vegas or in --

12 Q. Just generally.

13 A. Yes, I got my CDL in 1998.

14 Q. And where was the CDL awarded?

15 A. New York State.

16 Q. And did you operate a bus after you got  
17 the CDL?

18 A. Yes, sir.

19 Q. Whom did you work for?

20 A. I worked for an ambulette company, and  
21 then I worked for New York City Transit for almost  
22 12 years.

23 Q. What was the first company?

24 A. An ambulette company.

25 Q. What are they?



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1 A. Like a paratransit, where you take  
2 people from -- to like their dialysis and stuff like  
3 that.

4 Q. So it was a transit bus for people with  
5 special needs?

6 A. Yes, sir.

7 Q. And then you worked for New York  
8 Transit?

9 A. Yes, sir.

10 Q. Did you operate a bus, Transit bus?

11 A. Yes, sir.

12 Q. In the city?

13 A. Yes, sir.

14 Q. In all the boroughs or a particular  
15 borough?

16 A. Mostly Brooklyn.

17 Q. And you did that for 12 years?

18 A. Yes, sir.

19 Q. When -- and did you leave New York at  
20 that time?

21 A. I moved here April 8th of last year.

22 Q. When you stopped working for the  
23 New York Transit Authority, where did you go?

24 A. I moved here.

25 Q. Okay. So that's when you first came

1 here?

2 A. Yes, sir.

3 Q. And when you came here, whom did you go  
4 to work for?

5 A. Silverado Stages.

6 Q. And how long did you work for  
7 Silverado Stages?

8 A. From April 20th, and I'm still employed  
9 with them right now.

10 Q. The day that this event occurred, you  
11 were driving a Michelangelo's bus?

12 A. Correct.

13 Q. Did you work for Michelangelo?

14 A. Yes, sir.

15 Q. And when did you start working for  
16 Michelangelo?

17 A. April 20th the same -- last year.  
18 April 20th, 2016.

19 Q. So this event happened on  
20 April 18th, 2017.

21 A. Correct.

22 Q. And you were working for Michelangelo on  
23 that occasion?

24 A. Yes. I'm just a little confused,  
25 because they got sold. So when you say

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1 Michelangelo, I just get a little confused, but it's  
2 all the same company.

3 Q. So as far as you're concerned, it's the  
4 same company that you started with when you first  
5 came to Vegas?

6 A. Yes, sir.

7 Q. The owners may have changed, but it's  
8 the same company?

9 A. Correct. Yes, sir.

10 Q. When you went to work for  
11 Silverado/Michelangelo and you came here to  
12 Las Vegas, did you operate transit buses or coaches?

13 A. I operated coaches when I came here.

14 Q. Had you operated coaches before?

15 A. No, sir.

16 Q. When you came here, went to work for  
17 Silverado to operate coaches, did you receive any  
18 specialized training?

19 A. Absolutely.

20 Q. What kind of training did you receive?

21 A. Ten days of classroom and on-the-road  
22 training.

23 Q. Who provided the training?

24 A. Michelangelo.

25 Q. So they had in-house people who trained

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1 you --

2 A. Yes, sir.

3 Q. -- how to operate the buses?

4 A. Yes, sir.

5 Q. And then they took you on the road?

6 A. Absolutely.

7 Q. Was there a probationary period that you  
8 followed?

9 A. I -- I don't know.

10 Q. Was there a period of time when you had  
11 a more licensed or more experienced driver accompany  
12 you on routes, before you were let go on your own?

13 A. The first ten days is the training.

14 Q. So at the end of ten days, then you  
15 became a coach operator?

16 A. Correct.

17 Q. As a coach operator, were you assigned a  
18 particular coach or were you just placed in  
19 rotation?

20 A. In rotation.

21 Q. So you would go from one coach to  
22 another?

23 A. Yes, sir.

24 Q. The coaches that  
25 Silverado/Michelangelo's operated when you started

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1 with them, was there more than one kind?

2 A. Yes, sir.

3 Q. What kinds did you operate?

4 A. Prevosts, MCIs, Vanhools, Setras,  
5 Volvos.

6 Q. Did you operate all of those coaches?

7 A. I trained on all of those, yes, sir.

8 Q. And you were competent to drive all of  
9 those coaches?

10 A. Yes, sir.

11 Q. Did you have a particular coach or coach  
12 line that you used more often than others?

13 A. No, sir.

14 Q. You used them all equally?

15 A. Yes, sir.

16 Q. On the day of the incident,  
17 April 18th, 2017, how long had you been working  
18 then for Silverado/Michelangelo's?

19 A. Two days shy of a year.

20 Q. And was your title still operator,  
21 coach operator?

22 A. Yes, sir.

23 Q. Whom did you report to?

24 A. My supervisor was, I guess -- well,  
25 Robert Garcia was the safety manager. And then you

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1 had Javier and then you had Chris. These are all  
2 management guys.

3 Q. And how did you receive your  
4 assignments?

5 A. We receive our assignment -- they would  
6 call you and give you an assignment over the phone.  
7 Then when you come in, you get your paperwork.

8 Q. So you would receive a call at your  
9 residence?

10 A. Yes, sir.

11 Q. And they would tell you what you were  
12 going to do or what you were expected to do?

13 A. Yes.

14 Q. Was there a yard you reported to?

15 A. Correct.

16 Q. And then they gave you the paperwork?

17 A. Yes.

18 Q. And then you took the coach wherever you  
19 were supposed to take it?

20 A. Right.

21 Q. On this day, when this event occurred,  
22 did you receive the assignment the day of the event  
23 or had you received it --

24 A. The day before.

25 Q. So they called you and they told you you

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1 were expected to make this run?

2 A. Correct.

3 Q. And then did you come in the day of  
4 the event?

5 A. Yes, sir.

6 Q. What time did you show up?

7 A. Oh, shucks. I don't remember that, what  
8 time it was.

9 Q. Was it like 8:00 or 9:00 in the morning?

10 A. Yeah. Because I had to be at the  
11 airport I believe at 10:00 a.m.

12 Q. When you came in, were you assigned  
13 a bus?

14 A. Yes, sir.

15 Q. Was that the first time you knew which  
16 bus you would be assigned?

17 A. When I came in?

18 Q. On the 17th.

19 A. Right. Well, yes. It's on your  
20 paperwork. Yes.

21 Q. Okay. So when you get your paperwork,  
22 you learn your bus?

23 A. Correct.

24 Q. Had you operated that particular bus  
25 before?

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1 A. Yes, sir.

2 Q. Did that bus have a number designation  
3 within Silverado/Michelangelo?

4 A. 5688.

5 Q. So you were assigned Bus 5688?

6 A. Yes, sir.

7 Q. And you had driven that bus before?

8 A. Yes, sir.

9 Q. And it was an MCI coach?

10 A. Correct.

11 Q. And you were familiar with the  
12 MCI coaches?

13 A. Absolutely.

14 Q. Had you driven those before?

15 A. Yes, sir.

16 Q. What were you told was your mission or  
17 your job?

18 A. I would be shuttling people who were  
19 coming into the airport, and they were going to Red  
20 Rock Casino. We were taking them to their place of  
21 lodge for their time here.

22 Q. Was there more than one coach?

23 A. Correct, yes.

24 Q. How many coaches were assigned?

25 A. I don't know.



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1 Q. Was there a man in charge?

2 A. There was someone in charge who was the  
3 contractor for the shuttle.

4 Q. Who had made arrangements for the  
5 coaches?

6 A. Correct.

7 Q. Who was that man, do you know?

8 A. No, sir, I don't know.

9 Q. So when you picked up your coach, did  
10 you go then to the airport?

11 A. Correct.

12 Q. Where did you station yourself at the  
13 airport?

14 A. Zero level, Terminal 1.

15 Q. And how many coaches were there when you  
16 arrived?

17 A. I don't know.

18 Q. Was there someone who collected the  
19 people who were going to be transported and assign  
20 them to the coaches?

21 A. Right. We give our -- you know, show up  
22 and check in with whoever was in charge of the  
23 shuttle at that particular location.

24 Q. But you didn't go into the airport; you  
25 stayed with your coach?

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1 A. No, sir. No, sir.

2 Q. And they brought the people to you?

3 A. Correct.

4 Q. And then you were going to take the  
5 people from the airport to the Red Rock?

6 A. Yes, sir.

7 Q. Was this -- when this event occurred,  
8 was this your first run into the city for this  
9 mission?

10 A. It was my first run, right, yes, sir.

11 Q. What time did you depart the airport?

12 A. I would say -- I don't -- I don't recall  
13 what time exactly, what time it was.

14 Q. How long does it take to go from the  
15 airport to the Red Rock Casino?

16 A. I don't exactly know exactly how long it  
17 takes.

18 Q. And so you were to take whoever was on  
19 the bus from the airport to the Red Rock Casino, let  
20 them get out, and then go back to the airport --

21 A. Yes, sir.

22 Q. -- or were you done?

23 Go back to the airport?

24 A. Yes, sir.

25 Q. Would you tell me what route you

1 followed to get from the airport to the  
2 Red Rock Casino?

3 A. I believe it's the 215 to the  
4 Charleston exit, Charleston to Pavilion, and then to  
5 the Red Rock.

6 Q. So you came down Charleston and turned  
7 right on Pavilion?

8 A. Correct.

9 Q. And then you were going to the Red Rock?

10 A. Yes, sir.

11 Q. In terms of the number of people on your  
12 bus, were you fully loaded, mostly loaded?

13 A. No, sir. 18 people.

14 Q. Do you count the souls before you  
15 take off?

16 A. The people at the shuttle -- at the --  
17 they have the clicker. They have counters. People  
18 were counting.

19 Q. Okay. So they told you you had  
20 18 people?

21 A. Correct.

22 Q. Do you remember people that were seated  
23 in the first row behind you and to the right?

24 A. I do.

25 Q. Do you remember their names?

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1 A. Not offhand, no.

2 Q. What do you remember about those two?

3 A. That one was sitting right behind me,  
4 and one was sitting in the very first row, very  
5 first seat here.

6 Q. Both men? Men and women?

7 A. Both men, yes, sir.

8 Q. Did you talk or have conversation with  
9 them over the course of the route?

10 A. I may have, yes, sir.

11 Q. Did they initiate it --

12 A. Yes, sir.

13 Q. -- or did you?

14 In terms of the route that you took,  
15 once you took the Charleston exit you went down to  
16 Pavilion. I assume you turned right?

17 A. Yes, sir.

18 Q. Do you know what street you were going  
19 to, to get into the Red Rock Casino?

20 A. It's not a street. It's a turn-in.

21 Q. Does it have a name?

22 A. Not to my knowledge.

23 Q. Had you done that before --

24 A. Yes, sir.

25 Q. -- gone that way into the Red Rock?

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1 A. Yes, sir.

2 Q. In terms of traveling from Charleston to  
3 Pavilion headed toward the entrance to the Red Rock,  
4 did you see a bicycle?

5 A. Say that again.

6 Q. When you were going down Charleston,  
7 after you made the right turn onto Pavilion and  
8 you're headed toward the entrance to the Red Rock,  
9 did you see a bicycle?

10 A. No, sir.

11 Q. Did you ever see a bicycle?

12 A. Yes, sir.

13 Q. When did you first see the bicycle?

14 A. As I was approaching the turn off of  
15 Charleston onto Pavilion.

16 Q. And at the time you first saw the  
17 bicycle, was he in the bicycle lane or  
18 right-turn lane?

19 A. On Charleston and Pavilion?

20 Q. Yes.

21 A. He was in the bicycle lane.

22 Q. When you came up on the bicycle, is that  
23 intersection controlled by a traffic light?

24 A. Yes, sir.

25 Q. Did you have to come to a stop?

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1 A. I don't -- I don't remember that. I  
2 don't remember, sir.

3 Q. When you came up to that intersection,  
4 is there a right-hand turn lane to go onto Pavilion?

5 A. Yes, sir.

6 Q. Did you go into the right-hand turn  
7 lane?

8 A. Yes, sir.

9 Q. Where was the bicycle when you went into  
10 the right-hand turn lane?

11 A. In the bike lane.

12 Q. Did he turn right as well?

13 A. Yes, sir.

14 Q. Did he turn right across your front?

15 A. No, sir.

16 Q. Was he then in the right-hand turn lane  
17 in front of you, or was the bike lane to the right  
18 of you?

19 A. At Charleston and Pavilion, at the turn?

20 Q. Yes.

21 A. He was in the bike lane.

22 Q. Was that to the right of the right-hand  
23 turn lane?

24 A. Right. That's right. He's -- he's to  
25 the right of me.

1 Q. Did he turn right before you?

2 A. He did, because I allowed him. Yes,  
3 because I'm -- he's turning and I'm -- let him turn,  
4 and then I turn.

5 Q. So when you turned onto Pavilion, were  
6 you then in the main traveled lane, right-hand turn  
7 lane? Where were you?

8 A. No, I was in the first -- this first  
9 traffic lane right here (indicating).

10 Q. So it would be the outside  
11 southbound lane?

12 A. I --

13 Q. Okay. Sorry.

14 There are two lanes that go south. One  
15 is at the center stripe, one is closer to the curb.

16 A. Right. I'm in this lane right here,  
17 that's closest to the curb.

18 Q. When you completed your turn, where was  
19 the bike?

20 A. When I completed my turn, the bike was  
21 in the bike lane.

22 Q. Did he remain in the bike lane, as far  
23 as you could tell?

24 A. He remained in the bike lane, yes. Yes  
25 he did. Until -- yes.

1 Q. Now, the street near -- or the  
2 intersection near where this event occurred is the  
3 intersection of Pavilion and a street called  
4 Griffith?

5 A. Correct.

6 Q. Between the time you completed your  
7 right-hand turn onto Pavilion, before you got to  
8 Griffith, did you ever make a move to the right in  
9 the bus?

10 A. No.

11 Q. Did you ever start a right-hand turn or  
12 contemplate a right-hand turn?

13 A. No, sir.

14 Q. Did you always remain, then, in the main  
15 traveled lane?

16 A. Correct.

17 Q. As you approached the intersection of  
18 Pavilion and Griffith, was the bike in front of you  
19 at some point?

20 A. The bike was nowhere -- the bike was not  
21 anywhere near me when I approached the intersection  
22 at Pavilion and Griffith.

23 Q. Was the bike in the bike lane?

24 A. No, sir.

25 Q. Where was the bike?



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1           A.           It was not in my scanning view. It  
2           was -- I did not see the bike.

3           Q.           When you completed your turn and you  
4           were behind the bike, did you see the bike in front  
5           of you in the bike lane?

6           A.           Are you talking at Charleston?

7           Q.           No, sir. When you turned onto Pavilion.

8           A.           Right. When I turned onto Pavilion, the  
9           bike was in the bike lane.

10          Q.           And were you behind the bike when you  
11          first completed your turn?

12          A.           Correct.

13          Q.           Did you overtake the bike?

14          A.           Not at all, sir. No, sir.

15          Q.           Did he remain in the bike lane?

16          A.           Yes, he did.

17          Q.           Okay. Could you see him in the  
18          bike lane?

19          A.           I saw him in the bike lane.

20          Q.           Did you watch him in the bike lane?

21          A.           I continued on and -- on Charleston.

22          Q.           Did you overtake the bike?

23          A.           No, sir.

24          Q.           Did he --

25          A.           Not Charleston. Pavilion. Excuse me.

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1 Q. So when you went down Pavilion, you  
2 completed your turn, you saw the bike in the bike  
3 lane ahead of you?

4 A. Right. Yes, sir.

5 Q. And he remained in the bike lane?

6 A. Again -- I -- yeah -- I continued on,  
7 sir. I continued on, straight down Pavilion.

8 Q. Did you pass the bike?

9 A. I did.

10 Q. Where were you when you passed the bike?

11 A. As I'm turning here (indicating), as I'm  
12 turning onto Pavilion, I would say I guess a little  
13 bit -- a little bit where the bus stop is, there's a  
14 bus -- there's a city bus stop, maybe somewhere in  
15 that area is where I passed him, and then just  
16 continued to -- straight down Pavilion.

17 Q. Okay. So as you're going down Pavilion,  
18 before you get to the bus stop area, you did  
19 overtake the bike in the sense that you passed him?

20 A. Correct. I stayed in my lane and just  
21 continued forward down Pavilion.

22 Q. When you passed him, did you see him to  
23 your right?

24 A. I did. I did see him, yes. He was to  
25 my right. And I just continued on and went down.

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1           Q.           When did you first become aware that  
2   there had been an impact between the bike and  
3   your bus?

4           A.           I would say -- the crosswalk is here  
5   (indicating). I would say just maybe a little bit  
6   past the crosswalk. I wouldn't say that I knew  
7   there was an impact, but I -- I -- I went to get out  
8   of the way of him because he had came over, so I  
9   went to get out of the way of him.

10                   And as I pulled up, I looked into my  
11   mirror and I saw him on the ground. That's when I  
12   knew there was an impact. I didn't hear an impact.  
13   I didn't feel an impact.

14           Q.           So your first notice, then, that  
15   something was occurring is you sensed him  
16   turning into you?

17           A.           Correct. As I'm -- as I'm coming up  
18   Pavilion, and the crosswalk -- the crosswalk was  
19   here. As I'm coming up Pavilion, scanning -- you  
20   know, scanning my area, and then he -- I look,  
21   he comes right over -- he just like came right  
22   over into the -- I want to say the door area, and  
23   that's when I made my maneuver to not make contact  
24   with him, and I -- and went into the other lane over  
25   here, out of his way.

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1 And when I looked into the mirror, I saw  
2 that he was on the ground in the back.

3 Q. So as you come up to the intersection of  
4 Griffith and Pavilion, you saw the bike turn into  
5 what looked like your door area?

6 A. I don't know if it was a turn. I don't  
7 know what it was. I know that he just -- he came  
8 into it.

9 Q. Did you see enough to determine whether  
10 or not it was a deliberate effort or move on  
11 his part?

12 A. I do not know, sir.

13 Q. As soon as you became aware of that,  
14 then you turned to the left?

15 A. Absolutely.

16 Q. As you traveled on, did you see the  
17 bicyclist on the ground?

18 A. I'm sorry?

19 Q. As you traveled on, having turned  
20 left --

21 A. Right, I got -- as I got the bus out of  
22 his way and hit -- you know, putting on my brakes to  
23 slow down over into that next lane, and then when I  
24 looked in the mirror, that's when I saw him down,  
25 further back.

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1 Q. Where was he in relation to your bus  
2 when you saw him?

3 A. Where was he in relation -- you mean  
4 when I had stopped the bus?

5 Q. No, sir. When you first looked into  
6 your rearview mirrors and you saw him on the ground,  
7 where was he in relation to your bus?

8 A. Oh, he was behind.

9 Q. He was behind the bus?

10 A. Yes.

11 Q. Now, in terms of what you experienced as  
12 a driver, did you experience anything that told you  
13 he had impacted your bus when you saw him turn or  
14 come into you?

15 A. No, sir. I didn't -- I didn't -- I  
16 did not know that he had made contact with the bus,  
17 no, sir.

18 Q. Did you hear anything or feel anything?

19 A. No, sir. My -- I was -- I was -- he --  
20 at that -- whatever that move was that he did, my  
21 reaction was I've got to get out of his way and I --  
22 I went over.

23 Q. And you turned left?

24 A. Yes, I went over and (indicating).

25 Q. From the time that you turned left until

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1 you brought the bus to a stop, did you as a driver  
2 ever experience anything that suggested you had  
3 driven over something?

4 A. No. No, sir.

5 Q. You didn't feel any bump --

6 A. No, sir.

7 Q. -- feel any bump or anything?

8 A. No, sir.

9 Q. And then you brought your vehicle to  
10 a stop?

11 A. Yes, sir.

12 Q. In terms of your experience as an  
13 operator -- an operator of Transit buses and  
14 coaches, have you ever encountered a guard that is  
15 placed in front of the right rear tires --

16 A. No, sir.

17 Q. -- that is to deflect things from under  
18 the tires?

19 A. No.

20 Q. Ever seen that?

21 A. I seen it on a picture, but I  
22 haven't -- no.

23 Q. Have you ever operated a bus that had  
24 that kind of guard?

25 A. No, sir.

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1 Q. Based on what you saw or observed,  
2 can you -- or do you know or have an opinion as  
3 to whether or not your bus ran over the man on  
4 the bike?

5 A. I do not know.

6 Q. In terms of what you experienced as an  
7 operator, handling the wheel, listening to the  
8 sounds, the feel of the bus in motion, did you  
9 experience anything that suggested to you that your  
10 bus had driven over him or run over him?

11 A. No, sir.

12 Q. In terms of when you did this maneuver,  
13 when you turned from Charleston onto Pavilion, when  
14 you traveled Pavilion up to the intersection, did  
15 you see the bike, the bicyclist, in the bike lane?

16 A. I'm sorry, can you say that again.

17 Q. Okay. When you come down Charleston,  
18 you turn right?

19 A. Correct.

20 Q. You're traveling down Pavilion toward  
21 Griffith. Did you see the bike --

22 A. I did.

23 Q. -- in the bike lane?

24 A. Like I said, after that -- after I made  
25 the turn onto Pavilion, I saw him in the bike lane,

1 and I continued straight on Pavilion, and there's  
2 a -- there's a cutoff for where the city bus parks  
3 at or picks up at. And as I'm scanning my mirrors,  
4 that's when I don't -- he was not in my vicinity  
5 anymore. And as I continued down Pavilion, like I  
6 already said, that's -- you know.

7 Q. So as you're going down Pavilion, you  
8 did see the bike in the bike lane and you overtook  
9 him and passed him in your lane?

10 A. In my -- correct. I was in my lane.

11 Q. When you're in your lane and you're  
12 looking at the bike, are you able to control the  
13 lateral separation between your bus and the bike?

14 A. Yes. I'm 3 to 4 feet away, as I was  
15 trained to be.

16 Q. After you overtake and pass the bike,  
17 does he leave your field of vision?

18 A. Right, correct. I'm just doing, I'm --  
19 right. I don't --

20 Q. Because you're looking ahead?

21 A. Right. And not just ahead. I'm trained  
22 to look ahead and I'm trained to look at my mirrors  
23 and scan, and that's what I was doing. There was no  
24 bike anywhere in my -- in that next, you know,  
25 however many feet it is. I'm not familiar with



1 that. But as I'm traveling down, that's --

2 Q. As you're traveling down, do you know  
3 where the bike was?

4 A. I don't. I know that he's not anywhere  
5 near me.

6 Q. But at some point you had the sensation  
7 that he came into you or turned into you?

8 A. As I'm -- as I'm -- as I'm entering the  
9 intersection, that's this -- the whole thing -- when  
10 he came, like I said, into the front door area, and  
11 I made my move to avoid him.

12 Q. So as -- as you came down Pavilion,  
13 having completed your turn from Charleston onto  
14 Pavilion, you could see the bike in the bike lane as  
15 you were driving down Pavilion?

16 A. After the turn, yes.

17 Q. And you did see the bike in the  
18 bike lane?

19 A. Correct.

20 Q. And you watched him as you overtook him  
21 and passed him?

22 A. Absolutely.

23 Q. Do you have a sense of how fast you were  
24 going in your bus after you passed the bike?

25 A. After I -- I had made the turn -- after

1 I passed the bike?

2 Q. Or at the time you were passing the  
3 bike, how fast were you going?

4 A. After I made the turn, I was going, I  
5 don't know, maybe 15, because I had just come out of  
6 a turn, so I'm not speeding. I had just come out of  
7 the turn, so I'm going straight now.

8 So I'm probably, you know, going 15, you  
9 know, trying to get up to 25 or whatever the speed  
10 limit is. And that's what I would do.

11 Q. So you were accelerating as you  
12 completed your turn?

13 A. After the turn, correct.

14 Q. After the turn. Up to the speed limit?

15 A. Correct.

16 Q. So do you know how fast your bus was  
17 going when the bike came into you?

18 A. I would say about 25 to 30 miles  
19 an hour.

20 Q. As you're going down Pavilion then, if I  
21 understand you correctly, when the bike is in front  
22 of you in the bike lane, you can see the bike?

23 A. You're talking about in the back -- back  
24 at Charleston and Pavilion?

25 Q. Yes. After you complete the turn from

1 Charleston onto Pavilion --

2 A. Right.

3 Q. -- and you can see the bike --

4 A. Yes, sir.

5 Q. -- in the bike lane?

6 A. Yes, sir.

7 Q. You do see the bike in the bike lane?

8 A. Yes, sir.

9 Q. You watch the bike in the bike lane as  
10 you're coming down the road?

11 A. Correct.

12 Q. And you overtake and pass the bike?

13 A. Correct. In my lane, yes (indicating).  
14 Maintaining my 3 to 4 feet away from the bike as I'm  
15 trained, and I just continued going down.

16 Q. In your experience as a driver,  
17 particularly when you were a Transit driver in  
18 New York City, had you ever had an event where the  
19 right rear wheels of a Transit bus ran over a  
20 passenger or anything like that?

21 A. Absolutely not.

22 MR. TERRY: Okay, sir, that's all I  
23 have. Thank you.

24 ///

25 ///

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1 EXAMINATION

2 BY MR. KEMP:

3 Q. Good morning, Mr. Hubbard. I think  
4 we're going to ask some preliminary questions and  
5 then we're going to get some exhibits that will kind  
6 of help us, you know, pinpoint 50 foot, a hundred  
7 foot, 150 foot, pictures of the scene. Okay? But  
8 let me just ask you a quick follow-up or two.

9 What I seem to hear you saying is that  
10 you saw the bike rider on Charleston, then you  
11 turned on Pavilion and you still saw him, and then  
12 you passed him and you lost track of him for some  
13 period, and then you saw him again right at the  
14 very end.

15 Is that pretty much a fair statement?

16 A. Right.

17 Q. Okay. Because you used the term "not in  
18 scanning view"?

19 A. Correct.

20 Q. What do you mean by that?

21 A. What I mean by that is that I'm trained  
22 to, of course, look in front of me, look in my  
23 mirrors, lean in my mirrors so that I can get as  
24 much view of my mirrors as possible. That's all of  
25 my scanning. And that's what I was doing, and he

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1 was nowhere in that area.

2 Q. And so you mentioned the municipal bus  
3 stop. So between the municipal bus stop and the  
4 intersection, you lost track of him during that time  
5 period? Or you couldn't see him during that time  
6 period?

7 A. Right. He was not in my -- he was not  
8 near my bus at that time period.

9 Q. Okay. Fair enough.

10 All right. And then you think right  
11 before -- before you went through the intersection,  
12 you saw him coming at you again, is that --

13 A. Coming towards my side, my front door.

14 Q. Okay. Fair enough. All right. Let's  
15 back up then. We'll get back to that, but let's  
16 back up.

17 First of all, have you ever had your  
18 deposition taken before, like we're doing here  
19 today?

20 A. No, sir.

21 Q. Okay. Let me explain what the purpose  
22 of a deposition is. The purpose of a deposition is  
23 to discover facts relevant to a lawsuit; in this  
24 case, the lawsuit filed as a result of the  
25 April 18th incident.

1 Counsel's already asked you questions.

2 I've asked you some questions. I'm sure there's  
3 going to be a lot of other people asking you  
4 questions.

5 Our questions, your answers, get typed  
6 up into a little booklet that you're given at a  
7 later time, and that's called a deposition  
8 transcript. And at that time, you get to review it  
9 and see if, you know, your answers are accurate upon  
10 reflection.

11 So for example, I think you said you  
12 started working driving buses in '98. If later on  
13 you think it's really '97, you'll have the right to  
14 make that little correction.

15 Okay. But if you do make a correction  
16 after today, everybody has the right to comment on  
17 the fact you made a correction. So they'd be able  
18 to say, Oh, well, Mr. Hubbard initially said A and  
19 then he changed it to B.

20 Okay. So we -- we -- there is a premium  
21 here on accuracy, and I'd ask you to give the best  
22 possible answer you can.

23 If you don't understand the question,  
24 please stop me and ask me to rephrase it; I'll be  
25 more than happy to do so.

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1                   And I don't think we're going to get  
2   real technical here, but there are going to be terms  
3   that you know that I don't know; for example, like  
4   parts of the bus or I think the driving technique  
5   you were talking about has been referred to by some  
6   witnesses as a rock-and-roll technique.

7                   When we get into areas of bus  
8   terminology or bus driver vernacular, things like  
9   that, and you see that I'm wrong or I'm maybe making  
10   a wrong assumption on what you're saying, stop me  
11   and we'll try to iron it out.   Okay?

12           A.           Yes.

13           Q.           Because it will go a lot faster.  
14   Because I've seen a lot of times where the attorney  
15   runs for 30 or 40 minutes down some rabbit hole and  
16   all of a sudden the witness says, Well, I didn't  
17   mean red, I meant blue.   Okay?   So it's better for  
18   everybody.

19                   The oath you've taken, that you took, is  
20   the same oath that is administered in court of law.  
21   It has the same force and effect.

22                   Do you remember all that -- or you  
23   understand that?

24           A.           Yes.

25           Q.           Okay.   Now, prior to today, I assume you

1 had some meetings with counsel, so I'm going to ask  
2 you when they took place and how long, but do not  
3 tell me what was said by you or your counsel during  
4 those meetings. Okay?

5 A. Uh-huh.

6 Q. Okay. Did you have a meeting with  
7 counsel prior to --

8 A. Yes.

9 Q. And when did that occur?

10 A. Yesterday, the 19th.

11 Q. Okay. And approximate length?

12 A. Seven hours.

13 Q. And prior to that time, had you met with  
14 counsel before?

15 A. No, sir.

16 Q. On any occasion? Did counsel meet with  
17 you to ask you some information?

18 A. Oh, yes, yes.

19 Q. Okay. And when did that occur?

20 A. Oh, I don't know the exact dates, you  
21 know. I had to sign some papers. I don't know the  
22 exact dates.

23 Q. All right. So you met with counsel  
24 yesterday for seven hours?

25 A. Yes, sir.



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1 Q. And was that just your counsel or were  
2 other people present?

3 A. Just my counsel.

4 Q. And more specifically, have you met with  
5 the manufacturer's counsel, MCI's counsel?

6 A. No, sir.

7 Q. And we've been told that you had a  
8 chance to look at a video of the scene?

9 A. Yes.

10 Q. Okay. Other than that, did you look at  
11 anything else yesterday during your prep session?

12 A. Yes, sir.

13 Q. What did you look at?

14 A. Photographs of the -- the street.  
15 Photographs of the bus afterwards. Photographs of  
16 the area afterwards, the exact area.

17 Q. Anything else?

18 MR. STEPHAN: I'm going to hand the  
19 witness the documents he reviewed yesterday.

20 THE WITNESS: My driving record from  
21 New York and here. The police report. And that was  
22 it, yes.

23 BY MR. KEMP:

24 Q. Okay. And I see a picture here, there's  
25 a picture of the bus.

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1 A. Oh, and my job application for  
2 Michelangelo.

3 Q. Other than that, you've looked at  
4 nothing else --

5 A. No, sir.

6 Q. -- in the prep session?

7 A. No, sir.

8 Q. The answer's yes, you've looked at  
9 nothing else?

10 A. Oh, yes, I've looked at nothing else.

11 Q. Now, with regards to this bus, this bus  
12 is apparently still in operation; is that correct?

13 A. It is, yes.

14 Q. And as I understand, it's been moved to  
15 L.A. Do you know one way or the other?

16 A. I do not know.

17 Q. And prior to it being moved to L.A.,  
18 assuming that to be a fact, did you operate this  
19 particular bus any time after the accident?

20 A. I have.

21 Q. On how many different occasions?

22 A. I would say two times.

23 Q. Twice?

24 A. Yes.

25 Q. That's just the luck of the draw?

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1 A. No, I've operated it twice.

2 Q. I mean, but that's just the luck of the  
3 draw, you happened to be on this bus as opposed to  
4 another one of the buses?

5 A. Oh, yes, that's correct.

6 Q. In other words, you don't have an  
7 affinity for this bus or a request for this bus?

8 A. No, sir.

9 Q. Okay. All right.

10 Okay. Now, you said you lived at  
11 Hargrove Street?

12 A. That's where I reside now, yes, sir.

13 Q. Where did you previously live?

14 A. 8476 Indigo Sky, Las Vegas.

15 Q. And without getting real detailed, where  
16 is Hargrove at?

17 A. Hargrove is --

18 Q. What are the major cross-streets?

19 A. Oh, 95 and Jones.

20 Q. And you've lived there since when?

21 A. I lived there -- August.

22 Q. Of 2017?

23 A. Yes.

24 Q. Okay. And then when you first came to  
25 Nevada, I believe it was April 8th, 2016?

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1 A. Yes.

2 Q. And at that time, did you move into the  
3 Indigo address?

4 A. Correct.

5 Q. Why did you move to Nevada from  
6 New York?

7 A. I got married. My wife lives here and I  
8 moved here.

9 Q. So your wife's from Vegas?

10 A. She's from Michigan, but she's been  
11 living here for five-plus years.

12 Q. Okay. I assume she's got some kind of  
13 job here?

14 A. Correct.

15 Q. Okay. All right.

16 And you had mentioned that you first got  
17 your CDL in '98 in New York; is that right?

18 A. Yes.

19 Q. Do you currently have a New York CDL?

20 A. New York, no.

21 Q. You got a Nevada CDL --

22 A. Yes.

23 Q. -- as I understand it -- we have it in  
24 your file somewhere -- sometime in early 2016?

25 A. January 2017.

1 Q. January 2017. Okay. Fair.

2 So for a time period when you were  
3 working for Michelangelo or Silverado, whichever it  
4 was, you were driving on your New York CDL?

5 A. Yes, sir.

6 Q. But you ultimately got a Nevada CDL?

7 A. Absolutely.

8 Q. Now, there's a reason -- excuse me --  
9 there's a law here, and I don't know if applies to  
10 buses, but it applies to cars, where if you move  
11 from another state you're supposed to get your  
12 driver's license in two weeks or three weeks or  
13 something.

14 Are you kind of familiar with that?

15 A. I was under the impression you're  
16 supposed to change your registration, which I did,  
17 within, I don't know, the first month I was here.

18 Q. Okay. And by changing your  
19 registration, you're talking about your personal  
20 vehicle registration?

21 A. My car that I used to have, yes.

22 Q. So when you came here you had a car from  
23 New York?

24 A. Yes.

25 Q. What kind of car was it?

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1 A. '05 Dodge Grand Caravan.

2 Q. And so when you came here in April 2016,  
3 you changed the registration on the Dodge Caravan  
4 from New York to Nevada?

5 A. Yes, sir.

6 Q. And I assume when you came to Nevada it  
7 was your intent to make it your permanent home?

8 A. Yes, sir.

9 Q. Now, we talked about the CDL license and  
10 that you got a Nevada one. Do you also have a  
11 driver's license?

12 A. I do.

13 Q. And is that from Nevada, too?

14 A. I'm sorry. Do I have -- I have a CDL  
15 license.

16 Q. Does that cover the whole thing?

17 A. Yes.

18 Q. You don't have a separate driver's  
19 license?

20 A. No, sir.

21 MR. STEPHAN: I'm sorry, Mr. Hubbard.  
22 Could you let him finish the question and pause a  
23 second, because it's going much too fast for the  
24 court reporter.

25 MR. KEMP: Yeah, it makes it kind of

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1 sloppy, because she misses something I say and then  
2 she misses -- so counsel's right. I'll slow down a  
3 little bit, too.

4 BY MR. KEMP:

5 Q. So you said it was your intent to become  
6 a Nevada resident when you moved here in April 2016.  
7 Did you vote here after that point in time?

8 A. No.

9 Q. Are you registered to vote here in  
10 Nevada?

11 A. Yes.

12 Q. When did you register?

13 A. I'm sorry, I did vote.

14 Q. You did vote here in Nevada?

15 A. The presidential election.

16 Q. Right. Okay. So that would have been  
17 the one versus Trump and Clinton?

18 A. Yes.

19 Q. And without telling me who you voted  
20 for, can you tell me where you voted?

21 A. I do not remember where I voted at. I  
22 don't remember.

23 Q. But you did vote?

24 A. Yes, sir.

25 Q. So you voted in the -- for the state

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1 officers, too?

2 A. Correct.

3 Q. And by state officers, I mean the Nevada  
4 state officials that were running for election. You  
5 voted for them?

6 A. Yes.

7 Q. Now, you said you worked for "ambulot."  
8 Can you spell that, first of all? Ambulot?

9 A. It's called an ambulette. It's just  
10 like a -- it's just like a paratransit here. You  
11 know, like the RTC, small --

12 Q. Is that a municipal entity?

13 A. No, no.

14 Q. It's a private entity?

15 A. Yeah.

16 Q. The name is spelled what?

17 A. That's not a company. That's just what  
18 it's called. That's the type of work it's called.  
19 Back east it's called ambulette, but it's just like  
20 the paratransit that you see here in Las Vegas, the  
21 little RTC buses -- not buses -- 15-or-more-seaters  
22 that pick up passengers and take them to church or  
23 dialysis.

24 Q. So the service would be ambulette?

25 A. Correct.



1 Q. But the specific employer would be  
2 different?

3 A. Correct.

4 Q. And do you remember as we sit here today  
5 who the specific employer was when you first drove  
6 an ambulette service?

7 A. E-v-e, Eve Ambulette, was the name of  
8 the company.

9 Q. Was that the only ambulette company you  
10 worked with before you went to New York City  
11 Transit?

12 A. Correct.

13 Q. How long did you work for Eve?

14 A. From 1998 until 2004.

15 Q. Is that regular trips or is that  
16 piecework, or how does that work? I mean, are you  
17 driving day -- every day?

18 A. Right.

19 Q. So do you have a regular schedule, like  
20 9:00 to 5:00 or something like that?

21 A. Right. Yeah, 9:00 to 5:00.

22 Q. And basically you'd take people to  
23 dialysis or whatever their needs were?

24 A. Yes.

25 Q. Okay. And then at some point in

1 time you applied to become a driver for  
2 New York City Transit?

3 A. Yes.

4 Q. And do you remember approximately when  
5 that was?

6 A. I took the -- I took the exam in 2003,  
7 and I got a call back from them in 2004.

8 Q. Okay. And I'm not familiar with their  
9 exam. What's that consist of?

10 A. It's a civil service exam, where anyone  
11 can take the exam, and you take the exam, and  
12 depending on how well you scored, it depends --  
13 depending on how well you score, where you line up  
14 at, to when you'll get called back, called to come  
15 in, you know, to -- for an interview to get hired.

16 Q. And then after you're hired do they give  
17 you training?

18 A. Absolutely.

19 Q. And what kind of -- just in general,  
20 what kind of training did New York City Transit  
21 give you?

22 A. It's -- I'm trying to think how long my  
23 training was. I want to say it was -- it's -- I  
24 think it was ten -- ten days.

25 Q. Okay. Do you remember approximately

1     when you got that?   2004?

2           A.           I started with them in November 2004.

3           Q.           So it would have to be prior to that you  
4     got the training, or --

5           A.           Yes.

6           Q.           Okay.   All right.

7                       Now, you said that you drove primarily  
8     in Brooklyn?

9           A.           Yes.

10          Q.           Did you live in Brooklyn?

11          A.           I did.

12          Q.           And did you also drive in New York City  
13     in the other boroughs?

14          A.           For New York City Transit Authority?

15          Q.           Right.

16          A.           Yes.   On occasion, yes.

17          Q.           Okay.   Can you give me how much of the  
18     time was in Brooklyn as opposed to anywhere else?

19          A.           The majority of the time was in Brooklyn  
20     because I was in the Brooklyn division.   However,  
21     when -- sometimes, when there's work being done on  
22     the subway system, they will use the Transit buses  
23     from any borough to transport the -- you know, to do  
24     where the subways are being worked on, to shuttle  
25     people between those points using Transit buses.

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1 Q. Okay. So the majority of the time was  
2 in Brooklyn. And by "majority" you mean over  
3 50 percent?

4 A. Way over.

5 Q. 80, 90 percent in Brooklyn?

6 A. 90, 95 percent.

7 Q. Who was your supervisor at -- when you  
8 were with New York City Transit?

9 A. My -- oh, man. I'm trying to think of  
10 his name now. I have his card, but I don't -- I  
11 have his card. I don't remember his name.

12 Q. There's a reference in your job  
13 application. Is that the same person? You give a  
14 New York City Transit person as a reference.

15 A. That's him, right.

16 Q. That's the same person?

17 A. Yes, sir.

18 Q. Okay. We'll get to that. All right.

19 And he was your supervisor the entire  
20 time, 2004 to 2016?

21 A. Correct.

22 Q. Do you remember what his job title was?

23 A. General superintendent.

24 Q. Okay.

25 A. Michael Yodice. I'm sorry.

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1 Q. Yeah, that's the same -- it's Y-o-d-i-s?

2 A. Y-o-d-i-c-e. Michael Yodice.

3 Q. What nationality is he?

4 A. Good man. I'm sorry. I said he was a  
5 good man.

6 Q. What nationality is Yodice? Is that  
7 Greek or something?

8 A. I don't know.

9 Q. When was the last time you talked  
10 to him?

11 A. April 6th, 2016.

12 Q. Do you have contact information for him?

13 A. I do. I have his card, yeah.

14 Q. With you today?

15 A. I do. I only have his card so that I  
16 could use it when I was --

17 Q. Okay. When we take a break, can you  
18 take a look and give me -- is the phone number on  
19 the card?

20 A. Yes.

21 Q. Okay. Give me his phone number.

22 All right. Now, and we've taken  
23 Mr. Bartlett's deposition. Do you remember  
24 Mr. Bartlett?

25 A. Will Bartlett?

1 Q. Right.

2 A. Yeah, I -- I --

3 Q. He went through the training program  
4 with us, so I'm going to try to skip over a lot of  
5 stuff he said. But one of the things he said is  
6 that there's a pre-hiring requirement that they do a  
7 background check.

8 A. Yes.

9 Q. Are you familiar with that?

10 A. Yes.

11 Q. Okay. And what was your understanding  
12 of that requirement?

13 A. That they were going to check my  
14 background, do a background check.

15 Q. And a background check would be your  
16 driving history for a period of time and then any  
17 accidents or citations --

18 A. Yes, sir.

19 Q. -- you got?

20 A. Sorry. My mind works fast, so --

21 Q. And Mr. Bartlett had suggested, given  
22 the dates in the employment file, that you may have  
23 done the background check and just brought it in to  
24 the company. Do you -- is that the way it occurred?

25 A. That I did the background check?

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1 Q. Yeah.

2 A. No.

3 Q. Okay. Well, I'll show you the file, but  
4 the reason he says that is the background check is  
5 dated March and the first contact he has with the  
6 company is April.

7 A. That's my driving record. I'm  
8 talking about my -- yes, I did present my MVR,  
9 whatever you call it.

10 Q. What do you call it?

11 A. My driving record from -- you know,  
12 previous driving record.

13 Q. Okay. So you gave him a driving  
14 record for a set period of time that you  
15 obtained somewhere?

16 A. Yes.

17 Q. Where did you get it?

18 A. From New York City, when I moved here.

19 Q. All right. Why don't we mark -- and by  
20 the way, Mr. Hubbard, if you need a break at any  
21 time, this isn't a contest to see how long you can  
22 go. Okay? If you need a break for any reason -- I  
23 don't know if you smoke, but if you want to smoke,  
24 need to use the bathroom or whatever -- just let me  
25 know and we'll stop and we'll take a break. Okay?

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1 A. Yes.

2 Q. And I think all counsel here -- they're  
3 a little older than you -- I think will be taking  
4 more breaks than you will. Okay.

5 All right. Why don't we start out with  
6 your driver's application, and you've got your copy.  
7 Let me get my copy.

8 MR. STEPHAN: Can we use yours?

9 MR. KEMP: Yeah.

10 MR. STEPHAN: Because I put tabs on  
11 this one.

12 MR. KEMP: There's secret notes on  
13 that, huh?

14 MR. STEPHAN: No. There's actually just  
15 Post-its on it so that I can keep up with you.

16 (Exhibit 1 marked.)

17 THE WITNESS: Do I keep this?

18 MR. STEPHAN: Just keep that in front of  
19 you.

20 BY MR. KEMP:

21 Q. All right. Mr. Hubbard, I've handed you  
22 a document that we've marked as Exhibit 1. That's  
23 been presented to us as your complete employment  
24 file at Michelangelo/Silverado. Okay?

25 A. Yes.



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1 Q. And I don't want to mislead you. They  
2 also said there may be some other files related to  
3 medical or some -- there's a different file for  
4 other things, but this is the complete personnel  
5 file they gave us. Okay?

6 A. Yes.

7 Q. All right. The first page, Exhibit 1,  
8 is that your signature?

9 A. Yes.

10 Q. And the date on this is 4/18/16?

11 A. Yes.

12 Q. Is that the date you applied to be  
13 with Michelangelo?

14 A. Correct.

15 Q. Okay. And the next page has things that  
16 you've completed?

17 A. Yes, sir.

18 Q. All right. And it says that you're a  
19 walk-in?

20 A. Yes, sir.

21 Q. Did you know anyone at Michelangelo or  
22 Silverado before you applied for the position there?

23 A. No, sir.

24 Q. How did it come to your attention that  
25 there was such an entity?

1 A. I believe I seen them on either Indeed  
2 or Craig's List.

3 Q. Advertising for drivers?

4 A. Correct.

5 Q. What was the first thing, N-D?

6 A. Indeed.

7 Q. Oh, Indeed. Okay.

8 And you list Mr. Yodice down at the  
9 bottom there. Is that the same gentleman we talked  
10 about before?

11 A. Yes, sir.

12 Q. And he has a phone number, which I can't  
13 read. Can you read that?

14 A. (718) 927-7488.

15 Q. All right. And then we go on. Is there  
16 a section here that lists prior accident or criminal  
17 citations?

18 Top right of page 3 says "Accident  
19 record for last three years"?

20 A. Oh, I'm sorry. Yes, sir.

21 Q. And in that you disclose a 2015  
22 accident?

23 A. Yes, sir.

24 Q. Was that with the bus or is that with a  
25 personal car or which?

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1 A. That was with the bus.

2 Q. And what is -- what is it you say there?

3 A. "Rear tire well clipped door."

4 Q. What does that mean?

5 A. It means that as I was coming up a  
6 street, someone opened up their door as I  
7 passed them, and the rear tire well of the bus hit  
8 their door.

9 Q. And the person that opened the door was  
10 a passenger car?

11 A. Correct.

12 Q. And then the next sentence on traffic  
13 convictions you say "None"?

14 A. Correct.

15 Q. Now, you were -- I think you were going  
16 for the printout when I stopped you. Where is that  
17 at? What page number?

18 A. I was -- my abstract of driving record.

19 Q. Mm-hmm. What page is that? On the  
20 bottom right there's little page numbers.

21 A. 821.

22 Q. 821, okay.

23 So now this is the abstract that you had  
24 brought with you from New York City?

25 A. Correct.

1 Q. And the abstract, does it list any  
2 accidents?

3 A. It does not.

4 Q. Does it list any driving convictions?

5 A. No, sir.

6 Q. And what time period does this abstract  
7 cover from?

8 A. It covers the last -- I'm trying --  
9 I'm -- it covers from 2000 -- I'm sorry, 1998, up  
10 until -- the last thing on here is 2013.

11 Did I say 2008 or 1998? 1998.

12 Q. And where do you see that on this?

13 A. It says, "Class Change 2/23/98 New DO  
14 permit."

15 "Class Change 7/7/98 New CDL B." That's  
16 when I got my CDL license.

17 Q. So you were presenting something to  
18 the potential employer that would cover from 1998  
19 to 2016?

20 A. Correct.

21 Q. Why that time period? Because that's  
22 the time period you were a driver?

23 A. That's the time period of this abstract  
24 of driving record.

25 Q. Okay. And is this intended to disclose

1 any accidents and/or criminal convictions during  
2 this time period?

3 A. Absolutely.

4 Q. So basically you were telling the  
5 potential employer that you had no accidents or  
6 driving convictions from 1998 forward?

7 A. Correct.

8 Q. Is that a correct statement?

9 A. Yes, sir.

10 Q. So you had no accidents or driving  
11 convictions from 1998 forward?

12 A. Well, I -- not that got reported to the  
13 police, I guess, because you see that I put that  
14 down here, but it's not on here (indicating). I  
15 don't know why.

16 Q. You put what down here? You said -- I'm  
17 confused. Okay. Let's back up.

18 A. This is -- this is my driving record,  
19 right. Yes, you're right.

20 Q. And when you say "this," you're  
21 referring to page 821 of Exhibit 1?

22 A. Yes, sir.

23 Q. Okay. And in that driving record I see  
24 no accidents, correct?

25 A. Correct.

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1 Q. And I see no traffic violations, right?

2 A. Correct.

3 Q. Okay. Is that because you had no  
4 accidents or traffic violations from 1998 forward?

5 A. Correct.

6 Q. And that's what you told the employer?

7 A. Yes.

8 MR. KEMP: Now, can I have my -- let's  
9 see. Maybe Eric can help me. I'm looking for my --  
10 okay, I got it right here. My fault. My fault.

11 Okay. Why don't we mark this as 2.

12 (Exhibit 2 marked.)

13 BY MR. KEMP:

14 Q. Do you have Exhibit 2 in front of you?

15 A. Yes.

16 Q. Okay. And Mr. Hubbard, this is a  
17 document we got from the State of New York which  
18 purports to show your driving history. It's six  
19 pages long. And I direct your attention to page 4  
20 of 6.

21 A. Yes.

22 Q. And on page 4 of 6 it indicates, number  
23 one, that you were convicted on July 13th, 2010, for  
24 not having a seat belt.

25 Do you see that?

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1 A. Yes, sir.

2 Q. Were you convicted on July 13th, 2010,  
3 for not having a seat belt?

4 A. Yes, sir.

5 Q. And why did you just tell me you had no  
6 traffic convictions from 1998 forward?

7 A. Okay. I'm confused about what you're  
8 saying.

9 Yes, that's in my personal car.  
10 Yes, sir.

11 Q. So you did have traffic convictions from  
12 1998 forward?

13 A. Correct, but -- yes, I did, yes.

14 Q. And you did not disclose those to  
15 Michelangelo?

16 A. No. I gave them my driver's abstract,  
17 which has everything on it.

18 Q. And the next one I see is dated  
19 May 2, 2010, where there's some kind of violation of  
20 using a mobile phone while operating a vehicle.

21 Do you see that?

22 A. Yes, sir.

23 Q. Were you, in fact, convicted on  
24 May 2nd, 2010, for using a mobile phone while  
25 operating a motor vehicle?

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1 A. My personal vehicle, yes, sir.

2 Q. And again you did not tell that to  
3 Michelangelo?

4 A. No, sir.

5 Q. Okay. Now, the next conviction is dated  
6 January 28th, 2002, where it says you disobeyed a  
7 traffic DV -- or DEV, whatever that means.

8 Do you know what that means?

9 A. No, sir.

10 Q. Maybe it means device, traffic device.  
11 Were you convicted on January 28th,  
12 2002, for disobeying a traffic device?

13 A. Yes, sir.

14 Q. Again you didn't tell Michelangelo that?

15 A. No, sir. Because this says record for  
16 past three years.

17 Q. Okay. I didn't ask you why you didn't  
18 tell them. I asked you if you didn't tell them.

19 A. No, sir.

20 Q. Okay. All right.

21 Now, with regards to the next one, it  
22 says that you were convicted on October 1st, 1998,  
23 for unsafe lane change. Is that what that is?

24 A. Yes, sir.

25 Q. Were you in fact convicted on



1 October 1st, 1998, for an unsafe lane change?

2 A. Yes, sir.

3 Q. And again you didn't disclose that to  
4 Michelangelo?

5 A. No, sir.

6 Q. All right. Now, with regards to the  
7 accidents, I see an accident dated August 6th, 2010,  
8 involved some personal injury and a motorist.

9 Do you see that?

10 A. Yes.

11 Q. Were you involved in an accident on  
12 August 6th, 2010, that there was some sort of  
13 personal injury to another motorist?

14 A. Yes.

15 Q. Can you tell me what happened in general  
16 on that?

17 A. I do not -- I don't remember that.

18 Q. Do you know if there was any lawsuit  
19 arising out of that?

20 A. No, sir.

21 Q. No, you don't know?

22 A. I don't know.

23 Q. Okay. All right. And then the next one  
24 I see is April 7, 2009, involving a personal  
25 injury/property damage. Do you see that?

1 A. Yes, sir.

2 Q. Were you involved in an accident on  
3 April 7th, 2009, that involved personal injury and  
4 property damage?

5 A. Yes, sir.

6 Q. Okay. Do you remember any circumstances  
7 of that?

8 A. No, sir.

9 Q. All right. The next one I see is dated  
10 June 16th, 2000. And if you look at the next page,  
11 it involves another personal injury/property damage.

12 Were you involved with an accident on  
13 that particular day?

14 A. Yes, sir.

15 Q. Do you remember anything about  
16 that accident?

17 A. No, sir.

18 Q. Other than that you were cited?

19 A. Other than what?

20 Q. You were cited?

21 A. I wasn't cited, sir. If you see,  
22 it says "Fire/Police: No." There was no fire  
23 or police involved in these things. I  
24 don't understand --

25 Q. Okay. Why don't we go back to the first

1 one then.

2 The August 6th, 2010, you were involved  
3 in an accident?

4 A. Yes, sir.

5 Q. And where do you see a reference to fire  
6 or police?

7 A. Right here. It says, "Type: Personal  
8 injury. Reports: Motorist. Fire/Police: No."

9 Same thing on the other one. Same thing  
10 on the other one. Which is why it's not on this  
11 (indicating).

12 MR. STEPHAN: The witness is pointing to  
13 Exhibit Number 1 as he's testifying.

14 BY MR. KEMP:

15 Q. So when it says no fire and police, what  
16 does that mean to you? What do you think that  
17 means? That you were involved in an accident and  
18 the police didn't investigate it?

19 A. That means that they -- right. I don't  
20 know what it means, but I know that it -- they  
21 weren't involved in it. Where it wasn't a serious  
22 accident.

23 Q. Okay. How did you get a case number for  
24 it then?

25 Do you see the case number on the right?

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1 A. Yes, sir, I do.

2 Q. Where did that come from?

3 A. I do not know, sir.

4 Q. I mean, I assume it came from some  
5 governmental authority. Do you make that same  
6 assumption?

7 A. I do.

8 Q. Okay. All right. Back to the third  
9 one that we were talking about, which is the  
10 June 6th, 2000, one.

11 Do you remember anything about that as  
12 we sit here today?

13 A. Where are you at, sir?

14 Q. Bottom of 3, top of 4.

15 A. No, sir.

16 Q. Okay. Then we have a fourth one, which  
17 is dated March 29th, 1999. Did you get -- were you  
18 involved in an accident on that day?

19 A. Yes, sir.

20 Q. Can you tell me anything about that?

21 A. I don't remember, sir.

22 Q. Now, this report says "Police motorist,"  
23 right?

24 A. Right.

25 Q. Did you hit a police --

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1 A. No.

2 Q. -- car or motorcycle?

3 A. No, no.

4 Q. Do you know why a police motorist made  
5 this report?

6 A. Okay, now I think -- I don't know, sir.

7 Q. Okay. Were you involved in any other  
8 accidents, other than the four we have here?

9 A. No, sir.

10 Q. And you think these were all involved  
11 with your personal vehicle?

12 A. Yes.

13 Q. Would that have been the 2004 Dodge we  
14 talked about earlier?

15 Excuse me. With regards to the 2010 and  
16 2009 incidents, would that have been the 2005 Dodge?

17 A. I don't know, sir, because -- I  
18 don't know.

19 Q. You don't know what you were driving  
20 in 2010?

21 A. Right, because I also had another car  
22 before. This is a long time. I don't know.

23 Q. All right. Now let's get to the point  
24 that I think you wanted to make earlier.

25 You said the reason this was not

1 disclosed to the company is because these were older  
2 than three years?

3 A. Right. It says for me to -- it says  
4 record for past three years.

5 Q. Okay. So you were thinking about them  
6 at the time, but you only recorded ones within the  
7 last three years when you filled out page 812?

8 A. Right. That's why I put the 2015.  
9 Yes, sir.

10 Q. But you were thinking of the others at  
11 the time; you just didn't put them down? You knew  
12 you had the others?

13 A. Right.

14 Q. Okay. All right.

15 Did there come a time that New York  
16 suspended your driver's license?

17 A. No, sir -- yes, sir. Yes, yes, yes.

18 Q. In what time period was your license  
19 suspended in New York?

20 A. It was suspended on  
21 September 11th, 2012, and it was cleared on  
22 September 12th, 2012.

23 Q. Okay. And how did you become aware that  
24 your license got suspended?

25 A. The New York City Transit Authority runs

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1 periodically, like every year or whatever it is,  
2 your license. I came into work one day, one of my  
3 supervisors called me in and said, "Yo, dude, your  
4 license is suspended. You better go take care of  
5 this."

6 I went and took care of it.

7 Q. So how long had it been suspended, do  
8 you know?

9 A. I do not know.

10 Q. Okay.

11 A. I do not know.

12 Q. So your understanding is that someone in  
13 New York City Transit was doing an update check on  
14 you, after you were already driving for them;  
15 right?

16 A. Right.

17 Q. They find out about the suspension.  
18 They relayed that to you?

19 A. Right.

20 Q. And you went and cleaned it up?

21 A. Right.

22 Q. Okay. What did you have to do to clean  
23 it up?

24 A. I had to pay a fine.

25 Q. Is that indicated on here somewhere?

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1 A. Give me one second. I don't believe  
2 it is.

3 Q. Do you remember how much the fine was?

4 A. No, sir.

5 Q. Okay. Now, let's go back to the cell  
6 phone conviction.

7 Is it against New York law to talk on a  
8 cell phone while operating a vehicle?

9 A. Yes.

10 Q. Were you, in fact, doing that?

11 A. Actually, I was parked and my car was  
12 running, and that's why I got the ticket.

13 Q. But you were talking on a cell phone  
14 while your car was running?

15 A. Parked.

16 Q. Okay. As long as we're talking about  
17 cell phones, what's the policy at Michelangelo or  
18 Silverado with regards --

19 A. No cell phones while -- I'm sorry.

20 Q. While you were there.

21 A. No cell phones while you're operating  
22 the bus.

23 Q. And when it says "no cell phones,"  
24 does that mean you were supposed to turn the cell  
25 phone off?



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1 A. I don't know.

2 Q. In other words, if you have a cell phone  
3 in your pocket, you're not using it, but you can  
4 still feel it vibrate sometimes, depending on the  
5 setting, if an incoming message is coming in.

6 Are you with me so far?

7 A. I hear what you're saying. I don't know  
8 if that's a question or not.

9 Q. Okay. The question is: Is that  
10 allowed?

11 A. No, sir.

12 Q. So you're supposed to have the cell  
13 phone turned off?

14 A. You're not supposed to have your cell  
15 phone on you.

16 Q. Where are you supposed to put it?

17 A. I don't know. Wherever you need to  
18 put it.

19 Q. Somewhere in the bus, I assume?

20 A. Right.

21 Q. Okay. Where was your practice to put  
22 the cell phone?

23 A. Probably in one of my -- if I had my bag  
24 with me.

25 Q. Did you have a policy?

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1 A. I'm sorry?

2 Q. You had a policy to put the cell  
3 phone away?

4 A. I did, yes, sir.

5 Q. And your policy was to put it in a bag?

6 A. Yes.

7 Q. Which bag was that?

8 A. I'm sorry?

9 Q. Which bag was that?

10 A. See, I don't know if I had it in the bag  
11 that day. Are you talking about that day?

12 Q. In general what was your policy?

13 A. Well, sometimes, if I don't know where  
14 I'm going, I have my cell phone out.

15 Q. For what reason?

16 A. GPS, the -- the map.

17 Q. Well, I thought -- on this particular  
18 day you knew where you were going?

19 A. Yes, sir.

20 Q. So you didn't have it out for that  
21 reason?

22 A. No, sir.

23 Q. So it's your understanding you can use a  
24 cell phone for GPS while you're driving the bus?

25 A. No, sir.

1 Q. Before you engage in the operation?

2 A. Correct.

3 Q. So no texting, incoming or outgoing,  
4 is allowed while you're operating the bus; is  
5 that right?

6 A. No.

7 Q. No, it's not right?

8 A. You're correct.

9 Q. Okay. And with regards to cell phones,  
10 we've been allowed to download your cell phone.

11 Did you have one cell phone or two at  
12 that period of time? Referring to April 18th, 2017.

13 A. One.

14 Q. Okay. And as we understand it, Cricket  
15 was your provider?

16 A. Yes.

17 Q. Is Cricket still your provider?

18 A. Yes.

19 Q. And you still have the same phone number  
20 that you had then?

21 A. Yes.

22 Q. And -- okay. Why don't we go through  
23 maybe another section and then we'll take a break.

24 Okay? Are you okay?

25 A. I'm great.

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1 Q. All right.

2 Have you taken any courses in  
3 aerodynamics?

4 A. No.

5 Q. Do you have any special training of any  
6 sort in aerodynamics?

7 A. No.

8 Q. Do you understand in general that a  
9 large object will alter the surrounding airflow?

10 A. I have no knowledge of that.

11 Q. Do you have any sort of understanding  
12 that a bus, if it's moving at 30, 35 miles an hour,  
13 will cause air blasts or air disturbances at the  
14 front of the bus? Have you ever heard of that?

15 A. Yes.

16 Q. You have heard of that? Okay.

17 In what respect have you heard that?

18 A. I'm sorry. Can you say that again?

19 Q. You said you have heard of that?

20 A. Of what? Of the --

21 Q. Of the bus, a large bus, is moving --  
22 strike that. Let's make it more specific for you.

23 If a J4500 is moving forward at 30,  
24 35 miles an hour, is it your understanding that  
25 there are no air blasts, some air blasts, air blasts

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1 on some occasions?

2 A. I don't -- I don't know, sir.

3 Q. Don't know one way or the other?

4 A. No, sir.

5 Q. Okay. And we've referred to a number of  
6 different types of buses that you said you drove.  
7 And I wrote down that you drove -- one was Serta;  
8 right?

9 MR. CHRISTIANSEN: Setra.

10 MR. KEMP: I started off wrong and I'm  
11 going to screw up the whole case.

12 BY MR. KEMP:

13 Q. You have driven a Setra before?

14 A. Yes.

15 Q. Is that a Setra 417?

16 A. I don't know the number. I just know  
17 it's a Setra.

18 Q. Okay. And you've also driven a Volvo?

19 A. Yes, sir.

20 Q. And what were the other -- the MCI we  
21 talked about. What were the other two?

22 A. Prevost.

23 Q. P-r-e-v-o-s-t?

24 A. Yes.

25 Q. And what else?

1 A. And Setra, Volvo. Oh, Vanhool.

2 Q. And that's spelled ...?

3 A. Vanhool, V-a-n-h-o-o-l.

4 Q. And those are the five kind of buses  
5 they had at Michelangelo when you were there?

6 A. Right, yes.

7 Q. Do they still have all five?

8 A. Yes.

9 Q. We were talking about air disturbance or  
10 air blasts potentially caused by a bus. Do you know  
11 one way or the other whether or not the air blasts  
12 or air disturbance caused by a Setra 417 is  
13 different in any way, shape or form than that caused  
14 by an MCI J4500 when you're traveling at 30,  
15 35 miles an hour?

16 MR. STEPHAN: I'm just going to make an  
17 objection to form.

18 THE WITNESS: I -- I don't know anything  
19 about that, sir.

20 BY MR. KEMP:

21 Q. So you don't know if there's a  
22 difference between the two in terms of air blasts,  
23 if they do generate air blasts?

24 A. I don't know about that.

25 Q. And would the same answer apply to the

1 Volvo, the Prevost and the Vanhool, you don't know  
2 if there's any difference, if there are air blasts?

3 A. Yeah, I don't know, sir.

4 Q. Now, assuming for the sake of argument  
5 that a J4500 does create some sort of air blast when  
6 it's traveling 30 to 35 miles an hour, at the front  
7 of the bus, and you had become aware of that fact  
8 from some -- somewhere, would you take that into  
9 consideration while you were driving?

10 MR. STEPHAN: Objection to form.

11 THE WITNESS: I -- again, I don't know  
12 anything about the wind.

13 BY MR. KEMP:

14 Q. All I'm asking is if you knew that the  
15 bus was generating air blasts, would you take that  
16 into account in your driving habits?

17 MR. STEPHAN: Same objection.

18 THE WITNESS: I don't know, sir.

19 BY MR. KEMP:

20 Q. Okay. Let me make it a little bit more  
21 specific.

22 If you knew that a bus was giving out an  
23 air blast that was, say, 10 feet -- goes out 10  
24 feet, and you were within the range of a small child  
25 or a bicyclist, for example, would you take that

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1 into account in how you drove your bus?

2 MR. STEPHAN: Objection to form.

3 THE WITNESS: I've answered it. I  
4 don't know, sir. I don't know what you want me to  
5 say, but ...

6 BY MR. KEMP:

7 Q. Is there a reason you wouldn't take that  
8 into account?

9 A. Take what into -- the wind? I don't  
10 know anything about the wind.

11 Q. Assuming for the sake of argument that  
12 someone had told you --

13 A. I couldn't -- I can't answer that  
14 question because I don't know anything about  
15 the wind and I don't know who's telling me. I don't  
16 know --

17 Q. Okay. Well, let me make it more  
18 specific then.

19 Assuming today you got a bulletin from  
20 the manufacturer of the bus that said, Our bus  
21 creates a 10-foot air blast on the front, would you  
22 take that into account when you were driving the bus  
23 tomorrow, the next day, on?

24 MR. STEPHAN: Objection to form.

25 Answer.



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1 THE WITNESS: Yes, sir.

2 BY MR. KEMP:

3 Q. And the reason you would take it into  
4 account is because why?

5 A. Because the bus manufacturer's telling  
6 me that it -- or --

7 Q. That it's a potential safety hazard; is  
8 that right?

9 A. Yeah.

10 Q. That's the reason you would take it into  
11 account, right?

12 A. I'm sorry?

13 Q. Right? That's the reason you would take  
14 it into account?

15 A. Because if that was part of my training,  
16 yeah. If that's what they told me, right.

17 Q. All right. Now let me ask you a related  
18 question.

19 Has anyone ever indicated to you that  
20 the rear tires on a bus can create a negative air  
21 situation, where people are sucked into the bus?

22 MR. STEPHAN: Objection to form.

23 BY MR. KEMP:

24 Q. Has anybody ever said that to you?

25 A. No.

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1 MR. STEPHAN: Sorry. I didn't mean to  
2 interrupt. I don't really want to keep  
3 interrupting.

4 MR. KEMP: No, you're just supposed  
5 to say "Form; foundation." That's all you've got  
6 to say.

7 MR. STEPHAN: That's all I'm doing.

8 MR. KEMP: Believe me, I do it myself.

9 MR. STEPHAN: Thank you, sir.

10 BY MR. KEMP:

11 Q. Okay. Let's just make sure we got  
12 this down.

13 So you didn't have any information from  
14 any source, including the manufacturer, that there  
15 was some sort of suction when you're driving a  
16 J4500 at 30, 35 miles an hour, that would pull  
17 objects or potentially pull objects or people into  
18 the rear wheels?

19 MR. STEPHAN: Form; foundation.

20 THE WITNESS: No.

21 BY MR. KEMP:

22 Q. And when I say "the manufacturer," I'm  
23 referring to MCI, the manufacturer of the J4500.

24 You didn't have that information?

25 A. No.

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1 Q. And in -- any source, you didn't know  
2 that from any source, right?

3 A. No.

4 Q. Now, same question that I asked before.  
5 If MCI had sent you a directive saying, Hey, you  
6 know, the rearview [sic] wheels potentially create a  
7 suction that can pull people in, would you take that  
8 into consideration in the future when you were  
9 driving the bus?

10 MR. STEPHAN: Form; foundation.

11 THE WITNESS: Yes.

12 BY MR. KEMP:

13 Q. And for the same reason; that it was a  
14 safety hazard, potential safety hazard?

15 A. Part of my training.

16 Q. Part of your training to be aware of  
17 potential safety hazards?

18 A. Correct.

19 Q. So if you knew that there were either  
20 air blasts or suction in the rear tires, you  
21 would -- you would take that into account in how you  
22 drive the bus?

23 MR. STEPHAN: Form; foundation.

24 THE WITNESS: Yes.

25 BY MR. KEMP:

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1 Q. And I asked you before if you knew of  
2 any differences between bus types with regards to  
3 air turbulence.

4 Do you know of any differences in bus  
5 types with regards to the suction, if any, in the  
6 rear tires?

7 MR. STEPHAN: Form; foundation.

8 THE WITNESS: No.

9 BY MR. KEMP:

10 Q. Do you know whether or not the  
11 manufacturer represents that a Setra 417 or  
12 Setra 500 is more aerodynamic in general than a  
13 J4500 or other buses? Do you know that one way or  
14 the other?

15 A. No, sir.

16 Q. Okay. Does your car have a proximity  
17 sensor? Referring to your 2005 Dodge.

18 A. I don't -- I don't own that anymore. I  
19 don't have a car.

20 Q. You don't have any vehicle now?

21 A. No.

22 Q. Does your wife have a car?

23 A. No.

24 Q. Do you know what proximity sensors are?

25 A. No, sir.

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1 Q. Have you driven or been in cars where a  
2 red light pops up in the rearview mirror when  
3 they're close to other vehicles or anything?

4 A. (Shakes head in the negative.)

5 Q. Haven't heard of that?

6 A. No.

7 MR. KEMP: Why don't we take our break  
8 and I'll get some boards and move to that part.

9 MR. STEPHAN: Thank you.

10 THE VIDEOGRAPHER: Going off the record.  
11 The time is 11:13.

12 (A recess taken.)

13 THE VIDEOGRAPHER: We are back on the  
14 record. The time is 11:32.

15 BY MR. KEMP:

16 Q. Okay. Mr. Hubbard, I -- in the break  
17 here I put two big charts, and I'm showing you the  
18 first one, which has Charleston, Pavilion, the Red  
19 Rock, to get you oriented with the second one, which  
20 doesn't have Charleston on it.

21 But if you'll look at both of these,  
22 you'll see that it's -- see how the vehicles are  
23 here? It's the same -- it's the same blowup, only  
24 one's a little bit bigger. Do you see what I mean?

25 And this does not purport to be the day

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1 of the accident. This is a completely different  
2 day. Okay?

3 A. Yes.

4 Q. All right. So are you oriented? You've  
5 got Charleston, Pavilion?

6 A. Yes.

7 Q. Okay. All right. Now, with regards to  
8 Charleston, I believe you said that you got off 215  
9 and went on Charleston; is that correct?

10 A. Yes.

11 Q. Okay. Was there a reason you didn't get  
12 off Sahara and come the other way?

13 A. That's -- no reason. That's just the  
14 way I take 215 to Charleston.

15 Q. And there's been some work done on the  
16 Charleston off-ramp the last couple months, I think  
17 it's ongoing, to fix it because there's been concern  
18 about it backing up. Are you aware of that, or --

19 A. No, sir.

20 Q. Now, with regards to the Sahara  
21 off-ramp, have you ever used the Sahara off-ramp to  
22 go to Red Rock?

23 A. No, sir.

24 Q. You said you've been to Red Rock before?

25 A. Yes.

1 Q. How many times do you think, before this  
2 accident?

3 A. Many, many -- many times. Because we do  
4 a lot of work there.

5 Q. And by "we" you mean the bus company?

6 A. Yes.

7 Q. The -- okay.

8 And you mean -- when you say you do a  
9 lot of work there, you pick a lot of people up there  
10 and drop a lot of people off there?

11 A. Yes.

12 Q. Is there a typical place that you pick  
13 people up and drop people off at Red Rock Casino?

14 A. Yes.

15 Q. Where is that at?

16 A. (Indicating.)

17 Q. So that would be to the south side of  
18 the east parking garage?

19 A. I'm -- I'm not familiar with south side,  
20 north side.

21 Q. Okay. All right. If -- if -- this is  
22 south. This is north. Charleston is north, right?

23 A. Yes.

24 Q. Charleston is north of Red Rock, right?  
25 Charleston Street's north of Red Rock, right?

1 A. Yeah, I'm listening to you, sir.

2 Q. Okay. And you understand Charleston  
3 runs east/west, right?

4 A. Yes.

5 Q. And the west would be this way  
6 (indicating), towards your left, and the east would  
7 be towards the right?

8 A. Yes.

9 Q. So where you drop people off would be to  
10 the south of the east parking garage, right?

11 A. Yes.

12 Q. And there appears to be some sort of  
13 porte-cochere there?

14 A. The overhang?

15 Q. Right.

16 A. Correct. Drop them right underneath  
17 here.

18 Q. So you drop them right underneath the  
19 overhang?

20 A. Correct.

21 Q. Is that where you pick people up, too?

22 A. Yes, sir.

23 Q. So when you started this trip, it was  
24 your intent to drop people off here, underneath the  
25 overhang; is that correct?



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1 A. Yes, sir.

2 Q. Okay. Now, do you know what a -- that's  
3 the wrong one.

4 Is there some sort of device on the bus  
5 that keeps track of how fast you were going?

6 A. Speedometer?

7 Q. In addition to that. Some kind of GPS  
8 monitor system of some sort?

9 A. I do not know.

10 Q. Have you ever heard of what's called a  
11 Trimble report?

12 A. Yes.

13 Q. What is a Trimble report?

14 A. I've heard of Trimble. I don't know  
15 what the report is. The Trimble is our thing that  
16 keeps our time. It's a tablet that keeps our -- the  
17 log time.

18 MR. KEMP: Can I get that marked as 3.

19 (Exhibit 3 marked.)

20 BY MR. KEMP:

21 Q. Okay. Exhibit 3, have you ever seen a  
22 document like this before?

23 A. No, sir.

24 Q. Okay. This purports to be a Trimble  
25 report that we've been provided by your employer

1 with your trip details as of the day of this  
2 accident. Okay?

3 This is the first time you've seen this?

4 A. Yes, sir.

5 Q. Did you know they were keeping this kind  
6 of information on the bus trips?

7 A. No, sir.

8 Q. All right. Now, if you take a close  
9 look at it, it says 4/18/17. That's the date,  
10 right? And then you see the time, which is 8:31.  
11 This is apparently -- or 8:28, rather -- is when you  
12 were starting the trip. And it has your route to  
13 travel, you know, where you're at.

14 Do you see that?

15 A. Yes, sir.

16 Q. Okay. And so it says, "Location: Logan  
17 Avenue, North Las Vegas."

18 Is that where you started the trip?

19 A. I started the trip at 4 -- at  
20 East Gowan.

21 Q. East Gowan? Okay.

22 A. But I don't -- I don't --

23 Q. Okay. That's the third entry there, and  
24 that references 8:31. Do you see that?

25 A. I do, but I just don't recognize the

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1 address. Because our address -- it is supposed to  
2 start where I start at, correct?

3 Q. I think it is.

4 A. The address of our depot is  
5 412 East Gowan.

6 Q. Okay. At some point it says that you  
7 got on -- and I'm referring to the 8:46 mark. Do  
8 you see where it says you got on Las Vegas Boulevard  
9 or I-15?

10 A. Yes.

11 Q. Okay. Did you get on I-15 at some point  
12 during this trip?

13 A. Yes.

14 Q. So you left the yard, you went to I-15;  
15 is that correct?

16 A. Yes.

17 Q. And when you got on I-15, did you use  
18 the Cheyenne on-ramp?

19 A. Yes.

20 Q. And then you went from I-15 to where?

21 A. To the airport, which is the  
22 Tropicana exit.

23 Q. Okay. And if you went to the Tropicana  
24 exit, why does it say in here that you were on  
25 Paradise for a period of time?

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1           A.           Right. Because you get on the Tropicana  
2 exit -- you get off the 15 at the Tropicana exit,  
3 and you take Tropicana straight up to Paradise, and  
4 you make the right on Paradise, which takes you into  
5 the airport terminals.

6           Q.           Is that your recollection of the route  
7 you took?

8           A.           That's the recollection.

9           Q.           Okay. All right. And do you see the  
10 miles-per-hour on this particular thing? It's the  
11 third column.

12          A.           Yes.

13          Q.           And according to this, you were going  
14 39 miles per hour on Paradise. Do you see that?

15          A.           Yes.

16          Q.           Is that how fast you were going on  
17 Paradise?

18          A.           I don't recall.

19          Q.           How fast is the speed limit on Paradise?

20          A.           I don't -- 40 miles an hour?

21          Q.           Do you think maybe it's 35?

22          A.           I do not recall. I thought -- I don't  
23 recall.

24          Q.           And this states that you were on  
25 Paradise at 9:02. Do you see that?

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1 A. Yes.

2 Q. Is that consistent with your  
3 recollection?

4 A. Yes.

5 Q. And you said it was a 9:30 pickup, or  
6 what did you say?

7 A. I said I didn't recall what time the  
8 pickup was.

9 Q. All right. All right. And then  
10 according to this, at 10:07 you're on Wayne Newton  
11 Boulevard. Do you see that?

12 A. Correct.

13 Q. Where is Wayne Newton Boulevard at?

14 A. That's the zero level.

15 Q. Of the airport?

16 A. Yes, sir.

17 Q. So you were still at the airport as of  
18 10:07, correct?

19 A. Yes, sir.

20 Q. Okay. And according to this you left  
21 the airport at 10:09. Do you see that?

22 A. 10:07.

23 Q. 10:07, that's when you see the bus is  
24 moving. Is that why you say 10:07?

25 A. Yes, sir.

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1 Q. Okay. And so the entry you're referring  
2 to is the one that says 10:07, 18 miles per hour, at  
3 Wayne Newton Boulevard, right?

4 A. Yes.

5 Q. Okay. So basically you left the airport  
6 at 10:07 to go to the Red Rock. Is that consistent  
7 with your memory?

8 A. Yes.

9 Q. And you've already said you don't  
10 remember how long the trip is from the airport to  
11 the Red Rock?

12 A. Yes.

13 Q. Would I be correct that it's at least a  
14 half-hour?

15 A. Yes.

16 Q. And did you have an understanding as to  
17 what these people you were picking up were doing at  
18 the Red Rock?

19 A. No.

20 Q. And more specifically, did you know that  
21 they were salespeople that were going to some sort  
22 of sales conference?

23 A. No.

24 MR. KEMP: Let me mark this as  
25 Exhibit 4.

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1 (Exhibit 4 marked.)

2 BY MR. KEMP:

3 Q. Okay. I'm handing you a document that's  
4 marked as Exhibit 4, which I don't expect you to  
5 have seen before, but this is information provided  
6 to us by Thermofisher, who was apparently the  
7 company that chartered the bus, and it has the  
8 agenda for the meetings that they are having at the  
9 Hard Rock -- excuse me, the Red Rock, on -- on the  
10 day in question. Okay?

11 So we're talking about Tuesday,  
12 April 18th, right?

13 A. Yes, sir.

14 Q. And do you see where on this agenda it  
15 refers to the sales meeting and when it starts, the  
16 team meeting? Sales activity team meeting, do you  
17 see that?

18 A. Sales activity team meeting?

19 Q. Right.

20 A. Sales advisory?

21 Q. Right.

22 A. Sales advisory committee team meeting?

23 Q. Right.

24 A. Okay.

25 Q. Do you see what the start time of

1 that is?

2 A. 9:00 a.m. to 5:00 p.m.

3 Q. Okay. Now, you left the airport at  
4 10:07. Did any of these gentlemen on the bus  
5 indicate to you that they were late for a sales  
6 meeting?

7 A. Absolutely not.

8 Q. And prior to today, you didn't know that  
9 their sales meeting was starting at 9:00 a.m.?

10 A. No, I did not.

11 MR. STEPHAN: Belated objection. Form;  
12 foundation.

13 BY MR. KEMP:

14 Q. While you were driving on the bus, did  
15 anyone indicate to you that you should speed up?

16 A. No, sir.

17 Q. And more specifically, did anyone  
18 indicate to you that you should speed up and pass  
19 the bike driver?

20 A. No, sir.

21 Q. And more specifically, did anyone, while  
22 the bus was on Charleston, say to you, Speed up and  
23 pass the bicyclist?

24 A. No, sir.

25 MR. KEMP: Eric --



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1 BY MR. KEMP:

2 Q. I want to show you a clip from  
3 Mr. Pears, who was the right front passenger, where  
4 he describes a conversation that he believes  
5 happened, okay, to see if it can refresh your  
6 recollection.

7 (Video played as follows:

8 "QUESTION: And the bus driver, he  
9 actually -- you and he -- and I know this is  
10 an unpleasant topic for you -- I know there  
11 was some discussion relative to the cyclist  
12 before the collision, between the driver, you  
13 and Mr. Plantz, correct?

14 "ANSWER: Yes.

15 "QUESTION: Tell me what that was,  
16 sir.

17 "ANSWER: We had joked about the  
18 cyclist, because the bus driver was driving  
19 very slow, and we were aware that the resort  
20 was really close. And we joked to the bus  
21 driver: Speed up and get the cyclist's heart  
22 rate up.

23 "QUESTION: Obviously -- when you say  
24 'we,' I want to understand who said that.

25 "ANSWER: So, Mike Plantz and myself.

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1 "QUESTION: And did you say that --  
2 where are you when that is said? Because, if  
3 I understand correctly, you first observed  
4 Dr. Khiabani on eastbound Charleston, riding  
5 his bike?

6 "ANSWER: That is correct, and we  
7 started joking on eastbound Charleston, and  
8 when he turned onto Pavilion.")

9 (Video stopped.)

10 BY MR. KEMP:

11 Q. Mr. Hubbard, I've shown you the clip of  
12 Mr. Pears. Do you recognize that gentleman?

13 A. I do.

14 Q. Do you recognize him as the right front  
15 passenger, or one of the front passengers?

16 A. Right. He's one of them. I don't  
17 remember if he was the one behind me or the one -- I  
18 had two people here, in each seat.

19 Q. And by "here," your left hand is the  
20 seat behind you?

21 A. One behind me, and one in the very first  
22 seat here (indicating).

23 Q. Now, I've been on the bus, and it's kind  
24 of -- the seats are kind of staggered, so the  
25 right-hand seat is not directly in line with the

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1 left-hand passenger seat. Am I right?

2 A. I believe it is directly in line with  
3 it, to my knowledge.

4 Q. All right. But in any event, you  
5 remember Mr. Pears as one of the passengers behind  
6 you, but you don't know which seat he was in?

7 A. He was in one of the front seats. I  
8 don't remember if he was in this front seat or the  
9 one behind me.

10 This is the first time I've seen that  
11 gentleman since April 18th, when this incident  
12 happened. So I really don't -- it's the first time  
13 I've seen him.

14 Q. Now, you heard his testimony that the  
15 comment was made by him or Mr. -- or the other  
16 gentleman to speed up. Did you hear his testimony  
17 just then?

18 A. I heard him say that.

19 Q. Was that a true statement?

20 A. I don't -- I don't know. I didn't hear  
21 him say it on the bus, no.

22 Q. So you didn't hear him say, "Speed up"?

23 A. No, sir.

24 Q. And he also says that the comment was  
25 made to get the cyclist's heart rate up.

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1 Did you hear him testify about that?

2 A. I heard him say that, yes, right there.

3 Q. Did that, in fact, happen?

4 A. I did not hear that.

5 Q. And is there a reason -- well, first of  
6 all, how far away would the passenger behind -- two  
7 passengers behind you be? Are we talking three or  
8 four feet?

9 A. I don't know exactly the amount of feet.  
10 I'm -- I don't know the feet, amount of feet.

11 Q. Within 5 feet, would you agree?

12 A. I don't know, sir.

13 Q. Is there any kind of reason you  
14 can think of why you wouldn't be able to hear  
15 their comment?

16 A. I wasn't listening. I was operating  
17 the bus. They were talking between themselves. I  
18 don't know.

19 Q. Okay. He said in the testimony that he  
20 was talking to you. Did you see that?

21 MR. STEPHAN: Objection; form and  
22 foundation.

23 THE WITNESS: I don't -- I didn't hear  
24 him say he was talking to me. I heard him say that  
25 he had a conversation with him and the other

1 gentleman.

2 BY MR. KEMP:

3 Q. I thought he said he joked to the  
4 driver. That's what he said.

5 A. I did not hear that, sir.

6 Q. Okay. Was there any reason, in terms of  
7 physical obstruction, like music or something, that  
8 you can think of why you wouldn't have heard his  
9 statement?

10 THE WITNESS: I -- the bus is a big bus.  
11 I didn't hear him say that.

12 BY MR. KEMP:

13 Q. Okay. All right. Now, you've already  
14 testified that you became aware of the cyclist  
15 sometime on Charleston; is that correct?

16 A. Yes.

17 Q. And according to Mr. Pears you were  
18 following him slowly for some point in time. Is  
19 that accurate?

20 A. That I was following him?

21 Q. Right.

22 A. No, that's not accurate.

23 Q. You were in your lane and he was in the  
24 bike lane?

25 A. I was operating my bus, right.

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1 Q. So you weren't following the cyclist?

2 A. I wasn't following him, no, sir.

3 Q. Okay. All right. Now, you've indicated  
4 you turned right onto South Pavilion Center,  
5 correct?

6 A. Yes.

7 Q. And during the entire time period you  
8 were on South Pavilion Center -- well, strike that.

9 On South Pavilion Center there's a bike  
10 lane, correct?

11 A. Yes.

12 Q. And then there's two lanes of travel  
13 heading to the south, correct?

14 A. Yes.

15 Q. And you were in the far right lane the  
16 entire time?

17 A. Is it okay if I stand up?

18 Q. Yeah, if you want to move the --

19 A. When you say the far right lane --

20 Q. Let me move the -- let me move the -- do  
21 you need the little one anymore?

22 A. No.

23 Q. If you need the little one back, let  
24 me know.

25 All right. We've changed directions on

1 you. So you are where Charleston is. Okay. Are

2 you --

3 A. Yes.

4 Q. Okay. Go ahead.

5 A. Right. I turned --

6 Q. Now, there's the bike lane.

7 A. Correct.

8 Q. Am I correct? That's goes all the way  
9 through to the intersection, right?

10 A. Yes, sir.

11 Q. Now, there are two lanes of travel here  
12 heading to the south?

13 A. Yes.

14 Q. Which one were you in, if any?

15 A. I was in this lane right here  
16 (indicating).

17 Q. So that would be the lane on the  
18 Red Rock or curb side, correct?

19 A. Right. Yes, right here (indicating).

20 Q. And that would be the lane -- that would  
21 be the west lane as opposed to west and east, right?

22 A. This traffic lane right here. I was in  
23 this lane right here.

24 Q. The lane with the white vehicle in it?

25 A. Yes, sir.

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1 Q. And at no time were you in the lane with  
2 the gray vehicle in it, before you went into the  
3 intersection?

4 A. No, sir.

5 Q. So I am correct?

6 A. Sorry?

7 Q. I am correct, at no time were you in  
8 that left lane until you went to the intersection?

9 A. Right. I was in this lane right here  
10 (indicating).

11 Q. Okay. Let's break it down a little bit.

12 All right. When -- at some point in  
13 time the bus was in that lane at the 300-foot mark;  
14 is that correct?

15 A. Yes, sir.

16 Q. Where is the bicycle at that time?

17 A. The bicycle at that time -- I don't see  
18 the -- the --

19 Q. Do you want the small thing?

20 MR. STEPHAN: I think he wants the  
21 smaller one where the cut-out is.

22 BY MR. KEMP:

23 Q. Hang on, Mr. Hubbard. We're not trying  
24 to trick anybody here.

25 MR. STEPHAN: Don't crush the bike.



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1 (Indicating.)

2 THE WITNESS: Right --

3 MR. STEPHAN: Wait. Just one second.

4 Okay. I'm sorry. I just wanted to make sure which  
5 corner we were working off of.

6 BY MR. KEMP:

7 Q. Okay. All right. Mr. Hubbard, at the  
8 time the bus was at the 300-foot mark, where --  
9 let's put the bus back on the 300-foot mark -- where  
10 was the bicyclist at that time?

11 A. Okay. Right. So I'm about right here  
12 then (indicating).

13 Q. That's where the 300-foot mark is?

14 A. Right.

15 Q. Where was the bike at that time?

16 A. Okay, I -- I went past the bike, so the  
17 bike --

18 Q. So at that point in time you think you'd  
19 already passed the bike?

20 A. Correct. Because I passed the bike -- I  
21 passed the bike somewhere in this area where the --  
22 this is the city bus -- where the city bus turns in  
23 at. So, yes, I passed the bus -- the bike in here,  
24 in this area (indicating), and I'm still in my lane  
25 right here.

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1 Q. Okay. All right. So you think that  
2 when the bus was at the 300-foot mark, the bike was  
3 behind you; is that correct?

4 A. Yes.

5 Q. Okay. Do you know how far behind you?

6 A. No, I don't.

7 Q. All right. But you think it's  
8 behind you?

9 MR. KEMP: What happened to the bike?

10 MR. STEPHAN: It's right there.

11 BY MR. KEMP:

12 Q. So can you put the bike behind you, and  
13 we can take a picture of this so the record's --  
14 yeah, we've got to take a picture, because they  
15 can't tell from --

16 MR. STEPHAN: Can we get a marker for  
17 the exhibit number that that picture will be, like  
18 we've done in all the prior depositions?

19 MR. KEMP: Well, we haven't done it in  
20 all the priors, but we should have.

21 MR. CHRISTIANSEN: What's the next in  
22 line, Bill?

23 MR. KEMP: Why don't we use A, B?

24 Okay. This will be A.

25 THE VIDEOGRAPHER: Do you want me to

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1 take the picture?

2 MR. KEMP: Yeah, from the top down

3 (indicating).

4 (Exhibit A marked. Photo taken by  
5 videographer.)

6 BY MR. KEMP:

7 Q. Okay. Now, can you put the bus where  
8 you were at the 250-foot mark?

9 A. (Indicating.) Still in the lane.

10 Q. And where was the bike at that time?

11 A. I do not know, sir. He was not in the  
12 bike lane. He was not in my -- my area of front of  
13 me or my area of my scan of my mirrors, just as I  
14 stated earlier, leaning into my mirrors. He was  
15 nowhere near my bus.

16 Q. So somewhere between the 250 and the 300  
17 mark you lost visibility of the bike?

18 A. Right, yes.

19 MR. KEMP: Okay. So let's just make  
20 this B. And let's leave the bike out of it, since  
21 you don't know where the bike was.

22 (Exhibit B marked. Photo taken by  
23 videographer.)

24 BY MR. KEMP:

25 Q. Okay. And now at the point where the

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1 bus is at B, approximately how fast were you going?

2 A. I've already come out the turn. I -- I  
3 thought that I was, you know, starting to speed up  
4 to about 25, but as I see here, I didn't even do  
5 over 17 miles an hour, so I was wrong in my  
6 judgment. On Charleston I didn't even do over  
7 17 miles an hour.

8 Q. According to this, you did 31 on  
9 Charleston.

10 A. I'm sorry. Not on Charleston.  
11 On Pavilion.

12 Q. According to this, it says, if I'm  
13 reading this right, it says 32.

14 A. No. Actually, I don't even see -- I'm  
15 sorry, I was on -- I was on Charleston doing 17. I  
16 don't even see a speed for Pavilion.

17 Q. Okay. Well, what's that number that I'm  
18 looking at (indicating)?

19 A. That's the distance. That's the  
20 distance, sir. If you turn the page to the first  
21 page, it will say "Distance."

22 Q. What's it say on speed? It says  
23 "Parked." Okay. All right. Fair enough.  
24 All right.

25 So at this point in time you think

1     you're going about 25?

2           A.        Again, I was -- I don't know exactly how  
3     fast I was going, but I know that I -- when you come  
4     out -- when I completed my turn, I'm going -- as I  
5     said earlier, I'm going to build up to the speed  
6     limit.

7           Q.        Okay. Now, there's been some suggestion  
8     by one of the witnesses that you attempted to turn  
9     into Red Rock prior to this particular intersection.

10          A.        That's incorrect.

11          Q.        At any time did you cross the bus into  
12     the bike lane?

13          A.        No, sir.

14          Q.        And at any time did you get into the  
15     right-hand turn lane prior -- well, at any time did  
16     you get in the right-hand turn lane?

17          A.        No, sir.

18          Q.        Okay. All right. So at the 250-foot  
19     mark you can't see the bike?

20          A.        Right. The bike is not -- it's not  
21     anywhere near me, as far as -- as far as I see.

22          Q.        And do you remember one way or the other  
23     whether there were cars in front or behind you at  
24     this point in time?

25          A.        I don't remember.

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1 Q. All right. Let's move to the 200-foot  
2 mark. If you could put the bus at that mark.

3 A. (Indicating.)

4 Q. And where was the bike at that time, if  
5 you know?

6 A. I did not see the bike.

7 MR. KEMP: Okay. So let's get a picture  
8 of that at Exhibit C.

9 (Exhibit C marked. Photo taken by  
10 videographer.)

11 BY MR. KEMP:

12 Q. Okay. So, same question. Approximately  
13 how fast were you going at this point in time?

14 A. 25.

15 Q. And same question with the cars. Do you  
16 remember one way or the other whether there were  
17 cars in front or behind you?

18 A. No, I don't.

19 Q. And the same question in the lane. Do  
20 you remember if there were any cars in the lane to  
21 the left of you?

22 A. No, I don't.

23 Q. Okay. Now, could you place the bike --  
24 or the bus, excuse me, where it was when you were at  
25 the 150-foot mark.

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1 A. (Indicating.)

2 Q. And do you know where or did you see the  
3 bike at this point in time?

4 A. No, sir.

5 MR. KEMP: Okay. And let's put D there.  
6 Go ahead.

7 (Exhibit D marked. Photo taken by  
8 videographer.)

9 BY MR. KEMP:

10 Q. All right. And same questions: Do you  
11 remember if there were cars either in the far left  
12 lane or in front or behind you?

13 A. No, sir.

14 Q. You don't remember one way or the other?

15 A. No, sir.

16 Q. All right. And could you place the bus  
17 where it was -- where you were when you were at the  
18 100-foot line.

19 A. (Indicating.)

20 Q. Okay. And is your answer the same on  
21 the bike; you don't know where it was at this point  
22 in time?

23 A. That's correct.

24 (Exhibit E marked. Photo taken by  
25 videographer.)

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1 BY MR. KEMP:

2 Q. And with regards to speed, how fast do  
3 you think you were going at that point in time?

4 A. About 25.

5 Q. And with regards to cars either in the  
6 left lane or in front of you or behind you, what, if  
7 anything, do you remember?

8 A. I do not.

9 Q. You don't remember one way or the other  
10 whether there were any cars?

11 A. No, sir.

12 Q. Okay. All right. It may be probably  
13 better to go around on that side. I think it would  
14 be easier to reach.

15 Can you place the bus where you were  
16 when you were at the 50-foot mark.

17 A. (Indicating.)

18 Q. Is the same answer true, you don't know  
19 where the bike is at this point in time?

20 A. Yes, sir.

21 (Exhibit F marked. Photo taken by  
22 videographer.)

23 BY MR. KEMP:

24 Q. And with regards to cars, do you know if  
25 there were cars in the left-hand lane or in front or



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1 behind you at this point in time?

2 A. I don't recall.

3 Q. Do you remember seeing some  
4 motorcyclists on -- kitty-corner from you, on the  
5 south- --

6 A. No.

7 Q. -- west portion of the intersection?

8 A. No.

9 Q. Okay. All right. And I think I asked  
10 you, how fast were you going at this point in time?

11 A. 25.

12 Q. All right. Now, you're approaching the  
13 intersection at this point in time?

14 A. Yes, sir.

15 Q. Is the light red or green?

16 A. It was green.

17 Q. So was your intent to go through the  
18 intersection?

19 A. Yes, sir, straight.

20 Q. Now, can you place the bus at the zero  
21 mark, where you were?

22 (Exhibit G marked. Photo taken by  
23 videographer.)

24 BY MR. KEMP:

25 Q. And did you see the bike at this period

1 of time?

2 A. No, sir.

3 Q. And same question about cars on the --  
4 in the left-hand travel lane or in front of you or  
5 behind you. You don't know if there were any cars  
6 one way or the other?

7 A. I don't recall.

8 Q. So basically you did not see the bike  
9 from the 300-foot mark until the zero-foot mark?

10 A. No, I didn't -- I didn't even see him  
11 here, sir.

12 Q. But my statement's true, you didn't see  
13 him from zero to 300; is that correct?

14 A. Right.

15 Q. Did there come a time that you saw  
16 the bike?

17 A. Correct.

18 Q. And where was the bus when you saw  
19 the bike?

20 A. I would say about -- maybe right here  
21 (indicating).

22 Q. Okay. Now, you -- okay.

23 A. I don't know how straight I've got it,  
24 but I'm going straight.

25 Q. Can you put where the bike is when you

1 see him?

2 A. (Indicating.) He was coming into that  
3 area right here.

4 MR. STEPHAN: You have to put it down.

5 THE WITNESS: (Indicating.)

6 BY MR. KEMP:

7 Q. And when you say "that area right  
8 here" --

9 MR. STEPHAN: What exhibit number?

10 BY MR. KEMP:

11 Q. I'm having a tough time seeing where you  
12 put the bike.

13 MR. KEMP: First of all, let's get a  
14 picture here.

15 MR. FREEMAN: It's turned around, too.

16 MR. KEMP: Yeah, before we start taking  
17 pictures, let's get the --

18 (Exhibit H marked. Photo taken by  
19 videographer.)

20 BY MR. KEMP:

21 Q. Now, when we're in position H, how fast  
22 are you going?

23 A. At this time, I'm -- like now I'm  
24 going -- I'm veering over --

25 Q. No. Right at the time when you first

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1     **see the bike.**

2           A.        I'm hitting -- right when I'm seeing the  
3     bike, I'm hitting my brakes and going that way.

4           Q.        But before you hit your brakes --

5           A.        I was about 25 or less.

6           Q.        Now, you said you first saw the bike --  
7     and I think you told previous counsel that you don't  
8     know where the bike hit the bus?

9           A.        I'm sorry?

10          Q.        Do you know how --

11          A.        I don't know.

12          Q.        So you don't know if he hit the front of  
13     the bus, the side of the bus?

14          A.        Well, I know -- I don't know. I don't  
15     know. This is the front, right here. So I know he  
16     didn't hit this, because I went like that  
17     (indicating).

18          Q.        Okay. So it did not hit the front of  
19     the bus?

20          A.        No, sir.

21          Q.        And you don't think it hit the back of  
22     the bus?

23          A.        I don't know.

24          Q.        All right. Now, so let's put it back to  
25     where you first saw the bike, before you took -- I

1 guess you're saying you took evasive maneuvers,  
2 right?

3 A. I did. (Indicating.)

4 Q. Okay. That's the approximate point that  
5 you think you first saw the bike?

6 A. Yes.

7 Q. Okay. And we've already established  
8 that you didn't see the bike from the 300-foot mark  
9 to that. Where do you think the bike came from?

10 A. I don't know. I -- I don't know.

11 Q. And since you were traveling about  
12 25 miles an hour, do you think the bike was going  
13 faster than that?

14 A. Again, I don't know, sir.

15 Q. You've already said you were past the  
16 bike, so he had to catch you from behind?

17 A. I don't know. I don't know.

18 Q. Why don't you sit down, sir. Okay.

19 Now, what is your understanding of what  
20 the law is in Nevada when a motor vehicle, including  
21 buses, is overtaking a bicycle?

22 A. That you must give it 3 feet and -- as  
23 you pass it, you must give it 3 feet.

24 Q. Do you have any other understanding?

25 A. Sorry?

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1 Q. Do you have any other understanding?

2 A. No, sir.

3 Q. And more specifically, do you know  
4 whether or not you are also required to get into the  
5 far left lane when there's two lanes of travel by a  
6 bike lane?

7 A. I don't know that.

8 Q. Don't know? This is the first you've  
9 heard of that?

10 A. I'm sorry?

11 Q. You don't know if that's the law?

12 A. I don't know if that's the law.

13 Q. So let me read you a Nevada Revised  
14 Statute and tell me if this is the first you've  
15 heard of that.

16 Okay. This would be NRS 484B.270,  
17 Section 2. Quote, "When overtaking or passing a  
18 bicycle or electric bicycle proceeding in the same  
19 direction, the driver of a motor vehicle shall  
20 exercise due care and; (a) If there is more than one  
21 lane for traffic proceeding in the same direction,  
22 move the vehicle to the lane to the immediate left,  
23 if the lane is available and moving into the lane is  
24 reasonably safe," unquote.

25 Is this the first you've heard that

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1 that's the law in Nevada?

2 A. Yes.

3 Q. Yes, this is the first you've heard  
4 of that?

5 A. As far as what you're reading there.

6 Q. So you've never heard that before?

7 A. I mean, we've discussed it, but that's  
8 the first I've heard of it.

9 Q. Don't tell me what you've talked to your  
10 attorney about. Let me ask it differently.

11 Prior to Monday of this week, did you  
12 know that this was the law in the state of Nevada?

13 A. No, sir, I did not.

14 Q. And so Michelangelo or Ryan's Express  
15 did not provide you information that this was the  
16 law in Nevada?

17 A. I did not know that.

18 Q. All right. So if you had known this was  
19 the law, would you have gotten into the  
20 left-hand lane?

21 MR. STEPHAN: Objection; form and  
22 foundation.

23 THE WITNESS: Where do you mean at?

24 BY MR. KEMP:

25 Q. If you had known prior to this accident,

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1 April 18th, 2017, that this was the law in the state  
2 of Nevada, would you have followed the law and  
3 gotten into the left-hand lane?

4 A. Back here, you mean?

5 Q. No. I mean when you were coming down  
6 Pavilion.

7 A. Yes, I would have, of course, yes.

8 Q. Do you think that would have prevented  
9 this accident from happening?

10 MR. STEPHAN: Objection; form and  
11 foundation.

12 THE WITNESS: I don't know, sir.

13 BY MR. KEMP:

14 Q. Now, there's another provision in the  
15 law that says if there's only one lane, you have  
16 to give a safe distance, which must be not less than  
17 3 feet -- strike that.

18 Subsection 5 says that you're supposed  
19 to exercise due care and, quote, "give an audible  
20 warning with a horn of the vehicle if appropriate  
21 and when necessary to avoid such a collision,"  
22 unquote.

23 First of all, did you know that there  
24 was a provision in the law requiring an audible  
25 warning under certain circumstances?



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1 A. You mean blowing your horn?

2 Q. Right.

3 A. I mean, if -- I did not know that.

4 Q. And did you blow the horn at any time in  
5 this trip?

6 A. No, sir.

7 Q. Is there a reason you didn't blow  
8 the horn?

9 A. I wasn't anywhere near the bicycle to  
10 have to blow the horn. You mean at that point?

11 Q. At any point between 300 and zero --

12 A. No, I did not blow my horn.

13 Q. Did you blow the horn when you passed  
14 the bicyclist?

15 A. No, I did not.

16 Q. Is there a reason you didn't do that?

17 A. Because I was more than 4 feet away  
18 from him.

19 Q. All right. Now, we've already talked  
20 about the five different buses that you drive, five  
21 different kinds?

22 A. Yes, sir.

23 Q. Do those buses have different visibility  
24 on the right side in terms of what's blocked and how  
25 low the window goes and -- are there differences

1     between the buses?

2           A.       There are differences.

3           Q.       And with regards to buses, which has, in  
4     your view, the best right-hand visibility and which  
5     has the worst?

6           A.       I really don't know which has the best  
7     or the worst. You asked -- I don't know, sir.

8           Q.       But you do recognize there's  
9     differences?

10          A.       Yeah. When I'm talking about  
11     differences, I'm talking about the door, mostly  
12     the door area. Because the doors are made  
13     differently. Some --

14          Q.       Some doors are see-through and some  
15     are not?

16          A.       Well, some have more window, some have  
17     less window. Something like that.

18          Q.       So some have more visibility and some  
19     have more obstruction?

20          A.       Right. More window, less window, yeah.

21          Q.       And this particular bus, the J4500, does  
22     that have more or less, if you can recall?

23          A.       That has the whole -- as you see on the  
24     picture, it has the whole visible window right here.  
25     Very big window.

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1 Q. And would I be correct that the  
2 visibility line of the Volvo drops 6 or 8 inches  
3 below the visibility line of a J4500?

4 A. I don't know -- I don't know how much it  
5 drops.

6 Q. And with regards to the right pillar, is  
7 the J4500 different than some of the other buses?

8 A. I don't know.

9 Q. Earlier we talked about the  
10 rock-and-roll technique?

11 A. Yes, sir.

12 Q. Do you use that more for any particular  
13 type of bus than --

14 A. I use it for every single bus I'm in,  
15 and even when I was driving my personal car.

16 Q. Now, with regards to the mirrors on  
17 buses, some mirrors have buses [sic] coming over  
18 from the top and some mirrors are mounted on the  
19 side, correct?

20 A. Yes.

21 Q. So, for example, I think the Volvo has  
22 mirrors that come down from the top?

23 A. Yes.

24 Q. And is there any particular term you use  
25 for mirrors that come down from the top as opposed

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1 to the mirrors that we had on the J4500?

2 A. I don't know any term.

3 Q. Do you have any preference for one type  
4 of mirror as opposed to the other type of mirror?

5 A. I do not.

6 Q. And have you experienced any difference  
7 in the visibility you get from one type of mirror as  
8 opposed to the other type of mirror?

9 A. No, sir.

10 Q. And more specifically, do you know if  
11 there's better right-hand visibility from a Volvo  
12 mirror coming over the top than from an MCI J4500?

13 A. I don't know the difference.

14 Q. Now, you said you drove a municipal bus  
15 for 12 years?

16 A. Almost, yes.

17 Q. What kind of a municipal bus did the  
18 New York City Transit Authority have?

19 A. Flyers, hybrids, RTCs.

20 Q. And Flyers would be the bus made by  
21 New Flyer?

22 A. Right. They're the newer ones, right.

23 Q. Now, counsel alluded to this earlier,  
24 that there may be some sort of safety device that's  
25 available for buses with regards to its rearview

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1     tires, and you said you hadn't heard of anything  
2     like that?

3             A.         I haven't.

4                     MR. KEMP:   Okay.   Yeah.   Eric, can I  
5     have the stunt video, stuntman video.

6     BY MR. KEMP:

7             Q.         I'm going to ask you to watch a video  
8     that is produced -- or I shouldn't say produced --  
9     provided by a manufacturer of a device called an  
10    S-1 Gard.   I'll just ask you to take a look at it.

11                     (Video played.)

12                     MR. KEMP:   That's enough, Eric.

13    BY MR. KEMP:

14             Q.         In case you want to look at it, that's  
15    an S-1 Gard sitting in that box over there.

16                     So does this refresh your recollection  
17    as to ever becoming aware of an S-1 Gard?

18             A.         No, sir.

19             Q.         And you said that you drove  
20    Flyers, right?

21             A.         Yes.

22             Q.         And we've had testimony from an engineer  
23    for Flyers about this S-1 Gard.   In fact, he gave a  
24    testimonial to it.

25                     Do you know whether or not any of the

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1 New York Transit buses had S-1 Gards on them while  
2 you were there?

3 A. I don't know, sir.

4 Q. How about New Jersey?

5 A. I don't know about New Jersey.

6 Q. Okay. You've seen the S-1 Gard in the  
7 video, correct? You saw the video?

8 A. That you just showed?

9 Q. Yeah.

10 A. I didn't even notice that there was  
11 something on there. I don't know. I just saw the  
12 man on the ground, you know.

13 Q. Do you think it would be a good idea to  
14 have buses with safety devices that push people out  
15 of the way before they're run over by rearview  
16 tires?

17 MR. STEPHAN: Objection; form and  
18 foundation.

19 THE WITNESS: I -- I have no idea,  
20 because I don't -- I just drive the bus. I don't  
21 know about nothing like that. I don't know about  
22 that.

23 BY MR. KEMP:

24 Q. Is there any reason you can think of not  
25 to put a safety feature like that on a bus?

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1 MR. STEPHAN: Objection; form and  
2 foundation.

3 THE WITNESS: I don't know, sir.

4 BY MR. KEMP:

5 Q. Prior to you taking the bus out on a  
6 particular day, do you do some sort of inspection on  
7 the bus?

8 A. Yeah, pre-trip.

9 Q. It's called a pre-trip inspection?

10 A. Yes, pre- and post-trip.

11 Q. Okay. Can you tell me just in general  
12 what you do?

13 A. Well, the pre-trip?

14 Q. Right.

15 A. It consists of, you start at the front  
16 of the bus and I check my windshield wipers. I work  
17 my way to the door area and I check my -- my door  
18 area. I work my way to the front tire, check my lug  
19 nuts, make sure that those little arrow things are  
20 not one turned this way or the other way, make sure  
21 they are all lined up.

22 Again, work my way to the back rear  
23 tires, doing the same thing, make sure those -- the  
24 lug nuts are all there and that those little  
25 triangle things or whatever you call them are all

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1 lined up and not, you know, off-line. Also checking  
2 the tire that's on the inside as best I can.  
3 Working my way to the back of the bus and, you know,  
4 checking the back of the bus as well.

5 And same thing on the other side, as far  
6 as the tires and the -- and the -- both tires on the  
7 front and the back, and the -- when I get back to  
8 the front, I get in the bus. I check my mirrors,  
9 make sure that they're working properly. Make sure  
10 that they're not loose or shaky, because some buses,  
11 you get on them when you -- when you -- the mirrors  
12 are not -- are broken. You have to go get it fixed  
13 with maintenance.

14 Check my mirrors. Walk back on the  
15 inside of the bus, check the seats to make sure  
16 they're all good and intact.

17 Check my fire exit windows, make sure  
18 that they're operational and can be used if  
19 necessary. And check my horn.

20 And that's, in a roundabout way,  
21 basically what a pre-trip is.

22 Q. Let's talk a little bit about the  
23 pre-inspection examination of the rear tires, okay,  
24 that you've already alluded to?

25 A. Uh-huh.



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1 Q. So you said you look at the lug bolts,  
2 is that what you said?

3 A. Well, the nuts on them, the nuts, and  
4 then the triangle things that are on them, to make  
5 sure that they're lined up and not turned -- that  
6 way you can tell whether one is loose or not, or  
7 broken.

8 Q. Okay. I'm kind of lost when you say --  
9 let's put a picture in so we can make it easier for  
10 everybody.

11 MR. KEMP: Can we mark that as the next  
12 in order.

13 (Exhibit 5 marked.)

14 BY MR. KEMP:

15 Q. Okay. I'm showing you a picture of a  
16 tire on a bus, which I think is a rear tire. But in  
17 any event, so you would inspect the lug nuts which  
18 are in the center of the tire there?

19 A. Yeah, you're -- all these nuts right  
20 here (indicating). And also, if they have them on  
21 there, which most buses do, they have a -- they're  
22 usually orange, and they're on each of these big  
23 nuts, and they're lined the same way. And if one  
24 is, like, turned, you know, off-line, you want to  
25 take it to the maintenance and make sure that they

1 take a peek at that.

2 Q. And why is that?

3 A. Because it could be that one of the nuts  
4 is loose or something. I'm not much of a mechanic,  
5 but I was just told that if those -- those orange  
6 things that are on each of these big nuts here have  
7 to be lined up the same way and facing, you know,  
8 lined up. If they're not, if one is turned up or  
9 down or out of line, you need to take it to the  
10 maintenance and have them look at it.

11 I don't exactly know exactly what the  
12 exact reason is, but that's what I was trained  
13 to do.

14 Q. Now, in the far right of the picture  
15 there appears to be an object that drapes, you know,  
16 in front of this tire, I think there's another tire.  
17 It's kind of barely depicted. What is that thing  
18 called?

19 A. I -- I don't know what it's called, but  
20 I guess it's for the mud or something. I don't know  
21 what it's called.

22 Q. Have you heard the term "mud flap"  
23 before?

24 A. Yeah.

25 Q. Is that what it's called?

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1 A. I think so, yeah.

2 Q. Is the mud flap one of the things you  
3 also inspect?

4 A. Right, yes. That's part of your tire  
5 inspection, correct.

6 Q. Now, between the tire and the mud flap,  
7 do you see that other object that's hanging down  
8 from the bus, that steel thing?

9 A. I don't know what that is, sir.

10 Q. You do recognize that as a part that's  
11 on buses?

12 A. Again -- I don't know what it is,  
13 though, yeah.

14 Q. Okay. Is the picture, as I've got it on  
15 Exhibit 5, is that the way you usually see that  
16 steel thing -- in other words, bent towards the --  
17 that particular wheel -- or do you usually see it  
18 straight up and down, perpendicular?

19 A. I -- I don't know.

20 Q. All right.

21 MR. KEMP: Let me show you another  
22 picture that's been marked for identification as  
23 Number 6 that was taken by the coroner at the time  
24 of the incident.

25 (Exhibit 6 marked.)

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1 BY MR. KEMP:

2 Q. Do you see how there's some red material  
3 on the tires?

4 A. Yes, sir.

5 Q. Is that something you would observe  
6 during a pre-inspection examination?

7 A. Yes.

8 Q. If you saw red material like that on the  
9 tires, would you drive the bus out of the yard?

10 A. Well, that's -- that's like -- that's  
11 paint or -- sometimes red and sometimes yellow.

12 Q. So it wouldn't bother you to have that  
13 on the tires leaving the yard?

14 A. No, because we -- it's -- drivers  
15 sometimes tend to get too close to the curb and the  
16 paint comes off on the tire. You can tell that it's  
17 paint. As long as -- as long as, what I explained  
18 to you earlier about these tires, that's what I was  
19 trained to pull it in for. Not if there's paint,  
20 from people getting too close to the curb.

21 Now, if the tire is low or something  
22 like that, if you see something, you know, like  
23 that.

24 But a paint smudge, no, that's not a  
25 reason to pull the bus -- to take the bus out of

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1 service.

2 Q. You said you can tell that's paint.

3 Other people have suggested that is blood.

4 A. I'm sorry?

5 Q. Other people have suggested that that is  
6 blood.

7 A. Oh, I'm not -- you're talking about this  
8 picture, particularly this picture here?

9 Q. Yes, this picture.

10 A. Oh, no, no. I'm not talking about this  
11 picture. In general, I'm talking about, you said if  
12 I saw a bus in the yard with paint -- with red on  
13 it, would I take it out of service, and my answer  
14 was, no, I would not.

15 I didn't know that you were referring  
16 to this.

17 Q. I didn't say take it out of service. I  
18 said is that something that you would remedy before  
19 you left the yard. In other words, if you saw  
20 discoloration on the tire, would you wash it off  
21 before you left the yard?

22 A. No. Because like I said before, I know  
23 that it was one of the drivers got too close to the  
24 curb and it was either red or yellow paint.

25 Q. Okay. So focusing more specifically on

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1 Exhibit 6, you don't know one way or the other what  
2 the red substance is on these tires?

3 A. I do not.

4 Q. Now, earlier I talked to you about the  
5 steel object next to the mud flap. Do you see that  
6 in Exhibit 6?

7 A. Yes.

8 Q. And do you see how close it is to the  
9 tire there?

10 A. Yes.

11 Q. Is that too close?

12 A. I don't know, sir. I don't know. I  
13 don't know about that.

14 Q. If you had seen that tire in that -- or  
15 that object in that configuration, what, if  
16 anything, would you have done, again, during the  
17 pre-inspection back at the yard?

18 A. I -- I don't -- I was not told to do  
19 anything. That's just a mud flap, I guess. You're  
20 talking about the mud flap thing?

21 Q. No. I'm talking about the piece of  
22 steel between the mud flap and the tire.

23 A. I don't know what that is, sir.

24 Q. Okay. And you don't know whether the --  
25 as it's depicted in Exhibit 6, it's in its correct

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1 and normal position or whether it's been bent?

2 A. I don't know.

3 (Exhibit 7 marked.)

4 BY MR. KEMP:

5 Q. Okay. This is a picture taken of the  
6 right front of the bus, behind the right front tire,  
7 by the coroner after the accident. Okay?

8 A. Yes.

9 Q. And see that smudge mark there?

10 A. Yes.

11 Q. Okay. Is that something you would  
12 observe or not observe on a pre-trip inspection?

13 A. You would -- you would observe that.

14 Q. Why is that?

15 A. You would see it. You look for -- part  
16 of your pre-trip is looking for, you know, stuff  
17 that's -- that could be caused by damage to the bus,  
18 so you would look for that.

19 Q. And if you had observed it prior to the  
20 trip, what, if anything, would you have done?

21 A. If I saw that, I would write it on my --  
22 on my -- there's a paper that you write on, your  
23 pre-trip.

24 Q. So there's some sort of pre-trip  
25 inspection report?

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1 A. Right.

2 Q. What's that called?

3 A. It's called your pre-trip sheet or, you  
4 know -- and it has, you know, the bus side view, not  
5 a picture, but just like a, you know, bus side view,  
6 back. And you can put on -- it has where you put  
7 scratches, dents, such as that, scuff marks. And  
8 that would be a scuff mark.

9 Q. And you want to note scuff marks and  
10 dents so you don't get accused of making them during  
11 your trip?

12 A. Right.

13 Q. So that's an important thing for a  
14 driver to do, to note scuff marks and dents?

15 A. Yes.

16 Q. Okay. So you think if you had seen a  
17 dent -- a scuff mark such as depicted in Exhibit 7,  
18 you would have put it on the pre-trip sheet; is that  
19 correct?

20 A. Well, I don't know how -- I don't know  
21 how -- this is blown up, so I don't know if it's --  
22 how big it is. Because if it's a little tiny mark,  
23 no, I wouldn't have put it there. I can't -- I  
24 can't really tell, because this is a blown-up  
25 picture.



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1 Q. Well, it's as long as the light. You  
2 can see that, right?

3 A. Yes. I -- yeah.

4 Q. So you would have or you wouldn't have  
5 put this down?

6 A. For all I know I may have. Do you have  
7 my pre-trip from that day?

8 Q. No, I don't think I've got your  
9 pre-trip.

10 A. Because I could have marked that down.  
11 I don't know. I don't remember.

12 Q. That's a fair point. All right.

13 Now, it's been suggested by some people  
14 that this is the point where the bicycle first  
15 impacted the bus. Okay? Has anyone ever indicated  
16 that to you?

17 A. No, sir.

18 Q. Do you know one way or the other whether  
19 this -- this scuff mark that I've got in Exhibit 7  
20 is the first area where the bicycle hit the bus?

21 A. I don't know.

22 Q. You don't know one way or the other?

23 A. No, sir.

24 Q. Okay. Do you have any reason to dispute  
25 that this was the area where the bicycle first hit

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1 the bus?

2 A. I don't know if it is or isn't or is.

3 Q. Now, there was a video taken from the  
4 top of Red Rock Casino that shows parts, but not  
5 all, of the accident. Have you seen that before?

6 A. (Nods head in the affirmative.)

7 Yes, sir.

8 Q. When did you see that?

9 A. Yesterday.

10 Q. Now, in fact, there were two videos.  
11 There was one taken from the roof of the casino  
12 looking down, and then there was one taken by a  
13 bystander that's a little more graphic.

14 Have you seen both videos?

15 A. Yes, sir.

16 Q. You saw them both for the first time  
17 yesterday?

18 A. Yes, sir.

19 Q. Okay. I'm going to refer to the one  
20 that was taken from the top of the roof as the Red  
21 Rock video, and then I'm going to refer to the other  
22 one as the gardener's video. Okay? Okay?

23 A. Yes.

24 Q. Now, with regards to the Red Rock video,  
25 did that change, in any way, shape or form, the way

1 you remember the accident, when you viewed it  
2 yesterday?

3 A. I'm sorry. Can you say that again?

4 Q. Did that change, in any way, shape or  
5 form, the way you remembered the accident, when you  
6 viewed the video yesterday?

7 A. No.

8 Q. That was consistent with what you  
9 remember?

10 A. Yes.

11 Q. And do you remember in that video that  
12 there were no cars, when your bus came through, for  
13 quite some time period either before or after the  
14 bus? Do you remember that?

15 A. No, I don't remember that.

16 Q. Okay. I prepared a still -- why don't  
17 we get the first one. This is a still that's been  
18 produced from the Red Rock video that doesn't show  
19 the bus. I'm just trying to orientate you here.  
20 And this line would be the line dividing the left  
21 travel lane and the right travel lane, and then the  
22 bus -- bus lane -- excuse me, bike lane is over  
23 here.

24 Are you with me so far?

25 A. Yes.

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1 MR. KEMP: Okay. Can I have the other  
2 one?

3 BY MR. KEMP:

4 Q. I'd be happy to show you the video to  
5 confirm this, if you need it, Mr. Hubbard.

6 All right. Do you see in this -- in  
7 this depiction that -- where the bus is  
8 (indicating)? See the bus coming in the picture?

9 Let me try to move it a little closer  
10 towards you. Do you see where the bus is coming  
11 into the picture there?

12 A. Yes.

13 Q. And do you see where the travel  
14 demarcation of the left and right lane is?

15 A. I see the yellow line.

16 Q. So you see that the bus is on the  
17 right-hand side of the yellow line?

18 A. Yes.

19 Q. So assuming for the sake of argument  
20 that this yellow line is correctly showing the  
21 difference between the left lane and the right lane,  
22 is this consistent with what you told me?

23 A. That I was in this lane here, yes, sir.

24 Q. So the entire bus was in the right-hand  
25 lane when you were approaching the intersection; is

1 that right?

2 A. Yes.

3 Q. Now, at this point in time, I  
4 think you've already said you don't know where the  
5 bike was?

6 A. Correct, because I haven't crossed here  
7 yet, no.

8 Q. So when you say "crossed here," you mean  
9 crossed the crosswalk?

10 A. Right.

11 Q. So it wasn't until after you had crossed  
12 the crosswalk that you first observed the bicycle?

13 A. Right, coming across -- right.

14 Q. And let me rephrase that.

15 You first observed the bicycle back in  
16 Charleston, but this is when you first saw him again  
17 between the 300-foot mark and the zero mark, as  
18 we've established before?

19 A. Right.

20 Q. Okay. So you first saw him when the  
21 bike was -- when the bus was on the other side of  
22 this crosswalk?

23 A. Just like -- just like that is right  
24 there, sir (indicating).

25 Q. Well, in the -- the thing we take the