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.

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

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	Defendants Filed Under Seal on March 26, 2019			
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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

	Discovery on Order Shortening Time (FILED UNDER SEAL)			
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 Forseeability 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

side working with engineering. So I was sort of used by both departments. I wasn't formally brought on to engineering -- I don't have a date for that when it was formal. When a new manager came in, saw me signing off drawings, the background of that is they wanted a professional engineer to sign off the structural drawings, and at that point when that manager came in, he physically moved me up to engineering, and changed my job description, but I think that was 2009. This letter I believe I wrote when I was in the transition, working essentially for both departments, for manufacturing engineering as well as the engineering department.

Q Okay. Is there a reason that this letter says "New Flyer Engineering maintains" as opposed to some other entity?

A Yeah, they would say that because I wrote it wearing my engineering hat. It is written from an engineering department.

Q Was this a formal position at New Flyer engineering at this point in time?

A Yes.

Q Has this position ever changed up to and including today?

A Not that I'm aware of, no.

002501

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release, the S-1 Gard, so I don't know how many went on the bus afterwards.

BY MR. KEMP:

Q Okay. Do you know what percentage of buses New Flyer equipped with S-1 Gards?

A No.

Q Was it over ten per cent? Does that help?

MR. ROBERTS: Objection. Foundation.

A I don't know. Like my responsibility was the steel frame on the bus.

BY MR. KEMP:

Q Okay. So to sum up, you know that New Flyer was putting the S-1 Gards on buses, you just don't know how many. Is that correct?

A Yes.

Q Now, the letter says chassis or suspension of the coach. Do you see that?

A Yes.

Q Could you explain what you mean by the term "the coach" in this letter?

A The chassis or suspension of the coach; so the chassis of the coach goes through a 12 year, 500,000-mile simulated service life, and that's the -- that's the warranty that New Flyer offers. So this letter was meant to state that adding an S-1 Gard to a

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you started -- or learned when you started at New Flyer in 2004?

A I wouldn't say it was taught. It was just a general understanding for any vehicle that there is a risk of being run over by a tire.

Q All right. And when you viewed the video, did you see how the S-1 Gard pushed the bicyclist away from the tire?

A Yes, pushed the person, the physical person. Instead of being driven over, it bumped them out of the way.

Q And how would you describe that?

A It is a mechanical barrier between the tire and the individual.

Q And that's a safety feature; correct?

A Yes.

Q And would that be a good safety feature for buses in general?

A Again, it is my personal opinion; I would say yes. In terms of in general, the transit authorities in North America dictate what they want to see on their coaches. So ultimately they are the ones that would tell New Flyer that they want it or not. But if it was just me, then sure, any time you can improve safety you would want to consider that, for

002503

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EXHIBIT 27

DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI AND ARIA KHIABANI, MINORS BY AND THROUGH THEIR NATURAL MOTHER, KATAYOUN BARIN, ET AL., Defendants. vs. MOTOR COACH INDUSTRIES, INC., A DELAWARE CORPORATION, ET AL., Defendants.	No. A-17-755997-C

002505

VIDEOTAPED DEPOSITION OF MARK B. BARRON, a witness herein, noticed by Kemp, Jones & Coulthard, at 523 West 6th Street, Los Angeles, California, at 2:18 p.m., on Tuesday, September 26, 2017, before Jana Ruiz, CSR 12837.

Job No.: 418647

002505

15:19 **Q. Based on your experience as the inventor of the S-1 Gard, do you believe the S-1 Gard would still be effective if the bus was moving 20 miles per hour?**

A. It's not my professional opinion.

15:19 **Q. You leave that question up to a forensic engineer?**

A. Yes.

Q. Could you give me an estimate of the total number of buses to date with S-1 Gards?

15:20 A. In the country, U.S.?

Q. In the world.

A. In the world, over 50,000; 30 to 60, you know, it's hard to -- 40 to 60.

Q. If you could pull Exhibit 3 which is the

15:20 **product information.**

A. Uh-huh.

Product information? I said 30,000 --

Q. There it is. It's on the bottom.

A. Oh, okay.

15:21 **Q. If you could flip to page P01320 and the top of the page says "Major Transit Fleets Worldwide Retrofitting with the S-1 Gard."**

A. Yes.

Q. "Transit agencies and bus OEMs around the world

15:21 **have made the decision to install the S-1 Gard."**

002506

002506

16:21 **Q. -- getting on and getting off; correct?**

A. Right.

Q. And then the tour buses, the buses that go to Disney World and that kind of thing, same thing, they

16:22 **operate with a lot of people around?**

A. Yeah, parking lots.

Q. Okay.

But in terms of coaches that go over the road from city to city, few stops, high speeds, their method of

16:22 **operation is different than the transit bus?**

MR. PEPPERMAN: Form. Foundation.

THE WITNESS: Yes.

MR. TERRY:

Q. And they don't encounter as many people as

16:22 **often mingling with the bus?**

MR. PEPPERMAN: Form. Foundation.

THE WITNESS: Less riders.

MR. TERRY: Okay.

Q. Are you aware of any studies similar to the

16:22 **ones that were performed for the transit authority, like Report 125, that deal with motor coaches that operate as motor coaches?**

A. Well, the Fox News clip on the S-1 Gard where there was an actor that was killed by a motor coach in

16:22 New York -- you want to know whether accidents near it?

002507

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16:48

MR. PEPPERMAN:

Q. I was a little confused when you said that 50 percent of transit authorities have an interest in protecting its riding public.

16:48

What do you mean by that?

A. Well, their incentive, they don't have the incentive and they don't have -- the incentive to do it, and you know, they know their family member's not going to be run over. So there's no urgency, and they have

16:48

other things on their agenda. So it's kind of like in low priority in this.

The risk manager's job at transit authorities are to put glass guards on buses for graffiti, preventing graffiti, and they're paid by the taxpayers, and one

16:49

accident pays for all the guards and they're just not doing their job.

Q. Do you believe that the S-1 Gard should be standard equipment on all buses?

A. In the U.S. or --

16:49

Q. Yes.

A. The U.S., yes.

Q. Okay.

Based on your experience in the industry, do you believe that the safety benefits of an S-1 Gard outweigh

16:49

the cost to equip the buses --

16:49 A. Absolutely, absolutely.

Q. And when you say "absolutely," does that -- does it make a difference if it's a transit bus manufacturer or a motor coach manufacturer?

16:50 A. Depending on how many buses they have. If it's less buses, then less parts. I'd say it's the same.

Q. And, in fact, you have offered the S-1 Gard for sale to Motor Coach Industries; true?

A. If that's the name of the company. It's a

16:50 little murky. Could be -- sounds like the company. Pablo sounds -- Pablo, which is Ferrone. It sounds like, yes.

002509

Q. Do you believe that you have offered -- that you met with representatives or subsidiaries of

16:50 **Motor Coach Industries and offered to sell the S-1 Gard to the manufacturer?**

A. Not sell. At that time, I believe I was going to do -- because safety, it's hard to sell.

I wanted to let them -- give them parts at no cost

16:51 to get them on the buses, so it would become industry-mandated for the motor coach industry, because nobody puts money out. The companies aren't going to just write you a check.

So the plan was with Chris Ferrone and I was to

16:51 offer them the parts at no cost, my red -- and that once

16:51 their user started using it, you know, they'd put it on and get it jump-started, then they would be the main distributor. We would give them the rights to that, I believe.

16:51 It was something like that, but we didn't go to there to sell, like, "Here, I'm going to sell you a hundred S-1 Gards."

Q. So you offered the S-1 Gard to Motor Coach Industries or a subsidiary for free?

16:51 A. Well, not free. There was some type of --

MR. TERRY: Objection. Form.

THE WITNESS: -- strategy, marketing strategy that I always come up with.

MR. PEPPERMAN:

16:52 **Q. Is the strategy to provide them with the parts, let them try out --**

A. Yes.

Q. -- get them to like to use the product and then want to purchase more?

16:52 A. Right, to get them --

MR. TERRY: Objection. Form.

THE WITNESS: -- some type of marketing strategy.

MR. PEPPERMAN:

Q. And MCI or its subsidiary rejected that offer?

16:52 A. Yes.

002510

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16:52 **Q. They didn't even want to try them out for free?**

MR. TERRY: Objection. Form.

THE WITNESS: I gave them evaluation parts. Yeah, I'd say no.

16:52 MR. PEPPERMAN: Okay.

I have nothing further.

-EXAMINATION-

16:52 BY MR. TERRY:

Q. The meeting that you had with Pablo --

A. Oh, I'm sorry.

Q. That's all right.

The meeting you had with Pablo, he was Universal Coach Parts; correct?

16:52

A. I believe so.

Q. And that's a company that sells bus parts?

A. Yes.

Q. And you wanted him to become a distributor of the S-1 Gard?

16:52

A. Yes.

Q. So that he would include it in the inventory of things that he sells; right?

A. Uh-huh.

16:52 **Q. Yes?**

002512

EXHIBIT 28

S-1 GARD®

DANGERZONE DEFLECTOR

Installed on over 30,000 buses worldwide since 1993

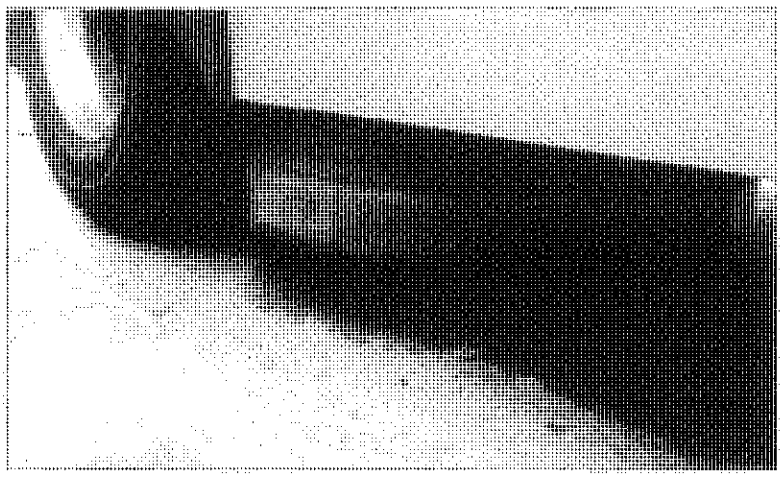
002513

002513

PRODUCT INFORMATION

P01316

S-1 GARD® DANGERZONE DEFLECTOR



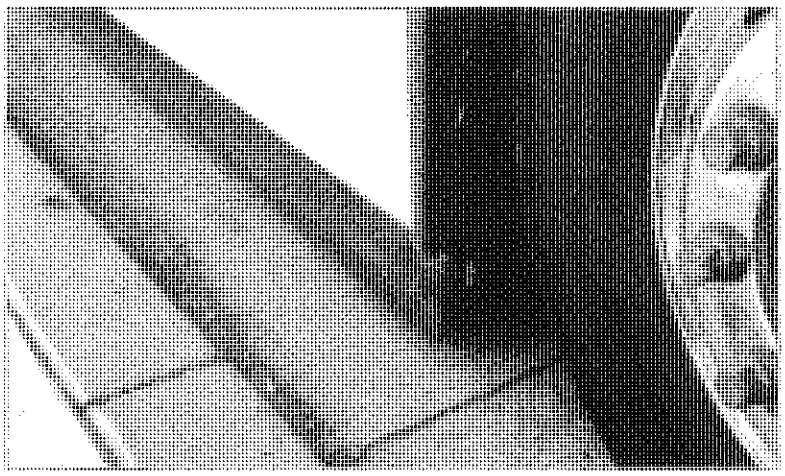
The **S-1 GARD Dangerzone Deflector** is a securely mounted maintenance-free barrier installed in front of the right rear wheels of a transit bus or motor coach, designed to deflect a person out of the path of the wheels, preventing catastrophic injury or death.

Its patented new impact-resistant receiver design, guaranteed for the life of the bus, has improved energy absorption and is engineered to withstand poor road conditions and operator's abuse.

The S-1 GARD Dangerzone Deflector and S-1 GARD Dangerzone Barrier are cast using only the best BASF polyurethane available and will last for as long as any transit bus is in service. Each part is custom fit to accommodate any bus configuration.

002514

S-1 GARD® DANGERZONE BARRIER

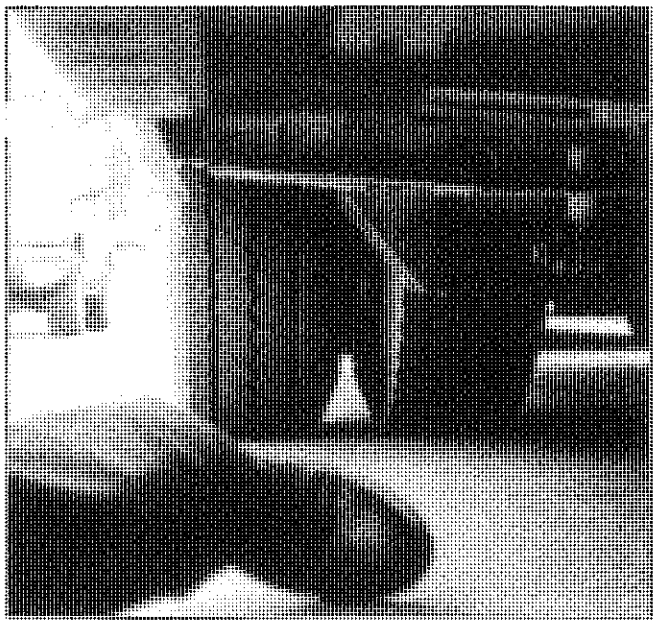


Ideal for low-floor buses, the **S-1 GARD Dangerzone Barrier** covers the entire gap between the front and rear wheels.

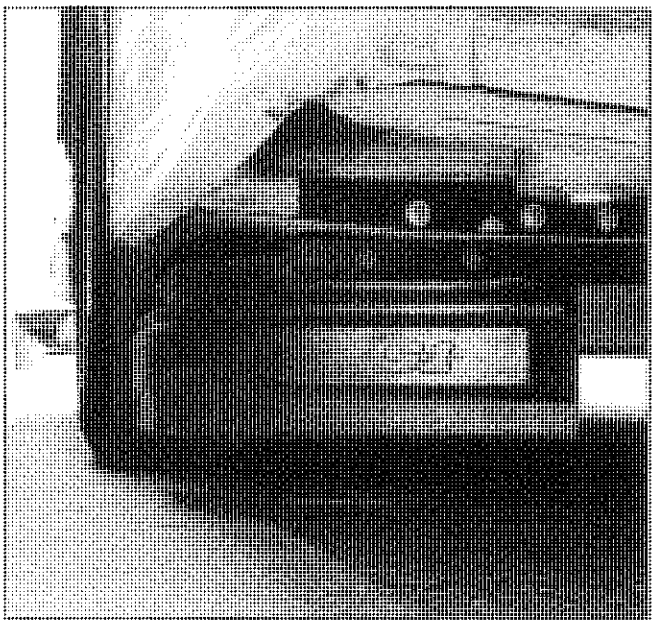
Cast from heavy-duty polyurethane, the Barrier is strong enough to deflect pedestrians and cyclists from the path of the wheels, yet flexible enough to withstand impact from road obstacles.

A patented energy absorption mounting receiver allows for barrier movement against impact for, is customizable to fit any compatible frame, and is guaranteed for the life of the bus.

002514



Danger Zone Exposed



Danger Zone Eliminated

THE S-1 GARD IS WORKING

"We seldom have a need to do any maintenance on the S-1 GARD."
- Tom Barrio, Vehicle Maintenance Manager, Montebello Bus Lines, Montebello, CA

002515

.n pleased to report that since the complete installation of the product six years ago, we have not had a right rear tire fatality. In addition, one preventable variable we did not factor in was the efficacy of the guard to apparently warn pedestrians to stand clear of the rear tires."
- Fred Goodine, Assistant General Manager, Safety and Risk Management, WMATA, Washington, D.C.

002515

Washington Metropolitan Transit Authority (WMATA) in Washington, D.C., installed the S-1 GARD in 2000. At the time, WMATA was averaging two severe accidents or fatalities per year; since installing the S-1 GARD, WMATA has reported zero right rear wheel incidents.

"In continuous service through our harsh winters for 12 years, the S-1 GARD is still in good condition firmly attached."
- Daniel G. Holter, General Manager, Rochester City Lines, Rochester, MN

Capital Metro Transit in Austin, TX, installed the S-1 GARD in 2005. Prior to installation, Capital Metro had been averaging one severe accident or fatality every two years. Since installing the S-1 GARD, Capital Metro has reported zero right rear wheel incidents.

ENDORSED BY PEDESTRIAN AND CYCLIST ADVOCATES NATIONWIDE

P01318

CONTROL CASUALTY LOSSES: INSTALL A PRODUCT PROVEN TO SAVE LIVES

With the continued rise of fuel prices, transit properties all over North America have continued to see increased ridership, which will demand more emphasis on safety. Because of the increased safety risks, transit properties' exposure rate is increasing by the day.

In order to reduce mounting casualty losses to risk reserves and insurance pools, major transit properties have installed the S-1 GARD. The S-1 GARD has been a proven safety device for over two decades and your entire fleet can be retrofitted for less than the cost of one settlement. The S-1 GARD will:

- **Prevent Catastrophic Losses.** Fatalities, dismemberment, and degloving injuries can result in verdicts and settlements in excess of $5 million.
- **Reduce Legal Costs.** Attorney costs in catastrophic cases can exceed $250,000.
- **Avoid Adverse Publicity.** Press coverage of accidents and large settlements are damaging to the image of your transit system.
- **Improve Public Image.** Dedication ceremonies upon installation demonstrate the concern of your transit property for public safety.
- **Minimize Exposure of your Drivers.** Even non-fault accidents causing serious injuries have resulted in operators being unable to return to duty.
- **Improve Loss Experience.** For favorable underwriting and rating at time of renewal.

002516

Metropolitan Transport Authority
METRO
LOS ANGELES
Division 8

S-1 GARD SAVES LIFE

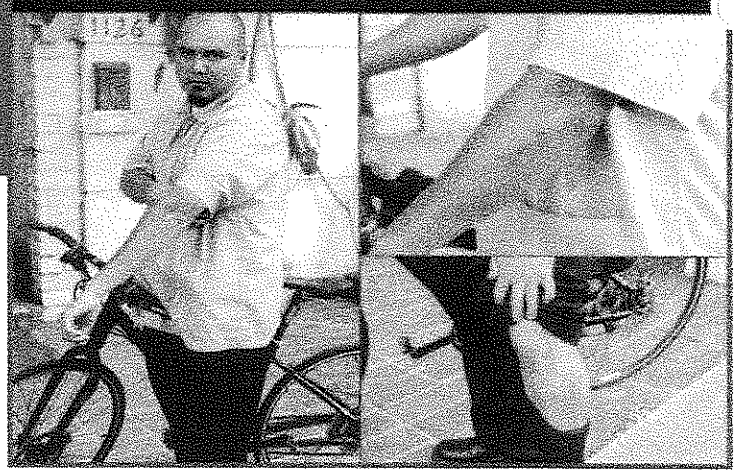
Date: **April 9, 2003 4:30 p.m.**

Location: **Wilshire Blvd., West Los Angeles, California**

Accident: **Bicyclist caught under bus and saved by S-1 GARD**

Result: **Minor scrapes, abrasions, and bruises**

PHOTOS OF INJURIES



Full LAPD report available upon request

002516

www.s1gard.com

P01319

MAJOR TRANSIT FLEETS WORLDWIDE RETROFITTING WITH THE S-1 GARD

Transit agencies and bus OEMs around the world have made the decision to install the S-1 GARD:

Transit Agencies including:

- LAMTA (Los Angeles, CA)
- SFMTA (San Francisco, CA)
- Keolis Sverige (Stockholm, Sweden)
- CapMetro (Austin, TX)
- WMATA (Washington, D.C.)
- MTA (Baltimore, MD)
- Riverside TA (Riverside, CA)
- Santa Clara Valley TA (San Jose, CA)
- Montebello Bus Lines (Montebello, CA)
- Big Blue Bus (Santa Monica, CA)
- Norwalk Transit System (Norwalk, CA)
- SDMTS (San Diego, CA)
- AC Transit (Oakland, CA)
- Glendale Beeline (Glendale, CA)
- Sun Tran (Tucson, AZ)
- OTS (Honolulu, Hawaii)

Bus OEMs including:

- New Flyer Industries
- Gillig Corp.
- Daimler Buses
- North American Bus Industries (NABI)
- Volvo Buses
- Veolia Transportation
- Fiba Canning
- Orion Bus
- ElDorado National
- MAN Bus (Sweden)

... As well as major theme parks and international airport shuttles.

002517

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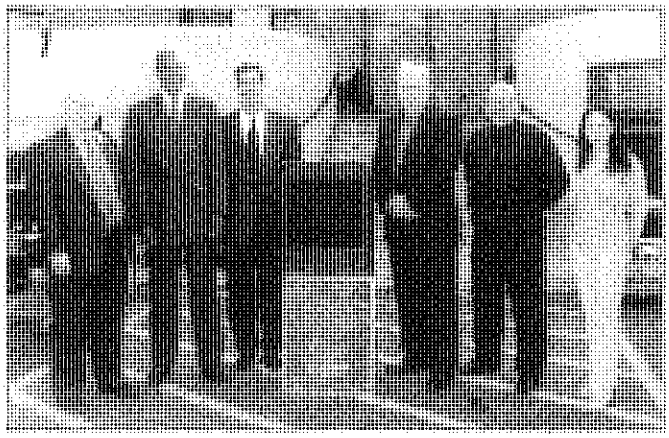
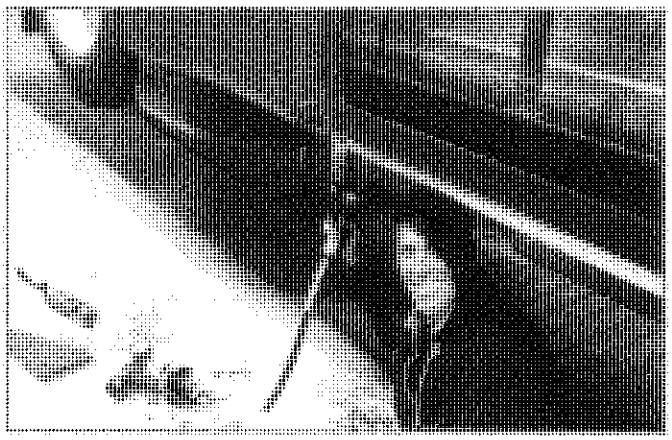


Dedication Ceremony, City of Santa Monica



PTS representative inspecting installation on buses in Stockholm

P01320

WORLDWIDE MANUFACTURER OF THE S-1 GARD

TPC, INC.
Fontana, California
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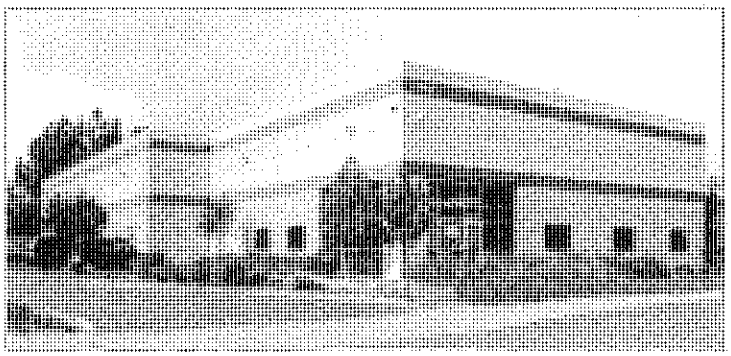
Since 1980, Turret Punch Company (TPC) has provided its customers with the highest grade urethane products with on-time deliveries, at a highly competitive price. TPC's state of the art equipment handles runs of all sizes, from single parts to mass production.



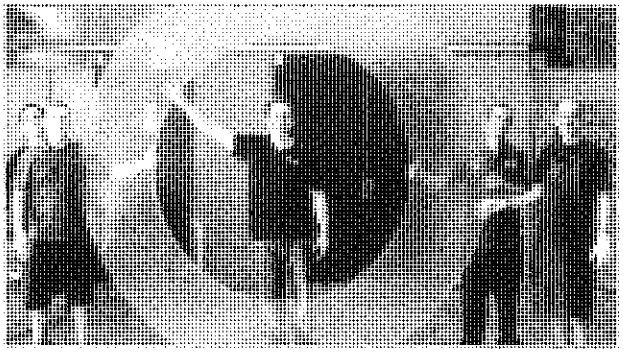


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EXHIBIT 29

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

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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.

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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.

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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.

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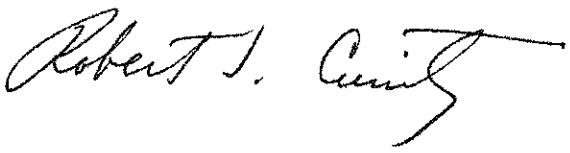
h. Within a reasonable degree of scientific certainty in my field of Human Factors, it is my opinion that the failure of Motor Coach Industries, Inc. to warn of the Hazard and the means to reduce Risk, created an unreasonable Danger on the highways where it is foreseeable that buses will be passing bicyclists 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.



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Robert J. Cunitz, Ph.D. CHFP

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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

OPPOSITION TO "MOTION FOR SUMMARY JUDGMENT ON FORESEEABILITY OF BUS INTERACTION WITH PEDESTRIANS OR BICYCLISTS (INCLUDING SUDDEN BICYCLE MOVEMENT)"

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This motion borders on silly. Plaintiffs begin and end with an undeniable observation—that bicycles might collide with buses on busy city streets—and then ask to avoid their burden of proof as if that conclusion follows from the observation. It does not, as set out below. Material questions of fact preclude summary judgment on the issue of reasonable foreseeability.

Let us be clear, moreover, even if the Court were to exclude the driver's reckless conduct for purposes of refuting the fourth element of plaintiffs' strict liability claim—*i.e.*, "that the product was used in a manner which was reasonably foreseeable by the defendant"—or to an affirmative defense of misuse, the driver's actions would still come into evidence. Evidence that is inadmissible for one purpose still may be admissible for another. NRS 47.110. Here, the driver's expectations, awareness and choices bear directly on the element of causation..

I.

THERE IS A MATERIAL QUESTION OF FACT REGARDING WHETHER THE PRODUCT WAS USED IN A REASONABLY FORESEEABLE MANNER, PRECLUDING SUMMARY JUDGMENT

Plaintiffs first mischaracterize the issues in this case by implying they turn on the frivolous observation that "it is foreseeable that bicyclists may interact with buses, including that bikes may veer into buses." (Mot. at 7:10.) Plaintiffs then leap from that obvious premise—assuming "foreseeable" is construed in a simple, lay sense of the word— to ***three incorrect conclusions***: (a) that a manufacturer, therefore, has a duty to protect the bicyclist from injury when he veers into the bus; (b) that the specific hazardous conditions theorized by their experts (e.g., "air blasts" or "rear tire suction" supposedly resulting the vehicle's aerodynamic properties) are both valid and "reasonably foreseeable" in the legal sense; and (c) that no evidence exists to refute their prima facie burden of demonstrating that the motor coach "was used in a manner that was reasonably foreseeable."[1] The motion is baseless.

[1] NEVADA JURY INSTRUCTIONS – Civil, Instruction No. 7 PL. 3 (elements of a product liability claim).

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A. Mere Foreseeability of the Collision Does Not Create the Duty that Plaintiffs Assume

To begin with, MCI is not obligated to design a vehicle that would prevent injury to a bicyclist upon impact just because such collisions may be foreseeable. Basing their motion on *Andrews v. Harley Davidson, Inc.*,[2] plaintiffs imply that the crashworthiness doctrine applies. It doesn't. Plaintiffs do not claim the motor coach is uncrashworthy, but rather that it is crash-incompatible with a bicycle. The crashworthiness doctrine does not extend to crash incompatibility.

In *Andrews v. Harley Davidson, Inc.*, the Nevada Supreme Court adopted the crashworthiness (or "second collision" or "enhancement") doctrine, which imposes liability on a manufacturer for design defects that exacerbate injuries sustained in an accident even if the defects did not cause the collision in the first place. 106 Nev. at 537, 796 P.2d at 1095 (1990). The notion rests on the practicality that users drive their vehicles on busy streets where accidents frequently occur and, therefore, the design of the vehicle should account for both ordinary travel as well as the risks to occupants in an ordinary collision. *Id*. At very least, the design of the vehicle should not enhance occupants' injuries beyond what would normally occur. *Id*. (gas tank on motorcycle separated on impact), *Curtis v. General Motors Corporation,* 649 F.2d 808, 810 (10th Cir. 1981) ("The critical question is whether, under all of the surrounding circumstances, a manufacturer has created an unreasonable risk of increasing the harm in the event of the statistically inevitable collision."). And because an occupant depends on the vehicle to transport him safely, it does not matter for strict liability purposes whether negligence contributed to the accident.

Importantly, the crashworthiness ("second collision" or "enhancement") doctrine applies to the *driver* and, perhaps, occupants of the allegedly defective vehicle. *See Andrews v. Harley Davidson, Inc.*, 106 Nev. at 537, 796 P.2d at 1095 (policy crashworthiness doctrine is to encourage manufacturers "to design a vehicle which will protect a *driver* in an accident" (emphasis added)). It

[2] 106 Nev. 533, 537, 796 P.2d 1092, 1095 (1990).

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does ***not*** compel the manufacturer to protect "third parties or nonusers when the design defect is not the cause of the accident." *De Veer v. Landrover*, 2001 WL 34354946, *2 (Cal. App. 2001). The vehicle need not be "crash compatible" with bystanders. *Id*. at *5.

A decision of the California Court of Appeal is particularly instructive. In *De Veer v. Land Rover North America, Inc.*, the plaintiff sued the manufacturer of the vehicle that collided with her vehicle. 2001 WL 34354946 (Cal. App. 2001). The plaintiff contended that "the front end of the 1988 Range Rover is defective because its overly aggressive design increased the risk of serious physical injury to other motorists, beyond those normally and reasonably expected in side-impact collisions." *Id.* at *1. Specifically, she claimed enhanced injuries because the Land Rover's "front end . . . was too stiff . . . causing her vehicle to absorb too much energy," and its "front bumper was too high," making it unreasonably dangerous to smaller vehicles in a collision. *Id*.

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

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

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

Here, the gravamen of one of the plaintiff's criticisms is that the Motor Coach was defective because it lacked an S-1 Gard to prevent such enhancement injuries after a bicyclist or pedestrian collides with it. But the crashworthiness doctrine simply does not apply to a crash-compatibility scenario, even if the possibility of collision is foreseeable. Thus, plaintiffs' reliance on *Andrews v.*

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Harley Davidson, Inc. is misplaced.

B. Assuming the Jury Accepts that the Alleged Defects Theorized by Plaintiffs' Experts Even Exist, the Jury Must Then Decide What Was Reasonably Foreseeable

The Court generally must leave questions of reasonableness and foreseeability to the jurors. And there is no justification to take that determination from them here.

1. Plaintiffs Improperly Portray their Experts' Dubious Theories as if they Were Fact

It is disturbing that plaintiffs have set out the theories of their experts (dedicating almost 50% of their points and authorities) as if they were undisputed fact. First, as the conclusions of those experts certainly are disputed, it is improper to assert them as the basis for partial summary judgment. Secondly, the expert opinion they rely on is insubstantial.

For example, plaintiffs rely on the expert opinion of James Green to claim that a "low-pressure gradient" caused by rotation of the rear tires effectively sucked Dr. Khiabani down into the wheel well. The motion quotes at length from one 5-page article that Mr. Green wrote in 2001 for the "journal" of his professional association, the National Academy of Forensic Engineers, in which he claims that many cyclist-pedestrian accidents result from individuals' "being dragged to the rotating wheel by the lower pressure gradient." (Exhibit A.) Mr. Green reached that conclusion based on (i) one data set that he took from a pamphlet published by the San Diego Transportation Corp. in 1993, and his own "interviewing of transit personnel,"[3] and (ii) his calculations with an equation he claimed applied the Bernoulli principle. (Exbibit A, at 2.) And, in fact, this is the only published article that anyone has produced discussing a Bernoulli effect vis-à-vis tire wheel wells, as Mr. Green hypothesizes. (Mr. Green later revised that same article with a few additions.)

Amusingly, one quick "peer" review of Mr. Green's article took place in this case, by another of plaintiffs' own experts, Dr. Robert Breidenthal, Jr., who earned his Ph.D. from

[3] Exhibit A, at 6, endnotes 2 and 4.

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California Institute of Technology and is a professor at the University of Washington.[4] (Exhibit B at 4-5.) During Breidenthal's deposition, he was shown the calculations in Mr. Green's article. Prof. Breidenthal opined that Mr. Green was "completely wrong":

> Q. I'm going to show you what has been marked as Exhibit Number 5, which I'll represent to you to be an article published in that journal. . . . Have you ever seen that before?
>
> A. I can't recall. I saw something. It might have been simply Dr. Funk's report. I don't believe I've seen this before, but that may just be confusing it with something I saw in Dr. Funk's report.
>
> * * *
>
> Q. Do you see the formula there for Bernoulli's theorem, or principle?
>
> A. Yes.
>
> Q. Is that a correct statement of the formula?
>
> A. Well, the equation itself has two typos in it, and the short answer is no. It's completely wrong. Not even partial credit.

(Depo. of Robert Beidenthal, Exhibit B at 71-72.)[5] In fact, Mr. Green's analysis in the 2001 article reminded him of how his "[s]tudents typically screw up applications of Bernoulli's principle." (Id. at 73.)

Similarly, plaintiffs refer to testing done on the S-1 Gard but fail to mention that they have never been tested at collision speeds even approaching the speed of impact in this case. Plaintiffs' allusions to their experts' theories as if they were fact is both inappropriate and unavailing.

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[4]Mr. Green obtained a B.S. in physical science and an M.S. in environmental and occupational health from East Tennessee State University, as well as another M.S. in civil engineering from the University of Tennessee.

[5] Mr. Green three times uses the Latin letter "p" to refer to pressure, but in two instances it should be the Greek letter rho ("ρ") for density. *Compare* HUBERT CHANSON, HYDRAULICS OF OPEN CHANNEL FLOW: AN INTRODUCTION xliv, 17, 22 (2004) (correctly stating Bernoulli's principle). That Mr. Green proceeds from this equation without really applying its elements—and thus leaving the pressure-for-density switch unremarked—simply underscores the dubiety of his application.

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2. The Question of Reasonable Foreseeability Must be Left to the Jury

Even in a strict liability case, reasonable foreseeability is almost always left to the jury, in part because it also is imbedded in essential element of causation. *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P .3d 11 (2001).[6] "Foreseeability in the context of proximate cause is normally a question of fact for the jury; it may be decided as a question of law only if under the undisputed facts there is no room for a reasonable difference of opinion." 63 AM. JUR. 2D *Products Liability* § 23; *see also* NEVADA JURY INSTRUCTIONS – Civil, Instruction No. 7 PL. 3 (citing *Allison v. Merck and Co., Inc*., 110 Nev. 762, 767, 878 P.2d 948, 952 (1994) and *Shoshone Coca Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 443, 420 P.2d 855, 858 (1966)).

Juries decide reasonable foreseeability on a case-by-case basis because "the mere fact that the accident occurred is no evidence that the accident was foreseeable." AM. L. PROD. LIAB. 3D § 4:7 ("Legal cause--Foreseeability"). Reasonable foreseeability "is measured by common sense and common experience." *Id.* "Consequences that are possible, but are not normal, natural, or probable, are not foreseeable." *Id., see also Kosmynka v. Polaris Indus., Inc*., 462 F.3d 74 (2d Cir. 2006) (foreseeability requires "knowledge of a danger, not merely possible, but probable."). Thus, courts are extremely hesitant to grant summary judgment on the question of reasonable foreseeability because they recognize that "*with the benefit of hindsight*, any accident could be foreseeable" and they do "not interpret foreseeability as imposing a requirement on the

---

[6] Plaintiffs who plead either negligence or strict liability are obligated to demonstrate causation. *Price v. Blaine Kern Artista, Inc*., 111 Nev. 515, 518, 893 P.2d 367, 369 (1995) (causation is germane to both negligence and strict tort liability). "Causation consists of two components: actual cause and proximate cause." *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P .3d 11 (2001). "To demonstrate actual cause with respect to [the] product, [plaintiffs] ha[ve] to prove that, but for [defect in the subject product] [the harm] would not have occurred." *Id.* "The second component, proximate cause, is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which that conduct created." *Id.*

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manufacturer to use a crystal ball." *Id*. (emphasis added). Were it otherwise, "the imposition of strict products liability could result in a manufacturer's becoming an insurer for every injury that may result from its product." *Id*. at 206, 527 A.2d at 1341 (emphasis added).

Even applying the crashworthiness exception, moreover, implicates other evaluations of reasonableness into the equation—*i.e.*, whether the manufacturer used "reasonable care in designing a vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." *Piltch v. Fort Motor Company*, 11 F.Supp.3d 884, 889 (N.D. Ind. 2014); *Andrews v. Harley Davidson, Inc*., 106 Nev. 533, 537, 796 P.2d 1092, 1095 (1990) (crashworthiness doctrine encourages manufacturers "to do all they *reasonably* can do to design a vehicle which will protect a driver in an accident" (emphasis added).)

C. A Reasonable Jury Could Conclude that the Driver Did Not Use the Motor Coach in a Reasonably Foreseeable Manner

Plaintiffs seem to suggest by their quotation of *Andrews v. Harley Davidson, Inc.* that MCI should be precluded from disputing whether the conduct of the driver was reasonably foreseeable. Parties cannot obtain partial summary judgment, however, by being cagy about the actual relief they seek and failing to confront any of the evidence that even might preclude summary judgment. *See* NRCP 56(c). This failure of clarity and transparency alone prevents the Court from granting this motion.

Sufficient evidence of driver misuse, along with reasonable inferences that can be drawn therefrom, precludes the Court from taking the question of reasonable foreseeability from jury. Even assuming that mere negligence cannot constitute unforeseeable misuse, a reasonable jury could find that the driver's conduct rose to the level of ***willfulness, gross carelessness or recklessness***, which would constitute unforeseeable misuse. *Jonas v. Isuzu Motors Ltd*., 210 F. Supp. 2d 1373, 1380 (M.D. Ga. 2002), *aff'd*, 58 F. App'x 837 (11th Cir. 2003) ("Isuzu has no duty to guard against grossly careless misuse of a vehicle by a reckless driver and has no duty to design an automobile incapable of causing injury"); *Simpson v. Standard Container Co*., 527 A.2d 1337, 1341 (Md. Ct. Spec. App. 1987) (a manufacturer "need not anticipate and provide for ... use of the

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product which constitutes wilful or reckless misconduct or an invitation of injury"); *Smith ex rel. Smith v. Bryco Arms*, 33 P.3d 638 (N.M. 2001) (manufacturer not required to foresee willful or reckless use); *Reott v. Asia Trend, Inc*., 55 A.3d 1088, 1096–97 (Pa. 2012) ("highly reckless" conduct may constitute product misuse); *Gangi v. Sears, Roebuck & Co*., 360 A.2d 907, 909 (Super. Ct. 1976) (distinguishing between "garden variety of negligence would not insulate the defendants from liability" and "misuse of the equipment in the category of willful or reckless misconduct"). And that is consistent with Nevada law. *Cf. Andrews v. Harley Davidson, Inc*., 106 Nev. 533, 537, 796 P.2d 1092, 1095 (1990) ("Negligent driving of a vehicle is foreseeable risk… * * * . . . it is foreseeable that a plaintiff, who is intoxicated, will drive negligently"); *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979) (distinguishing between mere negligence and willful and wantonness in analogous context of several liability).

Use of a product will be deemed reckless if the user "knew or had reason to know of facts which created a high degree of risk of physical harm to himself or that he deliberately proceeded to act, or failed to act, in conscious disregard of that risk." *Reott v. Asia Trend, Inc*., 55 A.3d at 1097

Here, a reasonable jury could conclude that ***the driver knew*** that his proximity to Dr. Khiabani facilitated a high degree of risk but ***deliberately failed to act*** in conscious disregard of that risk. First, the driver knew that Dr. Khiabani was in the bike lane only feet away from him, even if there were moments that he did not know exactly where along the length of the motor coach he was. (Depo of Edward Hubbard, Exhibit C at 21-23.) As a professional driver, the jury could reasonably infer that he was aware of the risk this posed—indeed, it is intuitive to every driver who has been nervous having to pass a bicycle in busy traffic. Second, the driver knew there was a lane to his left that he could have used to give Dr. Khiabani wider berth. *(Id.* at 118-19, 165-66, 218-19.) The chose not to use it. Third, a traffic statute [NRS 484B.270] even required the driver to move into that left hand lane. While the he denied knowledge of the law during his deposition, the

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jury may reasonably infer that he was being untruthful.[7] Fourth, the jury could even conclude that he intentionally stayed close to Dr. Khiabani to be funny. One passenger who sat immediately behind the driver, Robert Pears, testified that he and another passenger were having a "conversation" with the driver (depo. of Robert Pears, Exhibit D, at 177-79), a back-and-forth "discussion" in which they encouraged the driver to get closer to Dr. Khiabani to "get the cyclist's heart rate up":

> Q. And the bus driver, he actually -- you and he and I know this isn't a pleasant thought but I know there was some discussion relative to the cyclist before the collision between the driver, you, and Mr. Plantz; fair?
>
> A. Yes.
>
> Q. Tell me what that was, sir.
>
> A. We had joked about the cyclist because the bus driver was driving very slow. And we were aware that the resort was really close. And we joked to the bus driver, "Speed up and get the cyclist's heart rate up."
>
> Q. Obviously you—when you say "we," I want to understand. Who said that?
>
> A. So Mike Plantz and myself.
>
> Q. And did you say that -- where are you when that is said? Because if I understand correctly, you first observed Dr. Khiabani on eastbound Charleston riding his bike?
>
> A. That is correct. And we start joking on eastbound Charleston

[7] Everyone is presumed to know the law. *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *see Whiterock v. State*, 112 Nev. 775, 782, 918 P.2d 1309, 1314 (1996) ("mistake or ignorance of the law is not a defense"). This is true even in a civil context. *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972); *Hicks v. State*, 419 S.W.3d 555, 558 (Tex. App. 2013). This includes professional drivers, who are presumed to know the traffic laws that apply to them. *See e.g., Mallery v. Int'l Harvester Co.*, 690 So. 2d 765, 768 (La. App. 1996); *see Alfonso v. Robinson*, 514 S.E.2d 615, 618 (Va. 1999).

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and when he turned on to Pavilion.

Q. So he turned southbound or right?

A. Correct. And he was blocking, so we couldn't go around him initially. And the bus driver was—had commented that he was staying very—we joked with him that he was being overly cautious and why don't you just get the cyclist's heart rate up and drive a little faster.

(*Id.*, at 77-78.) While the driver has denied hearing that particular comment, a reasonable jury could disbelieve him, especially where his conduct was consistent with the joking request.

II. The Expectations, Awareness and Choices of the Driver and Dr. Khiabani Would be Admissible Regardless of How the Court Rules on this Motion

Alternatively, even if the Court were to exclude the driver's reckless conduct for purposes of refuting the fourth element of plaintiffs' strict liability claim—*i.e.*, "that the product was used in a manner which was reasonably foreseeable by the defendant"—or an affirmative defense of misuse, the driver's actions would still come into evidence. Evidence that is inadmissible for one purpose still may be admissible for another. NRS 47.110. Here, the driver's expectations, awareness and choices bear directly on the element of causation.

For example, plaintiffs claim that "the bus was defectively designed because it had right-side blind spots that a consumer would not reasonably expect." (Mot. at 7:3.) This claim assumes that the driver probably would have moved over into the left-hand lane if he had seen Dr. Khiabani better, that it would have made a difference. "To demonstrate actual cause with respect to [the] product, [plaintiffs] ha[ve] to prove that, but for [defect in the subject product] [the harm] would not have occurred." *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), overruled *in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P .3d 11 (2001). Yet, the driver already knew that Dr. Khiabani was only a few feet away from the motor coach. And he chose not to use the left-hand lane anyway. Thus, a reasonable jury could find that a smaller blind spot would not have made any difference.

The same causation problem arises for plaintiffs regarding their claim that "the bus was defectively designed because of MCI's failure to install side proximity sensors made the product

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unreasonably dangerous." (Mot. at 7:4.) The Court cannot exclude evidence that the driver already knew the information that a sensor allegedly would have given him and deliberately chose to stay close anyway merely because the same body of facts happen to overlap with the issue of driver culpability.

CONCLUSION

For the foregoing reasons, the Court must deny plaintiffs' "Motion for Summary Judge on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)." Respectfully, it would be reversible error to grant the motion.

DATED this 27th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2017, a true and correct copy of the foregoing **OPPOSITION TO "MOTION FOR SUMMARY JUDGMENT ON FORESEEABILITY OF BUS INTERACTION WITH PEDESTRIANS OR BICYCLISTS (INCLUDING SUDDEN BICYCLE MOVEMENT)"** was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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EXHIBIT A

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EXHIBIT A

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The Causal Factor of Bus Wheel Injuries and a Remedial Method for Prevention of These Accidents

By James M. Green, P.E., DEE (NAFE 193F)

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Introduction

The accident statistics for injuries caused by pedestrians or cyclists being injured, or killed, by U.S. transit buses have typically been categorized simply as either fatalities or serious injuries[1]. Although anecdotal information from police accident investigators and Forensic Engineers have indicated that certain types of accidents with transit buses are more prevalent than other types, definitive data has been lacking. Recent risk management efforts at various transit authorities[2] have revealed a prevalent type of accident from transit vehicles interacting with either cyclists or pedestrians. The predominant accident type seems to be pedestrians or cyclists being pulled into the bus-wheel, as opposed to individuals being struck by the vehicle body[3]. Further questioning of transit personnel indicates that, in most cases, the accidents occur from the rotating bus transit wheel on the bus as it passes the individual as opposed to the cyclist or pedestrian running into the stationary transit vehicle or tire. Surprisingly, the type of accident where the bus strikes the cyclist or pedestrian in an area other than on the rotating wheel is almost negligible.

While statistical reporting and analyses of this data has not been accomplished to a high degree of engineering certainty, most risk managers for metropolitan transit authorities will admit to a surprisingly high number of these rotating wheel type of accidents[4]. By whatever analysis method that is used, there is a clear problem with these types of accidents. Of particular interest is the fact that most points of impact onto the bus body appear to occur at the point of the rotating wheel in the bus wheel well.

The analysis in this paper is focusing on Transit Authority Buses since risk assessment managers have identified high incidents of injury at the site of the rotating wheel for these vehicles. More probably than not, other types of motor vehicles, such as trucks, would also tend to have a high degree of cyclist or pedestrian accident prevalence at wheel wells. Currently the Engineering, and related literature, does not contain valid statistics on wheel well accidents other than Transit Authority vehicles. As a result, this analysis centers on these vehicles, but can be applied to other heavy-duty vehicles as well.

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Bernoulli's Principle

Since transit authority personnel agree that there is a problem with pedestrians and cyclists being impacted in the proximate vicinity of the wheel well, an explanation is needed for this set of data. If Bernoulli's Principle is defined in terms of pressure, the equation becomes:

$$\frac{1}{2}pV^2 + p + pgy = \text{constant}$$

where: p = pressure

g = acceleration due to gravity

y = elevation.

V = velocity

If y does not change, then an increase in V means a decrease in p. This basically means that as a transit authority bus passes a cyclist or pedestrian at a higher speed, there will be a decrease in pressure between the two entities. Since the bus is at a much higher mass, the pedestrian or cyclist will be drawn toward the vehicle.

This does not explain why most points of impact occur on or near the rotating wheel. If we assume that elevation (y) and the constant (k) are both 1 and the equation is unitless[3], then the relationship between pressure and velocity becomes:

Solving For P

$$P = \frac{1}{\frac{3}{2}V^2 + 33.3}$$

The plot of P^{-1} versus V is shown in Figure 1. If a bus passes a pedestrian or cyclist at 10 MPH or 14.7 ft/second, the rotating wheel of an assumed 6 ft of circumference will rotate approximately 2.5 revolutions/second[6]. Therefore, regardless of the units used, if you compare the different speeds of the rotating wheel at 10 MPH, there is a ratio of 2.5/1 of wheel velocity to bus speed. For comparison purposes, the inverse pressure (p^{-1}) from Figure 1 is 183 at 10 MPH while the inverse pressure for the increased speed of the bus wheel is 971. From this unitless analysis, it is obvious that regardless of the method used, the rotating wheel of the bus, or any large vehicle, will create a low pressure between the cyclist or the pedestrian that is vastly different than just the motor vehicle passing the individual. As a result, there is a greater potential for the cyclist or pedestrian to be pulled into the motor vehicle body. This lower pressure resulting from

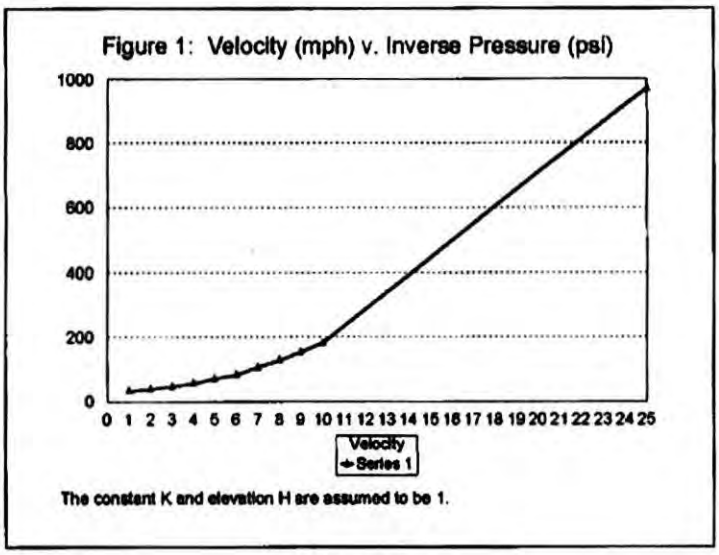

Figure 1

the higher rotational velocity of the motor vehicle wheel explains the greater grouping of the points of impact at the wheel well of transit authority buses.

An increase in velocity means a decrease in pressure and accounts for the fact that passing ships run the risk of a sideways collision. This is due to the fact that water flowing between ships travels faster than water flowing past the outer sides. Therefore, water pressure acting against the hulls is reduced between the ships. Unless the ships are steered to compensate for this, the greater pressure against the outer sides of the ships forces them together.

In order to design a remedial measure to prevent the inordinate amount of accidents at transit bus wheels, Bernoulli's principle must be utilized.

A Practical Design for Preventing Wheel Well Accidents

There are two problem areas in designing a remedial measure to prevent wheel well accidents.

The first area of concern is the description of the low-pressure gradient between the rotating high velocity bus wheel and the pedestrian or cyclist. The second area of design application is the prevention of the physical entrapment of the cyclist or pedestrian from a bus turning into the path of travel of either entity. In this second area, physical entrapment can also occur from the low-pressure gradient pulling the cyclist or pedestrian to the physical proximity of the rotating wheel.

Bernoulli's Principle can be applied to disrupt the low-pressure gradient that can pull a cyclist or a pedestrian into the high velocity-rotating wheel by considering the lifting force of the airplane wing. The airfoil of a curved airplane wing adds considerably to lift and results in a greater difference in pressure between the lower and upper wing surfaces. This net upward pressure multiplied by the surface area of the wing gives the net lifting force. By having a curved wheel guard at the forward leading edge of the transit bus wheel well, a net outward pressure away from the direction of travel of the bus is produced. This results in the complete elimination of the low-pressure gradient that would draw the cyclist or pedestrian into the high velocity-rotating wheel. More importantly, the curvature of the guard would act like an airplane wing and literally be able to push the cyclist or pedestrian out of the path of travel of the transit bus.

As noted in Figure 2, a wheel well guard with a leading edge capable of lifting the air outward from the bus's path of travel is shown. By utilizing this curvature, the cyclist or pedestrian is actually pushed away from the leading edge of the wheel well by the outward change in air gradient. The strength of materials of the guard should also be capable of actually pushing a pedestrian or cyclist away from the path of travel of the transit bus if the individual falls into the path of the rotating wheel.

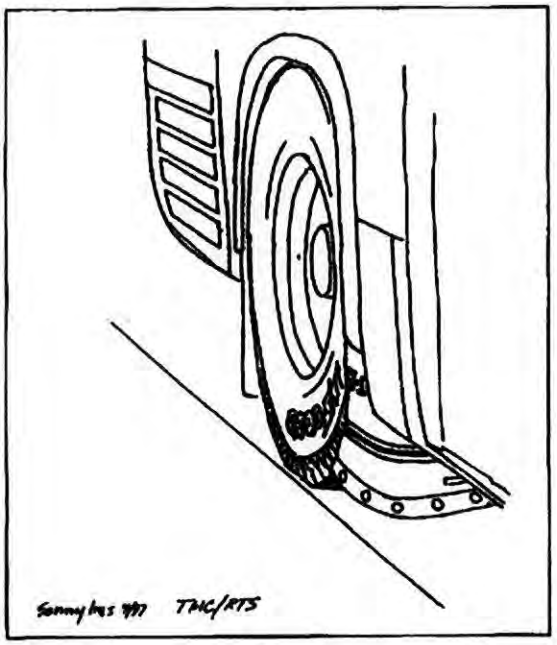

Figure 2

As noted in Figure 2, field trials do support the ability of this design to physically move a subject from the path of travel. This is helpful in instances where Bernoulli's principal is not a causal factor, as when transit buses turn into pedestrians or cyclists. In those instances, the guard must act much like the cowcatcher on a train and physically move the individual from the path of the rotating wheel.

Conclusion

As described in the Bernoulli analysis, and from the field data, the causal factor of most cyclist-pedestrian accidents with transit buses are from the individuals either being dragged into the rotating wheel by the lower pressure gradient or from the physical impacting of the bus during a turning radius.

When investigating these types of accidents, the Forensic Engineer should realize that Bernoulli's Principal could be a definite causal factor. Also, the bus physically turning into the path of an accident victim should be considered. Of equal importance in the analysis is the fact that remedial measures are easily available to prevent these accidents. The illustrated S-1 Gard (generic name), see Figure 2, has been implemented in several municipality's. Thus far, in those municipalities that have initiated this program the accident rate has decreased from several incidents per year to zero.

Case studies are being developed at: Washington D.C., Los Angeles, California, Miami-Dade County, Florida, and San Diego, California. Ferrone has accomplished a field evaluation of the effectiveness of the S-1 GARD[7]. In that effort, the emphasis was on the physical effectiveness of the S-1 GARD in moving a stunt man out of the path of the rotating wheel. The experimental runs, as expected, showed that the physical properties of the S-1 GARD did successfully remove the individual from the path of the rotating wheel.[8]

Additional case studies are being planned. The effectiveness of the S-1 GARD[9] to eliminate the low-pressure gradient at wheel wells as a function of speed is needed. Theoretically, the effectiveness of the S-1 GARD should increase as velocity increases. An additional study to determine the effectiveness of the S-1 GARD on heavy-duty vehicles should also be considered.[10]

The use of a guard on the rear wheel wells of transit authority buses as well as heavy-duty vehicles is in its infancy. The initial evaluations clearly show a dangerous problem exists. Field studies conducted thus far yield excellent preliminary results in utilizing the S-1 GARD, the only guard currently on the market, to completely eliminate wheel well accidents. Hopefully, the release of this paper into the Forensic Engineering community will enable the reason behind these accidents to be acknowledged as well as the remedial measure needed to eliminate the problem.

Reference

1. US Department of Transportation, National Highway Traffic Safety Administration, "Traffic Safety Facts," for Pedacyclists (DOT HS 808 957) and Pedestrians (DOT HS 808 95).

2. See Bus Wheel Injury Study, San Diego Transit Corporation, DART, G. Transit Richmond 1989-1993.

3. Ibid Although Risk Managers at these transit authorities have not applied statistical analyses, the predominant, and in most cases, total accident rate is by the rotating transit vehicle wheel.

4. Most reconstruction projects that I have had with accidents involving buses, pedestrians and cyclists did, in fact, involve rotating bus wheels. In my own interviewing of transit personnel, this type of accident is definitely the most common.

5. We are interested in making a comparison of the increased velocity of the bus wheel versus the body of the bus passing a cyclist or pedestrian. The important issue here is the inverse relationship between pressure and velocity.

6. 14.7/6 = 2.45 rps.

7. Ferrone, Christopher W. "A Field Evaluation of the S-1 Gard: Transit and Shuttle Bus Applications", Society of Automotive Engineers, Inc., Paper No. 982775, 1998.

8. Public Transportation Safety International Corporation, US Patent #5,462,324 WO 95/28300, S-1 GARD, Pacific Center, 523 West 6th Street, Suite 1222, Los Angeles, Ca., 90014, Office phone = 1-213-689-7763, Fax= 1-213-689-7765, e-mail= s1pts@aol.com, www.s1gard.com

9. Currently the S-1 GARD is the only device being sold to eliminate the accidents that occur at large vehicle wheel wells.

10. I have personally reconstructed accidents on garbage trucks operating in high-density population neighborhoods. The Forensic Engineering evaluation of these accidents did show that the victims where impacted at the well of the rotating rear wheel.

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EXHIBIT B

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EXHIBIT B

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D.(Decedent),	CASE NO.: A-17-755977-C
Plaintiffs,	
vs.	
MOTOR COACH INDUSTRIES, INC. A Delaware corporation; MICHELANGELO LEASING INC. D/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. D/b/a GIRO SPORT DESIGN, a California corporation; SEVENPLUS BICYCLES, INC. D/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.	
Defendants.	

EXPERT DEPOSITION OF ROBERT BREIDENTHAL, JR.
LAS VEGAS, NEVADA
FRIDAY, NOVEMBER 3, 2017

REPORTED BY: KAREN L. JONES, CCR NO. 694
JOB NO.: 430179

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DEPOSITION OF ROBERT BREIDENTHAL, JR., taken at 6385 South Rainbow Boulevard, Suite 400, Las Vegas, Nevada, on Friday, November 3, 2017, at 9:16 a.m., before Karen L. Jones, Certified Court Reporter, in and for the State of Nevada.

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I N D E X

WITNESS: ROBERT BREIDENTHAL, JR.

E X H I B I T S

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LAS VEGAS, NEVADA; FRIDAY, NOVEMBER 3, 2017

9:16 A.M.

-oOo-

(Exhibit 1 marked.)

(Exhibit 2 marked.)

Whereupon,

ROBERT BREIDENTHAL, JR.

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. TERRY:

Q. Could you tell us your name, sir.

A. Robert Edward Breidenthal, Jr.

Q. Are you employed?

A. Yes.

Q. By whom are you employed?

A. University of Washington.

Q. What do you do for the University of Washington?

A. I'm a professor in the William E. Boeing Department of Aeronautics & Astronautics.

Q. How long have you been with the University of Washington?

A. Since 1980.

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Q. Are you tenured?
A. Yes.
Q. Did you go there right after completing your own education?
A. I was a post-doc at Cal Tech for a year and a half or so before moving up to Seattle.
Q. So when you moved up to Seattle did you become a teacher at the University of Washington?
A. Yes.
Q. Where you have been since 1980?
A. Correct.
Q. Where did you get your education?
A. My undergraduate degree in aeronautical engineering is from Wichita State University, and then my masters and PhD as well as post-doc were all at Cal Tech.
Q. Did you attend school consecutively or were there breaks?
A. No breaks.
Q. Have you ever been employed in the private sector?
A. I've done a lot of consulting, and one summer I was full-time at Boeing in Seattle. I can't recall if I was an official employee or considered a consultant at that time.

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

A. Proposal 2.

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

A. Better than what?

Q. 1.

A. Marginally, yes.

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

A. Correct.

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

A. No.

(Exhibit 5 marked.)

BY MR. TERRY:

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

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

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MR. KEMP: No.

BY MR. TERRY:

Q. Have you ever seen that before?

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

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

A. Bernoulli.

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

A. Yes.

Q. Is that a correct statement of the formula?

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

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

A. Oh, yeah.

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

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that is a separate entity, correct?

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

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

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

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

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

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

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

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

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

I apologize for the long answer.

Q. That's all right.

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

A. In places, yes.

Q. Where would you use it?

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

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

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

A. No.

Q. Do you know if there are such accidents?

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

CERTIFICATE OF REPORTER

STATE OF NEVADA)
)SS:
COUNTY OF CLARK)

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

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

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

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

Karen L. Jones

KAREN L. JONES, CCR NO. 694

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EXHIBIT C

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EXHIBIT C

DISTRICT COURT
CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D.(Decedent),	) CASE NO.: A-17-755977-C
Plaintiffs,	)
vs.	)
MOTOR COACH INDUSTRIES, INC. A Delaware corporation; MICHELANGELO LEASING INC. D/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. D/b/a GIRO SPORT DESIGN, a California corporation; SEVENPLUS BICYCLES, INC. D/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.	)
Defendants.	)

VIDEOTAPED DEPOSITION OF EDWARD HUBBARD
LAS VEGAS, NEVADA
WEDNESDAY, SEPTEMBER 20, 2017

REPORTED BY: KAREN L. JONES, CCR NO. 694

JOB NO.: 417421

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DEPOSITION OF EDWARD HUBBARD, taken at Kemp, Jones & Coulthard, located at 3800 Howard Hughes Parkway, 17th Floor, Las Vegas, Nevada, on Wednesday, September20, 2017, at 10:01 a.m., before Karen L. Jones, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

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BY: ERIC PEPPERMAN, ESQ.
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For Motor Coach Industries, Inc.:

HARTLINE DACUS BARGER DREYER
BY: MICHAEL G. TERRY, ESQ.
800 N. Shoreline Boulevard
Suite 2000, North Tower
Corpus Christi, Texas 78401

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APPEARANCES:

For Michelangelo Leasing, Inc., and Edward Hubbard:

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BY: ERIC O. FREEMAN, ESQ.
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For Bell Sports, Inc.:

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scott.toomey@littletonpark.com

Also Present: JP Muritta, Videographer

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A. Yes, sir.
Q. In terms of traveling from Charleston to Pavilion headed toward the entrance to the Red Rock, did you see a bicycle?
A. Say that again.
Q. When you were going down Charleston, after you made the right turn onto Pavilion and you're headed toward the entrance to the Red Rock, did you see a bicycle?
A. No, sir.
Q. Did you ever see a bicycle?
A. Yes, sir.
Q. When did you first see the bicycle?
A. As I was approaching the turn off of Charleston onto Pavilion.
Q. And at the time you first saw the bicycle, was he in the bicycle lane or right-turn lane?
A. On Charleston and Pavilion?
Q. Yes.
A. He was in the bicycle lane.
Q. When you came up on the bicycle, is that intersection controlled by a traffic light?
A. Yes, sir.
Q. Did you have to come to a stop?

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

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

A. Yes, sir.

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

A. Yes, sir.

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

A. In the bike lane.

Q. Did he turn right as well?

A. Yes, sir.

Q. Did he turn right across your front?

A. No, sir.

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

A. At Charleston and Pavilion, at the turn?

Q. Yes.

A. He was in the bike lane.

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

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

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Q. Did he turn right before you?
A. He did, because I allowed him. Yes, because I'm -- he's turning and I'm -- let him turn, and then I turn.
Q. So when you turned onto Pavilion, were you then in the main traveled lane, right-hand turn lane? Where were you?
A. No, I was in the first -- this first traffic lane right here (indicating).
Q. So it would be the outside southbound lane?
A. I --
Q. Okay. Sorry.
There are two lanes that go south. One is at the center stripe, one is closer to the curb.
A. Right. I'm in this lane right here, that's closest to the curb.
Q. When you completed your turn, where was the bike?
A. When I completed my turn, the bike was in the bike lane.
Q. Did he remain in the bike lane, as far as you could tell?
A. He remained in the bike lane, yes. Yes he did. Until -- yes.

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Q. Do you have any other understanding?
A. No, sir.
Q. And more specifically, do you know whether or not you are also required to get into the far left lane when there's two lanes of travel by a bike lane?
A. I don't know that.
Q. Don't know? This is the first you've heard of that?
A. I'm sorry?
Q. You don't know if that's the law?
A. I don't know if that's the law.
Q. So let me read you a Nevada Revised Statute and tell me if this is the first you've heard of that.

Okay. This would be NRS 484B.270, Section 2. Quote, "When overtaking or passing a bicycle or electric bicycle proceeding in the same direction, the driver of a motor vehicle shall exercise due care and; (a) If there is more than one lane for traffic proceeding in the same direction, move the vehicle to the lane to the immediate left, if the lane is available and moving into the lane is reasonably safe," unquote.

Is this the first you've heard that

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that's the law in Nevada?

A. Yes.

Q. Yes, this is the first you've heard of that?

A. As far as what you're reading there.

Q. So you've never heard that before?

A. I mean, we've discussed it, but that's the first I've heard of it.

Q. Don't tell me what you've talked to your attorney about. Let me ask it differently.

Prior to Monday of this week, did you know that this was the law in the state of Nevada?

A. No, sir, I did not.

Q. And so Michelangelo or Ryan's Express did not provide you information that this was the law in Nevada?

A. I did not know that.

Q. All right. So if you had known this was the law, would you have gotten into the left-hand lane?

MR. STEPHAN: Objection; form and foundation.

THE WITNESS: Where do you mean at?

BY MR. KEMP:

Q. If you had known prior to this accident,

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BY MR. KEMP:

Q. Okay. I'd like you to watch the Red Rock video with the point of view of whether there were cars immediately before you or immediately after you that would have prevented you from moving to the far left lane. Okay?

MR. KEMP: All right, Eric.

BY MR. KEMP:

Q. And I'll make you aware there's two buses in this video. There's a bus before yours, so ...

(Video played.)

MR. KEMP: Okay, Eric, stop.

BY MR. KEMP:

Q. Do you see any cars immediately before you?

A. No, sir.

Q. And no cars immediately after you?

A. I don't know how many -- how much time went by, but no.

Q. No reason you couldn't have moved over to the left-hand lane if you wanted to?

A. No, I don't know how much time we went by, so I don't know if --

Q. Well, it's enough time for the bus to

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travel from one side of the intersection to the other.

A. Okay.

Q. So, I mean, there's at least four or five bus lengths.

MR. KEMP: Keep going, Eric. I don't think a car comes.

THE WITNESS: Okay.

BY MR. KEMP:

Q. Okay? So you would agree with me that if you wanted to you could have gotten over into the left-hand lane at any time between the 300-foot to the zero mark?

A. Yes, I could have. But -- okay.

Q. All right. Now, I asked you earlier if you had seen any motorcyclists across the street. Did seeing those -- the picture now of the motorcyclists and the one running across the street refresh your recollection in any way, shape or form?

A. No.

MR. KEMP: Okay. Go ahead, Eric.

(Video played.)

MR. KEMP: Okay. Stop right here.

BY MR. KEMP:

Q. Do you see that white delivery truck

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Q. And at some point that bus -- because you know the bus hits and ultimately runs over the head of Dr. Khiabani, right?

MR. STEPHAN: Objection. Foundation.

BY MR. CHRISTIANSEN:

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

A. Yes, sir. Yes.

Q. And you know he dies as a result --

A. Correct.

Q. -- correct?

So at some point you'll agree with me that the bus and the bike were closer than 3 feet to each other, right?

A. Again, as I stated, at -- up there we were closer than 3 feet. When he -- when he came over into -- into this area here, yes, we were closer than 3 feet.

Q. All right. And before you were closer than 3 feet, before that split second, as you've described it, that you see him turning towards your lane or into your lane, you'd never seen that bicycle until way back at the municipal cutout?

A. That's correct.

Q. And Mr. Kemp read you the statute that

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you were unaware of in Nevada that requires a bus driver to get into the far left lane if it's open. Do you remember that?

A. Yes.

Q. And in April you didn't know that that was the law?

A. I did not.

Q. And you -- you agree that you were able to do it, you could have done it that day, but you didn't?

MR. STEPHAN: Objection as to form and foundation.

THE WITNESS: Correct.

BY MR. CHRISTIANSEN:

Q. Same question about the horn. You were unaware that an audible warning was required under certain circumstances when overtaking a bicycle, back in April?

A. Correct, yes.

Q. Right. And had you been aware of both of them, I think you told Mr. Kemp you would have got over and honked your horn, if you would have known that was the law?

A. Correct.

Q. And the collision takes place -- I think

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EXHIBIT D

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EXHIBIT D

DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of KAYVAN KHIABANI, M.D. (Decedent),	
Plaintiffs,	
vs.	Case No. A-17-755977-C
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 California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20,	
Defendants.	

Videotaped Deposition of ROBERT ANTHONY PEARS

Hoffman Estates, Illinois

Thursday, August 17, 2017

2:02 p.m.

REPORTED BY: GAIL A. REED, RMR, CRR, CSR NO. 84-004568

Job Number 410669

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VIDEOTAPED DISCOVERY DEPOSITION of ROBERT ANTHONY PEARS, taken in the above-entitled cause, before Gail A. Reed, Certified Shorthand Reporter in and for the State of Illinois, at Chicago Marriott Northwest, 4800 Hoffman Boulevard, Hoffman Estates, Illinois, on Thursday, August 17, 2017, at the hour of 2:02 p.m.

APPEARANCES:

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ture@murchisonlaw.com

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APPEARANCES (Continued):

Also Present:

GABRIEL MARTIN, Videographer

I N D E X

E X H I B I T S

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15:44:51 A Correct.

15:44:52 **Q After a startled Dr. Khiabani, to your own**
15:44:56 **personal observation, was in shock the bus was as**
15:44:59 **close as it was on his left-hand side?**

15:45:02 A Correct.

15:45:06 **Q And the bus driver, he actually -- you and**
15:45:14 **he and I know this isn't a pleasant thought but I know**
15:45:18 **there was some discussion relative to the cyclist**
15:45:21 **before the collision between the driver, you, and**
15:45:23 **Mr. Plantz; fair?**

15:45:25 A Yes.

15:45:26 **Q Tell me what that was, sir.**

15:45:28 A We had joked about the cyclist because the
15:45:33 bus driver was driving very slow. And we were aware
15:45:36 that the resort was really close. And we joked to the
15:45:41 bus driver, "Speed up and get the cyclist's heart rate
15:45:46 up."

15:45:48 **Q Obviously you -- when you say "we," I want**
15:45:53 **to understand. Who said that?**

15:45:54 A So Mike Plantz and myself.

15:46:03 **Q And did you say that -- where are you when**
15:46:09 **that is said? Because if I understand correctly, you**
15:46:13 **first observed Dr. Khiabani on eastbound Charleston**
15:46:19 **riding his bike?**

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15:46:19 A That is correct. And we start joking on
15:46:26 eastbound Charleston and when he turned on to
15:46:33 Pavilion.
15:46:35 **Q So he turned southbound or right?**
15:46:37 A Correct. And he was blocking, so we
15:46:40 couldn't go around him initially. And the bus driver
15:46:45 was -- had commented that he was staying very -- we
15:46:50 joked with him that he was being overly cautious and
15:46:57 why don't you just get the cyclist's heart rate up and
15:47:00 drive a little faster.
15:47:02 **Q On Pavilion Center was Dr. Khiabani in the**
15:47:06 **bike lane?**
15:47:07 A Initially he was in the through lane. He
15:47:12 was not in the bike lane when we turned the corner.
15:47:16 **Q So as you are on eastbound Charleston,**
15:47:18 **there's a marked bike lane there, too, is there not?**
15:47:21 A Correct.
15:47:22 **Q And then this Red Rock Casino and the**
15:47:26 **Pavilion Center Street approaches, there's a cutout**
15:47:30 **for the right turn?**
15:47:31 A Correct.
15:47:31 **Q Dr. Khiabani got into that right-turn lane?**
15:47:34 A Correct.
15:47:34 **Q Made the right turn onto southbound Pavilion**

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18:05:51 **Q Why were you watching him?**
18:05:53 A Because we were -- the bus driver was going
18:05:57 very slow.
18:05:58 **Q And what does that mean?**
18:06:00 A He was being very cautious behind that
18:06:02 driver, and it was very obvious to Mike Plantz and
18:06:06 myself, and we were joking about the cyclist and to
18:06:12 the bus driver. The bus driver was very friendly. We
18:06:16 were talking to him. And we were joking about the
18:06:19 cyclist because he was going so slow.
18:06:23 **Q Okay. Up until that point on your trip, did**
18:06:27 **you see the -- Mr. Hubbard cut off any other driver**
18:06:31 **while he was operating the bus?**
18:06:33 A No.
18:06:33 **Q Did you observe him to commit any violations**
18:06:37 **of law that you knew about?**
18:06:39 A No.
18:06:39 **Q Okay. Do you believe he was speeding as he**
18:06:42 **made that right turn?**
18:06:44 A Not to -- not in my opinion.
18:06:46 **Q Okay. And when you say very slow, it's like**
18:06:49 **relative. You know, I've got a teenage driver. Very**
18:06:52 **slow is anything under 90, apparently. Joking, of**
18:06:56 **course. But what I'm trying to determine is when you**

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18:06:59 **say very slow, are you saying that it looked like the**
18:07:02 **bus was traveling slower than the rest of the traffic?**
18:07:06 A Yes.
18:07:06 **Q Okay. And, again, when you turned the right**
18:07:11 **from Charleston, he continued to operate the bus**
18:07:15 **slowly?**
18:07:16 A Yes.
18:07:17 **Q Okay. And did any cars honk behind him or**
18:07:20 **say hurry up, get moving?**
18:07:22 A No.
18:07:23 **Q But you guys had a conversation with him,**
18:07:24 **though?**
18:07:25 A Yes.
18:07:25 **Q Okay. And as a result of that conversation,**
18:07:30 **did he do something you asked him to do?**
18:07:32 A No.
18:07:32 **Q Okay. So he continued to drive the bus; you**
18:07:36 **continued to offer your thoughts on what -- how he**
18:07:38 **should drive the bus?**
18:07:39 A Correct.
18:07:40 **Q But he didn't follow that, did he?**
18:07:42 A Correct.
18:07:42 **Q Okay. And at some point, as you were going**
18:07:44 **down the street, I -- I think you testified that you**

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18:07:47 **took your eyes off the bicyclist and you were now**
18:07:50 **having a conversation with -- with the driver?**
18:07:52 A Correct.
18:07:53 **Q Okay. And we saw all that and the timing of**
18:07:57 **it. Now, I'm not going to make you go through that.**
18:07:59 **But at some point you are in the bus and you're**
18:08:05 **perceiving that the bus is driving in a lane; correct?**
18:08:08 A Correct.
18:08:09 **Q Okay. Now, just before I think it was the**
18:08:12 **50-foot mark that we had been talking about that --**
18:08:16 **that -- it was the last mark --**
18:08:17 A Yes.
18:08:17 **Q -- and we all took a bunch of pictures and**
18:08:20 **did all that. For sure at that 50-foot mark, you were**
18:08:23 **looking down from your seat and you were looking at**
18:08:27 **the bicyclist?**
18:08:28 A Yes. So around the 50-foot mark, yes.
18:08:30 **Q Okay. There's no question in your mind that**
18:08:32 **you were -- that's what you were looking at?**
18:08:34 A Yes.
18:08:35 **Q You weren't wearing any head phones**
18:08:36 **listening to music?**
18:08:37 A No.
18:08:38 **Q No sunglasses?**

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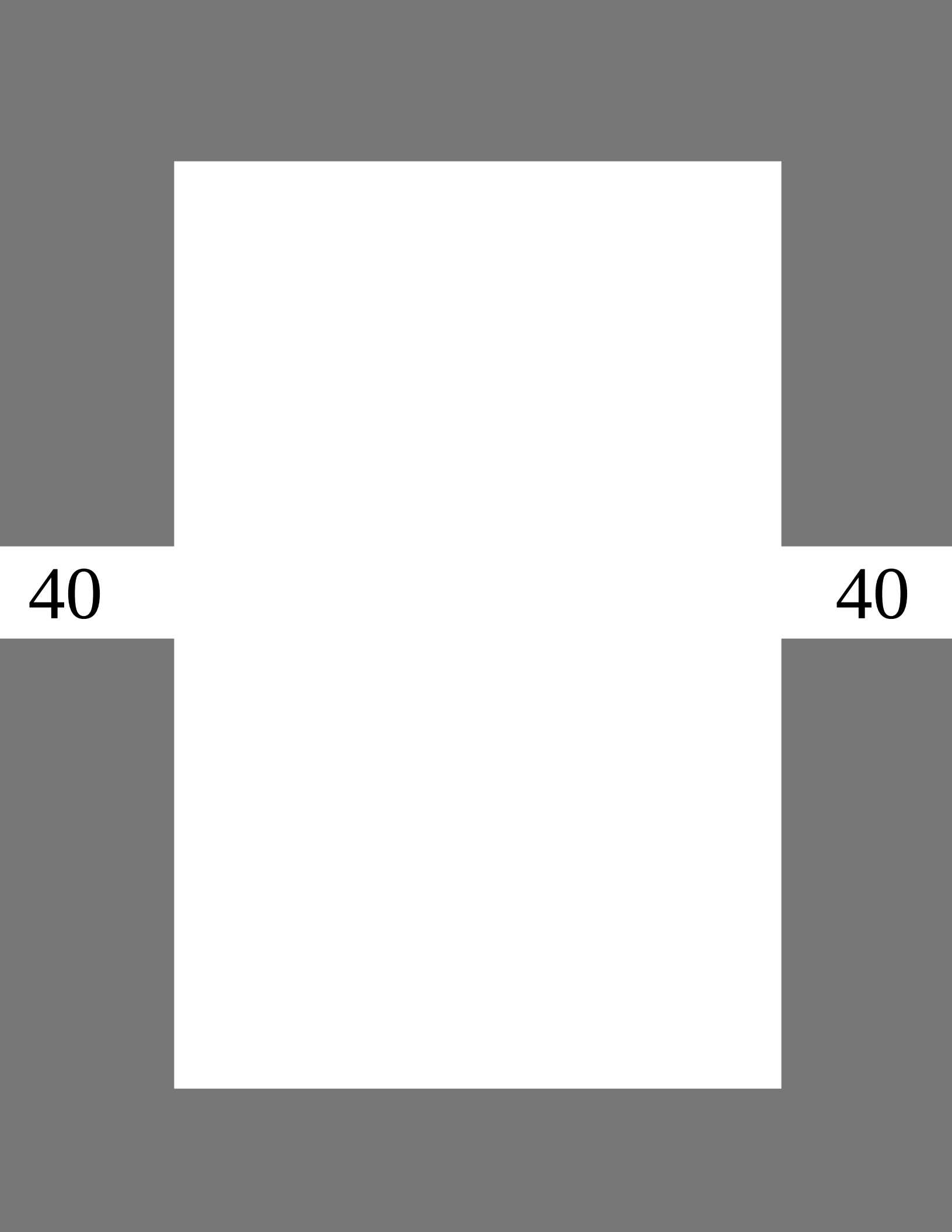
STATE OF ILLINOIS)
) SS:
COUNTY OF KANE)

I, Gail A. Reed, CSR No. 084-004568, RMR and CRR, the officer before whom the foregoing proceedings were taken, do certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting by Computer-Aided Transcription; that signature of the witness was not waived by the witness and by agreement of counsel for the respective parties; that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand on this 28th day of August, 2017.

Gail A. Reed

Certified Shorthand Reporter
Registered Merit Reporter
Certified Realtime Reporter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NEFF
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Attorneys for Defendant,
SEVENPLUS BICYCLES, INC
d/b/a PRO CYCLERY

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

DATED: January 8, 2018

MURCHISON & CUMMING, LLP

By _____

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

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PROOF OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

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

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

SEE ATTACHED LIST

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

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

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

Nicole Garcia

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

FINDINGS OF FACT AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

DISTRICT COURT JUDGE
4th January, 2018

Respectfully Submitted By:

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; 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 California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

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"

NOW APPEAR Plaintiffs, by and through counsel of record, and hereby oppose 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" on the following grounds:

(1) on the proposed gag order on the term "bullet train", lawyers explain complicated concepts through examples and anecdotes and commentators and caselaw endorse such exposition;

(2) on airblast foundation, there are multiple types of evidence that prove that buses produce an airblast and did so in this case, including but not limited to the 1981 scientific paper by Dr. Kato, the 1985 scientific paper by Dr. Cooper; MCI's 1993 wind tunnel tests; testimony from MCI's engineers; eye-witness Erika Bradley's observations; defense expert testing conceding at least a 2.5 pounds side force; and the Breidenthal aerodynamics opinion that the side force was 10 pounds.

I. ARGUMENT

A. Trial Lawyers Paint Verbal Pictures And Explain Complicated Concepts To Juries Through Examples, Analogies And Anecdotes

The leading trial practice authorities and multiple cases all recommend that lawyers use every day examples or offer analogies to explain complicated concepts:

> Dan Hunter, Teaching and Using Analogy in Law, 2 J. Ass'n Legal Writing Directors 151, 153 (2004) (citing to Edward Levi, An Introduction to Legal Reasoning 9-15 (U. of Chi. Press 1949)) (reminding that the practice of law is based on attorneys analogizing their cases to existing case law and encouraging the use of everyday examples to explain different concepts)
>
> Ronald L. Carlson & Edward J. lmwinkelried, The Three Types of Closing Arguments, 18 Am. J. Trial Advoc. 115, 122 (1994) (instructing that the use of analogies is **highly recommended and encouraged**)
>
> Lisa Blue and Robert Hirschhorn, Blue's Guide to Jury Selection at Lisa Blue and Robert B. Hirschhorn, 1 Blue's Guide to Jury Selection § 18:1 (Dec. 2016) (advocating the use of every day examples and analogies because jurors are more attentive when lawyers discuss analogies or everyday experiences that the jurors can relate to)
>
> Lisa Blue and Pamela Francis, 3 Litigating Tort Cases § 34:30 (June 2017) (explaining that analogies make it easier for juries to understand difficult concepts)
>
> Michael H. Bernstein, John T. Seybert, and Betsy Baydala, What We All Can Learn from the "Broccoli Analogy" Effective Use of Analogies in Legal Practice, 54 No. 9 DRI For Def. 51 (Sept. 2012) (emphasizing that an effective analogy allows the jury to understand counsel's view of the case)
>
> Gregory J. Morse, Techno-Jury: Techniques in Verbal and Visual Persuasion, 54 N.Y.L. Sch. L. Rev. 241, 243-44 (2010) (citing to G. Marc Whitehead, Juror Persuasion: New Ideas, New Techniques, 26 A.B.A. Litig. 34 (2000)) (encouraging lawyers to use everyday examples and analogies as a means to convey information in

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a way that allows jurors to connect with the information based on what they know or what makes sense to them)

Durst v. Van Gundy, 8 Ohio App. 3d 72, 75, 455 N.E.2d 1319, 1323 (1982) ("The general rule is that analogies, deductions, and inferences drawn from evidence in the case are a legitimate subject of argument and that **considerable latitude** is accorded counsel in that regard.")

Cusumano v. Pepsi-Cola Bottling Co., 9 Ohio App.2d 105, 122, 223 N.E.2d 477, 488 (1967) (emphasizing the "**considerable liberality**" that counsel are given to draw inferences where there is some evidence in the record)

Hall v. Burkert, 117 Ohio App. 527, 529-30, 193 N.E.2d 167, 169 (1962) ("counsel in argument may persuade and advocate to the limit of his ability and enthusiasm so long as he does not misrepresent evidence")

In the present case, Plaintiffs are offering several examples that illustrate that manufacturers can (and do) make aerodynamically streamlined products: (1) the bullet train; (2) the Tesla electric truck; and (3) the Setra 417 bus made by Mercedes and distributed by MCI. All of the foregoing are means of transport and trains, trucks and buses all share the primary feature of potentially being blunt objects that cause massive air displacement at elevated speeds -- the exact blunt shape that will most benefit from aerodynamic streamlining.

Introduced in 1964 at the Tokyo Olympics, the Japanese Bullet train was a pioneer high-speed passenger rail system that is an amazing example of aerodynamic engineering. It sparked widespread use of aerodynamic principles to streamline other objects. The Bullet Train "was greeted by widespread international acclaim." As the leading example of aerodynamic efficiency, the bullet train is arguably the best possible analogy to employ. MCI itself concedes that the bullet train reference is an analogy. (MCI 4:12; "Plaintiffs' creative analogy is entertaining . . . .") Hence, it comes squarely within the foregoing approved commentary of the above treatises. There is no reason that this Court should issue a gag order precluding reference to the Bullet Train as an analogy.

B. There Is Overwhelming Evidence That A J4500 Traveling 25 MPH Would Generate An Airblast And Did So In This Case

MCI makes the frivolous claim that there is no "evidence" that buses produce airblasts that may impact bicyclists and/or that there is no evidence that this occurred in this case. There are 8 pieces of compelling evidence that strongly support the airblast scenario: (1) the landmark Kato

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paper in 1981 established that a bus passing a bicycle will cause an outward airblast followed by inward suction and concluding that this is one reason "why a bicycle is caused to wobble by a passing vehicle"; (2) the 1985 article by Dr. Cooper that rounding bus fronts could reduce airblast; (3) MCI's 1993 wind tunnel tests documenting **"aerodynamic side force . . . [that] provide[s] a disturbance that deflects a bus from its path in the presence of side winds or passing vehicles."** (MCI039859); (4) testimony from MCI's engineer; (5) eye-witness Erika Bradley's observations. (Erika Bradley Dep., pp. 43-44; "**After discussing the wind drafts, that could make sense**.") (Bold added); (6) defense expert testing documenting side force generated by a J4500 bus traveling 25 mph; (7) multiple statements by MCI conceding that all moving buses create air blasts; and (8) the Breidenthal aerodynamics opinion.

1. Dr. Kato Documented Airblasts To Bicycles Followed By A Suction Towards The Bus In A Landmark 1981 Society Of Automotive Engineers Article

Over 35 years ago, Dr. Kato published his 1981 article entitled "Aerodynamic Effects to a Bicycle Caused by a Passing Vehicle" in the Society of Automotive Engineers. The abstract states:

> There are many **reasons why a bicycle is caused to wobble by a passing vehicle**, for example, human engineering factors, riding techniques, the conditions of the road, **aerodynamic effects**, etc.
>
> In this report, aerodynamic effects to a bicycle by a passing vehicle have been investigated experimentally and theoretically.

Kato, Aerodynamic Effects to a Bicycle Caused by a Passing Vehicle, SAE (1981)

The key finding of Dr. Kato was that the passing bus first caused an outward airblast from bus to bicycle followed by a strong pulling tug when the bus is even with the bicycle that "tends to pull the bicycle toward the vehicle":

> The first peak of force Fy occurs just as the front of the vehicle is even with the rear wheel of the bicycle and the negative value indicates that the force is in a direction away from the vehicle. The second peak occurs when the vehicle is approximately even with front of the bicycle, and the positive value tends to pull the bicycle toward the vehicle.

The three primary conclusions by Dr. Kato were as follows:

> 1. The force acting on stationary body (bicycle) in a direction away from the moving body (vehicle) occurs for the first time as the passing begins.
>
> 2. The force which pulls the stationary body (bicycle) toward the moving body

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(vehicle) is at a maximum when the two bodies come closest.

3. The maximum pulling force increases markedly with the decreasing of the distance between the two bodies (bicycle and vehicle).

In layman's terms, Dr. Kato documented that when a bus first passes a bike an airblast causes the bike to "wobble by a passing vehicle" and then when the bus and bike are even with one another there is a "force which pulls the stationary body (bicycle) toward the moving body (vehicle) . . . ." In light of this landmark article published in the Society of Automotive Engineers journal, MCI's claim that MCI there is no "evidence" that a passing bus would cause an "air blast" to an adjacent bike followed by a "suction" effect is meritless. The Kato article is a proposed exhibit and should be admitted as a learned treatise. See NRS 51.255 Learned Treatises. ("To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet or a subject of history, medicine or other science or art is not inadmissible under the hearsay rule . . . .")

2. Dr. Cooper Reported In 1985 That Rounding The Front Corners Of Buses Would Greatly Reduce Drag Coefficiency (And Reduce Air Blasts)

In 1985, Dr. Cooper published another important paper that explained that rounding the front corners of buses would greatly reduce their drag coefficient (make them more aerodynamic). K.R. Cooper, The Effect of Front-Edge Rounding and Rear-Edge Shaping on the Aerodynamic Drag of Bluff Vehicles in Ground Proximity. He documented that simply rounding the corners had a "much greater" aerodynamic effect for buses than trucks and that the reduction in drag coefficiency was basically "constant" with the reduction in edge flow (i.e., air blasts):

> As mentioned previously, **the drag-reducing potential of edge rounding is much greater for a simple body like a bus** or van than it is for more complex vehicles like truck bodies or trailers. In the former case [bus], the edge rounding must cause a significant change in the pressure distribution over the whole front face when the radius reaches the optimum value. **Fully-attached edge flow occurs and the consequent large drag drop to nearly constant values at greater radii is found.**

(1985 Cooper, p. 20) (Bold added) The significance of the 1985 Cooper paper is that MCI was explicitly informed that a very simple design change like rounding the front corners of buses could reduce drag coefficiency and air blasts. While MCI feigns ignorance of all things aerodynamic, the

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1985 Cooper paper was found in MCI's files. (MCI 39571-78) Because the Cooper paper was possessed by MCI, it is admissible as notice of the airblast danger and/or a business record. See NRS 51.135 Record of regularly conducted activity. It is also admissible as a learned treatise. See NRS 51.255 Learned Treatises.

3. MCI's Own 1993 Wind Tunnel Tests Strongly Hailed An Alternative Rounded Front Bus Shape That Dramtically Reduced Airblasts

In 1993, MCI hired the same Dr. Cooper (one of the leading aerodynamic engineers in the world) to conduct extensive wind tunnel testing of different shapes for the front of MCI buses that would reduce the drag coefficient. (MCI 39853-950) Despite this comprehensive testing that found optimal rounded bus fronts that would allow MCI buses to cut through the wind like a knife, MCI continued to make "boxy" buses that instead cause massive air displacement with flat fronts. MCI itself characterizes the J4500 as "boxy." See MCI Motion For Summary Judgment On All Claims Alleging A Product Defect, 19:1.

Simply changing the "boxy" front of the bus to a "smooth" rounded front resulted in the best drag coefficient when the front only was changed. (MCI039854) The best drag coefficient (.299) was achieved when MCI modified both the front (Proposal 1) and "beveled" the rear of the bus. (MCI039855) **The bottom line is that MCI proved in the 1993 wind tunnel tests that simply rounding the front and back of the bus would cause a dramatic increase in aerodynamic efficiency -- and a dramatic decrease in the dangerous airblasts.**

MCI's 1993 Generic Wind Tunnel testing explicitly recognized that one extreme danger from the existing poor drag coefficient of "boxy" buses was "**aerodynamic side force . . . [that] provide[s] a disturbance that deflects a bus from its path in the presence of side winds or passing vehicles.**" (MCI039859) Hence, MCI's own 1993 testing proved that flat front buses like the "boxy" J4500 generate an "aerodynamic side force" or, in other words, an airblast. Where MCI's 25 years old testing documents the airblast danger, MCI is flat out prevaricating in arguing to the Court that "there is simply no evidence to support this theory" that a bus produces an airblast. (Mot.Lim.#7, 4:18) The 1993 Wind Tunnel testing by MCI is admissible as a business record since it was authenticated by the MCI PMK on wind tunnel tests. (Hoogenstrat Dep., 31:3-21)

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4. MCI's Engineers Testified That A Flat Bus Front Like The J4500 Would Produce An Outward Airblast That Could Move Bicyclists

Consistent with the conclusion of the landmark 1981 Kato paper, the 1985 Cooper paper and MCI's own 1993 wind tunnel tests that documented the "aerodynamic side force", MCI's engineers knew that a moving bus creates an airblast that could impact adjacent bicycle riders. Virtually every MCI engineer that was deposed confessed to knowing that the relatively flat bus front of the J4500 (which MCI calls "boxy") would cause left and right side air displacement, i.e., air blasts. Bryan Couch was the Vice President of Design Engineering and Product Planning in 2009 and the top person in the MCI Design Engineering Dept. (Couch Dep., 122:17; 124:11) Couch conceded that a bus moving 25 miles per hour would displace air:

> Q. Do you have an understanding that a rectangular object moving through air will displace air?
> A. A rectangular object will, yeah.
> Q. Okay. And what do you call that?
> A. What do I call what, sir?
> Q. The air displacement. Let's make it a little more specific. Do you have an understanding that if a bus is moving, say, 25 miles per hour, it will displace -- the front of the bus will displace air?
> A. A coach will displace air, yeah.
> Q. And what do you call that?
> A. It could be part of drag.

(Couch Dep., 33:17-25; 34:1-5) Using a 55 mph bus as an example, Couch also conceded knowing that the wind displacement would initially push the bike rider:

> Q. All right. You said that the air blast will make the bicyclist and the bus move away. Can you tell me what mechanism you think that will occur by?
> A. It would be the air coming from the front of the bus.

(Couch Dep., 65:3-10) Couch also conceded MCI attempted to reduce the air displacement for the E series buses (the J series is the J4500 involved in this case). Such reduction was desirable to improve the drag coefficient and to "reduce air displacement that a bystander or bicycle would see":

> Q. Now, you said that the two reasons that you attempted to improve the drag coefficiency were fuel and dust, right?
> A. Yeah, un-huh.
> **Q. Was one of the reason to attempt to reduce air displacement that a bystander or bicycle would see?**
> **A. Well, that would be the effect.**

(Couch Dep., 52:24-25; 53:1-6) (Bold added) The Couch testimony alone ends any debate as to whether there was air displacement coming from the front of the MCI buses.

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Brad Lamothe was another MCI design engineer that worked on the J4500. Lamothe also admitted knowing that simply rounding the front corners on the bus would eliminate air blasts but believed that this was not a "safety factor":

> Q. But you do understand in general that the more you round the corner like a bullet train, for example, the better aerodynamics you'll have? You do understand that?
> A. Uh-huh.
> Q. Yes?
> A. And the higher the speed, the more of a factor that would be.
> Q. Great. Whose job was it to make sure that the aerodynamics design of the J4500 was reasonably safe, in your term?
> A. Well, I don't know that aerodynamics is a -- is a safety factor. The shape of the front of the coach, I'm not aware that they would be a safety factor.
> Q. So as far as you know, when the J4500 was designed, no one looked at aerodynamics as a safety factor as far as you know?
> A. Not to my knowledge.

(Lamothe Dep., 36:4-23) Astoundingly, MCI did not even try to improve the aerodynamics of the J4500. (Lamothe Dep., 47:3-13; "Q. So as far as you know, there was no effort made in that regard? A. To my knowledge, no.") The testimony by MCI's engineers that the reason to reduce an airblast was "to reduce air displacement that a bystander or bicycle would see" constitutes an admission that there was in fact an airblast.

5. Eyewitness Erika Bradley Testified That Airblasts From The Front Of The Bus Caused The Bike To Wobble

Erika Bradley was driving a car directly behind the bus and Dr. Khiabani and unequivocally stated that she believed that an airblast potentially caused the bike to wobble:

> Q. As we sit here today, do you know what made the bicyclist swerve?
> A. I don't know.
> Q. Could it have been windblast from the front of the bus?
> A. It's possible.
>
> . . . .
>
> Q. So the two operating theories are either a windblast or perhaps the bicyclist was physically impaired?[1]

---

[1] There is no evidence whatsoever that Dr. Khiabani was physically impaired at the time of the accident. The coroner tested his electrolytes and found that he was not dehydrated. MCI's experts concede that they have no evidence that Dr. Khiabani was physically impaired, do not have opinions that he was impaired and do not have evidence for any other cause of the wobble of the bike. (Rucoba, 60:1-6; "Q. But as we sit here today, you know of no evidence to support the other six causes [(1) mechanical, (2) weather, (3) roadway conditions, (4) physical impairment, (5) training of

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A. Correct.
Q. Okay. Anything besides that?
A. Not that I could think of.
Q. Okay. And as we sit here today, which makes more sense to you now?
A. **After discussing the wind drafts, that could make sense.**

(Erika Bradley Dep., pp. 43-44) (Bold added) Bradley also viewed a video of another bicycle accident caused by an airblast from a passing truck and stated that this was "substantially similar" to what occurred in this case. (Bradley Dep., 57:18 to 58:9) There is no contradictory testimony from any other witness to the accident.

Even MCI experts admit that this testimony from Bradley directly supports airblasts being the cause of the wobble. (Rucoba Dep., 59:10-18; "And, again, with regard to wobble, I don't know how many times I've had to say this, but it's -- there is no physical evidence that I can rely upon. **It's purely based on testimony. That's all we have to go with.**") (Bold added) Unlike its experts, MCI asserts that eyewitness testimony is not "evidence"

6. Defense Experts Concede Based Upon Their Testing That A Moving J4500 Generates An Aerodynamic Sideforce

MCI experts took a J4500 bus and attempted to measure the side force it generated. The test was rigged to provide better results for MCI. See Plaintiffs' Motion In Limine #13 [To] Preclude Defendants From Arguing Or Referencing Rig Air Blast Testing That Is Not Substantially Similar Because It Used A Stationary Bike And Not A Moving Bike.

Under Nevada law, only "substantially similar" testing is admissible. See Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 n. 23 (Nev. 2008) and Levine v. Remolif, 80 Nev. 168, 171, 390 P.2d 718, 719-20 (Nev. 1964) ("[t]he conditions of the out-of-court experiment should be **substantially similar** to those prevailing at the time of the incident in issue before opinion

---

bike rider or (6) bike rider error] -- and I can read them to you again -- for the wobble and you disagree with the windblast. Is that correct? A. Yes, that's correct.") MCI can not argue physical impairment nor any cause for the wobble other than airblast to the jury under Nevada law. See Williams v. The Eighth Judicial District, 127 Nev. 518, 262 P.2d 360, 369 (2011) ("Although we recognize a lower standard for rebuttal expert testimony regarding medical causation, **any alternative causation theories proffered by a defense expert to controvert the plaintiff's theory of cause are still subject to certain threshold requirements, namely that medical experts testifying as to cause must avoid speculation.**")

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testimony based thereon is admissible.") (Bold added) The rigged MCI airblast testing is not admissible because MCI experts have admitted that it was not similar -- much less substantially similar -- to what occurred at the time of the accident:

> Q. So the testing done on October 7th, 8th and 14th of 2017, was not designed to be similar or replicate the actual accident; is that correct?
> A. It was not designed to replicate the accident or recreate it....

(Granat Dep., 86:1-5) If admitted, however, even MCI's rigged test found airblasts.

Granat, the MCI expert that performed the testing, testified that even MCI's rigged test found that a bike one foot away from a bus traveling 25 mph saw a 2.5 pound side force:

> Q. That looks like about 2-and-a-half pounds?
> A. In that area, right, between 2 and 2-and-a-half pounds.
> Q. So does that mean there were 2-and-a-half pounds of lateral force measured in this test?
> A. Correct. The peak lateral force would be maybe on the order of 2.4 pounds, something like that.

(Granat Dep., 112:6-12) Where MCI experts concede that there is at least a 2.5 pound airblast, MCI can not credibly claim that there is no "evidence" of **any** airblast whatsoever.

7. MCI Has Admitted In Multiple Pleadings That A Moving J4500 Will Generate An Aerodynamic Sideforce

Stunningly, MCI admits in the same motion that argues that there is "no evidence that the subject coach at the time of the accident produced an air displacement" (Mot.Lim.#7, 2:4-5) that there was in fact air displacement in this case. (Mot.Lim.#7, 5:10; "it is a fact that all moving vehicles displace air") If "**all**" moving vehicles displace air and MCI so concedes, the J4500 moving at 25 mph displaces air.

8. Dr. Breidenthal -- The Only Aerodynamic Engineer In This Case -- Will Testify That A J4500 Moving 25 MPH Generates A 10 Pound Oscillating Side Force

Dr. Kato's paper documented that there was an airblast when the bus first passes the back following by a suction when the bus and bike are fully parallel. This airblast push and pull (an "oscillation") is exactly what Dr. Breidenthal will testify occurred in this case:

> Of course, before the bus encounters the cyclist there's no side force from the bus. And then there's a peak in the side force, more or less right where the cyclist is by the front corner. In fact, even a little bit in front of the front corner you can see these streamlines start to turn, even before you get to the front face of this bluff body. And then the force goes the other way and there's an attractive force [suction] towards the

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bus, and then finally the side force goes away again. So there's an oscillation. (Breidenthal Dep., 85:8-19) Generally, MCI's experts do not dispute that the foregoing air displacement is occurring but minimize the amount of force generated.

Dr. Breidenthal testified that a bus going 25 mph and passing a bicyclist going 13.5 mph would generate a 35 mph wind that creates 10 pounds of side force (airblast). (Breidenthal Dep., 81:24 to 82:3; "Q. So if I understand it, your opinion is that the side forces would be about ten pounds in this case? That's your estimate? A. Yes."; Q. And in terms of wind speed, what would that be? A. Well, it would be a little more than 34 miles an hour.") He also testified that MCI could have reduced the side force by a factor of 2 or 3 simply by rounding the front corners of the "boxy" J4500 bus. (Breidenthal Dep., 86:22 to 87:13) This would reduce the 35 mph generated "by about 70 percent of 35 [mph]." (Breidenthal Dep., 87:13-21) All of the foregoing Breidenthal opinions meet the reasonable degree of aerodynamic certainty standard. (Breidenthal, Dep., 91:1-14)

C. The Only Potential Cause For The Bike Wobble That Is Supported By Evidence Is An Airblast

There have been 3 primary theories advanced for why Dr. Khiabani's bike wobbled and then turned left into the bus: (1) the airblast theory; (2) physical impairment such as dehydration; and (3) the doctor committed "suicide by bus." As set forth above, there are multiple different types of evidence that directly support the airblast theory: (1) learned treatises by Drrs. Kato and Cooper; (2) MCI's 1993 wind tunnel tests; (3) MCI's engineers testimony; (4) eye-witness Erika Bradley's observations; (5) defense expert testing; and (6) the Breidenthal aerodynamics opinion. In marked contract, there is absolutely **no evidence to support any alternative theory as to why the bus wobbled** and the experts retained by MCI have expressly admitted that any other theory has no evidentiary support whatsoever.

There is no evidence whatsoever that Dr. Khiabani was physically impaired at the time of the accident. The coroner tested his electrolytes and found that he was not dehydrated. MCI's experts concede that they have no evidence that Dr. Khiabani was physically impaired, do not have opinions that he was impaired and do not have evidence for any other cause of the wobble of the bike.

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(Rucoba, 60:1-6; "Q. But as we sit here today, you know of no evidence to support the other six causes [(1) mechanical, (2) weather, (3) roadway conditions, (4) physical impairment, (5) training of bike rider or (6) bike rider error] -- and I can read them to you again -- for the wobble and you disagree with the windblast. Is that correct? A. Yes, that's correct.")

Dr. Krauss, MCI's warnings/human factors expert, expressly conceded that there was absolutely no evidence supporting a "suicide by bus" causation theory and that MCI was not making such claim:

> Q. Okay. All right. So out of these five potential causes [for the bike to wobble] -- and let me just give them to you again: Air blast, inattention, suicide by bus, dehydration, physical emergency -- would I be correct that you do not have an opinion, as we sit here today, as to what the cause was in this particular case?
> A. Yes.
> **Q. Okay. And you can't even tell me whether or not these -- of these five causes, whether there is evidence for any of them, right?**
> **A. I agree.**

(Krauss Dep., 48:11-12) (Bold added) In the motion, MCI expressly concedes that MCI has no evidence supporting any alternative theory as to why the bike wobbled:

> To this day, no one-not Plaintiffs, nor their counsel, and not their experts-can explain with any probability why Dr. Khiabani [sic] bicycle moved into the coach's travel lane. There are myriad possibilities, but **no one will ever be able to determine this to a degree of what is more likely than not**.

(Mot.Lim.#7, 7:23) (Bold added) MCI's vehement assertion that "no one" can determine the cause of the wobble bars MCI from asserting alternative causes to the jury both because this admission that MCI lacks any evidence of alternative causes constitutes judicial estoppel and because MCI concedes that it can not meet the requirements to advance an alternative causation theory (such as physical impairment or "suicide by bus") under Nevada law. See Williams v. The Eighth Judicial District, 127 Nev. 518, 262 P.2d 360, 369 (2011) ("Although we recognize a lower standard for rebuttal expert testimony regarding medical causation, **any alternative causation theories proffered by a defense expert to controvert the plaintiff's theory of cause are still subject to certain threshold requirements, namely that medical experts testifying as to cause must avoid speculation**.") For these reasons, the only potential cause for the bike wobble that can be advanced to the jury is the airblast assertion.

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D. MCI's Criticisms Of Breidenthal's Opinion Are Wrong Or Greatly Exaggerated

1. A Party That Fails To Hire An Opposing Aerodynamic Expert Has Only Itself To Blame

Dr. Breidenthal is the only aerodynamics engineer listed as either an expert or a witness by either party. MCI did not retain an aerodynamic engineer as an expert witness. MCI did not designate the aerodynamic engineer (Dr. Cooper) that helped MCI design and test alternative bus fronts that were more aerodynamically efficient in 1993 as a witness. Hence, the only aerodynamics expert that will testify to the jury is Dr. Breidenthal.

2. MCI's Failure To Timely Produce The Precise Front Corner Radii Drawing Necessitated The Estimate By Dr. Breidenthal In His First Report And Deposition That Was Refined In His Supplemental Report Filed After Some Radii Information Was Available

The radii of the right front corner is an important part of the aerodynamic equation but was not produced by MCI before either the Breidenthal report was filed on October 4, 2017 or before the Breidenthal deposition on November 3, 2017. (Breidenthal Dep., 95:23 to 96:2; "Q. In the terms of the precise drag coefficient the subject bus generates, that depends upon detailed information of the front of the bus that I haven't seen yet. Perhaps it hasn't been produced yet.") On January 3, 2018, the Special Master ordered that MCI produce the radii drawing.

A drawing showing the front corner radii developed by an MCI expert was produced on November 14, 2017 in the Granat work file. Plaintiffs have attached the pertinent portion thereof as Ex. 1. To this day, MCI counsel has refused to identify the MCI blueprint of the front radii despite repeat requests from counsel. See Breidenthal Supplemental Report ¶ 5. As said above, MCI has now been ordered to produce it.

3. Dr. Breidenthal's Opinion Has An Adequate Foundation And Is Based Upon An MCI Expert's Radius Calculation, Upon The MCI Expert Bus Speed, Upon the MCI Expert Bicycle Speed, Upon The Documented Wind Speed And Wind Direction At The Summerlin Weather Station And Upon Witness Testimony Regarding The Distance Between The Bus And Bicycle

MCI argues that Breidenthal's opinion should be stricken as "speculative" because he made "assumptions" regarding the following six factors in order to determine the magnitude of the airblast: "1) the corner radius of the vehicle; 2) the speed of the bus; 3) the speed of the bicycle; 4)

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the ambient wind speed; 5) the wind's direction; 6) and the proximity of the coach to the bicycle." (MCl Mot.Lim. 5:10-14; 8:3-7) MCI conveniently ignores that there is evidence supporting all six factors upon which the opinion can be predicated. Regarding the corner radius, Breidenthal's opinion is based upon the exact corner radius that an MCl expert belatedly produced on November 14, 2017. To date, MCl still has not produced the radii blueprint. On bus speed and bicycle speed, Breidenthal used verbatim the speeds as testified to by MCl expert Funk. On the ambient wind speed and direction, Plaintiffs' meteorologist (Rosenthal) provided this information based upon the Summerlin weather station 1 mile from the accident. On bus to bike proximity, Breidenthal's opinion was based upon eye witness testimony. For these reasons, MCI's primary argument that Dr. Breidenthal based "his opinion on speculation errs." (Mot.Lim.#7, 8:8)

II. CONCLUSION

Starting with Mot.Lim.#3, MCI's argument that Plaintiffs' counsel should be hogtied and precluded from explaining complicated aerodynamic concepts to the jury by citing the worlds leading aerodynamic achievement (the bullet train) as an example of good aerodynamic engineering should be rejected. All of the leading trial practice journals propose that trial counsel use examples and anecdotes to help the jury understand difficult concepts like aerodynamics. The caselaw agrees. For this reason, Mot.Lim. #3 should be denied.

In Mot.Lim.#7, MCl argues that there is "no evidence" of airblast after MCI concedes that "it is a fact that all moving vehicles displace air." (Mot.Lim.#7, 5:10) Compiling all "evidence" regarding whether a moving bus causes an airblast and/or was the cause of the wobble in this case, in addition to the MCI admissions, there are seven other pieces of evidence, any one of which is sufficient in and of itself to support the airblast claim: (1) a learned treatise by Dr. Kato; (2) a learned treatise by Dr. Cooper; (3) MCI's 1993 wind tunnel tests; (4) testimony from MCI's engineers; (5) eye-witness Erika Bradley's observations; (6) defense expert testing documenting side force; and (7) the Breidenthal aerodynamics opinion. In a test designed to minimize the true air blast strength.

MCl experts measured a 2.5 pound airblast from a 25 mph bus that was one foot away from a bicyclist. (Granat Dep., 112:6-12) While Plaintiffs expert states that the side force was four times

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higher at 10 pounds, the experts for both sides agree that there is an airblast. There is ample if not overwhelming evidence that there was an airblast. For these reasons, Motion In Limine #7 should be denied.

DATED this __ day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of January, 2018, the foregoing 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" 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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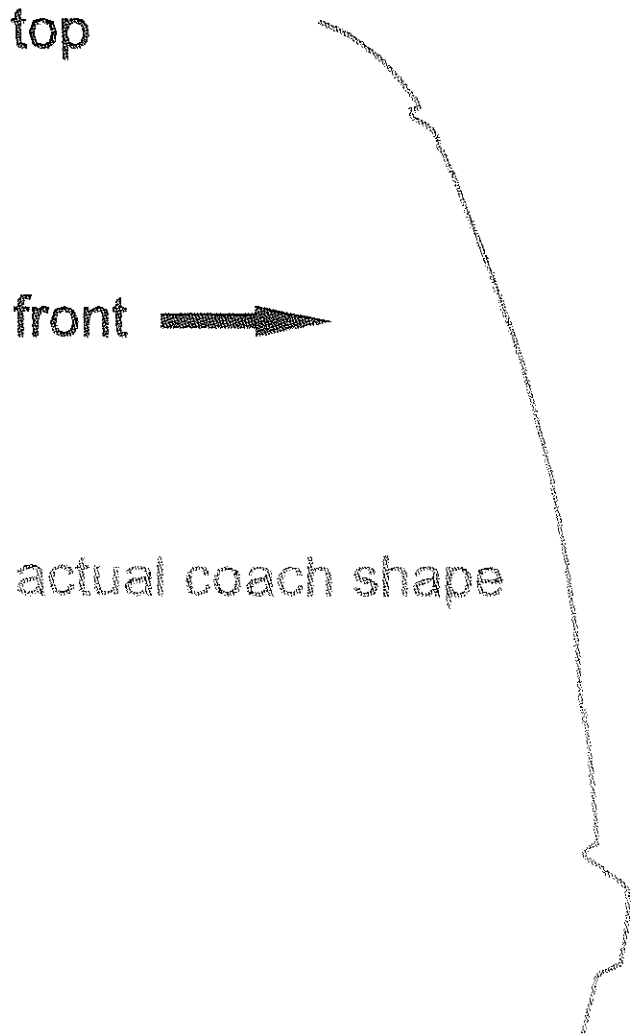
EXHIBIT 1



Khiabani v. MCI: Vehicle Dimensions, MCI J4500 Coach

Granat Technical Consulting, LLC

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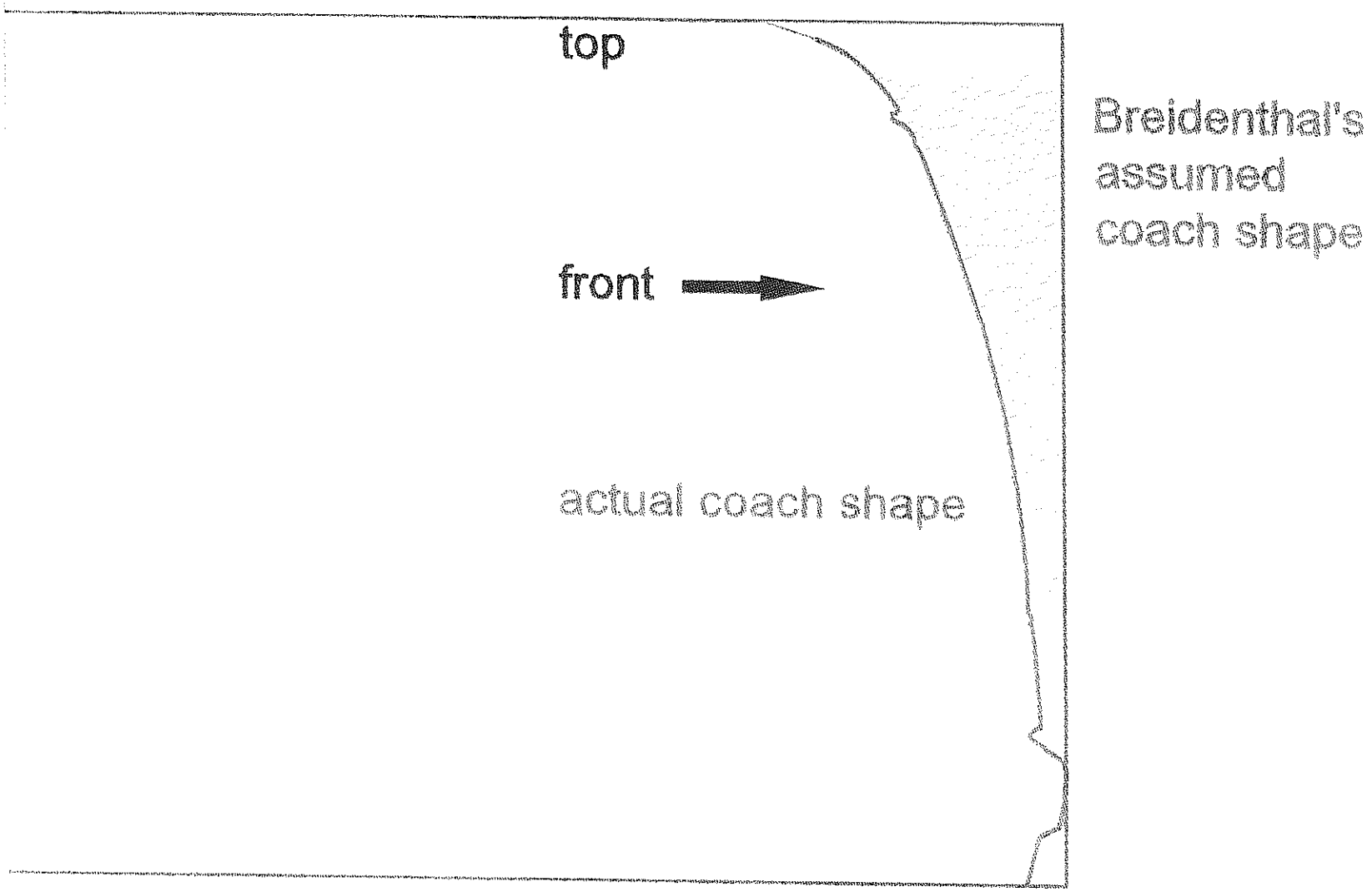

Khiabani v. MCI: Vehicle Dimensions, MCI J4500 Coach

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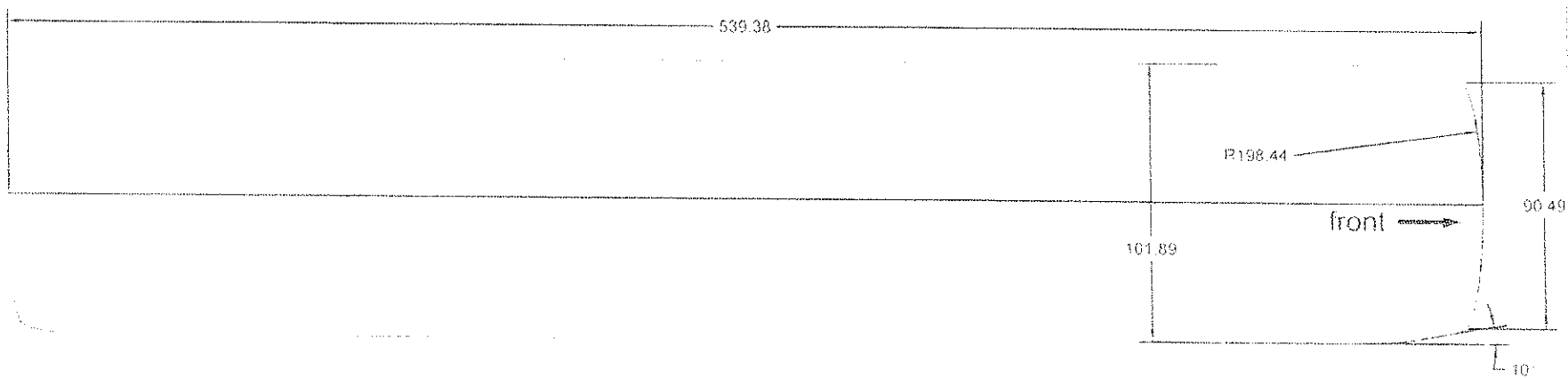

Khiabani v. MCI: Vehicle Dimensions, MCI J4500 Coach

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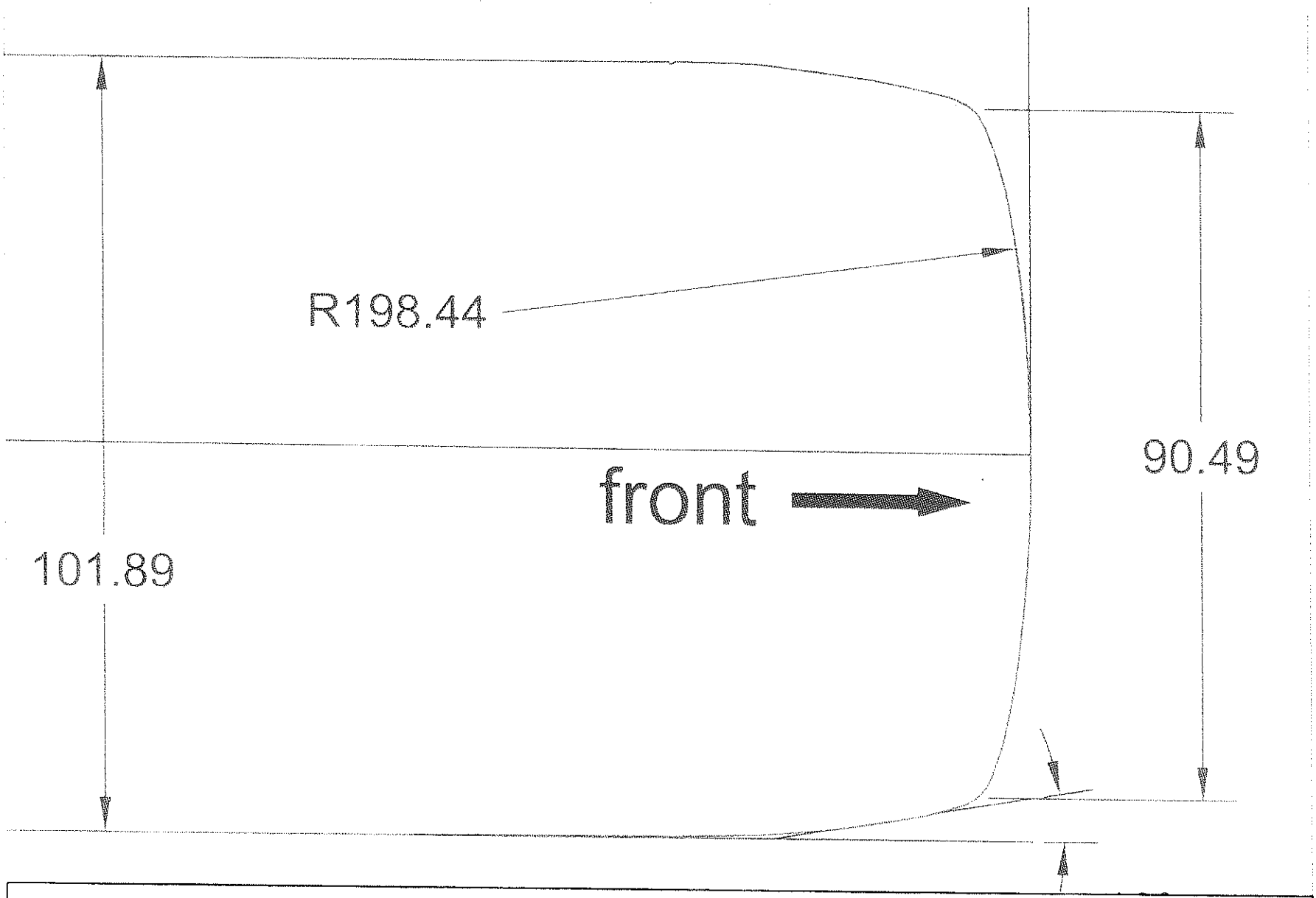

Khiabani v. MCI: Vehicle Dimensions, MCI J4500 Coach

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; 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 California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

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

NOW APPEAR Plaintiffs, by and through counsel of record, and hereby oppose Defendant's Motion In Limine No. 13 To Exclude Plaintiffs' Expert Witness Robert Cunitz Or In The Alternative To Limit His Testimony on the following grounds:

(1) Dr. Cunitz is the premier warnings/human factors expert in the United States and has been qualified as an expert witness 5 times in Nevada Courts since just 2010;

(2) numerous Nevada Supreme Court decisions have approved opinions from warnings/human factors experts;

(3) there are multiple methods by which manufacturers may provide warnings to product users (e.g., owner's manuals, bulletins or circulars, alerts on product stickers or on product packaging, educating sales staff or sales documentation warnings) -- not just employer training as MCI asserts;

(4) MCI has misrepresented the key testimony which unequivocally establishes that neither the bus driver nor the safety director at the bus company knew about the air blast risk and that the bus driver (Hubbard) would have heeded an air blast warning and taken appropriate corrective action;

(5) Mary Witherell can not be used to impute air blast knowledge to Hubbard because she worked in Reno, was never the safety director in Las Vegas and quit the bus company over two years before driver Hubbard was hired; and

(6) Plaintiffs have shown that there is an adequate factual predicate for the Cunitz opinion and MCI's arguments go to the weight and not the sufficiency of the evidence.

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I. ARGUMENT

A. Dr. Cunitz Is The Premier Warnings/Human Factors Expert In The Country And Has Been Qualified As An Expert Witness By Nevada Courts Five Times Since 2010

Robert Cunitz, Ph.D., is a Certified Human Factors Professional and Plaintiffs Warnings Expert in this products liability case. Since becoming a psychologist in 1972, Dr. Cunitz has taken a career path that has given him specialized knowledge in the risks inherent in a product, the need to warn against those risks, and how to make effective warnings and instructions. He has worked for private companies and United States governmental agencies, including the National Bureau of Standards, NASA, and the U.S. Army in the field of human factors. In 1972, Dr. Cunitz became **the head of the Human Factors Section of the Center for Consumer Product Technology of the National Bureau of Standards** and was responsible for evaluating warnings, instructions, and labels for a wide variety of products. During the 5 years that Dr. Cunitz worked at the National Bureau of Standards, it was part of the Food and Drug Administration ("FDA"). Dr. Cunitz also has

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extensive personal experience on the topic of human-subjects research, having proposed, drafted, and caused to be adopted the Commerce Department's policies and procedures regarding use of human subjects in research.

Over the last four decades, Dr. Cunitz has helped develop warning labels for many products including the yellow and black labeling now standard on refrigerator and other electric appliances. **Since 1983, Dr. Cunitz has served as a representative of the System Safety Society on the American National Standards Institute ("ANSI") Z535 Committee, which wrote the national standards for warning signs, labels, tags, safety manuals, symbols, and colors**. He is a member of the Human Factors and Ergonomics Society, the American Society of Safety Engineers, the American Association for the Advancement of Science, and has held teaching and research positions at various academic institutions. He has also studied the peer-reviewed, warnings-related literature in this field, a library that includes 160 publications. Through this involvement, experience, and research, Dr. Cunitz has participated in the academic debate and practical work that has led to the development of criteria for evaluating the adequacy of warnings in both the litigation and non-litigation context.

Dr. Cunitz has been qualified as a warnings and human factors expert in the following five Eighth Judicial Court cases since 2010 by the referenced judges: (1) Chanin v. Teva, Judge Walsh -- $505 Million verdict; (2) Sacks v. Teva, Judge Israel -- $200 Million plus verdict; (3) Hutchinson v. Teva, Judge Weiss (settled after Plaintiffs' case and triggered global resolution of all hepatitis cases); (4) Triana v. Takeda, Judge Earley; and (5) Decou v. Takeda, Judge Weiss.

B. Cunitz 46 Years Of Human Factors And Warnings Experience In The Public And Private Sector Qualify Him As An Expert In This Case

MCI claims that this former **head** of the Human Factors Section of the Center for Consumer Product Technology of the National Bureau of Standards with four and a half decades of experience with human behavior and safety concerns is not qualified to opine on the efficacy of an airblast warning because such opinion "is not reliable as it is based on incorrect assumptions and non-existent testimony." (Mot.Lim.#13, 11:18-19) This argument ignores direct Nevada Supreme Court precedent.

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1. The Law Recognizes the Admissibility of Human Factors Expert Opinion Regarding Human Behavior and the Inadequacy of Warnings.

Numerous courts have recognized human factors practitioners with less-impressive credentials than Dr. Cunitz as proper expert witnesses to testify about human behavior and the inadequacy of warnings. The Nevada Supreme Court reversed a trial judge's exclusion of a human factors expert in *Wright v. Las Vegas Hacienda, Inc.* 720 P.2d 696 (Nev. 1986). The trial judge found that the proffered witness, who was prepared to testify that the plaintiff fell on the Hacienda's stairway as a result of "the psychological effects of variations in the height and materials of the stairway," was "unqualified to testify in the field of human factors engineering" because he was not licensed as a psychologist or engineer. The Nevada Supreme Court disagreed, reasoning:

> Dr. Rasmussen was the Chairman of the Department of Psychology at the University of Nevada at Las Vegas, and had been with the department for nine years. [His] academic background included a bachelor's degree in psychology, and a Ph.D. in psychology with an emphasis on experimental psychology. His doctorate minor was in systems engineering with an emphasis on human factors engineering. . . . . and Dr. Rasmussen had taken several courses in human factors engineering designs. Finally, Dr. Rasmussen had previously taught a course in human factors engineering at [UNLV].

720 P.2d at 697. The Court concluded, "Clearly, Dr. Rasmussen was academically qualified to testify as an expert in the field of human factors engineering," and he "possessed special knowledge, training and education that would have enabled him to testify as an expert in the field of human factors *Id.*"

The Nevada Supreme Court made similar observations about the study of human factors in *Yamaha Motor Co. v. Arnoult* 955 P.2d 661 (Nev. 1998). Rejecting the defendant's argument that the plaintiff's warnings expert lacked the qualifications and factual basis necessary to opine that the owner's manual for the Plaintiff's ATV failed to adequately warn of the dangers that caused the Plaintiff's injuries, the court observed, "*Daubert* does not apply to this case because, while some empirical behavioral testing may be involved in assessing the efficacy of different warnings, warnings expertise does not, in its entirety, implicate the natural 'laws of science.'" 955 P.2d at 667-68. Instead, the Nevada Supreme Court held that **"the assessment of warnings falls within the area of 'specialized knowledge' that may be the subject of expertise not totally governed by the**

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scientific method," *Id.* (Bold added). so the gatekeeping inquiry focuses on whether his "specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute." *Id.* The court applied that standard to conclude that the Plaintiff's warnings expert was sufficiently qualified:

> Dr. Johnston's credentials demonstrate that he was qualified to testify with regard to the sufficiency of the warnings in the case at bar. Dr. Johnston holds masters and doctoral degrees in industrial engineering with specializations in human factors engineering and ergonomics from Texas Tech University. His work experience included service with McDonnell Douglas Corporation as a senior engineer on Gemini spacecraft and assistant professor of safety engineering at Texas A&M University with twenty-four years of tenure . . . . Finally, numerous corporations have enlisted Dr. Johnston's services as a safety consultant. . . . Based on his specialized knowledge as an experienced safety engineer, Dr. Johnston concluded that the owner's manual failed to adequately warn of the dangers which caused [Plaintiff's] injuries. . . . Dr. Johnston's testimony was based upon specialized knowledge that assisted in the assessment of the warnings contained within Yamaha's owner's manual.

Dr. Cunitz, too, holds masters and doctoral degrees with specializations in human factors engineering. He has more than 40 years of experience working in the human factors and warnings fields, and numerous corporations and governmental agencies "have enlisted" his services to evaluate and prepare warnings for actual products. Like Dr. Johnston in the Yamaha case, Dr. Cunitz' opinions are based upon his "specialized knowledge that assisted in the assessment of" MCI's warnings (or lack of warnings). This Court's gatekeeping inquiry should focus on whether his "specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute." *Id.*

Similarly, in *Nesbitt v. Sears, Roebuck & Co.*, the Pennsylvania court held that the proffered human factors expert was "qualified to testify as an expert on the issue of whether plaintiff would have followed an additional warning concerning use of [a] riving knife based upon human factors principles." 415 F. Supp.2d 530, 542 (E.D. Pa. 2005). The court found that his "three classes on human factors methodology and engineering" and a class on "writing warnings for products, and a class on writing manuals and procedures," combined with his membership in the Human Factors & Ergonomics Society and the Consumer Product Safety Commission's Human Factors and Engineering Committees and authorship of six power tool user manuals qualified him as an expert "in the area of how consumers respond to warnings." 415 F. Supp.2d at 541. In comparison to the

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human factors expert found competent in either Wright, Yamaha or Nesbit, Dr. Cunitz has **decades** more experience.

2. Dr. Cunitz is Extraordinarily Qualified to Offer His Opinions in this Case.

Dr. Cunitz is substantially more qualified than the experts in Wright, Yamaha and Nesbitt because his credentials span five decades, reach both the public and private sectors, and demonstrate his extensive academic experience studying and teaching human factors and behavior. Again, Dr. Cunitz spent 5 years as the **head** of the Human Factors Section of a department under the FDA and 4 **decades** on the ANSI warning committee. Further, the 40 years experience reflect a lifetime of concrete, hands-on applications of human factors principles in real-world applications as he helped create our country's standards for warnings and labels, and he has personally developed warnings for actual products.

Dr. Cunitz received his B.A. and M.A. in Psychology in 1962 and 1964, respectively, and his Ph.D. in Experimental and Human Factors Psychology from the University of Maryland in 1970. He became a licensed psychologist in 1972 and has taught graduate and/or college level courses on psychology, experimental psychology, physiological psychology, sensory and perceptual psychology, human ecology, scientific method, and research design. He is a Certified Human Factors Professional and holds (or has held) memberships in numerous professional organizations including but not limited to the American Psychological Association (and its Division of Applied Experimental and Engineering Psychology), the Human Factors and Ergonomics Society, the American Society of Safety Engineers, the American Institute of Physics, and the American Association for the Advancement of Science.

C. Plaintiffs Need Not Prove That The Bus Company "Would Have Changed The Training It Provided To Mr. Hubbard" To Meet The Sims "But For" Test

MCI asserts that Plaintiffs must prove that the bus company "would have changed the [employer] training it provided to Mr. Hubbard" as a prerequisite for the Cunitz opinion. (Mot.Lim.#13, 11:22) This baseless assertion that a change in an employer's training protocol is the only way that an airblast warning could be conveyed by a manufacturer to a product user directly

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violates the proof required in both Sims v. General Telephone & Electronics, 107 Nev.2d 151, 815 P.2d 151, 156 (Nev. 1991) [hereinafter Sims] and Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) and contravenes dozens of Nevada cases that explicitly approve various other means to transmit warning, e.g., owner's manuals, bulletins, circulars, stickers on products, product labeling, transmission by properly trained sales teams or warnings in sales documents. Before addressing these various methods to convey warnings and the evidence regarding the same in this case, it should be emphasized that, under applicable Nevada law, Plaintiffs need only produce evidence that an actor would have adhered to a warning.

In Sims, the Court held that merely showing that the actor had a history of following warnings was adequate proof to support a failure to warn claim:

> . . . the trier [of fact] may also find that, "but for" GTE's breach of this duty, Robert would not have entered the tank. In that regard, trial evidence may indicate that historically Robert had strictly heeded directions concerning his duties and safety responsibility. If so, the trier may conclude that in the face of proper warnings, Robert would have maintained his consistent attitude of compliance with instructions.

Id. See also Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) (approving Sims and stating: Sims "stated that the evidence [of historic compliance] could demonstrate that he would have adhered to an adequate warning.")

Unlike Sims, wherein there was **no** testimony from the actor that he would "take it into account in how you" act if provided a warning, bus driver Hubbard explicitly stated that he would in fact have taken an airblast warning "into account." The foregoing testimony is ample evidence to support opinions from Dr. Cunitz that Hubbard would take remedial action if properly warned about the airblast risk. The only evidentiary issue remaining is whether or not MCI did or could have provided bus drivers with an airblast warning through one or a combination of methods to transmit warnings.

Most product manufacturers provide hazard information in an owner's manual that is distributed to purchasers. See, e.g., Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 955 P.2d 661, 665 (Nev. 1998) (analyzing the "adequacy of the warnings in the owner's manual" in an ATV accident).

A second warning method is to issue direct bulletins or circulars where the product is such that the manufacturer knows where it is sold or where it is located (such as MCI's knowledge of

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where the bus in this case was always located).[1] Jacobsen v. Manfredi by Manfredi, 100 Nev. 226, 679 P.2d 251, 254 (Nev. 1984) (analyzing a post-accident product label change with "stronger warnings **and a circular providing additional warnings information**.")

A third option is to put a sticker on the product itself or its packaging -- the classic example being the yellow and black warning stickers on appliances that Dr. Cunitz developed in the 1970s. See Robinson v. GGC, Inc., 107 Nev. 135, 808 P.2d 522, 524 (Nev. 1991) (analyzing "warning decals on the [box crushing] machine"); Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271 (Nev. 2009) (warnings on cigarette packaging). A warning sticker on a motor vehicle has been expressly approved as a viable warning mechanism by our Supreme Court. Jeep Corp. v. Murray, 101 Nev. 640, 708 P.2d 251, 301 (Nev. 1985) (approving admissibility of fact that manufacturer "sent [post-accident] warning stickers to all known owners of Jeep CJ-5 vehicles" discussing lack of occupant protection and possible loss of control from sharp turns)

A fourth option is to educate the sales staff and have them convey the warning at the time of purchase either orally or, preferably, in writing. In General Electric Company v. Bush, 88 Nev. 360, 369, 498 P.2d 366, 367 (1972), the defective product was a "giant vehicle specifically designed for use in open pit mining" and the strict liability failure to warn claim was based on the assertion that the manufacturer did not warn that rigging should be kept at a 45 degree angle. Our High Court held that proof that "[n]o rigging diagram or warning was given by any of the manufacturers" supported liability despite the fact that the rig assembly crew were "professionals" and explicitly rejected the manufacturer's argument that "such notice and warning is not required when the reassembly crew

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[1] MCI knows the current owner and location of every J4500 that it sells in the United States because the bus operators must file a form with the US Department of Transportation that identifies each bus by vehicle identification number ("VIN"). The US government explicitly states that manufacturers do in fact access these registrations by the VIN. See National High Traffic Safety Administration, New Manufacturers Handbook, p. 24 (Nov. 18th, 2016 Revision Date) ("Organizations that use VINs in data systems include NHTSA, **manufacturers**, state motor vehicle departments, law enforcement agencies, insurance companies, and motor vehicle safety researchers.") (Bold added) In addition, there are lists of bus companies and tour operators by name and address available from multiple sources. For these reasons, it would be easy for MCI to send either a pre-purchase directive or a post-purchase directive (or both) about airblast hazards regarding the J4500 to all the bus companies that operated J4500 if MCI desired to do so.

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consists of professionals who not only know how to rig but also know the dangers attendant therewith." Id. 498 p.2d at 368. As an aside, in addition to focusing on warnings at time of sale, the Bush holding shreds MCI's hypothesis that failure to warn cases are somehow different when so-called "professionals" (i.e., bus drivers) are involved in product operations.

A fifth option is to provide the warning in the sales documentation. Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 56 P.3d 245, 246 (Nev. 2003) ("Two warnings regarding carbon monoxide poisoning accompanied the sale of this type of boat in 1981, one written by ONAN, the generator manufacturer, and the other by the National Marine Manufacturers' Association (NMMA).")

Plaintiffs will prove that MCI did not provide an airblast warning through any of these various five mechanisms. Starting with the owner's manual, the MCI owners manual for the J4500 will be an exhibit. (MCI000043-202) It does not contain any airblast warnings or any discussions whatsoever of air displacement.

As for direct bulletins or circulars issued by the manufacturer, while MCI has issued direct bulletins regarding other dangerous conditions, MCI did not issue any direct bulletin regarding airblasts caused by its buses. If it had, driver Hubbard already testified that he would have altered his behavior as a result of such warning:

> 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 taken that into account when you were driving the bus tomorrow, the next day, on?
> A. Yes, sir.
> Q. And the reason you would take it into account is because why?
> A. Because the bus manufacturer's telling me that it -- or --
> Q. That it's a potential safety hazard; is that right?
> A. Yeah.

(Hubbard Dep., 80:19 to 81:9) (Bold added)

As for stickers, there is no sticker on the bus regarding the airblast danger -- although MCI does provide stickers containing other information germane to bus operations.

Regarding the sales staff, MCI's principal west coast salesman confessed that he was not informed of the airblast risk despite selling thousands of J4500 buses in the last 20 years. (Dorr Dep., 26:4-13; "Q. Okay. You don't know one way or the other whether it would cause air blasts or air displacement." A. No, I don't.")

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Turning to the sales documentation, the salesman in this case testified that the only "warning" that MCI provided in the purchase agreement concerned environmental hazards and the sales documentation itself contains only that one warning in the "warning" section:

> Q. And the warning says, "This vehicle may contain HCFC R-134A refrigerant, a substance which harms public health and the environment by destroying ozone in the upper atmosphere." Did I read that right?
> A. Yes.
> Q. And that is the only warning I see in Exhibit 2 [the purchase agreement]. Do you see any other warning?
> A. No.

(Dorr. Dep., 52:16-25) While warning about chemicals that the bus might release in the air that could cause theoretic long term environmental damage is admirable, Nevada law required that MCI warn about concrete hazards such as airblasts that can potentially cause immediate physical injury to bicyclists. See Lewis v. Sea Ray Boats, Inc., 119 Nev. 245, 65 P.3d 245, 247 (Nev. 2003) Because MCI did not transmit an airblast warning through any one of these various methods, Dr. Cunitz can say that MCI provided no warning of the airblast risk.

C. MCI Misrepresents The Key Testimony That Neither The Bus Driver Nor The Safety Director Knew About The Airblast Risk And That The Bus Driver Would Have Heeded The Warning And Taken Appropriate Corrective Action

1. MCI Parts Experts, Salespersons, Customers And Bus Drivers Did Not Know Of Nor Expect Airblasts

Pablo Fierros was the head of MCI's parts division from 1997 to 2000 when the J4500 came on the market. Fierros was unaware of the air blast risk:

> Q. Okay. Now, do you have an understanding one way or the other whether or not a bus such as the J4500 creates an air blast or air displacement at its right front when it's traveling?
> A. I have no idea.

(Fierros Dep., 29:15-19)

David Dorr has been the primary MCI salesman on the west coast for almost 20 years and was the salesperson that actually sold the J4500 bus involved in this accident. Dorr not only did not know of nor expect airblasts, Dorr conceded that no warning whatsoever was provided regarding airblasts to the J4500 purchaser (Mr. Haggerty):

> Q. What is your understanding, if you have an understanding, as to whether or not when a 2007 vintage J4500 is traveling 35 to 40 miles per hour, what is your

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understanding as to whether or not it causes air blasts or air displacements from the bus?
A. I don't know.
Q. Okay. You don't know one way or the other whether it would cause air blasts or air displacement?
A. No, I don't.

(Dorr Dep., 26:4-13)

Q. Since you don't know whether or not a J4500 will cause air blasts from the front, I assume you've never discussed that point with a customer?
A. No.
Q. I'm correct, you've never discussed that point with a customer?
A. I've never discussed that, no.

(Dorr Dep., 27:9-15)

Q. Would I be correct that you did not have any communications with Mr. Haggerty [the person that bought the J4500 involved in this case] during any one of these 50 bus sales about the potential for air blasts, if any, from the J4500?
A. Yes, you're correct.

(Dorr Dep., 51:22 to 52:1)

Christopher Groepler was the General Manager of the tour company at the time of the accident. Groepler also did not know of nor expect airblasts:

Q. Okay. And broadening the question out, do you know one way or the other whether or not if a J4500 moves about 35 or 40 miles an hour that there's any sort of disturbance of the air in the front of the bus?
A. No.

(Groepler Dep., 19:7-11)

William Bartlett was the Safety Director of the tour company at the time of the accident. Bartlett also did not know of nor expect airblasts:

Q. But, as we sit here today, you don't know one way or the other whether or not a bus will create air turbulence or air blast that's going 30, 35 miles an hour?
A. I don't know. I've never tested it myself.

(Bartlett Dep., 139:7-13)

Edward Hubbard was the bus driver and also did not know of nor expect airblasts:

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.
Q. Don't know one way or the other?
A. No, sir.

(Hubbard Dep., 76:23 to 77:4)

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Completely cementing the failure to warn claim against MCI regarding its concealment of the known bus airblast hazard, bus driver Hubbard also expressly confirmed that Hubbard would have taken different actions if MCI had alerted him of the airblast risk:

> 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 taken that into account when you were driving the bus tomorrow, the next day, on?
> A. Yes, sir.
> Q. And the reason you would take it into account is because why?
> A. Because the bus manufacturer's telling me that it -- or --
> Q. That it's a potential safety hazard; is that right?
> A. Yeah.
> Q. That's the reason you would take it into account, right?
> A. I'm sorry.
> Q. Right? That's the reason you would take it into account?
> A. Because if that was part of my training, yeah. If that's what they told me, right.

(Hubbard Dep., 80:19 to 81:16)

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

(Hubbard Dep., 83:19-24) Based upon the fact that the MCI parts head, the MCI salesman, the GM of the bus company, the safety director for the bus company and the bus driver in this case all professed to be completely ignorant of the airblast hazard and did not expect it, MCI is flat out wrong in its claim that the bus company "already knew about this [airblast] phenomenon . . . ." (Mot. Lim. #13, 9:23) In actuality, no one at the bus company (i.e., Groepler, Bartlett and Hubbard) knew about the airblast risk. The foregoing testimony is ample evidence to support opinions from Dr. Cunitz based upon the professed lack of knowledge regarding the airblast risk.

2. Hubbard's Testimony that Hubbard Would Have Heeded The Warning Meets The Sims "But For" Test

Assuming arguendo that the J4500 would have been purchased in the first place despite a full and complete disclosure of the airblast hazard, a warning transmitted to the driver would have prevented Dr. Khiabani's death because the bus driver testified that he would have altered his driving behavior if warned. MCI's central argument is that Hubbard's testimony that he would "take into account in how you drive the bus" if given an airblast warning is not an adequate basis for an opinion by Dr. Cunitz that Hubbard would have heeded an adequate air blast warning. (Mot.Lim.#13, 8:5-10) MCI errs because the statement of positive action by Hubbard satisfies the

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"but for" test for failure to warn set forth in Sims v. General Telephone & Electronics, 107 Nev.2d 151, 815 P.2d 151, 156 (Nev. 1991). In Sims, the Court held that merely showing that the actor had a history of following warnings was adequate proof to support a failure to warn claim:

> . . . the trier [of fact] may also find that, "but for" GTE's breach of this duty, Robert would not have entered the tank. In that regard, trial evidence may indicate that historically Robert had strictly heeded directions concerning his duties and safety responsibility. If so, the trier may conclude that in the face of proper warnings, Robert would have maintained his consistent attitude of compliance with instructions.

Id. See also Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) (approving Sims and stating: Sims "stated that the evidence [of historic compliance] could demonstrate that he would have adhered to an adequate warning.") Unlike Sims, wherein there was no testimony from the actor that he would "take into account in how you" act if provided a warning, Hubbard herein stated that he would in fact have taken an airblast warning into account. The foregoing testimony is ample evidence to support opinions from Dr. Cunitz that Hubbard would take remedial action if properly warned about the airblast risk.

3. Mary Witherell Was Never The "Safety Director" In Las Vegas, Was Not Employed By The Bus Company When Driver Hubbard Was Hired And Was Not The Safety Director That Trained Hubbard

MCI argues that Mary Witherell knew of the airblast risk and that her knowledge should be imputed to bus driver Hubbard. (Mot. Lim. #13, 8:11-9:25) Mary Witherell was employed by the predecessor in interest of the bus company in Reno -- not Las Vegas. (Witherell Dep., 12:10-12) Witherell left the bus company in January 2014. (Witherell Dep., 11:8-10) Hubbard started working for the bus company in Las Vegas over two years later on April 20, 2016; when it was known as "Michelangelo Leasing." (Hubbard Dep., 10:15-18) Not only was Witherell **not** working in the transportation business anywhere when Hubbard was hired years later, Witherell stated that she did not know anything about Michelangelo's operations. (Witherell Dep., 47:8-18; Q. You were never an employee of Michelangelo Leasing? Q. No, sir. Q. Do you have any knowledge regarding Michelangelo's safety policies and procedures? A. I have no idea. Q. And I would understand you don't have any knowledge of their training program? A. No, sir.")

Based upon the actual facts, it is clear that MCI is deliberately attempting to mislead the Court into believing that Hubbard got some air blast training when it first captions a section "Ryan's

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Express Deposition Testimony Related To Its Training and Air Displacement by Moving Vehicles" and then leads off with a citation to Witherell's testimony that Witherell had heard of airblasts. (Mot.Lim.#13, 8:11-27; 9) That MCI is engaging in trickery is especially apparent where MCI uses Witherell's testimony to attack Cunitz by using the Witherell testimony to impute air blast knowledge to Hubbard; the driver in this case:

> This testimony [that Witherell knew of airblasts and that Barlett (the Las Vegas safety director) provided training to steer wide of bicycles] demonstrates Dr. Cunitz's opinion is based on pure speculation. He opines that MCI should have given some type of warning about the alleged air blast, but considering 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.

(Mot.Lim.#13, 9:21-25)

In response, as a matter of law, the Court can not impute the knowledge that Witherell had about air blasts to Hubbard for multiple reasons: (1) Witherell worked in Reno -- not Las Vegas; (2) Witherell quit working in January 2014 and Hubbard started over two years later in April 2016; and (3) Witherell admittedly knew nothing about the training program administered to Hubbard. Second, the actual testimony from both Hubbard (the driver) and Bartlett (the safety director that trained Hubbard) is that neither one of them knew about the air blast risk. (Bartlett Dep., 139:7-13; "Q. But, as we sit here today, you don't know one way or the other whether or not a bus will create air turbulence or air blast that's going 30, 35 miles an hour? A. I don't know. I've never tested it myself."; Hubbard Dep., 76:23 to 77:4; "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. Q. Don't know one way or the other? A. No, sir.") It is disgusting that MCI suggests to the Court that the direct opposite is true, i.e., that the bus company "already knew about this phenomenon" given this clear cut testimony from both the driver and the pertinent safety director. Finally, the argument that Cunitz should be disqualified from testifying because the Cunitz opinion is based upon the actual facts is frivolous where it is glaring obviously that the contorted recitation of the "facts" by MCI is false and inaccurate when the actual testimony is reviewed.

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4. There Are Multiple Actors To Whom A Proper Warning Would Have Changed Behavior

The reason that people quit buying Ford Pintos but kept getting the GM Cutlass after 1976 is that purchasers became aware that the Pinto was prone to explode in rear end collisions. Similarly, there is evidence in the record that bus purchasers would have evaluated the air blast hazzard while making purchasing decisions if told about the air blast risk of the MCI J4500:

Mr. Bartlett, the safety director for the bus company, testified that he would take disclosed hazards into account to "make a good buying decision":

> Q. If you were a purchaser of a purchaser of a vehicle, would you like them to convey all the information they have about potential hazards to you?
> A. Yes.
> Q. Why is that?
> A. To make a good purchasing decision.
> Q. And do you know one way or the other whether or not different buses have different degress of suction from the rear wheels?
> A. I don't.

(Bartlett Dep., 153:14-21)

Mr. Groepler, the General Manager of the tour company at the time of the accident, agreed that an air blast hazard would be important information for purchasers:

> Q. Okay. And so assuming that an air blast is a hazard, would it be good information for the manufacturer to give to you, the purchaser?
> A. If I was the purchaser, yes.
>
> . . . .

(Groepler Dep., 21:17-21) Obviously, all things being equal, a reasonable purchaser would buy a bus that was less hazardous if only to avoid accidents (and litigation). Therefore, if an adequate airblast warning had been provided at time of purchase, the trier of fact could determine that hte J4500 would not have been purchased in the first place.

D. The Four Claims By MCI Of "Non-Existent" Facts "Incorrectly" Assumed By Cunitz Are All Contrived Manipulations Of The Actual Testimony

MCI lists the four factual mistakes that it claims Cunitz makes in asserting his opinion near the end of the motion. (Mot.Lim.#13, 11:21-27). The first ("* that Ryan's Express and Mr. Hubbard did not know moving motor coaches displace air") is discussed in the preceding section. Where the driver says point blank that he did not know the impact of air blasts, it is outrageous that

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MCI is asserting the exact opposite to the Court. MCI's manipulation of the Witherell testimony to attempt to impute knowledge to Hubbard demonstrated above is borderline sanctionable.

As for the second alleged factual mistake ("that had MCI given any warning to Ryan's Express, that it would have changed the training it provided to Mr. Hubbard"), as set forth above, training changes are not the only way (nor the most common way) for manufacturers to transmit warnings. However, there is evidence in the record that a responsible bus operator would train its drivers about the air blast danger if alerted to such hazzard by the bus manufacturer:

MCI's third alleged factual mistake by Cunitz is "that Mr. Hubbard would have driven differently the day of the accident." (Mot.Lim.#13, 11:24) This is exactly what Mr. Hubbard said that he would do. (Hubbard Dep., 83:19-24; "Q. So if you knew that there were either air blasts or suction in the rear tires, you would -- you would take that into account in how you drive the bus? A. Yes.")

MCI's fourth alleged factual mistake is that "Mr. Hubbard testified that 'had adequate warnings and training materials been provided by the [MCI,]' that he 'would have given bicycles greater clearance during passing maneuvers.'" (Mot.Lim.#13, 11:25-27) In point of fact, Hubbard stated that he would have taken an airblast warning "into account." Elsewhere during the deposition, Hubbard stated that he explicitly followed his training to give bicycles at least a 3 to 4 foot separation. (Hubbard, Dep., 32:14-15; "A. Yes. I'm 3 to 4 feet away, **as I was trained to be**.") (Bold added) As Sims held, this evidence of historic compliance with training is dispositive on whether or not Hubbard, if warned, would have heeded an airblast warning. Hence, Cunitz can give an opinion on this point.

II. CONCLUSION

Dr. Cunitz is the leading warnings/human factors expert in the United States and has been qualified as such in five different trials here in the Eighth Judicial District Court since 2010 by the following jurists (Walsh, Israel, Earley and twice by Weiss). Faced with the hopeless task of attacking the amazing qualifications Cunitz has as a warnings/human factors expert, MCI instead argues that Dr. Cunitz does not understand the facts of this case and that there is "not evidence to support such opinion." (Mot.Lim.#13, 5:11) Actually, not only is there ample evidence to support

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the Cunitz opinion, MCI has misrepresented the key testimony and witnesses that establish that neither the bus driver nor the pertinent safety director at the bus company (i.e., Bartlett) knew about the air blast risk and that the bus driver would have heeded an air blast warning and taken appropriate corrective action. Motion in Limine No. 13 should be denied.

DATED this 8th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of January, 2018, the foregoing 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 was served on all parties currently on the electronic service list via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2.

An Employee of Kemp, Jones & Coulthard.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

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

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Plaintiffs, by and through their attorneys, hereby oppose the motion in limine to exclude Dr. Stokes' opinions about Decedent Dr. Khiabani's lost income filed by Defendant MCI on the following grounds:

(1) In this action for the wrongful death of their father, 14-year-old Keon and 16-year old Aria are entitled to seek damages for loss of probable support;

(2) Under Nevada law, loss of probable support "**translates into, and is often measured by, the decedent's lost economic opportunity**." *Alsenz v. Clark County School Dist.*, 864 P.2d 285, 287 (Nev. 1993) (bold added);

(3) Based on *Alsenz*, Dr. Stokes' opinions about Dr. Khiabani's lost income are relevant to Keon and Aria's claim for loss of probable;

(4) Dr. Stokes' opinions are also relevant and admissible to show "[t]he earning capacity of the deceased," which the jury is expressly authorized to consider under Nevada's pattern jury instruction on wrongful death damages. Nev. J.I. 10.13; and

(5) The fact that Keon and Aria will both reach the age of 18 within four years is irrelevant.

I

STATEMENT OF FACTS

Less that one year ago, Keon and Aria lived in Las Vegas with both of their happily-married parents. Their father, Kayvan Khiabani, MD, was a world-renowned hand surgeon employed by UMC. Their mother, Katy Barin, DDS, ran a successful dental practice in Summerlin. Aria, who was 15 at the time, was in the magnet program at Clark High School. Keon, who was 13 at the time, was finishing his final eighth grade year at Alexander Dawson.

In or around January 2017, Keon and Aria's world suddenly changed. Their mother was diagnosed with stage iv colorectal cancer. Although the diagnosis was scary, the family came together determined to help Katy beat her cancer. And that is exactly what she was doing. On April 18, 2017, however, Keon and Aria's world was shaken again. Their father was suddenly killed in the accident giving rise to this case.

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Following her husband's death, Katy took a turn for the worse. According to Plaintiffs' expert, Dr. Panigrahy, the stress of Dr. Khiabani's death caused an exacerbation of Katy's cancer. While Dr. Panigrahy opines that, but for this stress, she would have survived for several more years, Katy died in October 2017. As if the shock and pain of suddenly losing both of their parents within six months were not enough, Keon and Aria were uprooted from the lives and moved to Montreal Canada to live with their aunt and uncle.

Based on the wrongful death of their father, Aria and Keon seek damages for loss of probable support. Although he had the skills to earn much more money in private practice, Dr. Khiabani elected to work for the University of Nevada, Reno at UMC, where he could practice and teach. While he had the opportunity to make more, Dr. Khiabani was one of the highest paid state employees, earning an annual salary of nearly $1 million. Plaintiffs' expert economist, Larry Stokes, Ph.D., opines that, after factoring in his work-life expectancy, future earnings and personal consumption, the present value of lost earnings resulting from Dr. Khiabani's death totals **$15,262,417.00**. Because loss of probable support "translates into, and is often measured by, the decedent's lost earning capacity," Keon and Aria seek to recover these damages under their claim for loss of probable support. *See Alsenz*, 864 P.2d at 287.

II

ARGUMENT

A. MCI concedes that Keon and Aria are entitled to seek damages for loss of probable support.

In Nevada, "[w]hen the death of any person… is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death." NRS 41.085(2). In such an action, the heirs may prove their respective damages for "grief or sorrow, **loss of probable support**, companionship, society, comfort and consortium." NRS 41.085(4) (bold added). MCI does not dispute that Keon and Aria may properly assert a claim for loss of probable support pursuant to this statute. Mot., 4:25-26 ("the heirs are entitled to recover loss of probable support.").

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B. Under Nevada law, Keon and Aria's claim for loss of probable support "translates into" and may be "measured by" Dr. Khiabani's lost income.

In Nevada, it is well-established that loss of probable support "**translates into, and is often measured by, the decedent's lost economic opportunity**." *Alsenz*, 864 P.2d at 287 (bold added). The Nevada Supreme Court has long held that damages for loss of probable support are based on the decedent's lost income or earning capacity:

> NRS 41.085, enacted in 1979, allows heirs to prove damages for loss of probable support. The legislature carefully chose the words "probable support." The legislature's intent should be given full effect. **Heirs' damage, based on the decedent's lost earning capacity, may include present as well as future loss of support**. *Freeman v. Davidson*, 768 P.2d 885, 887 (Nev. 1989), citing *Wells, Inc. v. Shoemake*, 177 P.2d 451 (Nev. 1947) (bold added).

Accordingly, Keon and Aria's claim for loss of probable support is properly premised on their deceased father's lost income, which Dr. Stokes opines is more than $15 million.

C. Dr. Stokes' opinions about Dr. Khiabani's lost income are relevant to Keon and Aria's claim for loss of probable support.

MCI argues that "[a]lthough the [Keon and Aria] are entitled to recover loss of probable support, Dr. Stokes offers no opinion on the allowable claim of lost support." Mot., 4:25-26. This argument is untrue and based on nothing more than meaningless semantics. MCI effectively contends that Dr. Stokes' opinions should be excluded because he used the words "loss of earnings" and "income" instead of "loss of probable support." As set forth above, however, Keon and Aria's damages for loss of probable support "translate into" and may be "measured by" Dr. Khiabani's lost income. Regardless of whether he characterizes the damages as lost income, lost earning capacity, lost economic opportunity, or some other synonymous term, Dr. Stokes' opinions relate to Keon and Aria's claim for loss of probable support, which MCI concedes is proper. MCI's dubious request to exclude Dr. Stokes' relevant opinions should be denied.

D. Dr. Stokes' opinions on Dr. Khiabani's lost earning capacity have independent relevance under Nevada's applicable pattern jury instructions.

MCI baldly contends that presenting the jury with evidence regarding Dr. Khiabani's "'lost income' would be unduly prejudicial and confusing." Mot., 6:22-23. This conclusory

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assertion is belied by Nevada's applicable pattern jury instruction, which expressly states that "[t]he earning capacity of the deceased" is a relevant factor for the jury to consider when awarding wrongful death damages:

> WRONGFUL DEATH OF ADULT; HEIR AS PLAINTIFF; LOSS OF PROBABLE SUPPORT, COMPANIONSHIP, SOCIETY, COMFORT AND CONSORTIUM
>
> The heir's loss of probably support, companionship, society, comfort and consortium. In determining the loss, you may consider the financial support, if any, which the heir would have received from the deceased except for his death, and the right to receive support, if any, which the heir has lost by reason of his death.
>
> [The right of one person to receive support from another is not destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it.]
>
> You may also consider:
>
> 1. The age of the deceased and of the heir;
> 2. The health of the deceased and of the heir;
> 3. The respective life expectancies of the deceased and of the heir;
> 4. Whether the deceased was kindly, affectionate or otherwise;
> 5. The disposition of the deceased to contribute financially to support the heir;
> 6. **The earning capacity of the deceased**;
> 7. His habits of industry and thrift; and
> 8. Any other facts shown by the evidence indicating what benefits the heir might reasonably have been expected to receive from the deceased had he lived. Nev. J.I. 10.13 (bold added).

Thus, Dr. Stokes' opinions regarding Dr. Khiabani's earning capacity has independent relevance under Nevada's pattern jury instructions.

E. Under this same jury instruction, the fact that Keon and Aria will both reach the age of 18 within four years is irrelevant.

MCI states that, had Katy lived, it would have been acceptable to measure her loss of probable support by Dr. Khiabani's future earnings "less his personal consumption. Mot., 6:15-16. It contends, however, that this law doesn't apply to "minor children only two and four years from becoming adults" because it is not probable for adults to be supported by their parents. Mot., 6:18-19. This argument is baseless as a matter of law and a matter of fact.

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First, MCI's contention is (again) belied by Nevada's pattern jury instruction on wrongful death damages. While MCI argues that Keon and Aria's claim for probable support should be excluded because adults don't need, and commonly don't receive, support from their parents, the jury will be instructed that "[t]he right of one person to receive support from another is **not destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it**." Nev. J.I. 10.13 (emphasis added). Under the law, the fact that Keon and Aria are approaching the age of 18 does not deprive them of their claim for loss of probable support.

Second, it is incredulous for MCI to suggest that children of any age are not entitled to recover the full measure of probable support arising from their parent's wrongful death. Keon and Aria have suffered monumental loss, and MCI seeks a windfall because its dangerously defective bus killed a man with teenage children instead of toddlers. The Court should reject this rationale and deny MCI's instant motion in its entirety.

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III

CONCLUSION

MCI concedes that Keon and Aria are entitled to recover loss of probable support as an element of damages. Under Nevada law, "**[t]his element of damages translates into, and is often measured by, the decedent's lost economic opportunity**." *Alsenz v. Clark County School Dist.*, 864 P.2d 285, 287 (Nev. 1993) (bold added). Based on both this law and Nevada's pattern jury instructions, Dr. Stokes' opinions regarding Dr. Khiabani's lost income are relevant and admissible. There is no basis to exclude either Keon and Aria's lawful claim for these damages or Dr. Stokes' opinions supporting the same. Accordingly, and for all of the forgoing reasons, MCI's Motion in Limine No. 17 should be denied.

Dated this 9th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2018, the foregoing **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** 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.

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON FORESEEABILITY OF BUS INTERACTION WITH PEDESTRIANS OR BICYCLISTS (INCLUDING SUDDEN BICYCLE MOVEMENT)

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NOW APPEAR Plaintiffs, by and through counsel of record, and hereby file their reply to the opposition to the motion for summary judgment on foreseeability of bus interaction with pedestrians or bicyclists on the following grounds:

(1) foreseeability is an **objective** standard and the Nevada Supreme Court has expressly held in product liability actions that "[n]egligent [and intoxicated] driving of a vehicle is a foreseeable risk against which a manufacturer is required to take precautions" and has also held that intentional battery is foreseeable;

(2) Plaintiffs do not have the burden of proving case specific foreseeability as MCI contends;

(3) defense counsel for MCI have made the exact same losing argument to other courts that they should be able to point to negligence or recklessness of third-parties as a product liability defense under the rubric of foreseeability; and

(4) the only types of conduct of the bus driver that are relevant are whether he would have heeded an airblast warning from MCI or moved over when alerted by a proximity sensor.

I. ARGUMENT

A. Foreseeability Is An Objective Standard And Not A Case By Case Determination To Be Resolved By The Jury

In this case, a bus driver was driving a bus full of passengers down a city road that was adjacent to a bicycle lane. There is no valid argument that the bus driver was not using the product (the bus) in a foreseeable manner because the primary use of a bus is conveying passengers down roadways. This is a foreseeable use whether the bus driver was negligent, reckless or even intoxicated while driving the bus because it is foreseeable that some bus drivers will engage in such behavior. Indeed, the vehicle operator in Andrews v. Harley Davidson, Inc., 106 Nev. 533, 537, 796 P.2d 1092, 1095 (1990) was legally drunk and the Supreme Court held that any reference to intoxication must be excluded because it was a foreseeable misuse that people drive cars and motorcycles while intoxicated. Harley Davison was a strict liability case like the present one.

Applying Harley Davidson to this case, the Court therein held that "[n]egligent [and intoxicated] driving of a vehicle is a foreseeable risk against which a manufacturer is required to take precautions." Likewise, it was a foreseeable risk that the bus driver herein would potentially

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drive negligently or recklessly and this can not be a defense in a product liability case. The foreseeability test is whether the bus was being used in a foreseeable manner. It was because the bus was being driven down the road to ferry passengers. The foreseeability test is not whether or not this precise accident was foreseen.

MCI argues that there is an issue of fact as to whether MCI could foresee what MCI calls "driver misuse" or "unforceable misuse." (Opp., 8:21:23; "[e]ven assuming that mere negligence cannot constitute unforeseeable misuse, a reasonably jury could find that the driver's conduct rose to the level of willfulness, gross carelessness or recklessness, which would constitute unforeseeable misuse.") First, as Harley Davidson demonstrates, gross carelessness, recklessness and even criminal behavior such as intoxication are foreseeable. MCI is focusing on foreseeability of this specific accident as opposed to objective foreseeability of the harms which the product may cause.

In Price v. Blaine Kern Artista, Inc., 111 Nev. 515, 518, 893 P.2d 367, 369 (Nev. 1995), the Court held that an intentional tort (i.e., battery) was not a defense in a product liability case because the manufacturer could foresee that the product may tip over (which tipping was caused by the intentional tort of battery) and this foreseeability of the manner in which the product could be used ended the foreseeability analysis without regard to precisely what made the product tip over. More importantly, the Price Court admonished that the focus should be "on whether the harm is of a kind and degree that is so far beyond the risk foreseeable to the manufacturer that the law would deem it unfair to hold the manufacturer of the product responsible." Price, 893 P.2d at 371.

The Court explained:

> Whether an intervening cause is also a superseding cause in a strict products liability action **must be determined in light of the nature and extent of the injury attributable to the product defect, thus focusing on whether the harm is of a kind and degree that is so far beyond the risk forseeable to the manufacturer that the law would deem it unfair to hold the manufacturer of the product responsible.**
>
> In that regard, an intentional intervening act by a third party which is both unforeseeable and the proximate cause of the injury may insulate the manufacturer of a defective product from liability.

Id. (Bold added) In this case, the harm is that a bus ran over a bicycle with its rear tires so the issue is whether such "harm is of a kind and degree that is so far beyond the risk foreseeable" to MCI that

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"the law would deem it unfair to hold the manufacturer of the product responsible." As discussed below, the MCI PMK testified that MCI foresaw this type of harm to bicyclists decades ago. Furthermore, the potential risk of a bicyclist being run over by a bus is glaringly obvious.

The famous case of Palsgraf v. Long Island RR, 162 NE 99, 248 NY 339, 225 NYS 412 (N.Y.Ct.App. 1928) illustrates a scenario where the harm (an exploding bomb) was not foreseeable. In Palsgraf, a jury found for Plaintiff and despite this jury verdict the Court of Appeals of New York (through Justice Cardoza) held that the harm at issue (a train conductor dropping a package that contained a bomb which exploded) was not foreseeable as a matter of law to the railroad defendant.

Price also proves that MCI's assertion that objective foreseeability determinations in product actions are limited to "crashworthiness" cases is hogwash invented by defense counsel. Price did not even involve an automobile accident, involved an intentional tort and yet held that the test is an objective analysis of the "kind and degree" of "the harm" as opposed to foreseeability of the specific accident.

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B. MCI Fails To Confront The Decisive Evidence Proving Foreseeability In This Case

The precise issue is whether a bus manufacturer can foresee that there may be harm to bicyclists from passing buses. The PMK for MCI testified that MCI has been aware of this specific type of harm risk for decades:

> Q. Okay. Let me ask it a little differently. **Do you recognize that there's a theoretical potential that pedestrians or bicyclists could potentially be run over by rear tires of a bus under some scenarios.**
> **A. There may be a scenario where that could occur.**
> Q. Okay. And generally -- you understand generally that that could happen under some scenarios?
> A. It's possible that that could happen.
>
> . . . .
>
> Q. Well, let's put it differently. You knew back in, let's say, 2--- that this was a potential scenario?
> **A. There's a potential that a bus tire can roll over something, that's correct.**
> **Q. Okay. Including people?**
> **A. Anything, yeah. Tires on all vehicles can run over something?**
> **Q. And you knew that back in 2000?**
> **A. Yes.**
> **Q. Probably before that time?**
> **A. Probably before that time.**

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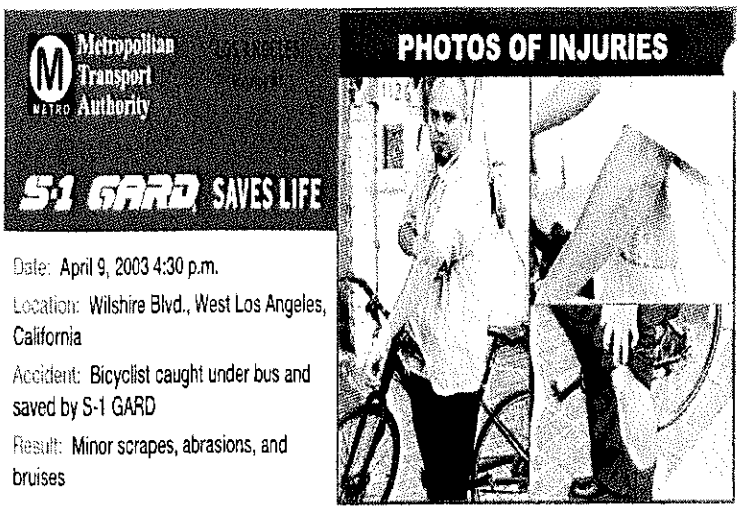
(Hoogestraat Dep., 85:5 to 86:8) (Bold added) Hoogestraat repeatedly confirmed that MCI foresaw this precise harm:

> Q. Protect people or objects that could potentially be run over by the rear tires?
> A. Well, objects that get underneath the bus, there is a potential that the rear tires can run over them. That's true.

(Hoogestraat Dep., 87:19-23) As Plaintiffs pointed out in the motion, this testimony is **binding** upon MCI because it was submitted by the person that MCI designated as MCI's most knowledgeable. Even if there was contradictory testimony from another MCI employee (and there is not), this testimony would be binding. In the opposition, MCI never once confronts this dispositive testimony.

Plaintiffs also pointed out in the motion that the manufacturer of the S-1 Gard prepared a video in the late 1990's depicting a bicycle going under the rear tires of a bus and being saved by the S-1 Gard and placed a picture of the same in its product literature:



The S-1 Gard manufacturer even describes the "accident" as bicyclist caught under bus and saved by the S-1 Gard. Plaintiffs cited the testimony of MCI personnel that they saw this literature in the motion. Again, MCI never once confronts these facts in its opposition. Based upon the admission of the PMK that the bicycle accident in this case was a "harm . . . of a kind and degree" that is foreseeable, the Court should so hold and grant the instant motion for summary judgment.

Because MCI has not offered any evidence whatsoever to controvert the testimony of its

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PMK that bus rear tires running over bicyclists is foreseeable, this motion should be granted for a second alternative reason -- MCI has completely failed its burden to oppose a summary judgment motion. In Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (Nev. 2005) (Bold added), the Court held:

> While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. **The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him."** The nonmoving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.

MCI has not attached any affidavits or deposition testimony suggesting that bus manufacturers could not foresee rear tire collisions with bicyclists. Presumably, this is because the MCI PMK testified exactly the opposite. Regardless, MCI has failed its burden of proving that there is an issue of fact to be tried regarding foreseeability of bicycle accidents.

C. Objective Foreseeability Is Determined By The Court

MCI argues that some sort of question about "reasonable foreseeability" must be decided by the jury. (Opp., 8:11 to 9:24) MCI more specifically argue that "a reasonable jury could conclude that the driver knew that his proximity to Dr. Khiabani facilitated a high degree of risk but deliberately failed to act in conscious disregard of that risk." (Opp., 9:15-17) In short, MCI suggests that the negligence or recklessness of the driver is some sort of defense to this product liability claim. This assertion directly contravenes Price and Harley Davidson. Again, Price held that the test is foreseeability of the kind and degree of harm -- not whether a third party negligently or even intentionally caused the harm:

> Whether an intervening cause is also a superseding cause in a strict products liability action **must be determined in light of the nature and extent of the injury attributable to the product defect, thus focusing on whether the harm is of a kind and degree that is so far beyond the risk foreseeable to the manufacturer that the law would deem it unfair to hold the manufacturer of the product responsible.**

Price, 893 P.2d at 371. Furthermore, Price expressly rejected an effort to focus on third party conduct (MCI's tact) as opposed to the nature and extent of the injury attributable to the product defect:

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> In the instant appeal, we must therefore consider whether the injury suffered by Price was of a kind and degree that the trier of fact may find to be within the ambit of risk that BKA [the mask manufacturer] would have addressed in designing its product.
>
> For purposes of summary judgment, we note that Price's injuries were not the immediate result of the assailant's push. Rather, the shifting of the weight of the caricature mask was allegedly the immediate cause of Price's injuries, and the risk of such an occurrence and the resulting strain on Price's head and neck may be found to be within the realm of risks that should have been considered and addressed by BKA in the design of its product. In the final analysis, the initial cause of Price's fall appears to be of little consequence, considering the reasonable prospect that among the quantity of users of BKA's products, some of them will sooner or later fall for any number of a variety of reasons.

Id. Likewise, in the present case, "the initial cause" of the bus and bike collission is "of little consequence, considering the reasonable prospect that among the quantity of users" of the bus, "some of them will sooner or later [hit the bus or] fall [under it] for any number of a variety of reasons."

In Palsgraf v. Long Island RR, 162 NE 99, 248 NY 339, 225 NYS 412 (N.Y.Ct.App. 1928), the Court held that foreseeability was lacking as a matter of law and reversed a jury verdict for the victim. Where the most renowned foreseeability case in modern jurisprudence found that foreseeability was a decision for the court -- not the trier of fact -- MCI should not be heard to argue the opposite.

D. MCI Counsel Has Repeatedly Attempted To Create A False Defense Based On The Alleged Negligence Or Recklessness Of Third Parties In Other Cases

Defense counsel know full well that driver negligence (or "recklessness") is not a defense in this product liability action against the bus company. This is especially true given the admission by the MCI PMK that the rear tires of an MCI bus potentially running over a bicyclist has been foreseeable for decades. MCI counsel are also aware that calling third-party negligence "unforeseeable" to revitalize a forbidden driver negligence defense is a charade that has been rejected in past cases.

The most prominent example of similar shenanigans involving current MCI counsel occurred in Meyer v. HPN, Case No. A583799, the largest verdict in the history of Nevada ($524 Million). In that case, MCI counsel conceded on the record that medical malpractice was foreseeable ("objective foreseeability") -- just as bad driving by a bus driver and resulting bicycle collisions are objectively

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foreseeable to MCI. Yet MCI's counsel argued in the Meyer case (identical to the claim made herein) that Plaintiffs had to prove that the specific malpractice that occurred at the Endoscopy Center was foreseeable to Defendant or the jury could find against Plaintiffs ("specific foreseeability").

In Meyers, the Hon. Timothy Williams summarized Plaintiffs position that Plaintiffs need not prove specific foreseeability as follows:

> In this instant Motion, Plaintiffs argue that Defendants have incorrectly suggested throughout their pre-trial motions that Defendants can only be liable in this case if Plaintiffs can demonstrate that Defendatns knew or should have known that ECSN or ECSN's medical providers would commit the specific act of malpractice/substandard practice that caused Plaintiffs' Hepatitis, i.e. the misuse of propofol by unsafe injection practices. As such, Plaintiffs argue that Defendants should be precluded from making any argument or presenting any evidence at trial which suggests Plaintiffs must prove Defendants could foresee the specific type of malpractice ECSN or its professionals would commit.
>
> Plaintiffs cite to *Sims v. General Telephone & Electrics*, 107 Nev. 516, 815 P.2d 151 (1991) for the proposition that legal foreseeability is essentially a policy consideration that limits an actor's liability to consequences that have a reasonably close connection with both the actor's conduct and the harm that conduct originally created. Moreover, Plaintiffs argue that an intervening cause of a third party's misconduct does not relieve an actor of liability if the likelihood that the third party might commit the misconduct is one of the very hazards which makes the actor negligent. *Doud v. Las vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993). Plaintiffs cite to additional case law to support their argument that Plaitniffs need not show that Defendants could have foreseen that ECSN or its professionals would specifically engage in improper injection practices. *See Louisville Gas & Elec. Co v. Roberson*, 212 S.W. 3d 107, 112 (Ky. 2006) (emphasis added) (it is not necessary that the defendant should have been able to anticipate the precise injury sustained, or to foresee the particular consequences, but only that the injury is a natural and probable consequence of the tortious conduct."); *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291 (6th Cir. 2011); *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 179 (2nd Cir. 1999) ("at common law, the [proximate cause] element of foreseeability is generally satisfied by a showing that the plaintiff was in a foreseeable category of persons who might be harmed.") *Chua v. Hilbert*, 846, So.2d 1179, (Fla. App. 2003) (in determining whether a subsequent cause of plaintiff's harm is an intervening cause for which the original tortfeasor is liable, it is not necessary that the exact harm suffered by the plaintiff be foreseeable).

Defendants argument was summarized as follows:

> Defendants further argue that *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005) and *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 492, 215 P.3d 709, 725 (2009) support their position that Defendants can only be liable in this case if Plaintiffs prove Defendants could have foreseen the specific act of malpractice that resulted in Plaintiffs' contracting Hepatitis C. The Court disagrees with Defendants' position that Plaintiffs must prove such a specific level of foreseeability to recover on their claims here.

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MCI's argument in this case (i.e., that Plaintiffs allegedly have a "prima facie burden of demonstrating that the motor coach 'was used in a manner that was reasonably foreseeable'") (Opp., 2:21-23) is almost word for word identical to the same frivolous argument that the same defense counsel made in the Meyer case (rejecting "Defendants' position that Plaintiffs must demonstrate that Defendant could foresee the specific act of improper injection practices to be found liable to Plaintiffs.") Order, 5:9-12)

Judge Williams rejected the assertion that a Plaintiffs had to prove the Defendants could specifically foresee the wrongful act of a third party for the following reasons:

> As to Defendants' argument that granting this motion amounts to establishing strict liability against HMOs for provider malpractice, the Court rejects that argument. This ruling, and the Court's related ruling regarding foreseeability, established that Plaintiffs need only demonstrate that an injury to Plaintiffs from medical malpractice was a foreseeable consequence of Defendants' breach of their duty to Plaintiffs. Here, the Court has already ruled as a matter of law that Defendants may not argue that the negligence of non-parties, including ECSN and its professionals, was a superseding cause so as to cut off Defendants' liability to Plaintiffs. Plaintiffs went to a clinic, with whom Defendants had selected and contracted for medical treatment. The harm suffered by Plaintiffs was directly related to that very medical treatment. Defendants' duty to Plaintiffs in this case directly relates to Defendants' selection and retention of network providers, and such duty involves what Defendants knew or should have known regarding Dr. Desai and his endoscopy center. Based on these facts, the Court reached its ruling that provider malpractice was a foreseeable risk, if not the only foreseeable risk, of Defendants' act of directing their members, including Plaintiffs, to ECSN and its professionals for medical treatment.

Under Harley Davidson and Price, Judge Williams conclusion that specific foreseeability was not an element of proof or a defense was correct and this Court should also so rule.

E. The Caselaw From Other Jurisdictions Cited By MCI Is Not Authority And Does Not Require Proof Of Specific Foreseeability In A Products Liability Case

MCI suggests ignoring the governing Harley Davidson case on the grounds that "the crashworthiness doctrine does not extend to crash incompatibility." (Opp., 3:7-8) There is no rationale reason that foreseeability analysis changes depending upon the particular strict liability theory espoused in a products case and the purported distinction is in no way supported by language or reasoning in Harley Davidson. Furthermore, as noted above, Price is not an automotive case and also held that foreseeability is decided by "the nature and extent of the injury attributable to the product defect" by "focusing on whether the harm is of a kind and degree that is so far beyond the

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risk foreseeable to the manufacturer that the law would deem it unfair to hold the manufacturer of the product responsible." Like Harley Davidson, Price rejected the argument that Plaintiffs must prove that a specific accident scenario was foreseeable.

Instead of confronting Price (which MCI only mentions in another context in a footnote; Opp., n. 6), MCI immediately runs to other jurisdictions which it claims hold that a Plaintiff must prove specific foreseeability. In actuality, none of these cited decision so hold and some actually support Plaintiffs position. MCI first cites Curtis v. General Motors Corporation, 649 F.2d 808, 810 (10th Cir. 1981). (Opp., 3:17-20) First, Curtis applies the law of Colorado -- not that of Nevada. Second, there is absolutely no discussion of foreseeability in the Curtis case. Instead, the Court reversed on the grounds that there was no expert testimony connecting the claimed injury with the alleged defect.

In the portion of the opinion cited by MCI, the Curtis Court actually held "that collisions and accidents are natural, foreseeable consequences of automobile use." Curtis, 649 F.2d at 810. This is exactly what Plaintiffs are arguing herein, "collisions and accidents" between a bus and a bike "are natural, foreseeable consequences" of bus operation in a metropolitan area. There is no need to prove that a defendant foresaw the specific nature of the collision and accident at issue. Hence, on the principal point before the Court, Curtis supports Plaintiffs' position.

The language in Curtis cited by Defendant neither focuses on foreseeability nor suggests in any way that a Plaintiffs must prove specific foreseeability to recover and/or that this is some sort of defense to a product liability case. In fact, the reference to a "statistically inevitable collision" is another admission by the Curtis court that objective foreseeability is the test -- not case specific foreseeability.

The next case cited by MCI is De Veer v. Landrover, 2001 WL 23254945, * 2 (Cal.App. 2001) which MCI claims is "particularly instructive." (Opp., 4:4) First, De Veer applied California law -- not the law of Nevada. Second, the California Supreme Court has expressly held that bystanders are entitled to even greater protection than users of defective products:

> If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their

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> purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need for protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.

Elmore v. Am.Motors Corp., 70 Cal.2d 578, 586, 451 P.2d 84, 88 (Cal. Sup. Ct. 1969) (drive shaft fell off car and hit car following) On foreseeability, Elmore held: ". . . . an injury to a bystander 'is often a perfectly foreseeable risk of the maker's enterprise . . . .'") Hence, any suggestion that De Veer establishes that bystanders do not merit product liability protection is error because the California Supreme Court decision in Elmore clearly holds otherwise.

MCI also cites De Veer for the proposition that, under California law, Plaintiffs' claim that the bus "was defective because it lacked an S-1 Gard to prevent such enhancement injuries after a bicyclist or pedestrian collides with it" is not a duty owed by a manufacturer. (Opp., 4:23.5 to 26.5) A recent California appellate court decision proves MCI errs. In Demara v. The Raymond Corp., 13 Cal.App.5th 545, 556 (Ct.App.4th 2017), the Court expressly rejected this exact same argument in a case where the alleged product defect was the failure of a forklift to have tire protectors:

> From the evidence submitted, Plaintiffs established the area on the outside of the drive wheel of the Subject Lift is open, with no guard, gates, skirts or bumpers; as the leading edge of the Subject Lift swung into Demare, his foot went under the lift and was crushed by the exposed wheel. . . .

The only difference between a forklift that did not have a protective barrier for its tires and a bus is that a bus is a much larger object that can potentially cause far more harm. Hence, California law clearly recognizes that a duty extends to install tire protective barriers.

MCI also claims that De Veer establishes some sort of rule that a manufacturer has no duty do make a bus "crash compatible" with smaller vehicles. (MCI Opp., 4:4-22) First, there is no "smaller vehicle" in this case and there is no argument being made herein that the bus should have had greater "crash compatibility." Instead, Plaintiffs argue that there should have been a protective barrier (the S-1 Gard being one example) at the rear tire. As the discussion of the 2017 Demare decision makes crystal clear, this is a viable product liability theory under California law. So too has the Nevada Supreme Court approved product liability theories that protective barriers should have been installed. See Robinson v. G.G.C., Inc., 107 Nev. 135, 808 P.2d 522, 523 (1991) (claimed

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product defect being the failure to put a protective barrier on a boxcrushing machine).

The second reason to reject MCI's "no duty" argument based on De Veer is that, De Veer actually held in Plaintiffs favor on foreseeability; adopting the rule that traffic accidents are foreseeable:

> Because traffic accidents are foreseeable, vehicle manufacturers must consider collision safety when they design and build their products. **Thus, whatever the cause of an accident, a vehicle's producer is liable for specific collision injuries that would not have occurred but for a manufacturing or design defect in the vehicle.**

De Veer, Id. *2 (Bold added). If De Veer is "instructive" (as MCI claims), the instruction is that the rule of law is that vehicle manufacturers like MCI are liable for defective design that would have prevented the accident "**whatever the cause of an accident**" because traffic accidents are a type of harm that is foreseeable as a matter of law.

MCI also argues that "reasonable foreseeability is almost always left to the jury." (Opp., 7:1 to 11:7) As Harley Davidson and Price exemplify, this is not true with regards to harms that are objectively foreseeable that arise from proper use of the product. MCI first cites Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1481, 970 P.3d 98, 107 (1998), **overruled in part on other grounds by** GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001) (Bold added) [hereinafter Mahlum] However, Mahlum says nothing about whether a jury should decide objective foreseeability; noting only "[t]hc second component, proximate cause, is essentially **a policy consideration** that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which that conduct created." Indeed, because Mahlam characterizes foreseeability as a "policy consideration" as opposed to a jury issue, Mahlam can be read as endorsing judicial (not jury) determination of such issue or the specter would be created of different juries making different "policy" decision in the same or similar cases.

MCI next runs to Am.Jur.2D Products Liability Sec. 23 and proclaims that this is authority that foreseeability must be resolved by the jury. However, Am.Jur.2d Product Liability Sec. 29 entitled "Foreseeability" (Bold added) explicitly repudiates MCI's position that MCI must foresee the "precise manner in which the accident occurred" and, like Price, states that "[t]he actor need only foresee an injury of the same general character as the actual injury . . . .":

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> In order to assess foreseeability, **the court asks** whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. An accident is foreseeable if a person possessing ordinary intelligence and using ordinary care would have anticipated that the accident, or some similar mishap, might reasonably result from the breach of duty. The accident must have been the natural and probable result of the breach of duty. **The actor need only foresee an injury of the same general character as the actual injury, and need not anticipate the extent of the injuries or the precise manner in which the accident occurred.** Consequences which are possible, but are not normal, natural, or probable, are not, however, foreseeable.

Where the MCI PMK admitted point blank that rear bus tires running over bicyclists was in fact foreseen for decades, there can be no valid dispute that "an injury of the same general character as the actual injury" was not foreseen by MCI. Also, Sec. 29 states that "the court asks" the question regarding foreseeability -- not a jury.

F. The Only Conduct By The Bus Driver That Is Relevant Is Whether He Would Have Heeded An Airblast Warning Or Would Have Acted If Alerted By A Proximity Sensor

Plaintiffs have filed a motion for summary judgment on foreseeability -- not a request to exclude bus driver Hubbard as a witness. Plaintiffs agree with MCI that Hubbard will provide some testimony but Plaintiffs vehemently disagree that MCI can offer evidence of "choices of the driver" or "reckless conduct of the driver." Without getting into detail, Plaintiffs do not anticipate objecting to testimony from Hubbard (1) that he saw the bicyclist on Charleston but never saw him again for the next 400 feet; (2) that he would have heeded a directive from MCI about airblasts; and (3) that he would have taken evasive action earlier if alerted by a proximity sensor. The first testimonial areas is a basic fact and the second and third types of evidence are allowable under Sims v. General Telephone & Electronics, 107 Nev.2d 151, 815 P.2d 151, 156 (Nev. 1991) [hereinafter Sims] and Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009). Sims sets forth a "but for" test for whether or not an actor would heed a warning. Id. See also Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) (approving Sims and stating: Sims "stated that the evidence [of historic compliance] could demonstrate that he would have adhered to an adequate warning.")

II. CONCLUSION

The Nevada Supreme Court has held that foreseeability is a policy decision that "must be

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determined in light of the nature and extent of the injury attributable to the product defect, thus focusing on whether the harm is of a kind and degree that is so far beyond the risk foreseeable to the manufacturer that the law would deem it unfair to hold the manufacturer of the product responsible." Price v. Blaine Kern Artista, Inc., 111 Nev. 515, 518, 893 P.2d 367, 369 (Nev. 1995) In Price, the intentional tort of battery was deemed foreseeable in a product liability case because the resulting harm (tipping over a large mask) was a risk foreseeable to the manufacturer. In Andrews v. Harley Davidson, Inc., 106 Nev. 533, 537, 796 P.2d 1092, 1095 (1990), the driver was legally drunk and the Supreme Court held that any reference to intoxication must be excluded because it was a foreseeable misuse that people drive cars and motorcycles recklessly or while intoxicated.

In this case, it is foreseeable that a bus driver could be negligent and even reckless and, in addition, foreseeable that a bus accident could occur whereby a bicyclists would be crushed by the rear tires of the bus. Because of this objective foreseeability, Plaintiffs are entitled to a summary judgment on foreseeable use (or misuse) of the product and MCI should be precluded from arguing that the bus driver's actions were "unforeseeable" as some sort of defense. MCI need not foresee the specific accident -- merely "an injury of the same general character as the actual injury." Am.Jur.2d Product Liability Sec. 29 entitled "Foreseeability" ("The actor need only foresee an injury of the same general character as the actual injury, and need not anticipate the extent of the injuries or the precise manner in which the accident occurred.")

The second alternative reason for granting the summary judgment is that the PMK of MCI testified that MCI had in fact foreseen the precise accident scenario in this case (a bicyclist being crushed by the rear tires of the bus) for decades. MCI has not offered any evidence to contradict this admission. Under Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (Nev. 2005), if this were an issue of fact (and Plaintiffs contend foreseeabily is instead a question of law because it is a policy decision), summary judgment is still appropriate because of the complete lack of contravening proof by MCI.

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For these reasons, the request for summary judgment of foreseeable use (or misuse) should be granted.

DATED this 16th day of January, 2018.

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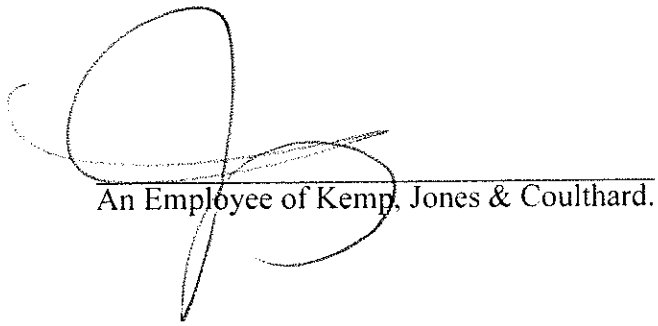
CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2018, the foregoing **REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON FORESEEABILITY OF BUS INTERACTION WITH PEDESTRIANS OR BICYCLISTS (INCLUDING SUDDEN BICYCLE MOVEMENT)** 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.



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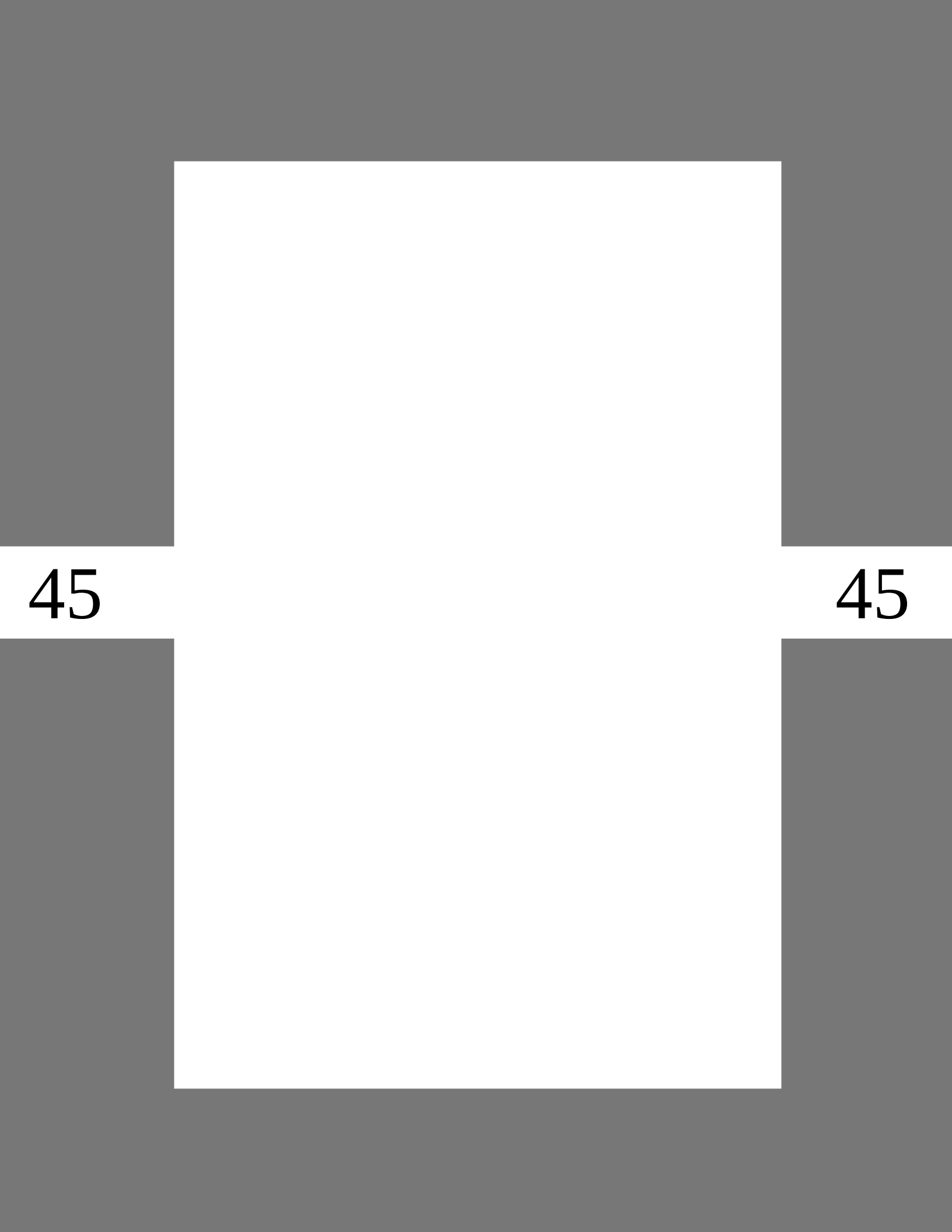
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. A-17-755977-C

Dept. No.: XIV

PLAINTIFFS' ADDENDUM TO REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON FORESEEABILITY OF BUS INTERACTION WITH PEDESTRIANS OR BICYCLISTS (INCLUDING SUDDEN BICYCLE MOVEMENT)

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PLAINTIFFS' ADDENDUM TO REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON FORESEEABILITY OF BUS INTERACTION WITH PEDESTRIANS OR BICYCLISTS (INCLUDING SUDDEN BICYCLE MOVEMENT)

Plaintiffs, by and through their attorneys of record, hereby submit the following addendum to the Reply to Opposition to Motion for Summary Judgment On Foreseeability of Bus Interaction With Pedestrians Or Bicyclists (Including Sudden Bicycle Movement), submitted on January 16, 2017. See attached Exhibit 1, January 17, 2018, article by Susan Carpenter, New Flyer Partners with L.A. Transit to Test Crash Avoidance Technology, including the statement by New Flyer (MCI's parent) that:

> Traveling in the right-hand lane, buses are by default always traveling in close proximity to pedestrians and cyclists, Stoddart said. "It makes a ton of sense to start exploring these types of technologies to hopefully reduce these sorts of incidents."

DATED this 17th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2018, the foregoing **PLAINTIFFS' ADDENDUM TO REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON FORESEEABILITY OF BUS INTERACTION WITH PEDESTRIANS OR BICYCLISTS (INCLUDING SUDDEN BICYCLE MOVEMENT** pursuant to Nev. R. Civ. P. 30(b)(6) was served on all parties by electronic submission via the Wiznet Syste.:

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EXHIBIT 1

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New Flyer Partners with L.A. Transit to Test Crash Avoidance Technology

SUSAN CARPENTER
(HTTPS://WWW.TRUCKS.COM/AUTHOR/SUSANCARPENTE

JANUARY 17, 2018

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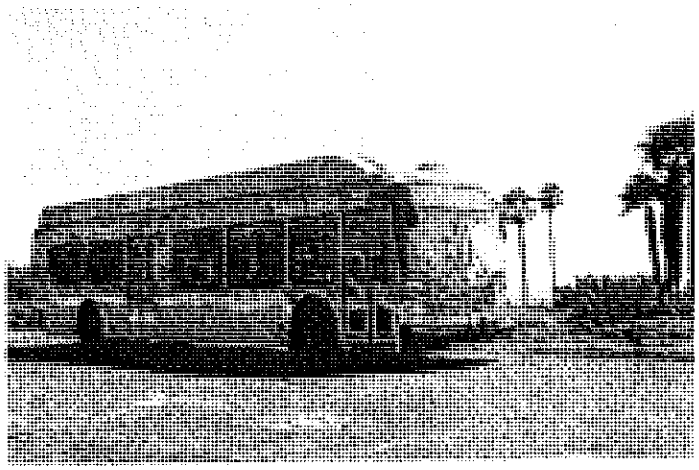

The Los Angeles County Metropolitan Transportation Authority has partnered with New Flyer to test collision-avoidance systems commonly used on self-driving vehicles. (Photo: New Flyer)

Autonomous transit buses may be a viable solution in the city of Los Angeles' quest to eliminate traffic fatalities.

That's why bus manufacturer New Flyer of America will give 60 of its buses to a federally funded demonstration project to test sensor-based collision-avoidance systems commonly used on self-driving vehicles.

The Los Angeles County Metropolitan Transportation Authority is spearheading the project, which will run through 2020. Los Angeles is one of several U.S. cities that has adopted the

Vision Zero program (http://visionzero.lacity.org/) to reduce the number of deaths caused by traffic collisions to zero by 2025. In 2016, 260 people were killed by vehicles of all types on L.A. roadways.

"We're always striving to make buses safer," said Metro spokesman Rick Jager. "That's our top priority from day one, so we're for any elements we can add to improve that safety."

In addition to the L.A. County Metropolitan Transportation Authority, the demonstration project has three other partners: the Federal Transportation Administration, the nonprofit Center for Transportation and Environment, which is serving as the project's manager, and St. Cloud, Minn.-based New Flyer.

"Safety is a high priority," said Chris Stoddart, senior vice president of engineering and service for New Flyer of America. "Buses are long vehicles, and they're operating in an urban environment, so they don't have the same maneuverability as a passenger car."

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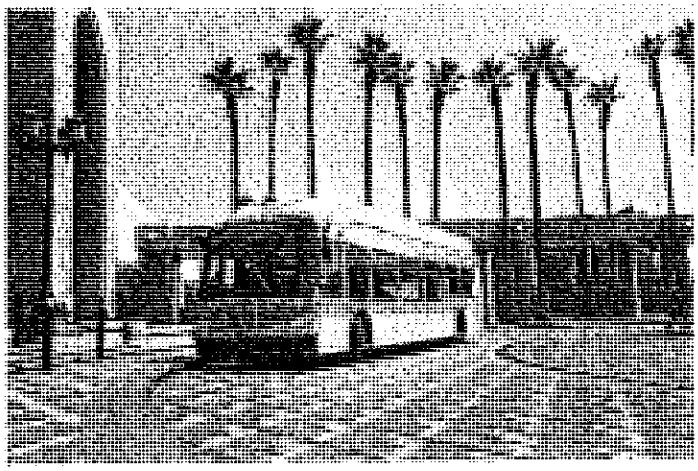
Traveling in the right-hand lane, buses are by default always traveling in close proximity to pedestrians and cyclists, Stoddart said. "It makes a ton of sense to start exploring these types of technologies to hopefully reduce these sorts of incidents."



An L.A. Metro bus built by New Flyer. (Photo: New Flyer)

Smart cameras and audio-visual modifications that will assist bus drivers with pedestrian and cyclist warnings as well as blind-spot alerts are among the systems the demonstration will test for their cost effectiveness and practicality. Specific technology suppliers will be selected this spring.

Of the 60 New Flyer buses that will be used for the demonstration, 20 will be equipped with sensors from one

provider, 20 will be equipped with sensors from another provider and 20 buses will remain unchanged.

Stoddart expects the buses to be equipped with the sensors by the end of 2018 and to run the evaluation for 18 months.

The project will cost $2 million. The partner share was $550,000, and New Flyer committed $100,000 from its research and development resources. Metro provided $450,000 in local voter-approved funding. A Federal Transportation Administration Safety Research and Demonstration grant will cover $1.45 million.

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New Flyer has a longstanding relationship with the Los Angeles transit system. Its last contract was a 900-bus order, Stoddart said.

The L.A. Metro safety demonstration project is the first step toward the use of autonomous buses (https://www.trucks.com/2017/10/17/la-metro-electric-bus-buying-spree/).

"Advanced collision mitigation technology didn't exist in any kind of volume until about two years ago," Stoddart said. "This is ground zero."

Fully driverless buses, he said, are still at least 15 years from mass deployment.

Read Next: CARB Approves $398 Million for Green Trucks, Buses (https://www.trucks.com/2017/12/18/carb-398-million-incentives-green-trucks-buses/)

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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

Case No.: A-17-755977-C

Dept. No.: XIV

REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGES

Hearing Date: January 23, 2018

Hearing Time: 9:30 AM

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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.

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' Opposition fails to do the one thing Plaintiffs were required to do: actually present the Court with substantial admissible evidence to create a question of fact to support a punitive damages claim. Plaintiffs cannot oppose MCI's motion with theories, or even with arguments that *might* be sufficient to create a fact question if the burden of proof was only a preponderance of the evidence (which MCI does not concede they have established). But Plaintiffs are content to rely on inadmissible statistics, soundbytes, and conjecture, rather than offer the Court any substantive facts a jury could find as substantial clear and convincing evidence of MCI consciously disregarding a known risk arising from some defect in the motor coach it sold. There are three overarching principles to guide this Court's analysis, none of which Plaintiffs have addressed in any meaningful way:

1) "It is the responsibility of the trial court to determine whether, as a matter of law, the plaintiff has offered **substantial evidence** of malice in fact to support a punitive damages instruction." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 380, 989 P.2d 882, 887 (1999) (emphasis added).

2) In deciding whether there is "substantial evidence", "evidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment." *Adamson v. Bowker*, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969).

3) The "substantial evidence" that the Court must find before allowing a punitive damage claim to go to the jury must show, by clear and convincing evidence, that the defendant acted with "knowledge of **the probable harmful consequences** of a wrongful act and a willful and deliberate failure to act to avoid those consequences." *Countrywide Home Loans, Inc. v. Thitchener,* 124 Nev. 725, 192 P.3d 243 (2008) (quoting NRS 42.001(1)) (emphasis added).

MCI will endeavor herein to address the various off-roads Plaintiffs wish to travel down, but at the end of the day the only question the Court must answer is this: Have Plaintiffs provided **substantial and admissible evidence** that would satisfy Plaintiffs' burden to establish, **clearly and convincingly**, MCI's knowledge (through an officer, director or managing agent) of the

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probable harmful consequences of a wrongful act *and* a willful and deliberate failure to act to avoid those consequences? The answer is clearly no, and summary judgment on Plaintiffs' punitive damage claim is warranted.

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiffs' reliance on general statistics is unavailing.

Plaintiffs start with the wholly incorrect assumption that general statistics are somehow meaningful here. First, Plaintiffs claim (relying on inadmissible evidence) that there have been over 7000 pedalcyclist fatalities between 2006 and 2015. Interestingly, this number includes fatalities from cyclist-car collisions, which obviously have nothing to do with this case. Opposition at 3:3-10. Plaintiffs fail to provide the specifics on how many of these accidents involved motor coaches or buses, other than to say that 5 of the 818 fatalities in 2015 were caused by buses, which interestingly is a rate of **.06%**. This, Plaintiffs claim, is the "substantial evidence" showing that MCI was aware of a probability of a bus-bicycle collision.

Plaintiffs then provide absolutely no context of how these 5 accidents occurred in 2015, what the circumstances of the accidents were, what type or model of buses were involved, and whether any accident involved alleged defects such as "air blasts", blind spots, or the absence of an S1 Gard. Moving vehicles are involved in fatal accidents with each other, with bicycles, and with pedestrians – this is not surprising. The reasons why these accidents happen are myriad, as are the number of accidents that have absolutely **nothing** to do with any defect in the vehicles involved in the accident. Plaintiffs are hoping the Court will be so swayed by histrionics that it will simply skip over the effect of accepting Plaintiffs' position, i.e., that the mere knowledge that vehicular accidents happen is the equivalent of knowledge to support a punitive damage claim for disregarding an alleged defect in a specific motor coach.

Plaintiffs' citation to the number of fatalities gives no context on how many of those accidents involved a claimed defect in the vehicle or bus involved. Perhaps all of the accidents were the result of a driver or cyclist violating the rules of the road, and perhaps none have anything to do with some alleged malfunction of the vehicle in question. Or perhaps the ones in which a vehicle did malfunction had nothing to do with the alleged defects here, but instead were the result

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of tire blowouts or steering malfunctions. Plaintiffs do not concern themselves with these important questions, but rather advocate for an approach to punitive damages that would easily extend to other hypothetical situations:

- In 2011-2015, United States fire departments responded to over 170,000 home structure fires per year that involved cooking equipment. Most were due to human error and inattention. Armed with this knowledge, a toaster manufacturer which had never received reports of some alleged defect in its appliance could be held liable for punitive damages simply because it should know that home fires can occur. It would not matter that those fires were caused by a number of factors and only a miniscule portion of all reported accidents even involved toasters - under Plaintiffs' theory the basic statistics would be enough to punish the manufacturer.

- Each year, emergency departments treat more than 200,000 children ages 14 and younger for playground-related injuries. More injuries occur on climbers than on any other equipment on public playgrounds, and swings are most responsible for injuries on home playgrounds. With these statistics available to it, and despite the obvious fact that many of these injuries were the result of childhood bravery or recklessness and not of any product malfunction, a manufacturer of playground slides would be subject to a punitive damage award even though it had no reported injuries on its slides, and no such injuries caused by a defect which is alleged in litigation for the first time.

Rather than requiring proof of specific knowledge the actual defendant had of some claimed defect in the product it sold, which alleged defect posed a risk of probable harmful consequences, Plaintiffs' approach to punitive damages completely absolves them of any burden to put forth substantial evidence of a malicious state of mind. But the law does not comport with Plaintiffs' approach.

Before a manufacturer can be subjected to punitive damages for a product defect, a plaintiff must submit substantial clear and convincing evidence that the manufacturer knew about the specific defect that harmed the plaintiff and failed to remedy it in conscious disregard of the public's safety. Conversely, a manufacturer's knowledge about general risks involving its product will never justify a punitive damages award. *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 176, 494 A.2d 1088, 1100 (1985) (evidence that defendant has access to literature that discussed the risks of working with asbestos and then took no action to mitigate that risk to the public was not sufficient to demonstrate the culpable state of mind that is required for a punitive damages award) *overruled on other grounds by Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989); *Cummings by Cummings v. Fisher-Price, Inc.*, 857 F. Supp. 502, 506 (W.D. Va. 1994)

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("the court finds that the plaintiff has not established the factual predicate necessary for an award of punitive damages . . . Plaintiffs have established, at most, that Fisher-Price knew that tricycles in general are hard to see on the road, and that, historically, accidents involving tricycles and cars have been an unfortunate fact of life."); *Thomas v. Am. Cystoscope Makers, Inc.*, 414 F. Supp. 255, 267 (E.D. Pa. 1976) (finding that because manufacturer of surgical instrument only had a general knowledge of the risks its product posed to doctors rather than a "fully realized" knowledge, punitive damages claim should never have gone to the jury); *see also* Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U.L. REV. 111, 148 (2008) ("awareness of risk needed to prove recklessness[1] must be fairly specific: awareness of a general risk is not enough for a finding of recklessness.").

All Plaintiffs have done is present the Court with general statistics on bicycle – vehicle collisions, with no context showing that any of these accidents was the result of some alleged defect in a motor coach, or more importantly, that the accidents were a result of the specific defects Plaintiffs allege here. The extreme nature of Plaintiffs' approach is shown when they make exaggerated statements such as "thousands of injuries and deaths [] could have been avoided if MCI" started using S1 Gards. Opposition at 27:3. And Plaintiffs' lack of concern over presenting actual evidence is highlighted when they make statements like "the J4500 had much greater air displacement" than an alternative design, but then give no context as to how much "greater" that would have been. Opposition at 7:12. It is not clear exactly where Plaintiffs get their statistics, but these types of histrionics are not the substantial evidence Plaintiffs must produce to support a punitive damages claim and oppose MCI's motion. Plaintiffs have the burden of proof to establish malice by clear and convincing evidence, and the burden of production in response to MCI's motion to present the Court with **substantial admissible evidence** that MCI knew of the risk of probable harmful consequences and failed to address that risk. Plaintiffs' use of statistics and argument in lieu of actual evidence cannot satisfy their burden.

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[1] Notably, even a showing of "recklessness" is not sufficient for a punitive damage award in Nevada. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 742-43, 192 P.3d 243, 254-55 (2008).

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II. General knowledge of a risk is not sufficient for punitive damages.

Plaintiffs forget that "constructive knowledge," "substantial knowledge" or "should have known" is not enough to meet the knowledge requirement for a punitive damage claim. *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 653 (Md. 1992); *Sch. Dist. v. U.S. Gypsum,* 750 S.W.2d 442, 446 (Mo. App. 1988) (mere suggestions from which the defendant might deduce the existence of a dangerous defect are not enough). The plaintiff must show that, armed with actual knowledge, the defendant consciously or deliberately disregarded foreseeable harm resulting from a specific defect. *Owens-Illinois*, 601 A.2d at 653; *see also* NRS 42.001(1) (conscious disregard requires "a willful and deliberate failure to act to avoid [the probable harmful] consequences"). All Plaintiffs have offered is testimony from MCI's witnesses of general principles of physics that cannot be disputed; what Plaintiffs have failed to offer is substantial evidence of knowledge of a risk of probable harmful consequences that MCI deliberately ignored.

First, Plaintiffs discuss the unsurprising notion that a large vehicle traveling down the road will displace air as it travels. To this end, **any** solid object in motion will displace air as it travels. Whether it is a car, a motor coach, or Plaintiffs' lauded "bullet train", a moving vehicle will displace air as it travels. MCI understands this, and as testified to by several witnesses, reducing drag was part of the design goal of the subject coach. What MCI did not know, have reason to know, and still disputes, is that this air displacement from its coach traveling at 25 MPH creates a risk of probable harmful consequences. Despite relying heavily on broad statistics, Plaintiffs offer no evidence that there has been some epidemic of accidents where cyclists were pushed away by air turbulence, and then pulled back into the side of a bus. Instead they offer a single article (inadmissible hearsay) from 1981 discussing the general principle. And what matters for purposes of this case is that MCI was never made aware of its motor coach causing such an accident.

Plaintiffs' reliance on 1993 wind tunnel tests fails for the same reasons discussed in the above cases: all those wind tunnels tests could ever show, even if admissible, would be that aerodynamics operate differently depending on variations in design. Mr. Couch's testimony that the "***effect***" of reducing drag for fuel economy would also be a change in side air displacement is not evidence that MCI was or is aware of probable harmful consequences from the air

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displacement the J4500 creates at 25 MPH. Similarly, asking a lay witness about hypothetical air displacement effects of a bus moving at 55 MPH is wholly misleading since the coach at issue was only traveling 25 MPH, and the lay witness hypothesizing that the faster moving bus will displace air is in no way the same as knowledge of some defect in the subject coach's tendency to displace air or how that might affect a cyclist. Plaintiffs take speculative and hypothetical testimony from MCI witnesses on the possibility of changing the design of a J4500 as the equivalent of knowledge that the current design creates a risk of probable harmful consequences. It plainly is not the same.

Second, Plaintiffs contend that MCI knew its coach had a right side blind spot. What MCI knows is that **all** vehicles have blind spots, and Mr. Hoogestraat stated this. Anyone who has ever operated a motor vehicle knows that there are blind spots,[2] and this general knowledge simply cannot be the basis of a punitive damage award. Plaintiffs again fail to recognize the distinction between general knowledge of an unavoidable risk, and knowledge of a specific defect that created a risk of probable harmful consequences. Mr. Hoogestraat explained that MCI did what it could to mitigate the unavoidable fact that blind spots exist in all vehicles. Deposition of Virgil Hoogestraat, portions attached hereto as Exhibit "1", 136:5 to 136:18. That is the **evidence** and Plaintiffs have no evidence to refute it. They can argue with MCI's results all they wish, but they cannot escape the fact that MCI had no knowledge of any specific defect vis-à-vis a blind spot creating a risk of probable harmful consequences, and in relation to the unsurprising fact that all vehicles have blind spots, MCI did take steps to mitigate that issue. Punitive damages simply cannot be awarded under such facts.

That line of sight studies may not have been specifically done for the J Series does not change the outcome. Plaintiffs may have their criticisms of MCI's coach, but those criticisms are not **evidence** that MCI deliberately failed to address a risk which it had specific knowledge was likely to lead to probable harmful consequences. A failure to conduct safety studies on a product

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[2] As Ms. Witherall testified, **any** bus will have blind spots. Opposition at 16:5-7. This is not disputed. What Plaintiffs repeatedly conflate is general knowledge of an inherent aspect of any vehicle with specific knowledge by MCI that the sight lines in the coach it sold actually created a risk with probable harmful consequences. Knowledge of general principles is **not** the same as knowledge of a specific defect.

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cannot give rise to punitive damage liability. For example, in *In re Prempro*, the Eighth Circuit held that a manufacturer's failure to conduct any in-house studies on whether its products could cause breast cancer was not sufficient to support an award of punitive damages against that manufacturer. *In re Prempro Prod. Liab. Litig.*, 586 F.3d 547, 572 (8th Cir. 2009). Other courts are in accord. *Henry v. St. Croix Alumina, LLC*, 572 Fed. Appx. 114, 121 (3d Cir. 2014) (holding that defendant's failure to study the health risks of the red dust emitted from its refinery that harmed plaintiff could not give rise to a punitive damages claim); *Hagen v. Richardson-Merrell, Inc.*, 697 F. Supp. 334, 338 (N.D. Ill. 1988) ("the lack of pre-marketing testing is not relevant on the issues of fraud and punitive damages."); *compare to Wyeth v. Rowatt*, 126 Nev. 446, 468, 244 P.3d 765, 780 (2010) (upholding punitive damages award because manufacturer deliberately manipulated safety studies) (i.e. active harm vs. passive harm).

Finally, Plaintiffs' list of available proximity sensors falls into the same "general knowledge" category as air disturbances and blind spots. MCI denies that it had knowledge of an effective "proximity sensor" available for its coach in 2007, but even if it did know of the various products Plaintiffs list (the evidence of which is inadmissible), that alone is not sufficient evidence to support a punitive damage award. The proximity sensor theory Plaintiffs advance is linked to their blind spot theory; only if a cyclist is in a purported blind spot would a proximity sensor make any difference. But as noted above, MCI understands that all vehicles have blind spots, and steps were taken to mitigate that unavoidable aspect of all vehicles. Even if MCI had general knowledge that types of proximity sensors were on the market in 2007, there still must be evidence that MCI had specific knowledge of probable harmful consequences from not installing a proximity sensor, and a willful and deliberate failure to try to remedy the consequences. No such evidence has been developed or presented to the Court.

III. Plaintiffs continue to rely heavily on inadmissible evidence

As the Court is aware, Plaintiffs have the burden to respond to MCI's motion with admissible evidence. In deciding MCI's motion, therefore, the following materials and arguments should be disregarded by the Court:

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a. Any reference to seat belts as this wholly irrelevant; Opposition at 2:12

b. Exhibit 2: Hearsay and references a product from a different manufacturer from 2016

c. Exhibit 3: Hearsay and references irrelevant passenger car-bicycle accidents

d. Exhibit 4: Hearsay and speculative that any "air blast" impacted Dr. Khiabani

e. Exhibit 5: Hearsay

f. Exhibit 6: Hearsay and irrelevant as it does not address the subject coach

g. Exhibit 7: Hearsay and references a product from a different manufacturer which is not even in production yet

h. References to Erika Bradley's testimony as she has no foundation to testify to an "air blast" (see MCI's Motion in Limine No. 15)[3]

i. References in depositions to articles discussing other products as the articles themselves are hearsay; Opposition at 8:12-20

j. Deposition testimony that is predicated on inaccurate facts, such as hypotheticals about a bus moving at 30, 35 or 40 MPH, when the undisputed evidence is that the coach at issue was traveling at approximately 25 MPH; Opposition at pages 10-11

k. Exhibit 16: Hearsay and speculative that any "air blast" impacted Dr. Khiabani

l. Exhibit 17: Hearsay and speculative that any "air blast" impacted Dr. Khiabani

m. Exhibit 22: Hearsay and references a passenger car from a different manufacturer

n. Exhibit 23: Hearsay

o. Exhibit 24: Hearsay

p. Exhibit 25: Hearsay

q. Exhibit 28: Hearsay and irrelevant as it does not address the effects of the S1 Gard impacting an individual at 25 MPH

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[3] The Court should perhaps look at this testimony to understand just how patently speculative Plaintiffs' entire "air blast" theory is. Plaintiffs are resting their case on the testimony of a lay witness, with no engineering background, who was inside her car, behind the coach, to argue that Dr. Khiabani experienced an "air blast". This witness says that this theory was "possible" and "could make sense". Opposition at 12:14 - 13:3. A "possibility" or a theory that "could make sense" are not even sufficient to establish causation by a preponderance of the evidence, let alone serve as clear and convincing evidence sufficient to sustain a punitive damage claim.

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r. Exhibit 29: Hearsay and speculative as to what causal effects warnings would have had (see MCI's Motion in Limine No. 13)

There are other specific evidentiary problems with some of the deposition testimony Plaintiffs cite, but as the Court can see, there is woefully little evidentiary substance to Plaintiffs' Opposition. Summary judgment motions cannot be defeated by theories, speculation, or reliance on inadmissible evidence. When the Court reviews the very little admissible evidence Plaintiffs cite, it is apparent that there is not substantial evidence by which a jury could find, clearly and convincingly, a malicious state of mind on MCI's part.

IV. Plaintiffs must prove all elements of their punitive damage claim by substantial evidence

All elements of a punitive damages claim must proven with "substantial clear and convincing evidence"[4] before the claim may go to the jury, not merely the defendant's subjective knowledge of the defect. NRS 42.005; *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1309 (S.D. Cal. 2003) ("a plaintiff is not eligible for punitive damages unless the underlying claims for fraud, oppression or malice are proven by clear and convincing evidence."); *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238, 245 (D.D.C. 1986) ("The elements justifying punitive damages must be 'clearly established.' In the context of product liability actions, this burden has been equated with the clear and convincing standard of proof.") (internal citation omitted); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 850-51 (2d Cir. 1967) ("the quality of conduct necessary to justify punitive damages must be 'clearly established'"); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3d Cir. 1983) ("[a] plaintiff seeking punitive damages . . . must prove the requisite "outrageous" conduct by clear and convincing proof."). It is necessary that Plaintiffs show substantial evidence of a causal link between the alleged defects that Plaintiffs say caused the accident and MCI's alleged conscious disregard to remedy these defects, to comport with the due process protections set forth by the United States Supreme Court. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003) (discussing importance of causal "nexus"

[4] *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000).

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between harm and alleged punitive conduct).

Thus, even if Plaintiffs could prove by a "preponderance of the evidence" that they are entitled to compensatory damages on a strict products liability claim, which they plainly cannot, the punitive damages claim would still fail because Plaintiffs cannot show with "clear and convincing evidence" that there is (1) a causal connection between the alleged defects and the accident at issue, and (2) that MCI knew of the defects and acted with conscious disregard for the public's safety. MCI maintains that Plaintiffs cannot establish causation with even a preponderance of the evidence, but they surely cannot do so by clear and convincing evidence.

- On the "air blast" theory, Plaintiffs have only the speculative testimony of Erika Bradley, a driver behind the subject coach who plainly cannot testify that an invisible air blast was created by the coach, or that it impacted Dr. Khiabani. Beyond that, they offer the opinion of their expert Robert Briedenthal, which as explained in MCI's Motion in Limine No. 7, is unreliable and inadmissible. Plaintiffs have presented only a theory, not facts.

- On the "blind spot" theory, Plaintiffs' expert admits that to determine that any purported blind spot had an impact on the coach operator's ability to see Dr. Khiabani, he would have to know where Dr. Khiabani's bicycle was at the point in time the bicycle was in the area of the blind spot, and whether the driver was actually looking in that direction at that point in time. Deposition of Thomas Flanagan, portions attached hereto as Exhibit "2", at 120:2-122:1; 133:12-136:4; 139:3-140:14. He knows neither of those details, and therefore the opinion that Dr. Khiabani was ever in the blind spot is wholly speculative (certainly insufficient to sustain a punitive damage award).

- On the "proximity sensor" theory, the effectiveness of any such sensor would depend on the lateral distance between the bicycle and the bus, which Plaintiffs' expert does not know. And if Dr. Khiabani was already within the sensor's field at the time the coach passed him, the sensor Plaintiffs' expert imagines would not create any different or additional warning as Dr. Khiabani got laterally closer to the coach. *Id.* at 83:8-85:14. As such, to assume that Mr. Hubbard would have acted differently if warned about a cyclist he already knew he had passed is wholly speculative.

- Finally, on the "S1 Gard" theory, there is a dispute among the experts whether the guard would have even come into contact with Dr. Khiabani's helmet, but it is undisputed that none of Plaintiffs' experts (nor the creator of the S1 Gard) have tested the impact of the guard striking someone in the head at 25 MPH. Deposition of Mark Barron, portions attached hereto as Exhibit "3" 34:1-7; 94:6-96:4. Even if Plaintiffs can survive a directed verdict for the inability to establish that the absence of an S1 Gard caused Dr. Khiabani's death, the evidence to support such a claim is far from substantial and certainly cannot sustain a punitive damage claim.

It is Plaintiffs' burden, in responding to MCI's motion, to come forward with **substantial and admissible evidence** to establish, **clearly and convincingly**, MCI's knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences. Assuming *arguendo* that the admissible evidence they have cited would even

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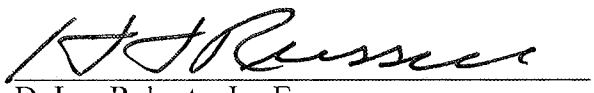
be sufficient to meet the "preponderance of the evidence" standard to prove causation for their compensatory strict liability claim, Plaintiffs have wholly failed to provide substantial evidence to sustain a cause of action for punitive damages.

CONCLUSION

For the reasons stated herein and in its moving Memorandum, MCI requests that the Court GRANT its Motion and dismiss Plaintiffs' punitive damage claim with prejudice.

DATED this 17th day of January, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2018, a true and correct copy of the foregoing **MOTOR COACH INDUSTRIES, INC.'S REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGES** 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

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EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

VIDEOTAPED DEPOSITION OF VIRGIL HOOGESTRAAT

LAS VEGAS, NEVADA

FRIDAY, OCTOBER 13, 2017

REPORTED BY: HOLLY LARSEN, CCR NO. 680, CA CSR 12170
JOB NO.: 425410

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VIDEOTAPED DEPOSITION OF VIRGIL HOOGESTRAAT, taken at 3800 Howard Hughes Parkway, 17th Floor, Las Vegas, Nevada, on Friday, October 13, 2017, at 9:09 a.m., before Holly Larsen, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

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APPEARANCES (Continued):

Also Present:

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JP MARRETTA, Videographer
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Q. And so for that reason you don't believe it's a hazard?

A. We don't think the rear tire situation is a hazard.

Q. Okay. And we've already talked about right-side visibility obstructions; right?

A. We said -- I said the mirror can be an obstruction that the driver has to look around, as well as an A post can be an obstruction, but it's not a problem.

Q. So you would agree that that is a potential hazard?

A. No.

Q. Well, right-side visibility, in general, is a potential hazard that you have either mitigated or attempted to mitigate?

A. We try to mitigate it as best as possible any blind spot so it does not become a problem.

Q. But you would agree it's a potential hazard in theory?

A. I agree that the driver has to take actions sometimes to move in his seat to be able to look around the A post and the mirror. You're right, if that's what you mean.

Q. Okay. All right. And 22 is "Prior

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EXHIBIT 2

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EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D.(Decedent), Plaintiffs, vs. MOTOR COACH INDUSTRIES, INC. A Delaware corporation; MICHELANGELO LEASING INC. D/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; 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.	CASE NO.: A-17-755977-C

EXPERT DEPOSITION OF THOMAS PATRICK FLANAGAN

LAS VEGAS, NEVADA

FRIDAY, DECEMBER 15, 2017

REPORTED BY: KAREN L. JONES, CCR NO. 694

JOB NO.: 438118

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DEPOSITION OF THOMAS PATRICK FLANAGAN, taken at Litigation Services, located at 3770 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, on Friday, December 15, 2017, at 12:10 p.m., before Karen L. Jones, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

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that 50 feet up behind the motor coach so you know something's coming up in that lane and it continues to pick it up while it's in that lane. And that's why you've got the second one that picks it up when it finally gets parallel. There's sometimes a need for one or two, depending on how you want to utilize it.

Q. And do these blind-spot monitoring systems listed under Number 2 make a distinction to the driver as to what the proximity of that object is?

And I think you maybe understand where I'm going, but let me try to get there faster. Okay?

In my passenger car I have a blind-spot monitor on the mirror. It doesn't matter if the car to my right is two inches next to me or six feet next to me, it's the same light no matter what. Okay?

A. Correct.

Q. Do these blind-spot monitoring systems that you've listed here make that distinction to a driver, that something is a foot, two foot or eight feet away?

A. I said before, some are set up for four

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feet. So if the driver of the car next to you is zero to four feet from your side, it will be picked up. If it's six feet away, that would be a different one that was set up for six feet. Or it could be two radars, one for four feet and one for six feet. And if it was ten feet away, it could be one set up for three feet -- four feet, six feet and ten feet. All that's feasible.

Q. Sure. Okay.

So let's say something is set up for -- can you think of any that are set up any less than four feet?

A. No. Not that I know of.

Q. So even at its most conservative, the blind-spot monitoring system will pick up something that's four feet to the right of the vehicle, correct?

A. It's a good idea.

Q. Is that right?

A. Correct. Correct.

Q. And so whether that object is six inches or four feet, the driver doesn't know; the driver just simply knows there's something within four feet, correct?

A. Correct. It could be a bike close, a

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bike four feet away. It could be a bike in the bike lane, a bike out of the bike lane. It doesn't matter.

Q. What if it's set up for six feet?

A. Then it picks up the same thing.

Q. And the driver would see the same signal whether the bike was two inches or six feet away?

A. I believe so.

Q. And that was the reason I asked the question about proximity, is because the blind-spot monitoring doesn't give you the proximity, other than the outer edge of the proximity, whether four feet, six feet or eight feet?

A. Uh-huh, that's correct. Now you know.

Q. So if a bus passed a bicyclist and allowed three feet of space between it and the bicyclist, the proximity sensor would alert?

A. Go off, yes.

The third page is kind of a repeat of the second page. We already covered the first bullet. That aftermarket -- it has the forward collision system independent of brakes. It has a blind-spot-incorporated detection offered for pedestrians and bikes and other vehicles. All that comes with the Eaton system as an aftermarket kit

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guy in the blind spot.

Q. This blind spot that you perceive --

A. Lower blind spot.

Q. The lower blind spot that you perceive, does the size of that blind spot depend on the distance away the object is from the bus?

A. Sure. Absolutely.

Q. Do you have an opinion as to the time the bus passed Dr. Khiabani, how far away the bus was from Dr. Khiabani's bike?

A. I'm not doing reconstruction.

Q. Have you seen --

A. Yes.

Q. -- any measurements by which an expert has testified or opined how far away the bike and Dr. Khiabani were at the point that the blind spot would have come into play?

A. I may have read your expert's report. I have not read Caldwell's deposition, even though -- but I can't recall him specifically talking about it. They may have. As I said once before, I'm not doing reconstruction so I didn't focus on that.

My more focus was on the length of the blind spot and the time he's invisible, and I know he can't rock and roll to handle that.

Q. How did you determine the size of the blind spot?

A. The physical --

MR. PEPPERMAN: Form; foundation.

THE WITNESS: The physical geometric distance as if he was perfectly at the side of the bus going forward, and that distance will -- as long as you can't see his head, until you can see his head, as you progress out, that distance will get bigger.

It's a pie, and you've got an angle and you're going further up the pie from the point of the pie. And as you get deeper into it, it's a wider angle, until his head pops out.

BY MR. RUSSELL:

Q. To determine the size of the blind spot you have to know how far the bike is away from the bus, correct?

A. Specifically, yes.

MR. PEPPERMAN: Form; foundation.

THE WITNESS: Yes.

BY MR. RUSSELL:

Q. And as I heard you say, you don't have any opinion as to how far away the bike was from the bus?

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A. That's correct.

Q. All right. Let's look at --

A. Are we done with the deposition?

Q. No. We're getting close, though.

MR. PEPPERMAN: I think he meant Hubbard's.

BY MR. RUSSELL:

Q. All right, let's go to the -- starting on page 9 of your report, the summary of opinions.

And I know you talk about some of these things throughout the report. They're kind of spread and repeated at times throughout the report, but let's just focus on that page.

Let's look at 1 through 7 in the summary, and these are -- are some statements based on articles and statistics you talked about earlier in your report.

Okay. The statistics on bus and bicycle -- bus-versus-bicycle accidents, do you know if those statistics are based on transit buses or over-the-road motor coaches?

A. It probably was a combination of the two. I cannot tell which it is.

Q. Do you understand there's a distinction between the two?

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Q. How do you know that?

A. How do I know what? Assuming that all the passengers on the bus are going to one location, they would follow approximately the same route.

Q. Do you know what a fixed bus route means?

A. Yes, I do.

Q. What does it mean?

A. It means a designated route for a transit bus. That wasn't what I was using in the report, though.

Q. All right. I think we've covered this, but do you have an opinion as to where a bicyclist would need to be oriented vis-a-vis the bus in order for the cyclist to be in the right front blind spot?

A. Where he would have to be?

Q. Correct.

A. Laterally or longitudinally?

Q. Both.

A. To be in the blind spot. I'd have to lay it out from the driver's eye points based on Joshua's work and then move that bike up and down the sides of the pie, the rear tire towards the rear of the pie and the front tire towards the front of the pie, and at each location laterally I could tell

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you how wide the blind spot is.

Q. And you've not done those calculations, correct?

A. No, I have not.

Q. And that calculation, whatever it may be, would also be dependent on where or how the driver himself is oriented in the seat, correct?

A. Absolutely.

Q. And would you agree with me that the presence of a blind spot --

A. He doesn't indicate -- well, he does indicate he was rocking and rolling -- he thought he was rocking and rolling when all of the sudden the bus -- the bike magically appeared.

Q. I understand that. I don't mean to discuss it in terms of Mr. Hubbard. I'm just saying from a scientific standpoint of being able to determine what impact any blind spot would have, one of the factors is how the driver is oriented?

A. Well, that just shifts the pie. That's all.

Q. Understood. But it changes with his position, correct?

A. Not going to change the size of the pie much.

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Q. And you would agree with me, though, that a blind spot and its impact is only relevant if the driver is looking in the direction of the blind spot when the object comes into focus?

A. Let me go back and clarify. You're rocking and rolling, you're moving longitudinally front and back. That means the pie is shifting one way or the other. If you're moving laterally, it will change it. But if you're moving front to rearwards, you're taught to rock and roll, not rock and rotate. You can't steer a bus and rotate and rock. I mean, you've got to be in a Circus Circus show or something like that.

Q. Have you ever been involved in the training of a coach driver?

A. No.

Q. Going to my next question. You would agree with me that a blind spot is only relevant if the driver is looking in the direction of the blind spot at the time an object is in the blind spot, correct?

A. Unless he's notified that he's in the blind spot by a proximity sensor.

Q. Okay. Let's focus on the blind spot.

It's only a blind spot if the driver is

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looking that way, correct?

A. Theoretically it's still a blind spot, but effectively it's only applicable if he's looking at it.

Q. And in fact, as you say on your report or in your report, and this is page 9, Number 11, you say, "This blind spot could completely hide a bicyclist on a bike from the driver's view at or in front of the tour bus's front end."

So what you're presenting to us is, depending on the location of the bicycle at a given point in time --

A. What page are we on?

Q. Page 9.

Depending on the bicycle's location at a given point in time, the driver's view of that cyclist can be obstructed?

A. What number?

Q. Number 11.

A. That's a correct statement. At least one whole bike, if not more, is blocked by the blind spot that exists in front of that bumper and then there's a blind spot rear of that bumper.

We know the bike's seven feet and then there's some added to that to the rear. So it's,

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A. If we know it's one second, we know he's approximately 22 feet in front of that point.

Q. What I hear you saying is from the surveillance video you're able to determine that at some point in time, because of the dark shadow, Dr. Khiabani is alongside, essentially, the door of the bus, for lack of a better term?

A. He's along the right front side in front of that door.

Q. Okay. So at some --

A. In that blind spot. And the bus passes him. As it passes him, the accident occurred. So I'm saying where basically the handlebar mark is, go 22 feet forward and that's approximately where his handlebar was, or his grip, at the time -- and I believe that's in the blind spot, roughly.

Q. And how much or how little of a blind spot there was at that point would depend on the distance between the bus and Dr. Khiabani, correct?

A. We've gone through that before, yes.

Q. And do you know if at that point in time where you believe Dr. Khiabani was in front of the door, on the right front side of the bus but in front of the door, do you know if at that point in time Mr. Hubbard was looking in that direction?

A. Do I know? I do not know.

Q. For that blind spot to have an impact, would he have to be looking in that direction?

MR. PEPPERMAN: Form; foundation.

THE WITNESS: I don't -- what I gather from his depo is that this bike came out of nowhere.

I didn't see it. And I'm looking over there and I'm rocking -- I think.

But I don't know what he was doing. I really don't know what he was doing. I assume he's looking straight and got peripheral vision.

BY MR. RUSSELL:

Q. But you don't know?

A. No. No camera on the bus.

Q. And I'm not -- and, you know, just to let you -- just so you understand, I'm not asking you right now to comment on Mr. Hubbard's credibility. But given what you know about this accident and your own investigation of this accident, there was nothing in the design of the bus that precluded Mr. Hubbard from seeing Dr. Khiabani when he was 100 yards down the road, correct?

A. Correct.

Q. So why he didn't see him for really -- well, strike that.

EXHIBIT 3

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EXHIBIT 3

DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI AND ARIA KHIABANI, MINORS BY AND THROUGH THEIR NATURAL MOTHER, KATAYOUN BARIN, ET AL., Defendants. vs. MOTOR COACH INDUSTRIES, INC., A DELAWARE CORPORATION, ET AL., Defendants.	No. A-17-755997-C

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VIDEOTAPED DEPOSITION OF MARK B. BARRON, a witness herein, noticed by Kemp, Jones & Coulthard, at 523 West 6th Street, Los Angeles, California, at 2:18 p.m., on Tuesday, September 26, 2017, before Jana Ruiz, CSR 12837.

Job No.: 418647

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Also Present: MARNIE LEVY, Videographer;
KRISTA BARRY, Public Transportation Safety International Corporation

15:19 **Q. Based on your experience as the inventor of the S-1 Gard, do you believe the S-1 Gard would still be effective if the bus was moving 20 miles per hour?**

A. It's not my professional opinion.

15:19 **Q. You leave that question up to a forensic engineer?**

A. Yes.

Q. Could you give me an estimate of the total number of buses to date with S-1 Gards?

15:20 A. In the country, U.S.?

Q. In the world.

A. In the world, over 50,000; 30 to 60, you know, it's hard to -- 40 to 60.

Q. If you could pull Exhibit 3 which is the

15:20 **product information.**

A. Uh-huh.

Product information? I said 30,000 --

Q. There it is. It's on the bottom.

A. Oh, okay.

15:21 **Q. If you could flip to page P01320 and the top of the page says "Major Transit Fleets Worldwide Retrofitting with the S-1 Gard."**

A. Yes.

Q. "Transit agencies and bus OEMs around the world

15:21 **have made the decision to install the S-1 Gard."**

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16:33 **Q. Okay.**

So it's right on the tire tread, which can be 1 to 2 inches --

A. 1 1/2, 1 1/4, from the sidewall of the tire.

16:33 **Q. Okay.**

In terms of the testing that you have done, besides the simulations that we see in the video, have you done any actual testing to determine whether or not an individual struck by the S-1 Gard by a bus traveling 25 to 35 miles per hour would sustain injury?

A. No.

Q. Do you know whether or not they would sustain an injury?

A. Minimize.

16:33 **Q. Minimize, what do you mean minimize?**

A. Well, the side of their temple gets hit by the guard, they can die on impact.

Q. Okay.

A. Expire on impact.

16:33 You know, depending on if their legs go under and the bus is going 25, it would do major minimization, would minimize it majorly.

But the side of your head or your face or your temple getting struck by a bus, you know, a solid

16:34 impact --

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16:34 **Q. You'd be dead on impact?**

MR. PEPPERMAN: Form. Foundation.

THE WITNESS: Could. I don't know for sure, but it would be, you know, bus is going 25 miles an hour and

16:34 someone's head gets hit without a helmet, in a crystal ball --

MR. TERRY:

Q. What about with a helmet?

A. With a helmet?

16:34 **Q. With a bike helmet, do you know whether or not --**

A. It would help.

Q. The bike helmet would?

A. Yeah, the bike helmet, sure.

16:34 **Q. Do you know whether or not an individual would survive --**

A. Don't know. It's not my professional opinion. I couldn't give that opinion.

Q. Do you have any data within your company,

16:34 **either in terms of polyurethane testing or actual field testing, that can tell us whether that's a survivable event --**

MR. PEPPERMAN: Form --

MR. TERRY: -- if someone gets their head struck by

16:35 your guard when the bus is driving 25 to 35 miles an

16:35 hour?

THE WITNESS: No.

MR. PEPPERMAN: Form. Foundation.

THE WITNESS: No.

16:35 MR. TERRY: Okay.

That's all I have. Thank you.

-EXAMINATION-

16:35 BY MR. PEPPERMAN: I just have a few follow-up questions.

Q. Counsel directed your attention to Exhibit 8 and the types of collisions that are at issue in that exhibit.

16:35 **In terms of whether or not the S-1 Gard is a safe and effective device for preventing people from getting run over by the rear wheels of a bus, does it matter how the person gets under the bus?**

A. No.

16:35 **Q. So I'm looking at the collision types at issue in Exhibit 8.**

If the person falls under the bus in front of the rear wheels and the bus is turning right, the S-1 Gard is going to prevent that person from getting run over by

16:36 **the rear wheels?**

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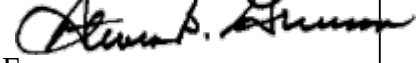

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Attorneys for Defendant Motor Coach Industries, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

MOTOR COACH INDUSTRIES, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS ALLEGING A PRODUCT DEFECT

Hearing Date: January 23, 2018

Hearing Time: 9:30 a.m.

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The event in this case was tragic. That does not mean, however, that motor coaches are unreasonably dangerous under the consumer expectations test. The manner of operating the coach may have been unreasonably dangerous, but Plaintiffs have submitted no evidence to demonstrate that the coach failed to perform as expected. That, alone, is fatal to their claims. And the evidence about purported alternative designs is irrelevant in this case because it says nothing about the expectations of the *ordinary* consumer with *ordinary* knowledge.[1]

I. Non-Users Have No Claim for Products Liability.

Plaintiffs note (as MCI did in its motion for summary judgment) that other jurisdictions have allowed non-users to bring a products liability claim. Yet, Nevada does not simply follow the crowd. The dissent in *Trejo* pointed out that the majority opinion made "Nevada an outlier, as only a small minority of jurisdictions rely solely on consumer expectations in design defect cases." *Ford Motor Co. v. Trejo*, 402 P.3d 649, 662 (Nev. 2017) (Pickering, J., dissenting). And *Trejo* reaffirmed Nevada's long-standing adoption of Section 402A of the Restatement (Second) of Torts. *Id.* at 653 (majority opinion). The plain language of that section does not extend beyond harm "caused to the ultimate user or consumer." *See* Restatement (Second) of Torts § 402A. This Court should not assume that the Nevada Supreme Court would expand the scope of products liability. *See Ewen v. McLean Trucking Co.*, 706 P.2d 929, 934-35 (Or. 1985) (under section 402A, "[t]he word 'consumer . . . does not include everyone who might be affected by the product").

II. The Plaintiffs Are Improperly Applying the Very Risk-Utility Standard that *Trejo* Rejected.

Trejo rejected the risk-utility test, which provides that "a product 'is defective in design

[1] Unfortunately, the potential danger of being run over by a bus is so obvious that it is a colloquialism. *See* The Explainer Gets Hit by a Bus: The Origins of the Catastrophic Cliché, slate.com, July 28, 2009, *available at* http://www.slate.com/articles/news_and_politics/explainer/2009/07/the_explainer_gets_hit_by_a_bus.html. Joseph Conrad wrote about it. *See* Joseph Conrad, The Secret Agent: A Simple Tale 309 (1907) ("But just try to understand that it was a pure accident; as much an accident as if he had been run over by a bus while crossing the street."); *see also* https://en.wikipedia.org/wiki/Bus_factor.

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when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.'" *Ford Motor Co. v. Trejo*, 402 P.3d 649, 652 (Nev. 2017) (quoting Restatement (Third) of Torts: Prods. Liab. § 2(b) (1998)). Plaintiffs' entire response focuses on precisely this standard. They argue that MCI should have made a safer motor coach by making it more aerodynamic, installing proximity sensors (which MCI was unaware of in 2007, when the coach was manufactured), and adding an "S-1 Gard" (that nobody in Nevada uses).

The proper test, however, requires Plaintiffs to establish two things: that the coach (1) "'fail[ed] to perform in the manner reasonably to be expected in light of its nature and intended function' and (2) '[was] more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.'" *Id.* at 650 (quoting *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970)); *see also Metal Window Prods. Co. v. Magnusen*, 485 S.W.2d 355 (Tex. Ct. App. 1972) ("[Section 402A's] "terminology contains two requisite elements plaintiff must establish in defendant's product, i.e. (1) a defect, and (2) unreasonable danger").[2]

All products carry some risk of harm. For liability to attach, the product "must be dangerous *to an extent beyond* that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts § 402A cmt. i (1965) (emphasis added). The test is objective. *See Horst v. Deere & Co.*, 769 N.W.2d 536, 551 (Wis. 2009).

III. The Bus Was Not Defective or Unreasonably Dangerous.

To be clear, this motor coach is a very safe vehicle, as buses and motor coaches go.

[2] The consumer expectations test has been applied to all three types of products liability claims. *See Trejo*, 402 P.3d at 659 (Pickering, J., dissenting) (citing *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 105, 65 P.3d 245, 248 (2003) (inadequate warnings); *Ward v. Ford Motor Co.*, 99 Nev. 47, 49, 657 P.2d 95, 96 (1983) (design and manufacturing defects)). Thus, the same analysis applies to all of Plaintiffs' claims, including the failure to warn claim. There is no duty to warn of an obvious danger.

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Nevertheless, the inherent dangers involved in driving a vehicle this large is obvious. And, while a plaintiff may present evidence of alternative designs under the consumer expectations test, that evidence is irrelevant where the danger was open and obvious.

a. The Danger Was Open and Obvious.

Plaintiffs have the burden to demonstrate that the allegedly defective aspect of the design is not contemplated by the ordinary consumer. *See Trejo*, 402 P.3d at 653 ("Adoption of strict tort liability as a theory of recovery 'does not mean that the plaintiff is relieved of the burden of proving a case.'" (quoting *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 443 (1966)). Open and obvious dangers do not satisfy the consumer expectations test. *See Horst*, 769 N.W.2d at 543; *Blue v. Envt'l Eng'g*, 828 N.E.2d 1128, 1136 (Ill. 2005). "The test has been described as reflecting the 'surprise element of danger.'" *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 387 (Pa. 2014). That element is lacking when the danger is open and obvious.

Here, there is no evidence that the bus did not perform in the manner reasonably to be expected in light of its nature as a large motor vehicle and intended function of moving large numbers of people around. *See Metal Window Prods.*, 485 S.W.2d at 358 ("[G]iven the popularity and general acceptance of clear glass doors, it must be considered doubtful that the risk of collision without breakage due to the transparency involves outweighs the utility and value such doors have attained.").

And there is no evidence that the coach was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.[3] The inherent danger

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[3] There certainly is no expert testimony regarding the more sophisticated expectations of those who buy and drive coaches. Expert testimony is only excused when the juror is part of the community that buys and uses the product at issue. *See Krause Inc. v. Little*, 117 Nev. 929, 928, 34 P.3d 566, 572 (2001). Although Plaintiffs say *Stackiewicz* held that expert testimony is never required in products liability cases, the case says nothing of the sort. It held only that "*[o]n the facts presented in this case*, . . . evidence of a steering malfunction which resulted in the driver losing control of the vehicle might properly be accepted by the trier of fact as sufficient circumstantial proof of a defect, or an unreasonably dangerous condition, without direct proof of the mechanical cause of the malfunction." *Stackiewicz*, 686 P.2d at 929 (emphasis added).

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presented by the coach's tires would have been appreciated by any ordinary person driving it or riding a bicycle near it. Although the proper analysis focuses on the consumer's expectations (and not a bystander's),[4] Plaintiffs cannot seriously dispute that *any* ordinary person would conclude that the bus operated exactly as expected and that the danger posed by the bus's tires would have been readily apparent.

If the bus was too close to Dr. Khiabani, that was the result of either the bus driver's actions or someone else's. It was not a problem caused by the bus. *See Tincher*, 104 A.3d at 388-89 ("The product is not defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains (*e.g.*, a knife)."); *Halliday v. Strum, Ruger & Co., Inc.*, 792 A.2d 1145, 1158 (Md. Ct. App. 2002) (gun was a lawful weapon and tragedy was caused by negligence of father in leaving it where child could find it).

b. Plaintiffs' Hypothetical Alternative Designs Are Not a Substitute for Showing of the Expectations of the Ordinary User with Ordinary Knowledge.

Plaintiffs have focused exclusively on alternative designs because they know that the danger posed by a large bus is open and obvious to everyone and that their only possible refuge is the risk-utility test that *Trejo* rejected. *Trejo* notes that evidence of alternative design may be considered when determining whether a product was unreasonably dangerous, *assuming* the threshold determination the product is more dangerous than ordinary expected. Put simply, alternative design allows the plaintiff to argue: 'This product is more dangerous than any of us could reasonably have expected *and* there's something that can be done about it.' Nevertheless, as the dissenting opinion

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[4] Although the Plaintiffs argue that MCI has cited no authority for this proposition and made up a "bus driver expectations test," the consumer expectations test itself focuses on whether the product is "'more dangerous than would be contemplated *by the ordinary user*.'" *Trejo*, 402 P.3d at 650 (quoting *Ginnis*, 86 Nev. at 413, 470 P.2d at 138) (emphasis added); *see also Ewen*, 706 P.2d at 934-35 (consumer expectations test does not address expectations of bystanders; it focuses on users). The "users" of coaches are the people who purchase and drive them.

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in Trejo points out, "the consumer expectation test does not fairly allow design defect claims when the design dangers are obvious." *Id*. at 664 (Pickering, J., dissenting) (emphasis added); *see also Halliday*, 792 A.2d at 1158 (firearm was not unreasonably dangerous under consumer expectation test)*; Tincher*, 104 A.3d at 388-89 (noting "obvious defect" exception under consumer expectations test). Under these facts, the Plaintiffs' proposed alternative designs are irrelevant.

i. There Is No Evidence That "Air Blasts" from This Coach Were More Dangerous Than Everyone Expects.

The "aerodynamics" evidence that Plaintiffs cite is passing strange. For example, Plaintiffs contend that MCI should have followed the lead of the Japanese bullet train when designing buses. The implication is that the bullet train is not defective or unreasonably dangerous. But a person riding a bicycle near a bullet train going 200 miles per hour would be subjecting himself to the same open and obvious (and undoubtedly *greatly heightened*) danger that Dr. Khiabani faced when riding his bicycle next to the bus. Plaintiffs' analogy to the bullet train shows exactly why their alternative design evidence is irrelevant.

And the voluminous data regarding drag coefficients and scientific studies does not prove that an *ordinary user* with *ordinary knowledge* would contemplate that a more aerodynamic bus would be safer. The primary purpose of designing a more aerodynamic bus would be to reduce fuel costs, not improve safety. And there is no evidence that the ordinary user with ordinary knowledge expects less air displacement than occurred here.[5]

Moreover, if the Court looks carefully at the portions of the deposition transcripts quoted by Plaintiffs, it will see that there is no evidence whatsoever showing that if the bus were more aerodynamic, the bus would have been safer or the accident would not have occurred.[6] And there is

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[5] (Ex. A, Parada Depo, at 35–36.)

[6] Plaintiffs are particularly liberal with their use of the word "admit," such as when they say that Brad Lamothe "admitted knowing that simply rounding the corners on the bus (the safer alternative design) would eliminate air blasts" when the deposition testimony says nothing of the sort. (Opposition at 39.)

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no evidence one way or the other about whether the supposedly more aerodynamic Setra 500 creates less forceful "air blasts."

The closest Plaintiffs come to actual evidence on air blasts is when they posit a hypothetical of a bus traveling at 55 mph, but there is no dispute that the bus here was traveling at least 30 mph slower than that. Purely hypothetical evidence does not establish anything. *See Franchise Tax Bd. of State of Cal. v. Hyatt*, 133 Nev. Adv. Op. 102, 407 P.3d 717 (2017).

In fact, there is no evidence that Dr. Khiabani was even hit with an "air blast." That is pure speculation, as demonstrated by the Plaintiffs' statement that Ms. Bradley "unequivocally stated that she believed that an airblast *potentially* caused the bike to wobble." (Opposition at 12 (emphasis added).) Nobody has testified that an air blast *did* cause the bike to wobble. MCI's expert *did not* admit that Ms. Bradley's testimony supported airblasts. He stated that the only evidence that the bike wobbled was Ms. Bradley's testimony that it was possible.

"To defeat summary judgment . . . a plaintiff is required to show more than speculation or possibility that the product caused the injury." *Holcomb v. Ga. Pac., LLC*, 289 P.3d 188, 197 (Nev. 2012). A party opposing summary judgment "'is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.'" *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (quoting *Hahn v. Sargent*, 523 F.2d 461, 467 (1st Cir. 1975)); *see also Flores v. State*, 116 Nev. 659, 662, 5 P.3d 1066, 1068 (2000) (speculation is not evidence). But that is precisely what Plaintiffs are doing here.

ii. There Is No Evidence That People Expect Motor Coaches to Have Proximity Sensors; People Know About Blind Spots.

There is no evidence that ordinary citizens (either purchasers of motor coaches or bicyclists) do not understand that buses and all other vehicles may have blind spots.[7] Like being "run over by a bus," the phrase "blind spot" is part of the vernacular and the existence of blind spots is well-known. "Vehicle blind spot" even has its own Wikipedia page.

[7] MCI is assuming, for purposes of this motion only, that there actually was a relevant blind spot.

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https://en.wikipedia.org/wiki/Vehicle_blind_spot.

And there is no evidence that the ordinary user or a bystander would expect a bus or motor coach to have proximity sensors.[8] In fact, the availability of proximity sensors is a red herring because the driver *did see* Dr. Khiabani and tried to keep the coach a safe distance from him.

iii. There Is No Evidence that Ordinary Consumers Know About the S-1 Gard, Much Less Expect Its Use.

There is no evidence that an ordinary purchaser or driver of a coach (or a passenger or nearby cyclist) would find the absence of an S-1 Gard to make the coach more dangerous than normally expected. Nobody in Nevada even uses the S-1 Gard. There is no evidence that ordinary consumers with ordinary knowledge even know that the S-1 Gard exists. And the ordinary person understands that falling in the path of any moving vehicle (much less a large motor coach) can result in serious injury or death. In fact, a witness whom Plaintiffs have touted as having been "saved" by an S-1 Gard testified that, both before and after that incident, he would have expected to suffer significant and potentially fatal injuries if he fell into a moving bus. *See* (Opposition at 25 and Ex. 28 at P01319); **Exhibit A**, attached hereto, at 35-36.

CONCLUSION

The Court should grant summary judgment in favor of MCI on all of Plaintiffs' claims premised on liability for alleged product defects.

DATED this 17th day of January, 2018.

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[8] The driver's testimony about the desirability of proximity sensors being installed *now* is irrelevant to whether the coach was defective when it was manufactured in 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2018, a true and correct copy of the foregoing **MOTOR COACH INDUSTRIES, INC.'S OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE NO. 17 (TO ADMIT EVIDENCE OF FACTS ESTABLISHING DEFENDANTS' CONSCIOUSNESS OF RESPONSIBILITY)** was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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EXHIBIT A

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EXHIBIT A

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; et al.,	)	
Plaintiffs,	)	
vs.	)	No. A-17-755977-C
MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF JOSE G. PARADA, JR., a witness herein, noticed by Kemp, Jones & Coulthard, LLP, taken at 201 North Brand Boulevard, Glendale, California, at 9:28 a.m., Thursday, December 14, 2017, before Stephanie Ferrell, CSR 9408.

Job Number 434305

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APPEARANCES (Continued):

Also Present:
BRIAN MURPHY, Videographer

I N D E X

THE VIDEOGRAPHER: We are on the record. The time is 9:28 a.m. The date is December 14th, 2017. This is the beginning of media No. 1 in the deposition of Jose Parada, volume 1, taken by the plaintiff in the matter of Khiabani v. Motor Coach Industries; et al. The case number is A-17-755977-C. This deposition is being held at 201 North Brand Boulevard, Glendale, California. The court reporter is Stephanie Ferrell. I'm Brian Murphy, the videographer, an employee of Litigation Services located at 3770 Howard Hughes Parkway, Las Vegas, Nevada. This deposition is being videotaped at all times unless specified to go off the video record.

Would all present please identify themselves.

THE WITNESS: Jose G. Parada, Jr.

MR. RUSSELL: Howard Russell for Motor Coach Industries.

MR. PEPPERMAN: Eric Pepperman for plaintiffs.

MR. CHRISTIANSEN: (Unintelligible).

THE REPORTER: Can't hear that guy.

THE VIDEOGRAPHER: Could the second person repeat himself. The court reporter was not able to hear.

MR. CHRISTIANSEN: Pete Christiansen for the plaintiffs.

THE VIDEOGRAPHER: And will the court reporter please swear in the witness.

JOSE G. PARADA, JR.,
a witness herein, having been sworn, testifies as follows:

-EXAMINATION-

BY MR. PEPPERMAN:

Q. Sir, can you please state and spell your name for the record.

A. Jose G. Parada, P-a-r-a-d-a, Jr.

Q. Mr. Parada, for the record, my name is Eric Pepperman. I represent two young boys who lost their father in a -- in an accident when he was riding his bicycle. He was run over by the rear tires of a bus.

Have you ever had your deposition taken before?

A. No.

Q. Well, a deposition is a fact-finding tool in a lawsuit. It's essentially a question-and-answer session. I'll be asking you some questions and, to the extent that you can, you'll be providing me answers to those questions. Okay?

A. Um-hum, yes.

Q. A couple of the ground rules that I just want to make you aware of are, No. 1, even though we're in an informal setting, the oath that you were just given is

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A. No.
Q. You are not?
A. No.
Q. Are you any sort of -- ever do any sort of designing of vehicles?
A. No, no.
Q. Have you ever driven a bus?
A. Not a bus, but a -- something heavy, a heavy truck, yes.
Q. Do you have a CDL?
A. Huh?
Q. Do you have a CDL license?
A. Yes.
Q. Do you use that currently?
A. Yes, sir.
Q. But you've never driven a bus?
A. No.
Q. And prior to your accident had you ever heard of -- of an S-1 GARD?
A. No.
Q. And prior to your accident what would you expect would have happened if you were in an accident in which you fell under the tires of a bus? What would you expect to happen?
A. Injury or killed.

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Q. So as the bus -- the day your accident, as the bus was approaching you and you heard the bus approaching you, did you expect that the bus was going to have any sort of device to push you out of the way if you had an accident with the bus?
A. No.
MR. PEPPERMAN: Form, foundation.
THE WITNESS: No.
MR. RUSSELL:
Q. Never heard of anything like that before?
A. No.
Q. And so in the -- how many years prior to your accident had you been riding your bike to work?
A. So that's '03? Probably three and a half years.
Q. And in those three and a half years riding your bike to work, would you have expected, if you fell into a moving bus, that you would have sustained significant injuries?
A. Yes.
Q. And would you have expected that you could possibly have -- have died from those injuries?
A. Yes.
Q. Because you didn't -- you'd never heard of an S-1 GARD?

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A. No.
Q. And so as a bike rider would you have taken steps to avoid having an accident with a bus because you would have expected you would have gotten injured?
A. Yes, I take extra caution before and after.
Q. Prior to today you said you've never seen this traffic collision report as Exhibit 1, correct?
A. No.
Q. Look through it, please, and tell me if anything in this -- in this report is in your handwriting.
A. Nothing, nothing is my writing. Nothing in here is my writing.
Q. Do you know who -- whose writing that is?
A. No, I don't know, sir.
Q. Do you know who wrote the report?
A. No, I don't.
Q. Do you know when they wrote it?
A. No, I don't.
Q. And other than on the day of your accident, have you ever seen an S-1 GARD again?
A. No.
Q. You still ride your bike to work?
A. No.
Q. How long after this accident did you continue

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to ride your bike to work?
A. Only reason is that I rode my bike was I didn't have no car.
Q. When did you get a car?
A. Let me see. After that was like -- tell you the truth, I was afraid to -- to ride my bicycle.
Q. But you continued to do so?
A. Yeah, I had no car. So I had to go to work.
Q. And even after that day of your accident. You never saw an S-1 GARD again?
A. No. You know what? I would see -- see the buses and I would glance to see if there and I saw some of them in some buses.
Q. Were they all city metro buses?
A. I was more conc- -- I never -- yeah, I think they were more MTAs.
Q. All right. Fair to say you've never actually held one of these things in your hand; is that correct?
A. No.
Q. Is that correct?
A. Yes.
Q. And you've never done any testing as to how one of these devices work?
A. I should have looked them up, but I -- I never did nothing.

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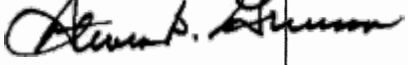
CLERK OF THE COURT



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Attorneys for Defendant
BELL SPORTS, INC.

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 o 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/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

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

ENTERED

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DEFENDANT BELL SPORTS, INC.'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT ON ORDER SHORTENING TIME

COMES NOW, Defendant BELL SPORTS, INC. (hereinafter "Defendant"), by and through its attorneys of record, MICHAEL E. STOBERSKI, ESQ. and JOSLYN D. SHAPIRO, ESQ. of the law firm of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and hereby submits its Motion for Determination of Good Faith Settlement on an Order Shortening Time.

This Motion is made and based on the pleadings and papers on file herein, the Points and Authorities submitted herewith, and any oral argument that may be had at the hearing of this matter.

DATED this 12th day of January, 2018.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

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JOSLYN D. SHAPIRO, ESQ.
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Attorneys for Defendant
BELL SPORTS, INC.

AFFIDAVIT OF COUNSEL IN SUPPORT OF ORDER SHORTENING TIME ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

MICHAEL E. STOBERSKI, ESQ. being first duly sworn, deposes and says:

1. That Affiant is over the age of eighteen (18) and a duly-licensed attorney

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practicing law in the State of Nevada, Nevada Bar Number 004762, and a shareholder of the law firm of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, the attorneys of record for Defendant BELL SPORTS, INC. in the above-captioned matter;

2. This matter arises out of the death of Kayvan Khiabani M.D. while operating his bicycle on April 18, 2017 following an impact with a touring motor bus;

3. Plaintiff has made negligence and products liability claims against numerous Defendants including Defendant BELL SPORTS, INC.;

4. Now that Defendant, BELL SPORTS, INC. and Plaintiffs have reached a settlement, which does not constitute an admission of fault by BELL SPPORTS, INC. for the subject incident or any injuries or damages sustained by the Decedent or Plaintiffs, the parties seek to avoid incurring additional expenses relative to the ongoing litigation;

5. As the settlement terms and amount are wholly confidential in nature, it is the intention of Defendant BELL SPORTS to submit the settlement amount for this Honorable Court's consideration either for *in camera* review or to submit the amount once all Defendants have stipulated to maintaining the confidentiality thereof by way of an Addendum to Defendant BELL SPORTS, INC.'s Motion for Determination of Good Faith Settlement on an Order Shortening Time;

6. That the trial in this matter is currently scheduled to begin on February 12, 2018;

7. By eliminating Plaintiffs' claims against Defendant BELL SPORTS, INC., there was not any need for this Defendant to conduct depositions or retain and disclose liability and medical experts;

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8. To reduce costs, promote judicial economy, and expeditiously resolve Plaintiffs' claims against Defendant BELL SPORTS, INC. without further involvement by this Honorable Court, Defendant BELL SPORTS, INC. brings the instant motion to obtain a determination by this Court that the settlement agreement reached on Monday, September 25, 2017 by and between Plaintiffs KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; and KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent) (hereinafter "Plaintiffs") and Defendant BELL SPORTS, INC. occurred in good faith;

9. If the instant motion is not heard on an Order Shortening Time, it is likely that the Court will assign the instant matter a hearing date in the ordinary course that is very close to the scheduled trial date of February 12, 2018; and

10. The instant motion is brought in good faith without any improper purpose and the Court should hear the instant motion at the earliest possible date in order to avoid inconvenience and prejudice to all parties.

FURTHER AFFIANT SAYETH NAUGHT.

MICHAEL E. STOBERSKI, ESQ.

SUBSCRIBED AND SWORN to before me
this 12th day of January, 2018.

NOTARY PUBLIC in and for said
County and State

JANE T. SCORSONE
Notary Public State of Nevada
No. 00-60502-1
My appt. exp. Dec. 29, 2019

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ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFOR, it is hereby ORDERED, that the time for the hearing of Defendant BELL SPORTS, INC.'s Motion for Determination of Good Faith Settlement be shortened to the 23rd day of January, 2018, at the hour of 9:30 a.m./p.m., or as soon thereafter as counsel can be heard.

DATED this 16th day of January, 2013.

DISTRICT COURT JUDGE

Submitted by:

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI

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POINTS AND AUTHORITIES

I.

INTRODUCTION

This matter arises out of the death of Kayvan Khiabani M.D. while operating his bicycle on April 18, 2017 following an impact with a touring motor bus. Plaintiffs filed their Amended Complaint on June 6, 2017 alleging the following claims against five (5) Defendants:

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1. Strict Liability against Defendant MOTOR COACH INDUSTRIES (MCI) based on the bus manufacture/design;
2. Negligence against Defendants MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS and EDWARD HUBBARD based on operation of the bus;
3. Negligence Per Se against Defendants MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS and EDWARD HUBBARD based on operation of the bus;
4. Negligent Training against Defendant MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS based on operation of the bus;
5. Strict Liability against Defendants GIRO d/b/a BELL SPORTS, INC. and SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY based on the helmet manufacture/design and helmet distribution;
6. Breach of Implied Warranty of Fitness for a Particular Purpose against Defendants GIRO d/b/a BELL SPORTS, INC. and SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY based on suitability of goods; and
7. Wrongful Death against all Defendants.

Plaintiffs' Motion for Preferential Trial Setting was granted and the firm trial setting in this matter is February 12, 2018. All five (5) Defendants have actively participated in this litigation to date and all necessary parties to the adjudication of this action have been joined pursuant to NRCP 19(1).

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II.

ARGUMENT

Nevada law favors settlement of claims as a means of resolving lawsuits and conserving judicial time and resources. Further, Nevada law places the determination that settlement occurred in good faith in the trial court's sound discretion. In the instant matter, Defendant SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY also similarly filed a Motion for Determination of Good Faith Settlement on September 22, 2017, on file herein. Moreover, it is this Defendant's understanding that two (2) additional Defendants: 1) Defendant MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS; and 2) Defendant EDWARD HUBBARD have also reached a confidential settlement with Plaintiffs and will also submit a similar Motion for Determination of Good Faith Settlement for consideration by this Honorable Court in the near future.

A. Standard for Good Faith Settlement.

Nevada Revised Statute 17.245 allows for the settlement of lawsuits when done in good faith. A determination that a settlement is in good faith precludes the non-settling tortfeasors from seeking contribution or implied indemnification or any other remedy from the settling tortfeasor. NRS 17.245(1)(b). Accordingly, NRS 17.245 provides that when one or multiple parties liable for the same tort obtain a release or agreement not to sue, "[i]t discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor." Id.

The Nevada Supreme Court set the standard for good faith settlement in Velsicol Chem. v. Davidson, 107 Nev. 356, 811 P.2d 561 (1991). The Court in Velsicol held that the trial court exercises its sound discretion in determining whether a settlement agreement occurs in good

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faith, based on a variety of factors. Id. at 360, 811 P.2d at 563. The Court further determined that once the trial court has made such determination by considering all relevant facts, the higher court will not disturb the ruling absent an abuse of discretion. Id.

In Veliscol, the Nevada Supreme Court reviewed the factors relied on by the United States District Court for the District of Nevada in In re MGM Grand Hotel Fire Litigation, 570 F.Supp. 913, 927 (D.Nev.1983) in construing NRS 17.245:

> Factors to be considered by the Court in assessing whether a settlement is in good faith is [sic] the amount paid in settlement, the allocation of the settlement proceeds among plaintiffs, the insurance policy limits of settling defendants, the financial condition of settling defendants, and the existence of collusion, fraud or tortious conduct aimed to injure the interests of non-settling defendants.

Veliscol at 359. More recently, in The Doctors Company v. Vincent, 120 Nev. 644, 651-652 (2004), the Nevada Supreme Court reiterated its holding in Velsicol that a determination of good faith settlement should be left to the trial court's sound discretion under an abuse of discretion standard, and should also include the above-referenced factors. Vincent at 652. As discussed in greater detail below, each of the above listed factors is met in the instant matter.

B. Plaintiffs and Defendant BELL SPORTS, INC. Settled in Good Faith.

In the case at hand, settlement between Defendant BELL SPORTS, INC. and Plaintiffs clearly and unequivocally occurred in good faith. Defendant BELL SPORTS, INC. has agreed with Plaintiffs to settle Plaintiffs' claims against Defendant BELL SPORTS, INC. for a sum that is fair and reasonable, as discussed below, which will be disclosed for consideration by this Honorable Court either for *in camera* review or in an Addendum to Defendant BELL SPORTS INC.'s Motion for Determination of Good Faith Settlement pursuant to a confidentiality agreement among all parties. As indicated above, it is Defendant BELL SPORTS, INC.'s

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understanding that Defendant MCI is the sole remaining Defendant that has not yet reached a mutually-agreeable settlement with Plaintiffs.

The settlement amount at issue constitutes a settlement of all claims that were or could have been raised in Plaintiffs' Amended Complaint against Defendant BELL SPORTS, INC., which merely manufactured the bicycle helmet worn by the decedent at the time of the subject accident. A factor relied on in reaching this settlement amount concerns the liability issues as to each of the five (5) Defendants. Defendant SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY's recent Motion for Determination of Good Faith Settlement is for $10,000.00. (See Defendant SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY's Motion for Determination of Good Faith Settlement at 4, on file herein). As stated in Defendant SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY's moving papers, "Defendant SevenPlus is simply the retail store that sold the decedent his bicycle and helmet, as well as related accessories." Id.

The liability arguments as to the other two (2) settling Defendants, MICHELANGELO LEASING d/b/a RYAN'S EXPRESS and EDWARD HUBBARD are based on allegations of negligence associated with the operation of the touring motor bus at issue. Due to its confidential nature, Defendant BELL SPORTS, INC. does not know the details of the settlement reached between Plaintiffs and Defendants MICHELANGELO LEASING and EDWARD HUBBARD which those Defendants are, or will be, seeking this Honorable Court's approval to settle Plaintiffs' claims against them.

Another factor relied on in reaching a settlement amount is avoiding further litigation expenses associated with identifying the precise liability theory being pursued against Defendant BELL SPORTS, INC. Notably, to date Plaintiffs have not identified a specific legal theory under which Plaintiffs are making claims for damages against Defendant BELL SPORTS, INC.,

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beyond stating that Defendant BELL SPORTS, INC. consciously rejected engineering standards that would have made its helmets safer. (See correspondence, dated September 11, 2017, attached hereto as Exhibit "A"). (See also Plaintiff Dr. Barin as an Individual's Answer to Interrogatory No. 20, dated September 5, 2017, attached hereto as Exhibit "B"). (See also Plaintiff Dr. Barin as the Executrix's Answer to Interrogatory No 28, dated September 5, 2018, attached hereto as Exhibit "C"). In all other answers requesting information identifying the bases of the claims against Defendant BELL SPORTS, INC., Plaintiffs deferred to presently-undisclosed experts, thus providing no substantive response. (See Exhibit "B" at Answer Nos. 10, 11, 12, 13, 14, 15, and 16). (See also Exhibit "C" at Answer Nos. 15, 16, 17, 18, 19, 20, and 21). In order to discern the legal theory against it, BELL SPORTS, INC. would not only likely have to move to compel Plaintiffs to do so, but would also have to retain experts to dispute the same.

Finally, with regard to liability, it appears that the cause of death was a skull fracture due to a bus running over the decedent's head. Defendant BELL SPORTS, INC. disputes that it has any liability regarding the cause of death in this matter. While Defendant BELL SPORTS, INC. has no opinion as to Plaintiffs' arguments against the remaining non-settling Defendant, MCI, no party can credibly contend that an alternatively-designed bicycle helmet could have precluded injury to its wearer upon impact with a touring motor bus and/or its undercarriage/tires while the bus progressed down the roadway.

Based on the above-mentioned liability, arguments that may exist against Defendant MCI in comparison to those that may exist against Defendant BELL SPORTS, INC., Defendant SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, and Defendants MICHELANGELO LEASING and EDWARD HUBBARD, the latter four (4) Defendants reached a monetary

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agreement that appears to have satisfied Plaintiffs' expectations from these four (4) Defendants. Specifically, Plaintiffs agreed that a sum of Ten Thousand Dollars ($10,000.00) is a reasonable and just sum for the settlement of all claims against Defendant SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY. Similarly, while not at liberty to reveal the confidential amount of the as to the settlement of Defendant BELL SPORTS, INC. as of yet, Plaintiffs agreed the sum is reasonable and just in light of their anticipated claims. Finally, it is this Defendant's understanding that Defendants MICHELANGELO LEASING and EDWARD HUBBARD also reached a mutually-agreeable confidential settlement with Plaintiffs. As to Defendant BELL SPORTS, INC., the settlement reached is fair, reasonable, and commensurate with the relative potential liabilities of the respective parties.

C. <u>The Settlement At Issue Meets All In re MGM Grand Hotel Fire Litigation Factors.</u>

1) The amount paid is reasonable.

As indicated above, Defendant BELL SPORTS, INC. disputes the existence of any liability in this litigation in light of the cause, manner, and circumstances surrounding the subject accident and resulting death. Therefore, Defendant BELL SPORTS, INC. seeks to settle this matter to eliminate the need for its further involvement in this litigation, eliminate ongoing costs associated with litigation, as well as to preserve this Honorable Court's time and judicial resources. Once disclosed pursuant to confidentiality assurances, this Honorable Court will be aware of the reasonableness of the monetary amount of this settlement.

2) The settlement proceeds will be allocated among the decedent's heirs and their counsel.

The Plaintiffs in this action consist of the decedent's former spouse, in her individual capacity and as the legal guardian for the couple's two minor children, as well as in her capacity

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and as the executrix of the decedent's estate. The entire amount of the settlement at issue will be payable to Plaintiffs and their legal counsel.

3) The settlement falls within the disclosed policy limits of this Defendant.

Also as noted above, Defendant BELL SPORTS, INC. disputes any liability in this action and is settling this case in order to eliminate the need for continued involvement in the ongoing litigation. Therefore, while Plaintiffs are aware of this Defendant's insurance policy limits based on disclosure of the same, the limits of coverage do not apply in this instance.

4) This Defendant's financial condition is protected by way of insurance payment of the settlement amount.

As this Defendant does not consider itself liable for causing or contributing to the subject incident, Defendant BELL SPORTS, INC. will appropriately preserve its financial condition by payment of the settlement funds, thus extricating itself from additional time, fees, expenses, and costs that would be associated with its continuing participation in the ongoing litigation.

5) No collusion, fraud, or tortious conduct occurred in reaching this settlement.

There can be no allegation of collusion as against the remaining non-settling Defendant, MCI. As noted above, no possibility exists that an alternatively-designed bicycle helmet could have prevented the outcome at issue in consideration of the impact between the decedent's head and the underside of a touring bus in-motion. All settlement discussions occurred in good faith and with no improper intention or purpose.

The subject settlement amount is reasonable in light of the claims and defenses, and the procedural posture of this matter to date. Defendant BELL SPORTS, INC. seeks to extricate itself from the ongoing litigation by way of its good faith participation in the settlement agreement at issue.

///

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III.

CONCLUSION

Defendant BELL SPORTS, INC. has engaged in no improper conduct in reaching this settlement with Plaintiffs. Defendant BELL SPORTS, INC. therefore urges this Court to formally determine that the settlement occurred as a result of good faith negotiations among the parties. As discussed above, the monetary amount is reasonable in relation to the generally-anticipated liability apportionment among the five (5) co-Defendants in this matter and the specific amount will be disclosed pursuant to the appropriate confidentiality assurances.

BASED ON THE FOREGOING, Defendant BELL SPORTS, INC. respectfully requests that this Court GRANT its Motion for Determination of Good Faith Settlement.

DATED this 12th day of January, 2018.

OLSON, CANNON, GORMLEY,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and that on the 17th day of January, 2018, I served a correct copy of **DEFENDANT BELL SPORTS, INC.'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT** via the court's Electronic Filing and Service System to the following person(s):

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. A-17-755977-C

Dept. No.: XIV

PLAINTIFFS' JOINDER TO DEFENDANT BELL SPORTS, INC.'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT ON ORDER SHORTENING TIME

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PLAINTIFFS, by and through their undersigned counsel, hereby join in and adopt by reference the legal reasoning and arguments set forth in DEFENDANT BELL SPORTS, INC.'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT ON ORDER SHORTENING TIME.

DATED this 18TH day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18TH day of January, 2018, the foregoing **PLAINTIFFS' JOINDER TO DEFENDANT BELL SPORTS, INC.'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT ON ORDER SHORTENING TIME** pursuant to Nev. R. Civ. P. 30(b)(6) was served on all parties by electronic submission via the Wiznet Syste.:

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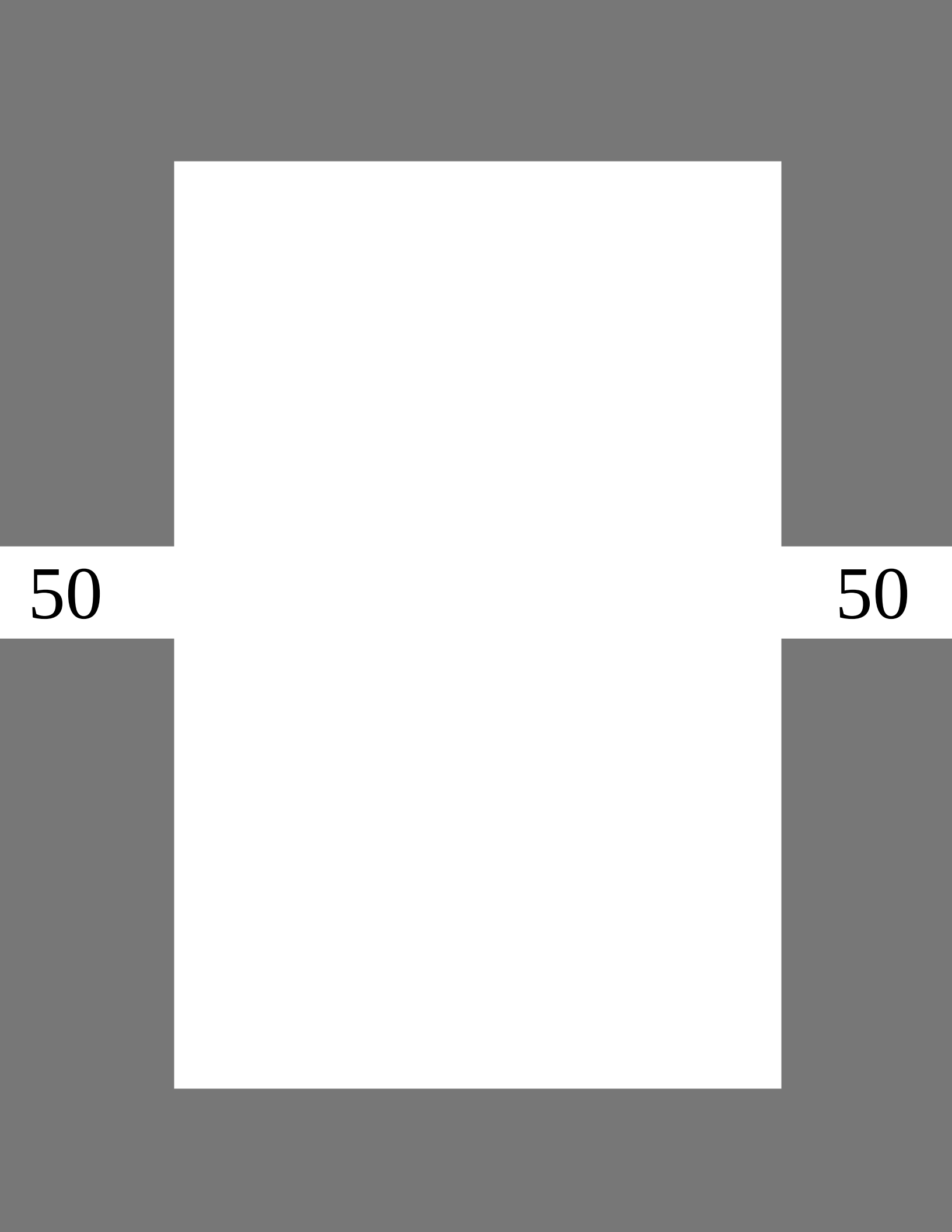
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

PLAINTIFFS' MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT WITH DEFENDANTS MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS AND EDWARD HUBBARD ONLY

ENTERED

AND

ORDER SHORTENING TIME

Date: January 23, 2018

Time: 9:30 a.m.

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Under NRS 17.245, Plaintiffs move this Honorable Court for a determination that: (1) the settlement and release agreement entered into between Plaintiffs and Defendants Michelangelo Leasing, Inc. d/b/a Ryan's Express ("Michelangelo") and Edward Hubbard ("Hubbard") was made and entered into in good faith, and that (2) Michelangelo and Hubbard are discharged from any liability for contribution and/or equitable indemnity to any other defendant or tortfeasor.

This Motion is made pursuant to Nevada Revised Statute 17.245, on grounds that the settlement between Plaintiffs and Michelangelo and Hubbard has been made in good faith. This Motion is based upon the attached Memorandum of Points and Authorities and exhibits thereto; upon the pleadings, records, and other documents on file with the Court in this action; and upon such oral and documentary evidence as may be presented at the hearing of this Motion.

Dated this 18 day of January, 2018

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DECLARATION OF ERIC PEPPERMAN, ESQ. IN SUPPORT OF ORDER SHORTENING TIME

I, Eric Pepperman, Esq., declare under penalty of perjury as follows:

1. I am an attorney duly licensed to practice law in the State of Nevada and am an attorney with the law firm of KEMP, JONES & COULTHARD, LLP ("KJC"). KJC and Christiansen Law Offices are counsel of record for Plaintiffs in the above-entitled action. I have personal knowledge about the matters contained in this Declaration.

2. Plaintiffs initiated this action on May 25, 2017 and filed amended complaints on June 6, 2017 and November 17, 2017. In their operative complaint, Plaintiffs assert negligence claims against Michelangelo and Hubbard, and product liability claims against Motor Coach Industries, Inc. ("MCI"), Bell Sports, Inc. and Sevenplus Bicycles, Inc.

3, The trial in this matter is currently set to commence on February 12, 2018.

4. Plaintiffs and Michelangelo and Hubbard have reached a confidential settlement resolving Plaintiffs claims against Michelangelo and Hubbard. Their proposed settlement is contingent upon the Court granting this motion, and Plaintiffs' contemporaneous petition for minors' compromise.

5. I believe that good cause exists to hear this motion on shortened time so Plaintiffs can finalize their settlement with Michelangelo and Hubbard prior to the February 12, 2018, trial date.

6. At the January 18, 2018, calendar call, the Court advised that this motion would be set on January 23, 2018, along with the other pretrial motions scheduled on that date.

7. I make this declaration under penalty of perjury.

Dated this 18 day of January, 2018.

ERIC PEPPERMAN, ESQ.

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ORDER SHORTENING TIME

Upon Plaintiffs' ex parte application, supported by the declaration of Eric Pepperman, Esq., counsel for the Plaintiffs, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time for notice and hearing of PLAINTIFFS' MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT WITH DEFENDANTS MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS AND EDWARD HUBBARD is shortened. This matter shall now be heard on the 23rd day of January, 2018, at the hour of 9:30 AM, before Department XIV in the above-entitled Court.

DATED this 16th day of January, 2018.

DISTRICT COURT JUDGE

Respectfully Submitted by:

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

On April 18, 2017, Kayvan Khiabani, M.D., a renowned surgeon, was struck and killed by a large tour bus while riding his bicycle. On May 25, 2017, Dr. Khiabani's wife, Katayoun "Katy" Barin, DDS, filed a lawsuit as the Executrix of her late husband's estate and on behalf of herself and her two sons, Aria and Keon. The complaint was amended on June 6, 2017, to substitute parties. Plaintiffs alleged product liability claims against MCI, Bell Sports, and SevenPlus, and negligence claims against Michelangelo and Hubbard.

Approximately two months before her husband's tragic death, Katy Barin was diagnosed with stage IV colon cancer. Unfortunately, on October 12, 2017, Katy died. Plaintiffs allege that the stress, grief, and sorrow caused by her husband's wrongful death accelerated and exacerbated her cancer and that Katy died as a direct and proximate result of the underlying accident. Plaintiffs amended their complaint on November 17, 2017, to assert a claim for the wrongful death for Katy Barin. The trial in this matter is presently set to commence on February 12, 2018.

Plaintiffs have agreed to proposed settlements with Defendants (i) Michelangelo and Hubbard, (ii) Bell Sports, and (iii) SevenPlus. Plaintiffs have not resolved their claims against Defendant MCI. On January 5, 2018, the Court granted SevenPlus' motion for good faith settlement and entered its order determining that the settlement between Plaintiffs and SevenPlus was made and entered into in good faith. On January 12, 2018, with respect to its own proposed settlement with Plaintiffs, Defendant Bell Sports filed a motion for good faith settlement determination, which is currently pending before the Court. By this motion, Plaintiffs ask the Court to enter an order determining that the settlement between Plaintiffs and Michelangelo and Hubbard was made and entered into in good faith as well.

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II

THE SETTLEMENT WITH MICHELANGELO AND HUBBARD

Plaintiffs and Michelangelo and Hubbard have reached a settlement resolving Plaintiffs' claims against Michelangelo and Hubbard. Their proposed settlement is contingent upon the Court granting this motion and a contemporaneous petition for minors' compromise. If the Court approves the proposed settlement, any judgment that may be entered against any other defendant would be reduced by the settlement amount, and Michelangelo and Hubbard will each be discharged from liability for the claims brought by Plaintiffs and from liability for contribution and/or equitable indemnity to any other joint tortfeasor. *See* NRS 17.245.

The proposed settlement amount is confidential, and it will be presented to the Court *in camera* at the time of the hearing on this matter. The settlement was encouraged by the financial condition of Michelangelo and Hubbard, the applicable insurance policy limits, and a balance of the risks and benefits of continued litigation. Pursuant to NRS 17.245, the settlement is now subject to this Court's determination that it satisfies the statutory requirement of "good faith."

III

LEGAL ARGUMENT

A. Good Faith Standard

In Nevada, a good faith determination is made pursuant to NRS 17.245, which states in relevant part:

> (1) When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death…
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

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(b) It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.

The Nevada Supreme Court has held that the determination of whether a settlement is entered in good faith is left to the "discretion of the trial court based upon all relevant facts available." *Velsicol Chem. Corp. v. Davidson*, 107 Nev. 356, 360 (1991). In considering a motion for good faith settlement, a court can consider the following relevant, but not exclusive, factors: "[t]he amount paid in settlement, the allocation of settlement proceeds among Plaintiffs, the insurance policy limits of settling defendants, the financial condition of settling defendants, and the existence of collusion, fraud or tortious conduct aimed to injure the interests of non-settling defendants." *Doctors Company v. Vincent*, 120 Nev. 644, 651-52 (2004) (following the facts established in *In re MGM Grand Hotel Fire Litigation*, 570 F. Supp. 913, 9127 (D. Nev. 1983)). In view of these factors as explained below, and in light of the relevant facts, it is clear that the settlement reached between Plaintiffs and Ryan's Express and Hubbard is in good faith.

B. Analysis of Good Faith Factors

1. Settlement Amount, Financial Conditions, and Policy Limits

As Plaintiffs' settlement with Michelangelo and Hubbard is confidential, the amount will be presented *in camera* at the time of hearing on the instant motion. Still, the settlement amount is considerable and constitutes a good faith resolution of the potential liability of Michelangelo and Hubbard given the facts and practical considerations. Before entering into this settlement agreement, the parties and their counsel gave full consideration to the financial conditions of the settling parties, the policy limits available, the strengths and weaknesses of Plaintiffs' claims and Michelangelo and Hubbard's defenses, the merits of all potential contribution and indemnity claims, the risks and possible result of a trial on the merits, the litigation costs and expenses that would be incurred absent a settlement, and other benefits resolving the claims at this time.

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2. *Allocation of Settlement Proceeds Among Plaintiffs*

As this is a case involving claims by minors, the overall settlement with Michelangelo and Hubbard, and the allocation of the settlement proceeds, must be approved by the Court. Contemporaneous with this motion, Plaintiffs are submitting a petition to compromise the Minor Plaintiffs' claims against Michelangelo and Hubbard. In their petition, Plaintiffs propose an allocation of the settlement proceeds from Michelangelo and Hubbard that they believe to be fair. Whether or not it accepts this proposal, the ultimate allocation of the settlement proceeds must meet the Court's approval.

3. *The Existence of Collusion, Fraud, or Tortious Conduct*

Plaintiffs represent to this Court that the settlement negotiations between them and Michelangelo and Hubbard were carried out absent any collusion, fraud, or tortious conduct aimed at injuring the interests of the non-settling parties. The settlement amounts were guided by the risks and benefits of further litigation. There was no intent or thought to injure any interest of any non-settling tortfeasor, who have all offered to stipulate to this motion.

Indeed, the proposed settlement is favorable to any remaining defendants. Plaintiffs' remaining claims will be reduced by the settlement amounts contributed by Michelangelo and Hubbard. NRS 17.245(1)(a). As set forth above, the remaining defendants will receive a contribution toward any future judgment entered against them.

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IV

CONCLUSION

For all the forgoing reasons, Plaintiffs respectfully request the following:

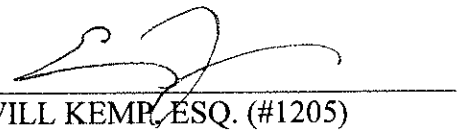
(1) That the Court grant their Motion for Determination of Good Faith Settlement with Michelangelo and Hubbard only;

(2) That the Court order that the settlement Plaintiffs reached with Michelangelo and Hubbard is in good faith and in accordance with NRS 17.245; and

(3) That the Court order that no party or entity may proceed with or recover on any claims for indemnity and/or contribution against Michelangelo or Hubbard.

DATED this 18 day of January, 2018.

KEMP, JONES & COULTHARD, LLP



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CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of January, 2018, the foregoing PLAINTIFFS' MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT WITH DEFENDANTS MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS AND EDWARD HUBBARD 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.

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DISTRICT COURT, CIVIL DIVISION

CLARK COUNTY, NEVADA

* * * *

KATAYOUN BARIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A-17-755977-C
	)	Dept. XIV
MOTOR COACH INDUSTRIES, INC.,	)	
	)	
Defendant.	)	
	)	

TRANSCRIBER'S TRANSCRIPT
OF
CALENDAR CALL

BEFORE THE HONORABLE ADRIANA ESCOBAR

DISTRICT JUDGE

Taken on Thursday, January 18, 2018

At 9:53 a.m.

APPEARANCES:

For the Plaintiff: ERIC PEPPERMAN, ESQ.
KENDELEE LEASCHER WORKS, ESQ.

For the Defendant: D. LEE ROBERTS, JR., ESQ.
JOEL D. HENRIOD, ESQ.

Transcribed by: Maureen Schorn

MAUREEN SCHORN, CCR NO. 496, RPR

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LAS VEGAS, NEVADA. THURSDAY, JANUARY 18, 2018, 9:53 A.M.

* * * *

THE COURT: Good morning.

MR. PEPPERMAN: Good morning, Your Honor.

THE COURT: All right. This is Barin v. Motor Coach Industries, Inc. We're here for calendar call. We have a firm date of February 12th at 9:30.

There is something I did just want to discuss with you quickly, I'm sure you're aware of it. We have a nonjury -- the court is closed on the 19th for a holiday, which is a Monday, February 19th.

I have, I show you through the 9th, Friday the 9th of March. I have a trial starting on the 12th, Monday the 12th. So how does that --

MR. ROBERTS: I think we can get it done, Your Honor. Lee Roberts for Motor Coach Industries. I believe we can get it done.

MS. WORKS: Plaintiffs agree, Your Honor.

THE COURT: Okay, great. All right. And then let's see, there's something else. There's a motion that's been placed on February 20th, which is after the beginning or the commencement of trial.

It's a nonparty New Flyer Industries, Inc.'s objection to Special Master Hale's January 4th, 2018

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decision or findings. So I'd like to place that on calendar sooner.

I know that we have motions on the 23rd and the 29th, and possibly on the 30th.

MR. PEPPERMAN: The 31st I believe, Your Honor.

THE COURT: The 31st, thank you. Okay. So I can hear it on any one of those days.

MR. PEPPERMAN: Your Honor, the motion that was filed was substantially similar to the motion that was filed in front of Special Master Hale.

Our opposition will be substantially similar, so I could get down and file it today, so the 23rd works for us, but I don't know if New Flyer is represented today.

MS. WORKS: It's an objection to the taking of a deposition, Your Honor, so the sooner you can hear it the better, obviously, given the trial date.

THE COURT: Why don't we place that on the 23rd then?

MR. ROBERTS: New Flyer is represented by Greenberg Traurig, and I'll let them know, but I believe they fully briefed the matter and should not need any additional time beyond that.

THE COURT: Okay, very good. And I expect that the jury questionnaire went out on Tuesday?

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