

Case No. 78701

**In the Supreme Court of Nevada**

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

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

Respondents.

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**APPEAL**

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

**APPELLANT'S APPENDIX  
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			36	8751–8822
98	Jury Trial Transcript	03/19/18	36 37	8842–9000 9001–9075
35	Motion for Determination of Good Faith Settlement Transcript	12/07/17	9	2101–2105
22	Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)	10/27/17	3	589–597
26	Motion for Summary Judgment on Punitive Damages	12/01/17	3	642–664
117	Motion to Retax Costs	04/30/18	47 48	11743–11750 11751–11760
58	Motions in Limine Transcript	01/29/18	12 13	2998–3000 3001–3212
61	Motor Coach Industries, Inc.’s Answer to Second Amended Complaint	02/06/18	14	3474–3491
90	Motor Coach Industries, Inc.’s Brief in Support of Oral Motion for Judgment as a Matter of Law (NRCP 50(a))	03/12/18	32 33	7994–8000 8001–8017
146	Motor Coach Industries, Inc.’s Motion for a Limited New Trial (FILED UNDER SEAL)	05/07/18	51	12673–12704
30	Motor Coach Industries, Inc.’s Motion for Summary Judgment on All Claims Alleging a Product Defect	12/04/17	6 7	1491–1500 1501–1571
145	Motor Coach Industries, Inc.’s Motion to Alter or Amend Judgment to Offset Settlement Proceed Paid by Other Defendants (FILED UNDER SEAL)	05/07/18	51	12647–12672
96	Motor Coach Industries, Inc.’s Opposition to Plaintiff’s Trial Brief Regarding Admissibility of Taxation Issues and Gross Versus Net Loss Income	03/18/18	36	8823–8838
52	Motor Coach Industries, Inc.’s Pre-Trial Disclosure Pursuant to NRCP 16.1(a)(3)	01/19/18	12	2753–2777

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

	Defendants Filed Under Seal on March 26, 2019			
40	Notice of Entry of Findings of Fact Conclusions of Law and Order on Motion for Determination of Good Faith Settlement	01/08/18	11	2581–2590
137	Notice of Entry of Findings of Fact, Conclusions of Law and Order on Motion for Good Faith Settlement	02/01/19	50	12385–12395
111	Notice of Entry of Judgment	04/18/18	42	10365–10371
12	Notice of Entry of Order	07/11/17	1	158–165
16	Notice of Entry of Order	08/23/17	1	223–227
63	Notice of Entry of Order	02/09/18	15	3511–3536
97	Notice of Entry of Order	03/19/18	36	8839–8841
15	Notice of Entry of Order (CMO)	08/18/17	1	214–222
4	Notice of Entry of Order Denying Without Prejudice Plaintiffs’ Ex Parte Motion for Order Requiring Bus Company and Bus Driver to Preserve an Immediately Turn Over Relevant Electronic Monitoring Information from Bus and Driver Cell Phone	06/22/17	1	77–80
13	Notice of Entry of Order Granting Plaintiffs’ Motion for Preferential Trial Setting	07/20/17	1	166–171
133	Notice of Entry of Stipulation and Order Dismissing Plaintiffs’ Claims Against Defendant SevenPlus Bicycles, Inc. Only	10/17/18	50	12361–12365
134	Notice of Entry of Stipulation and Order Dismissing Plaintiffs’ Claims Against Bell Sports, Inc. Only	10/17/18	50	12366–12370
143	Objection to Special Master Order Staying Post-Trial Discovery Including May 2, 2018 Deposition of the Custodian of Records of the Board of Regents NSHE and, Alternatively, Motion for Limited Post-Trial	05/03/18	51	12495–12602

	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 Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)”	01/17/18	11	2654–2663
49	Plaintiffs’ Joinder to Defendant Bell Sports, Inc.’s Motion for Determination of Good Faith Settlement on Order Shortening Time	01/18/18	11	2735–2737
41	Plaintiffs’ Joint Opposition to Defendant’s Motion in Limine No. 3 to Preclude Plaintiffs from Making Reference to a “Bullet Train” and to Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	01/08/18	11	2591–2611

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

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

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



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

1 MR. PEPPERMAN: Correct, Your Honor.

2 THE COURT: Very good. Is there anything  
3 else that we need to discuss at this time?

4 MR. PEPPERMAN: Just one thing pending.  
5 Bell Sports HAD submitted a Motion for Good Faith  
6 Settlement Determination, and that motion was set on the  
7 23rd, as well.

8 We have one more Motion for Good Faith Settlement  
9 Determination with Michelangelo and Hubbard Defendants,  
10 and I sent over a draft of the motion over to  
11 Michelangelo's counsel, so we should be filing that most  
12 likely today. I was going to file it on OST.

13 Would it be acceptable to put that motion on the  
14 23rd with the others?

15 THE COURT: Yes.

16 MR. PEPPERMAN: I don't think there's any  
17 opposition to that.

18 THE COURT: I think it's best if we have  
19 settlement motions to address them earlier, okay.

20 MR. ROBERTS: And we're not going to oppose  
21 those motions. We've agreed to stipulate to the good  
22 faith settlement agreement.

23 THE COURT: Very good. Anything else? Have  
24 a great day, counsel.

25 MS. WORKS: Thank you, Your Honor.

1 MR. ROBERTS: Thank you, Your Honor.

2

3 ATTEST: Full, true and accurate transcript of

4 proceedings.

5

*Maureen Schorn*  
MAUREEN SCHORN, CCR NO. 496, RPR

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MAUREEN SCHORN, CCR NO. 496, RPR

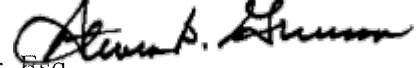
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Steven D. Grierson

CLERK OF THE COURT



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## DISTRICT COURT

## CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

**MOTOR COACH INDUSTRIES, INC.'S  
PRE-TRIAL DISCLOSURE PURSUANT  
TO NRCP 16.1 (a)(3)**

1 Defendant **MOTOR COACH INDUSTRIES, INC.** (hereinafter “Defendant”), by and  
2 through its attorneys of record, the law firms of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL,  
3 LLC and HARTLINE DACUS BARGER DREYER LLP, hereby submits the following Disclosure  
4 Pursuant to NRCP 16.1(a)(3) / FED. R. CIV. P. 26(a) and Local Rule 26-1. with regard to the above  
5 captioned matter.

6 **I. WITNESSES**

7 **A. Defendant expects to call the following witnesses at the time of trial, depending**  
8 **on Plaintiffs’ case in chief. The inclusion of any witness below is not a representation that**  
9 **Defendant will call a given witness, or that a particular witness’ testimony is admissible for**  
10 **any purpose:**

- 11 1. Virgil Hoogestraat  
12 c/o WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC  
13 6385 S. Rainbow Blvd.  
14 Ste. 400  
15 Las Vegas, NV 89118
- 16 2. Michael M. Baden, MD  
17 15 West 53<sup>rd</sup> Street, Ste. 18  
18 New York, NY 10019
- 19 3. David Krauss, PhD  
20 Exponent  
21 5401 McDonnell Ave.  
22 Los Angeles, CA 90066
- 23 4. Robert Rucoba  
24 Carr Engineering, Inc.  
25 12500 Castlebridge Drive  
26 Houston, TX 77065
- 27 5. James Funk  
28 Biocore  
1621 Quail Run  
Charlottesville, NC 22911
6. Kevan Granat  
Granat Technical Consulting, LLC  
702 S. Persimmon, Ste. 3A  
Tomball, TX 77375
7. Robert Stahl, MD  
525 Riverside Parkway NW  
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8. Michael Carhart, Ph.D.  
 Exponent  
 23445 N. 19<sup>th</sup> Ave.  
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9. Stan Smith, PhD  
 Smith Economics Group  
 1165 N. Clark Street, Ste. 600  
 Chicago, IL 60610

**B. Defendant may offer the following witnesses if the need arises. The inclusion of any witness below is not a representation that Defendant will call a given witness, or that a particular witness' testimony is admissible for any purpose:**

10. Bryan Couch  
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11. Dave Dorr  
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12. Edward Hubbard  
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 3993 Howard Hughes Pkwy., Suite 200  
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13. Keon Khiabani  
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AND

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14. Aria Khiabani  
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- 1 15. Katayoun Barin (by deposition)
- 2 16. Officer Lourenco (5198)
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- 5 Las Vegas, NV 89101
- 6 17. Officer Paul McCullough
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- 12 Las Vegas, NV 89145
- 13 19. Aaron Bradley
- 14 9208 Dalmahoy Place
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- 16 20. Luis Sacarias
- 17 2985 Mount Hope Dr.
- 18 Las Vegas, NV 89156
- 19 21. Michael Plantz
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- 22 Suite 160
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- 24 (847) 714-4892
- 25 22. Robert Pears
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- 27 Lake in the Hills, IL 60156
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23. Andrew Louis
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24. Shaun Harney
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26. Lisa Gavin, M.D.
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5 Kevin May  
6 Michael Martin  
7 Jesse Gomez  
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12 Stacy Whipple, Unit Clerk  
13 Jay Coates, DO  
14 Nancy Rivera, MD  
15 Elliot Welder, MD  
16 Tamora Locke, SW  
17 Purvi Patel, MD  
18 Patricia Archer  
19 Neil Kaura  
20 Treating Physicians  
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- 28 31. Robert Kilroy, Esq.  
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- 16 41. Pablo Fierros, former employee of MCI  
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3 Henderson, NV 89014
- 4 49. Anthony Nguyen, MD  
c/o COMPREHENSIVE CANCER CENTERS OF NEVADA  
5 3730 S. Eastern Ave.  
Las Vegas, NV 89169
- 6 50. Fadi Braiteh, MD  
c/o COMPREHENSIVE CANCER CENTERS OF NEVADA  
7 3730 S. Eastern Ave.  
Las Vegas, NV 89169
- 8 51. Custodian of Records  
c/o JACOBS MEDICAL ASSOCIATES  
9 1389 Galleria Drive, Ste. 100  
10 Henderson, NV 89014
- 11 52. Custodian of Records  
c/o HEATHER ALLEN, MD  
12 3730 S. Eastern Ave.  
Las Vegas, NV 89169
- 13 53. Custodian of Records  
c/o JENNIFER BAYNOSA, MD  
14 1707 W. Charleston Blvd.  
15 Las Vegas, NV 89102
- 16 54. Custodian of Records  
c/o QUEST DIAGNOSTICS  
17 4230 Burnham Ave.  
Las Vegas, NV 89119
- 18 55. Custodian of Records  
c/o ED W. CLARK HIGH SCHOOL  
19 4291 Pennwood Ave.  
Las Vegas, NV 89102
- 20 56. Custodian of Records  
c/o LABCORP.  
21 5380 S. Rainbow Blvd., Ste. 108  
22 Las Vegas, NV 89118
- 23 57. Michael Verni, MD  
24 653 N. Town Center Dr., Ste. 302  
Las Vegas, NV 89144
- 25 58. Jim Swauger  
26 Binary Intelligence  
150 Industrial Drive  
27 Franklin, Ohio 45005

28 ///

**C. Defendant expects that the following witnesses may be presented by means of a deposition:**

59. Katayoun Barin, Individually  
c/o KEMP, JONES & COULTHARD, LLP  
3800 Howard Hughes Pkwy., 17<sup>th</sup> Floor  
Las Vegas, NV 89169

AND

CHRISTIENSEN LAW OFFICES  
810 S. Casino Center Blvd.  
Las Vegas, NV 89101

60. Katayoun Barin, as Executrix for the Estate of Kayvan Khiabani, M.D. (Decedent)  
c/o KEMP, JONES & COULTHARD, LLP  
3800 Howard Hughes Pkwy., 17<sup>th</sup> Floor  
Las Vegas, NV 89169

AND

CHRISTIENSEN LAW OFFICES  
810 S. Casino Center Blvd.  
Las Vegas, NV 89101

61. Michael Plantz  
c/o ThermoFisher Scientific  
1201 E. Wiley Road  
Suite 160  
Schaumburg, IL 60173  
(847) 714-4892

62. Robert Pears  
4000 Spring Lake Drive  
Lake in the Hills, IL 60156  
(847) 814-2295

Defendant reserves the right to amend this list following the NRCP 16.1(a)(3) disclosure and to present any deposition into evidence if a showing of unavailability is made at trial.

**D. Defendant has not served any trial subpoenas to date. This information will be supplemented in the future.**

## II. DOCUMENTS

**A. Defendant expects to offer the following documents at trial, depending on Plaintiffs' case in chief. The inclusion of any document below is not a representation that**

1 **Defendant will introduce a given document, or that a particular document is admissible for**  
 2 **any purpose:**

- 3 1. Medical records from UMC of Kayvan Khiabani (identified as Lubbock Doe), P 2-50 (previously disclosed by Plaintiffs via Initial Disclosure).
- 4 2. Videotape from Red Rock Casino, P 51 (previously disclosed by Plaintiffs via Initial Disclosure)
- 5 3. Subject bicycle
- 6 4. Subject helmet

8 **B. Defendant may offer the following documents, if the need arises. The inclusion**  
 9 **of any document below is not a representation that Defendant will introduce a given**  
 10 **document, or that a particular document is admissible for any purpose:**

- 11 1. Motor Coach Industries, Inc. Answer to Plaintiffs' Amended Complaint.
- 12 2. Certificate of Death, P0001.
- 13 3. Videotape of post accident, P 52.
- 14 4. Giro Owner's Manual, P 56-91.
- 15 5. Giro Owner's Manual, P 92-127.
- 16 6. Giro Owner's Manual, P 128-148.
- 17 7. Receipt from Pro Cyclery in the amount of \$3,460.79 for purchase of a Scott Solace 10 Dis Bicycle and bag P 149.
- 18 8. Scott Bike User Manual, P 150-175.
- 19 9. 2008 Tour Bus Manufactured by Motor Coach Industries, VIN 2M93JMHA28W064555.
- 20 10. Bus engine module control data from subject bus.
- 21 11. Bus brake data from subject bus.
- 22 12. Videotape of bus download.
- 23 13. Bicycle photographs taken by Kemp Jones.
- 24 14. Helmet photographs taken by Kemp Jones.
- 25 15. Edward Hubbard cell phone records for April 2017.
- 26 16. Kayvan Khiabani cell phone records for April 2017 .
- 27 17. Preliminary Las Vegas Metropolitan Police Report LLV17041800868, LVMPD 1-12; Final Las Vegas Metropolitan Police Report LLV17041800868, LVMPD 13-93.

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- 1 18. Photographs taken by Las Vegas Metropolitan Police in connection with Report
- 2 LLV17041800868.
- 3 19. Diagrams completed by Las Vegas Metropolitan Police in connection with Report
- 4 LLV17041800868.
- 5 20. Title, MCI 1.
- 6 21. Final Vehicle Record, MCI 2 -3.
- 7 22. Agreement to Purchase, MCI 4.
- 8 23. 6247 Statement to Ca. Board of Equalization, MCI 11.
- 9 24. Notice to Seller for Ca. Board of Equalization, MCI 12.
- 10 25. Coach Specification, J08-FT-3, MCI 13-15.
- 11 26. Letter dated 09/17/07 to MCI from Ryan's Express, MCI 16.
- 12 27. Invoice to Purchase, MCI 17-19.
- 13 28. Email transmitting Revised ATP dated 09/19/07, MCI 20-22.
- 14 29. Certificate of Insurance, MCI 23-24.
- 15 30. Coach sale review and related documents, MCI 25- 28.
- 16 31. Letter enclosing contract documents, MCI 29.
- 17 32. Final Vehicle Record, MCI 30-31.
- 18 33. Customer Order Option Report, MCI 32-38.
- 19 34. Coach Delivery Record, MCI 39.
- 20 35. Driver Pickup Sheet, MCI 40.
- 21 36. Physical Inspection Form, MCI 41-42.
- 22 37. Operators Manual for MCI 2008 J4500, MCI 43-202.
- 23 38. Parts Manual for MCI 2008 J4500, MCI 203-1770.
- 24 39. Maintenance Manual for MCI 2008 J4500, MCI 1771-2955.
- 25 40. Red Rock Casinos c/o Station Casinos response to Subpoena Duces Tecum, RRC 1-
- 26 7.
- 27 41. American Medical Response response to Subpoena Duces Tecum, AMR 1-11.
- 28 42. Witness statement of Michael Plantz, PLANTZ 1-4.
43. Witness statement of Robert Pears, PEARS 1-3.
44. Clark County Fire Department response to Subpoena Duces Tecum, CCFD 1-6.

- 1 45. University Medical Center response to Subpoena Duces Tecum, UMC 1-144.
- 2 46. Clark County Coroner response to Subpoena Duces Tecum, CCC 1-58.
- 3 47. Comprehensive Cancer Centers response to Subpoena Duces Tecum, CCCN 1-196.
- 4 48. Response from Nevada Board of Medical Examiners to Subpoena Duces Tecum, NSBME 1, NSBME 2.
- 5 49. Las Vegas Metropolitan Police Department Photographs.
- 6 50. Photographs taken by Detective Salisbury during his investigation, SALISBURY 1-5.
- 7 51. Response from Social Security Administration to Subpoenas regarding K. Khiabani and K. Barin – SSA 1-4.
- 8 52. Materials disclosed via Responses to Request for Production, MCI 2956-35107 and the excel sheet MCI 333333
- 9 53. Two Boxes of Motor Coach Industries, Inc. materials, MCI 35125-39852.
- 10 54. 93-0026 Wind Tunnel Investigation, MCI 39853-39950.
- 11 55. Expert Report dated October 16, 2017 of Michael Baden, MD.
- 12 56. Curriculum Vitae, List of Testimony and Fee Schedule of Michael Baden, MD.
- 13 57. Expert Report dated October 16, 2017 of David Krauss, PhD.
- 14 58. Curriculum Vitae, List of Testimony and Fee Schedule of David Krauss, PhD.
- 15 59. Expert Report dated October 16, 2017 of Robert Rucoba.
- 16 60. Curriculum Vitae, List of Testimony and Fee Schedule of Robert Rucoba.
- 17 61. Expert Report dated October 18, 2017 of Kevin Granat.
- 18 62. Curriculum Vitae, List of Testimony and Fee Schedule of Kevin Granat.
- 19 63. Expert Report dated October 19, 2017 of James Funk.
- 20 64. Curriculum Vitae, List of Testimony and Fee Schedule of James Funk.
- 21 65. Expert Reports dated October 13, 2017 and December 6, 2017 of Michael Carhart, PhD.
- 22 66. Curriculum Vitae, List of Testimony and Fee Schedule of Michael Carhart, PhD.
- 23 67. Records in response to Subpoena Duces Tecum with Clark County School District, CCSD-KK 1-7; CCSD-AK 1-7.
- 24 68. Records in response to Subpoena Duces Tecum with Alexander Dawson School, AD/KK 1-41; AD/AK 1-24.
- 25 69. Any materials marked at depositions not yet produced via NRCP 16.1.

70. All materials previously disclosed by Plaintiffs including, but not limited to the following:

Initial	Certificate of Death	P0001
Initial	Medical records from UMC of Kayvan Khiabani (identified as Lubbock Doe)	P 2-50
Initial	Videotape from Red Rock Casino	P 51
Initial	Videotape of post accident	P 52
Initial	Videotape of truck sideswiping Bicyclist	P 53
Initial	Videotape - GIRO and MIPS	P 55
Initial	Videotape - behind the Scene - Bell Helmet Test Lab	P 54
Initial	Giro Owner's Manual	P 56-91
Initial	Biro Owner's Manual	P 92-127
Initial	Giro Owner's Manual	P 128-148
Initial	Receipt from Pro Cyclery in the amount of \$3,460.79 for purchase of a Scott Solace 10 Dis Bicycle and bag	P 149
Initial	Scott Bike User Manual	P 150-175
Initial	Kayvan Memorial Ride Flyer	P 176
Initial	Letter from Mayor	P 177
Initial	June 2017 Ghost Bike Memorial Ceremony	P 178
Initial	Letter from Governor	P 179
Initial	Article entitled "Bus & Motor Coach News"	P 180-181
Initial	New Flyer Industries, Inc. 2015 Annual Report	P 182-247
Initial	New Flyer Industries, Inc. 2016 Report	P 248-286
Initial	2008 Tour Bus Manufactured by Motor Coach Industries, VIN 2M93JMHA28W064555	Artifact
Initial	Bicycle	Artifact
Initial	Helmet	Artifact
Initial	Bus engine module control data from subject bus	Artifact
Initial	Bus brake data from subject bus	Artifact
Initial	Videotape of bus download	
Initial	Bicycle photographs taken by Kemp Jones	
Initial	Helmet photographs taken by Kemp Jones	
Initial	Motor Coach Industries 2015 Annual Report	
Initial	Motor Coach Industries 2016 Annual Report	
Initial	Bell Sports dba GIRO Sport design 2015 Annual report	
Initial	Bell Sports dba GIRO Sport design 2016 Annual report	
Initial	Edward Hubbard cell phone records for April 2017	
Initial	Kayvan Khiabani cell phone records for April 2017	
1st Supp	Stills of Truck sideswiping Bicyclist	P 35A (1-85)
1st Supp	Photographs of subject bicycle and Misc. taken by KJC	P 287-352
1st Supp	Photographs of subject Helmet taken by KJC	P 353-382



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1	1st Supp	Safety Corner Article "Still Blaming Bus-Pedestrian contact on A-Pillar/Mirror Design:	P 383-390
2	1st Supp	Brochure - MCI - MCI J4500	P 391-397
3	1st Supp	July 2015 MCI Operators Manual 03-26-1035B	P 398-520
4	1st Supp	Video entitled "Mass Transmit-Stuntman"	P 521
5	1st Supp	Video entitled "Terrifying moment baby's buggy blown onto Tube tracks"	P 522
6	1st Supp	Video entitled "CNN Headline News"	P 523
7	1st Supp	Video entitled "Fox News - New York"	P 524
8	1st Supp	Video entitled "NY DOT"	P 525
9	1st Supp	Video entitled "S-1 Guard Barrier"	P 526
10	1st Supp	Video entitled "Plastic Surgery"	P 527
11	1st Supp	Video entitled "Washington, DC - People Catchers"	P 528
12	1st Supp	Video entitled "Sweden ABC"	P 529
13	1st Supp	Video entitled "Cycle Eye Alerts Bus Driver"	P 530
14	1st Supp	Video entitled "Volvo Cyclist Detection"	P 531
15	1st Supp	Brochure Volvo 9700	P 532-543
16	1st Supp	New Flyer letter from Brad Ellis to Ken Lutkus re Integrity of Chassis and Suspension with S-1 Gard Installed	P 544
17	1st Supp	Letter from Tom Barrio to Ken Lutkus re S-1 Gard's Montebello Bus Lines	P 545-546
18	1st Supp	Memo from Frederick Goodine, Safety and Risk Mtng re S-1 Gard	P 547
19	1st Supp	Memo from Daniel Holter, GM of Rochester City Lines re S-1 Guard	P 548
20	1st Supp	Nevada Bicycle Coalition - Promoting Safe Bicycling in Nevada - "Three Foot Passing Rule becomes law in Nevada"	P 549-554
21	1st Supp	Nevada and Pedestrian Advisory Board - Announcing meeting date 05/18/2017	P 555-556
22	1st Supp	Nevada Department of Motor Vehicle - SWAP - Safe Walking and Pedaling - Bicycles Share the Road, Rules for Motorists, Rules for Cyclists, etc.	P 557
23	1st Supp	Senate Bill No. 248 - Senators Parks, Lee; Breeden, Copenig, Denis, Horsford, Kihuen, Leslie, Manendo, Scheider and Wiener	P 558-560
24	1st Supp	Article "many buses have built-in blind spots that make driving them dangerous"	P 561-571
25	1st Supp	AB328 Information	P 572-573
26	1st Supp	Assembly Bill No. 328	P 574-585
27	1st Supp	Assembly Committee on Transportation Minutes	P 586-610
28	1st Supp	Assembly Committee on Transportation Minutes	P 611-619
	1st Supp	Pages from Journal of Assembly AB328	P 620-638
	1st Supp	Senate Committee on Transportation Minutes	P 639-678

1	1st Supp	Senate Committee on Transportation Minutes	P 679-681
2	1st Supp	Video - Simple Bus in Wind Tunnel Simulation	P 682
3	1st Supp	Video - Duluth Barge Heading out	P 683
4	1st Supp	Exemplar - S-1 Guard	Artifact
5	1st Supp	Photos of Volvo - Right side door	
6	1st Supp	Photos from Right Bench of subject bus	
7	1st Supp	Photos of front left bench of subject bus	
8	1st Supp	Miscellaneous photos of subject bus	
9	2nd Supp	Video - Simple Bus in Wind Tunnel Simulation	P 682
10	2nd Supp	Video - Duluth Barge Heading out	P 683
11	2nd Supp	Photos of Volvo - Right side door	P 684
12	2nd Supp	Photos from front right bench of subject bus	P 685 (1-4)
13	2nd Supp	Photos of front left bench of subject bus	P 686
14	2nd Supp	Miscellaneous photos of subject bus 687 (1-5)	
15	2nd Supp	US Individual income Tax Returns for Kayvan Khiabani and Katayoun Barin from 2010-2016	P 688-1184
16	2nd Supp	Clark Co. Coroner records	P 1185-1197
17	2nd Supp	AMR billing and records	P 1198-1215
18	2nd Supp	Inspection photographs taken 08/09/17 by Robert Caldwell	P 1216 (1-180)
19	2nd Supp	Inspection photographs and videos taken 08/09/2017 by J. Cohen	P 1217 (1-127)
20	2nd Supp	Three-D Bus diagrams of subject bus by Joshua Cohen	P 1218 (1-2)
21	3rd supp	Clark Co. Coroner autopsy, Seen photos and Xrays	P 1219
22	3rd supp	Clark Co. Coroner records re toxicology	P 1220-1259
23	3rd supp	Clark Co. Fire Dept Medical records	P 1260-1263
24	3rd supp	UMC billing and medical records	P 1264-1301
25	3rd supp	Final Check Stub for Khiabani from UMC	P 1302
26	3rd supp	Thermo Fisher Scientific doc production	SUB 1-16
27	3rd supp	Foundation One Report for Katayoun Barin	K-BARIN 1-38
28	3rd supp	US Patent No 5,462,324 Safety Guard	P 1303-1315
	3rd supp	S-1 Gard Dangerzone Deflector Brochure	P 1316-1321
	3rd supp	Journal of National Academy of Forensic Engineers - Article Entitled "The Causal Factor of Bus Wheel Injuries and Remedial Method for Prevention of These Accidents - by James M. Green	P 1322-1326
	RSPN to	Tax Returns 2010-2016	P 1327-1342
	roggs/RFP		
	RSPN to	Final Check Stub for Dr. Khiabani	P 1351
	roggs/RFP		
	RSPN to	Driver's License of Kayvan Khiabani	P 1352
	roggs/RFP		
	RSPN to	Receipt for Celebration of Life	P 2198-2199
	roggs/RFP		

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1	RSPN to	Air Canada Flight receipts	P 2200-04, 2205-08, 2210-18
2	roggs/RFP		
3	RSPN to	Notice of Posting Obituary	P 2209
4	roggs/RFP		
5	RSPN to	50-1 Detail Map of accident site	P 2219
6	roggs/RFP		
7	RSPN to	The Mount Royal Cemetery-Burial	P 2221
8	roggs/RFP		
9	RSPN to	Services-Produces and Service	P 2222-24
10	roggs/RFP		
11	RSPN to	Services-Monument Inscription	P 2225-2227
12	roggs/RFP		
13	RSPN to	Marriage Certificate	P 2228
14	roggs/RFP		
15	RSPN to	Palm SW Mortuary	P 2231-2237
16	roggs/RFP		
17	RSPN to	Records from Comprehensive Cancer	K-BARIN 39-157
18	roggs/RFP		
19	RSPN to	Barin SSN card	K-BARIN 158-159
20	roggs/RFP		
21	4th Supp	W2 Wage and Tax Statements for 2011-2016 for Khiabani and Barin	P 1327-1342
22	4th Supp	2000 Mercedes Operator's Manual	P 1343-1763
23	4th Supp	2004 Mercedes Operator's Manual	P 1764-2197
24	4th Supp	Receipt for Celebration of Life for Khiabani	P 2198-2199
25	4th Supp	Air Canada Flight Receipt	P 2200-2204
26	4th Supp	Air Canada Flight Receipt	P 2205-2208
27	4th Supp	Receipt from Montreal Gazette - Notice of Posting Obituary	P 2209
28	4th Supp	Air Canada Flight Receipt	P 2210-2218
	4th Supp	50-1 Detail Map of accident site, intersection and vicinity	P 2219 (a-e)
	4th Supp	Comprehensive Cancer Center records	K-BARIN 39-157
	4th Supp	Driver's License of K. Barin	K-BARIN 158-159
	4th Supp	Driver's License of K. Khiabani	P 2220
	4th Supp	The Mount Royal Cemetery Receipt	P 2221
	4th Supp	Mount Royal Commemorative Services Receipt	P 2222-2224
	4th Supp	Mount Royal Commemorative Services Receipt	P 2225-2227
	4th Supp	Marriage Certificate of K. Khiabani and K. Barin	P 2228
	4th Supp	Birth Certificate of A. Khiabani	P 2229
	4th Supp	Birth Certificate of K. Khiabani	P 2230
	4th Supp	Palm Mortuary Contract	P 2231-2234
	4th Supp	Single Cash Receipt for Palm SW Mortuary	P 2235
	4th Supp	Single Cash Receipt for Palm SW Mortuary	P 2236
	4th Supp	Single Cash Receipt for Palm SW Mortuary	P 2237
	5th Supp	State of NY DMV - License System for Edward	P 2238-2243

1		Hubbard	
2	6th Supp	Landan Daneshmand c/o Kemp Jones - family friend	
3	7th Supp	Clark Co. Incident Detail Report	P2244-2246
4	7th Supp	Clark Co. 911 Audio tape	P2247
5	7th Supp	State of NV DMV records re Hubbard	P2248-49
6	7th Supp	Billing from UMC re Khiabani	P2250-51
7	7th Supp	Article - World Premiere of the New Serta Comfort Class 500	P2252-2270
8	7th Supp	SAE Technical Paper Series - A Field Evaluation of the S1 Pedestrian Gard: Transit and Shuttle Bus Applications	P 2271-2275
9	7th Supp	Photo Stills from Red Rock Surveillance video	P2276
10	7th Supp	LVMPD Photos (43)	
11	Dropbox	Cell phone records from ATT re Driver Hubbard	
12	Email	Cunitz job file via dropbox	
13	8th Supp	Inspection photos (210) taken 08/09/17 by Flanagan	P2277
14	8th Supp	ATT Cell Phone and Land Line Records for E. Hubbard	ATT 1-1218
15	8th Supp	Ghost Bike Photographs (258)	P2278
16	8th Supp	Kayvan Khiabani Funeral video	P2279
17	8th Supp	Photo of headstone of Kayvan Khiabani and Katy Barin	P2280
18	8th Supp	Family Photos of Khiabani Family	P2281

71. All materials previously disclosed by Michelangelo Leasing, Inc., dba Ryan's Express and Edward Hubbard including, but not limited to the following:

19	Initial	Answer to First Amended Complaint	MICH 1-17
20	Initial	State of NV Accident Report	MICH 18-24
21	Initial	Michelangelo Leasing's Incident File	MICH 25-43
22	Initial	Michelangelo Insurance	MICH 44-184
23	1st Supp	Statements from Pears and Plantz	MICH 185-191
24	1st Supp	Thirteen color photographs of the bus and accident scene	MICH00192- MICH00204
25	1st Supp	Dispatch Incident Report	MICH00205- MICH00206
26	1st Supp	Trimble Report	MICH00207- MICH00212
27	1st Supp	Corporate Organizational Structure	MICH00213- MICH00221
28	1st Supp	Classroom Learning Curriculum	MICH00222- MICH00288
	1st Supp	Driver Training and Employee New Hire Training	MICH00289- MICH00367
	1st Supp	Ergonomics Analysis Program	MICH00368- MICH00375

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1	1st Supp	Michelangelo Grounds Up Training-Driver without CDL	MICH00376-MICH00532
2			
3	1st Supp	Safety Policies and Procedures	MICH00533-MICH00573
4	1st Supp	Safety Posters	MICH00574-MICH00588
5	1st Supp	Training Videos	MICH00589-MICH00612
6			
7	1st Supp	Operator Development Program	MICH00613-MICH00809
8	1st Supp	Personnel File for Edward Hubbard	MICH00810-MICH00931
9	1st Supp	Michelangelo Employee Handbook	MICH00932-MICH01023
10	1st Supp	Michelangelo Leasing, Inc. Drug and Alcohol Policy	MICH01024-MICH01054
11			
12	1st Supp	Hours of Service Training	MICH01055-MICH01079
13	1st Supp	Blood Pathogens Exposure Control Plan	MICH01080-MICH01093
14	1st Supp	Control of Hazardous Energy Program,	MICH01094-MICH01114
15	1st Supp	Emergency Action and Fire Prevention Plan,	MICH01115-MICH01127
16			
17	1st Supp	Fire Prevention Plan,	MICH01128-MICH01136
18	1st Supp	Hazard Communication	MICH01137-MICH01142
19	1st Supp	Heat and Cold Stress Program	MICH01143-MICH01155
20			
21	1st Supp	AA. Injury and Illness Prevention Plan,	MICH01156-MICH01163
22	1st Supp	Written Workplace Safety Program	MICH01164-MICH01180
23	1st Supp	CC. Sexual Discrimination and Harassment Policy,	MICH01181-MICH01187
24	1st Supp	DD. Federal RFP Policy,	MICH01188-MICH01198
25	1st Supp	Safety Articles,	MICH01199-MICH01228
26	1st Supp	Trimble Video,	MICH01229
27			
28	1st Supp	GG. Silverado Stages NV Work Ticket	MICH01230
	1st Supp	HH. Bus Download by Rimkus Consulting	Exhibit HH

72. All materials previously disclosed by Bell Sports, Inc. dba Giro Sport Design including, but not limited to the following:

Initial	Giro Owner's Manual	BELL 1-68
Initial	Giro Owner Manual - International	BELL 69-138
Initial	Giro Bike Helmet Standard Box	BELL 139
Initial	Giro Trinity Box Label	BELL 139A
Initial	2014 Giro Cycling Helmets Catalog	BELL 140-193
Initial	2015 Giro Cycling Helmets Catalog	BELL 194-222
Initial	2016 Giro Cycling Helmets Catalog	BELL 223-258
Initial	Stoberski helmet photos (6/20/17)	BELL 259-299
Initial	Ughetta photos - accident location, helmet, bicycle and gear	BELL 300-352
Initial	Giro Internal CPSC labels (will be produced subject to confidentiality order)	BELL 353
Initial	G388 CPSC Certification test Reports (April 24, 2013) (will be produced subject to confidentiality order)	BELL 354-383
Initial	G388 Design drawings and product specifications (will be produced subject to confidentiality order)	BELL 384-411
RSPN to RFP	G388 AU Batch Test Results	BELL000412-588
RSPN to RFP	G388 AU Certification Test Results	BELL000589-623
RSPN to RFP	G388 EN1078 Certification Test Results	BELL000624-737
RSPN to RFP	G388 Labels, drawings, BOMs (non-CPSC)	BELL000738-798
RSPN to RFP	Stoberski Bus Inspection Photos	BELL000799-838
RSPN to RFP	Vista Ins Pol RGD9437822 (Primary) [Redacted]	BELL000839-906
RSPN to RFP	Vista Excess Ins 1 AIG 19452242 [Redacted]	BELL000907-998
RSPN to RFP	Vista Excess Ins 2 Ironshore 002578801 [Redacted]	BELL000999-1021
RSPN to RFP	Vista Excess Ins 3 Canopus S01438B [Redacted]	BELL001022-1037
RSPN to RFP	Vista Excess Ins 4 Allied World C025765002 [Redacted]	BELL001038-1054
RSPN to RFP	Vista Excess Ins 5 XL BM00030462LI16A [Redacted]	BELL001055-1069
RSPN to RFP	EBS Authorized Dealer Agreement	BELL001070-1080
RSPN to RFP	EBS Direct Dealer Agreement Addendum	BELL001081-1084
RSPN to RFP	Spreadsheet of sales of Giro Trinity to SevenPlus	BELL001085
RSPN to RFP	Vista Records Retention Schedule	BELL001086-1124
RSPN to RFP	Vista Outdoor Corporate Policy - Records Retention	BELL001125-1126
RSPN to RFP	Invoices to SevenPlus	BELL001127-1147
1st Supp	Giro Internal CPSC labels	BELL 353
1st Supp	G388 CPSC Certification Test Reports (April 24, 2013)	BELL 354-383
1st Supp	G388 Design drawings and product Specifications	BELL 384-411
1st Supp	G388 AU Batch Test Results	BELL 412-588
1st Supp	G388 AU Certification Test Results	BELL 589-623
1st Supp	G388 EN1078 Certification Test Results	BELL 624-737

1	1st Supp	G388 Labels, drawings, BOMs (non-CPSC)	BELL 738-798
2	1st Supp	Stoberski Bus Inspection Photos	BELL 799-838
3	1st Supp	Vista Insurance Policy (primary)	BELL 839-906
4	1st Supp	Vista Excess Ins 1 Policy	BELL 907-998
5	1st Supp	Vista Excess Ins 2 Policy Ironshore	BELL 999-1021
6	1st Supp	Vista Excess Ins 3 Canopus	BELL 1022-1037
7	1st Supp	Vista Excess Ins 4 Allied World	BELL 1038-1054
8	1st Supp	Vista Excess Inc 5 XL	BELL 1055-1069
9	1st Supp	EBS Authorized Dealer Agreement	BELL 1070-1080
10	1st Supp	EBS Direct Dealer Agreement Addendum	BELL 1081-1084
11	1st Supp	Spreadsheet of sales of Giro Trinity to Seven Plus	BELL 1085
12	1st Supp	Vista Records Retention Schedule	BELL 1086-1124
13	1st Supp	Vista Outdoor Corporate Policy - records retention	BELL 1125-1126
14	1st Supp	Invoices to Seven Plus	BELL 1127-1147
15	1st Supp	Vista QC Product Instruction - Cycling Helmets	BELL 1148-1160
16	1st Supp	BRG Helmet QC Batch Testing Procedures	BELL 1161-1167

73. Article from deposition of Dr. Funk, "Fracture Propagation in the Human Cranium: A Re-Testing of Popular Theories", ARTICLE 1-10.
74. Supplemental report of Dr. Funk dated November 10, 2017.
75. Records in response to Subpoena Duces Tecum from Leslie Jacobs, MD, LJ 1-120.
76. Records in response to Subpoena Duces Tecum from Heather Allen, MD, HA 1-10.
77. Records in response to Subpoena Duces Tecum from Jennifer Baynosa, MD, JB 1-59-68.
78. Records in response to Subpoena Duces Tecum from Clark High School, CHS-AK 1-15 & CHS-KK 1-22.
79. Records in response to Subpoena Duces Tecum from Quest Diagnostics, QUEST 1-48.
80. Statement of No Records from TPC, Inc., TPC 1.
81. Expert Report dated December 1, 2017 of Robert Stahl.
82. Curriculum Vitae and Fee Schedule of Robert Stahl.
83. Records in response to Subpoena Duces Tecum from LabCorp, LC 1-13.
84. Statement of No Records from Public Transportation Safety International, Corp., PTSIC 1-33.
85. Any and all articles and learned treatises relied on by expert witnesses.
86. Expert Report dated December 21, 2017 of Stan Smith, PhD.

87. Curriculum Vitae, List of Testimony and Fee Schedule of Stan Smith, PhD.
88. The job file of Dr. Krauss produced at the time of his deposition and the list of materials relied upon identified in Dr. Krauss' report. Dr. Krauss may rely on anything included with his job file, or testimony presented through other fact witness or expert depositions, or any evidence presented at trial, in support of his opinions.
89. The job file of Mr. Rucoba produced at the time of his deposition and the list of materials relied upon identified in Mr. Rucoba's' report. Mr. Rucoba may rely on anything included with his job file, or testimony presented through other fact witness or expert depositions, or any evidence presented at trial, in support of his opinions.
90. The job file of Mr. Granat produced at the time of his deposition and the list of materials relied upon identified in Mr. Granat's report. Mr. Granat may rely on anything included with his job file, or testimony presented through other fact witness or expert depositions, or any evidence presented at trial, in support of his opinions.
91. The job file of Dr. Funk produced at the time of his deposition and the list of materials relied upon identified in Dr. Funk's report. Dr. Funk may rely on anything included with his job file, or testimony presented through other fact witness or expert depositions, or any evidence presented at trial, in support of his opinions.
92. The job file of Dr. Carhart produced at the time of his deposition and the list of materials relied upon identified in Dr. Carhart's report. Dr. Carhart may rely on anything included with his job file, or testimony presented through other fact witness or expert depositions, or any evidence presented at trial, in support of his opinions.
93. Annotated photograph depicting Exponent TEC
94. Records in response to Subpoena Duces Tecum from Keck Hospital of USC, KECK 1-191.
95. Any future deposition exhibits, expert reports, expert job files marked during future discovery until the time of trial of this case.

**C. Defendant may offer the following responses to written discovery, if the need**

**arises:**

1. Plaintiff Katayoun Barin's Response to SevenPlus Bicycles, Inc. dba Pro Cyclery's First Set of Request for Production.
2. Defendant Bell Sports, Inc.'s Responses to Plaintiffs' First Set of Interrogatories
3. Plaintiff Katayoun Barin as Executrix of the Estate of Kayvan Khiabani, M.D.'s Responses to Motor Coach Industries, Inc. Request for Production
4. Plaintiff Katayoun Barin as Executrx of the Estate of Kayvan Khiabani, M.D.'s Responses to Motor Coach Industries, Inc. Interrogatories.



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5. Plaintiff Katayoun Barin's Responses to Bell Sports, Inc.'s First Set of Interrogatories
6. Plaintiff Katayoun Barin Executrix of the Estate of Kayvan Khiabani, M.D.'s Responses to Bell Sports, Inc.'s First Request for Production.
7. Plaintiff Katayoun Barin's Responses to Bell Sports, Inc.'s First Set of Request for Production of Documents
8. Plaintiff Katayoun Barin's Responses to Motor Coach Industries, Inc.'s First Set of Request for Production of Documents
9. Plaintiff Katayoun Barin as Executrix of the Estate of Kayvan Khiabani, M.D.'s Responses to Bell Sports, Inc.'s Interrogatories
10. Plaintiff Katayoun Barin's Responses to Motor Coach Industries, Inc.'s First Set of Interrogatories
11. Defendant Michelangelo Leasing Inc. dba Ryan's Express' Responses to Plaintiffs' First Request for Production
12. Defendant Michelangelo Leasing Inc. dba Ryan's Express' Responses to Plaintiffs' First Set of Interrogatories
13. Defendant Bell Sports, Inc.'s Responses to Plaintiffs' First Request for Production of Documents
14. Plaintiff Katayoun Barin's Response to Motor Coach Industries, Inc.'s First Set of Admission
15. Plaintiff Katayoun Barin's Response to MCI's Second Set of Request for Production of Documents
16. Plaintiff Katayoun Barin's Response to MCI's Second Set of Request for Production of Documents Estate of Katayoun Barin, D.D.S. (Decedent) Responses to MCI's First Set of Requests for Production of Documents

### III. DEFENDANT'S OBJECTIONS TO ALL OTHER PARTIES' EXHIBITS & WITNESSES

Objections have been or will be filed within the time limits specified by Rule 16.1(a)(3). Defendant reserves the right at the time of trial to object to any Witnesses or Exhibits identified / produced by any party involved in this litigation. Defendant reserves the right to object to any document in this disclosure, and the listing of a document on the "expects to" or "may offer" list above is not an admission that a document is authentic, relevant or admissible for any purpose.

Objections have been or will be filed within the time limits specified by Rule 16.1(a)(3). Defendant reserves the right at the time of trial to object to any witnesses listed by any party

involved in this litigation, including witnesses listed on the “expects to call” or “may call” list above.

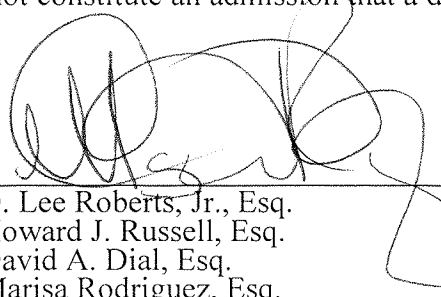
#### IV. DEFENDANT’S DEMONSTRATIVE EXHIBITS

1. Videos (including videos of the incident, an enhanced version of same, and surveillance videos), photographs, transparencies, memoranda, timelines, demonstrative and actual photographs, actual diagnostic studies, computerized studies, diagrams, drawings, images, story boards, charts, transparencies, DVDs, video tapes, reports, analysis, and audio recordings.
2. Enlargement of Diagrams from Depositions and Reports Produced.
3. Timeline of Events.
4. Charts, tables, graphs, descriptions from materials used as reference by experts and/or within expert files produced.
5. Enlargement of any photographs disclosed during the discovery period.
6. Any materials relied upon by experts in forming their expert opinion.

Defendant reserves the right to utilize any evidence or call any witness as designated by any other party to this litigation, and any documents or witnesses produced via NRCP Rule 16.1, via discovery responses or via an Order of the Court by any party.

Defendant reserves the right to supplement this list prior to trial. Defendant does not represent that it *will* use any of said exhibits at trial, only that it may. In addition, Defendant reserves the right to use any document identified in the exhibit list of any other party. Exhibits included on the list may become admissible if a proper foundation is laid for admissibility at trial. The presence of a document on this exhibit list does not constitute an admission that a document is admissible.

DATED this 19th day of January, 2018.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of January, 2018, a true and correct copy of the foregoing **MOTOR COACH INDUSTRIES, INC.'S PRE-TRIAL DISCLOSURE PURSUANT TO NRCP 16.1 (a)(3)** 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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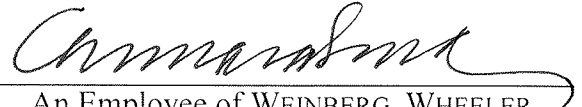
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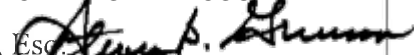
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**DISTRICT COURT****CLARK COUNTY, NEVADA**

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,

v.

MOTOR COACH INDUSTRIES, INC., a  
 Delaware corporation; MICHELANGELO  
 LEASING INC. d/b/a RYAN'S EXPRESS.

Case No.: A-17-755977-C

Dept. No.: XIV

**DEFENDANT'S REPLY IN SUPPORT  
 OF MOTION IN LIMINE NO. 7 TO  
 EXCLUDE ANY CLAIMS THAT THE  
 SUBJECT MOTOR COACH WAS  
 DEFECTIVE BASED ON ALLEGED  
 DANGEROUS "AIR BLASTS"**

Hearing Date: January 29, 2018

Hearing Time: 9:30 AM

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.

## REPLY MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

Plaintiffs miss the point of MCI's motion. As the motion's title suggests, MCI seeks to exclude any claims that any potential air displaced by the subject coach *was a dangerous condition* rendering the coach defective. The basis of MCI's motion is simple—there is zero evidence that the effect of any air displacement is the reason Dr. Khiabani lost control of his bicycle when he veered into the coach. Nothing can salvage Plaintiffs' speculative theory that alleged "air blasts" caused Dr. Khiabani to lose control of his bicycle. Nothing.

Plaintiff cannot use their expert Mr. Breidenthal to remedy this problem. Mr. Breidenthal candidly admitted that to accurately determine the magnitude of vehicular air displacement and the area that is affected, one must measure a number of factors and he assumed all the values corresponding to these factors. Thus, Mr. Breidenthal's opinions regarding vehicular displacement are speculative and inadmissible. *See Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (holding that a party "is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.").

Wholly speculative and unsupported theories do not become admissible by simply cloaking them with the moniker of an "expert opinion". And unreliable expert opinions should not be admitted under the guise of the argument of "it just goes to weight, not admissibility". *Hallmark* is clear that baseless expert opinions that are not the product of reliable methodology do not assist the trier of fact and cannot be admitted.

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Plaintiffs apparently think that MCI's position is that the subject coach did not displace air. Rather, MCI's position is that whether or not the coach displaced air is irrelevant and, thus, inadmissible. NRS 48.025(2). Whether or not the coach displaced air is irrelevant to this case because there is no evidence that vehicular air displacement caused Dr. Khiabani to lose control of his bicycle. The parties can speculate on a plethora of reasons why Dr. Khiabani lost control of his bicycle (e.g., human error, a pebble on the street, a bug in his eye, he got distracted, he mistakenly believed it was safe to move to the coach lane, the condition of the road, alleged air displacement,<sup>1</sup> Dr. Khiabani's riding technique,<sup>2</sup> etcetera, etcetera). But speculative theories are not admissible evidence. *See Collins*, 99 Nev. at 302, 662 P.2d at 621. The only person who could offer any testimony as to why he lost control of his bicycle is Dr. Khiabani.

#### **ARGUMENT AND CITATION OF AUTHORITY**

##### **I. PLAINTIFFS' OPPOSITION HAS NO BEARING ON MCI'S MOTION AND SIMPLY FOCUSES ON RED HERRINGS**

Plaintiffs' Opposition is broken into three arguments: 1) there is evidence that moving coaches generate air displacement; 2) air displacement is the only potential cause for Dr. Khiabani losing control of his bicycle that is supported by evidence; and, 3) that Mr. Breidenthal is qualified. Plaintiffs' arguments are wholly without merit.

##### ***a. The Evidence Cited in Plaintiffs' Opposition Regarding Vehicular Air Displacement is Irrelevant***

To argue that moving coaches generate air displacement, Plaintiffs discuss a 1981 paper authored by Dr. Kato, a 1985 report authored by Dr. Cooper, 1993 wind tunnel tests conducted by MCI, testimony of MCI engineers, Ms. Bradley's testimony, MCI's Motion, and the opinions of their expert Mr. Breidenthal. As stated above, whether the subject coach displaced air is wholly irrelevant, as it does no more than support a speculative theory. Consequently, the alleged support for Plaintiffs' position that vehicles displace air is also irrelevant.

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<sup>1</sup> Which MCI adamantly denies.

<sup>2</sup> Some of these possible causes are listed in Plaintiffs' Opposition, citing to the 1981 article authored by Dr. Kato.

1 **i. 1981 Article by Dr. Kato**

2 Plaintiffs state that an article written by a Dr. Kato in 1981 proves vehicles displace air.  
3 The article is titled “Aerodynamic Effects to a Bicycle Caused by a Passing Vehicle.” The title  
4 implies that Dr. Kato’s research deals with vehicles in general and not with the subject coach.  
5 Nothing in the Opposition indicates the article deals with the specific facts of this case (*i.e.*, the  
6 subject motor coach, the speed of the subject motor coach, the speed of Dr. Khiabani, ambient wind  
7 force, etcetera). Thus, the article is irrelevant to the facts of this case. In any event, whether not  
8 vehicles displace air is not the subject of MCI’s motion. Plaintiffs’ mention of Dr. Kato article is a  
9 red herring and has no bearing on MCI’s motion.<sup>3</sup>

10 **ii. 1985 Paper by Dr. Cooper**

11 Plaintiffs then cite a 1985 paper where a Dr. Cooper discusses drag coefficient. Dr.  
12 Cooper’s paper is irrelevant because as mentioned above, there is no admissible evidence to  
13 establish that air displacement caused Dr. Khiabani to lose control of his bicycle. Moreover, Dr.  
14 Cooper’s article does nothing to establish the varying forces side air displacement would actually  
15 cause and would actually be experienced by a parallel riding cyclist. Plaintiffs wish to take broad  
16 statements of how drag coefficient relates to side air displacement, but then do not connect the  
17 causal dots to show how much air disturbance Dr. Khiabani would have actually felt from a  
18 hypothetical different vehicle, and how that might have affected his ability to control his bicycle.  
19 Plaintiffs’ entire case suffers from this flaw: it is nothing more than theories without evidentiary or  
20 scientific support to establish causation.

21 **iii. 1993 Wind Tunnel Tests**

22 According to Plaintiffs, these tests concluded that rounding the front and back of a coach  
23 would increase aerodynamic efficiency. Plaintiffs then make an unsupported leap to argue that  
24 these tests established that round fronts “dramatic[ly] decrease . . . the dangerous air blasts.” Not  
25

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26 <sup>3</sup> As a side note, Plaintiffs indicate that Dr. Kato’s article should be admitted as evidence  
27 at trial. Plaintiffs’ request to admit an exhibit in an Opposition is not appropriate. Thus, MCI  
28 will not address its opposition to Plaintiffs’ request at this point, however the article is plainly  
irrelevant and hearsay.

surprisingly, Plaintiffs do not provide the Court any tests results to support this argument of a “dramatic” decrease in what Plaintiffs characterize as “air blasts”. This is because the 1993 wind tunnel tests did not deal with alleged “air blasts” which would cause lateral forced on a bicycle.

Plaintiffs blatantly misrepresent what the document says. Plaintiffs argue that the wind tunnel tests recognized an “extreme danger” from “poor drag coefficient”. Actually, what the document says is:

Aerodynamic forces and moments have an important influence on the operation of a high-speed, intercity bus. Aerodynamic drag absorbs a significant proportion of the engine power required at speed, thus affecting **fuel consumption and passing acceleration**. The aerodynamic side force, rolling moment and yawing moment are important to **handling** because they provide a disturbance that deflects a bus **from its path in the presence of side winds or passing vehicles**.

MCI 39859 (emphasis added). The document goes on to explain the purpose of the tests, which the Court will note was **not** to determine side forces on a cyclist, and the document is wholly irrelevant to the question of whether Dr. Khiabani was actually impacted by a theoretical “air blast”.

The Court can appreciate zealous advocacy, but Plaintiffs’ reliance on this passage to say that the wind tunnel tests recognized “one extreme danger” in the form of an “air blast” goes a shade too far. The passage discusses the handling of the coach, and the impact of side winds or passing vehicles on the bus itself. No one in this case has suggested that Dr. Khiabani caused some problem in the handling of the subject coach by creating a side wind. The wind tunnel tests do not support, or even address, the reduction of side “air blasts” vis-à-vis their effect on a parallel riding cyclist.

#### iv. **Testimony by MCI’s Engineers**

Plaintiffs cite to testimony of MCI’s engineers, Bryan Couch and Brad Lamothe, who testified about their general knowledge regarding air displacement and how the rounder a corner of a coach is, the better the aerodynamics. Plaintiffs conclude that this proves the subject coach displaced air. As stated above, MCI’s motion was not about whether or not the subject coach displaced air. As repeated *ad nauseam*, the point of MCI’s motion is that theoretical air displacement is irrelevant in this case as there is no evidence to make a causal connection between any alleged displacement and the accident.

**v. Erika Bradley's Testimony is NOT Evidence of What Caused Dr. Khiabani to Lose Control of his Bicycle**

Plaintiffs' attempt to use Ms. Bradley's testimony to establish what caused Dr. Khiabani to lose control of his bicycle is incredibly inappropriate for a number of reasons. First, Ms. Bradley rightfully testified she did not know what made Dr. Khiabani's bicycle swerve. This was the only truthful answer as Ms. Bradley could not possibly know exactly what caused Dr. Khiabani to lose control of the bicycle. Only Dr. Khiabani could have ever testified as to what made him lose control of his bicycle. Unhappy with her answer, Plaintiffs asked if it was "possible" that it was "windblast from the front of the bus." Simply because she answered, "[i]t's possible," does not mean air displacement caused Dr. Khiabani to lose control of his bicycle.

Next, Plaintiffs' counsel told Ms. Bradley that the "two operating theories [as to what caused Dr. Khiabani to lose control of his bicycle] are either a windblast or perhaps the bicyclist was physically impaired." This is clearly an incorrect statement. Plaintiffs' counsel then asked Ms. Bradley if she could think of any other reasons why Dr. Khiabani lost control of the bicycle and she said she could not think of any.

It goes without saying that it is not Ms. Bradley's duty to prove (or even hypothesize) what caused Dr. Khiabani to wobble. She is a non-party witness, driving behind the accident, who is under no obligation to come up with a list of possibilities at Plaintiffs' counsel's request. And, of course there are myriad possible reasons why Dr. Khiabani wobbled, *e.g.*, riding techniques, condition of the road (as admitted by Plaintiffs in their Opposition at page 4), human error, a pebble on the street, a bug in his eye, he got distracted, or he mistakenly believed it was safe to move to the coach lane. Ms. Bradley's testimony that "after discussing the wind drafts, that could make sense" is not admissible evidence to establish what actually caused Dr. Khiabani to wobble. Her statement is clearly speculative and spoon-fed by Plaintiffs' counsel.

**vi. Tests Performed By MCI's Experts & MCI's Motion**

Plaintiffs discuss tests performed by MCI's experts, and MCI's wholly reasonable acknowledgement of a basic physics principle that all moving vehicles displace air. Thus, Plaintiffs conclude that MCI cannot claim there is no evidence of an "air blast." Again, MCI's motion did

not address whether or not the subject coach displaced air; rather, the motion seeks to exclude any claims that any potential air displaced by the subject coach was a dangerous condition rendering the coach defective because there is zero evidence that the effect of any air displacement is the reason Dr. Khiabani lost control of his bicycle.

**vii. Mr. Breidenthal Cannot Salvage Plaintiffs' Theory**

As stated in MCI's motion and incorporated by reference hereto, Mr. Breidenthal's opinions regarding air displacement, and its effects on Dr. Khiabani, are speculative and inadmissible. *See Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (holding that a party "is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.").

**b. There are a Multitude of Reasons Why Dr. Khiabani Lost Control of His Bicycle and ZERO Evidence to Provide a Non-Speculative Answer**

Plaintiffs claim there are only three potential causes for why Dr. Khiabani lost control of his bicycle (listing their air displacement theory, physical impairment, and suicide). Obviously this is false. MCI has already listed a non-exhaustive list of possible causes. Plaintiffs also claim that only their theory of air displacement is supported by fact. As stated above, there is zero evidence to support causation related to this theory.

Finally, Plaintiffs claim MCI should be precluded from offering alternative causes at trial because it has admitted there is no evidence to support any other causation theory. Plaintiffs must not forget that they, not MCI, have the burden to establish all the elements of their causes of action against MCI, including causation. *Allison v. Merck & Co.*, 110 Nev. 762, 767, 878 P.2d 948, 952 (1994). MCI does not have to prove that it did not cause the incident; Plaintiffs must prove that a defect in the coach MCI sold did. They simply cannot establish that an "air blast" was the reason for this accident.

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CONCLUSION

Based on the foregoing and for the reasons stated in its moving Memorandum, MCI respectfully requests that Plaintiffs be precluded from claiming that the subject motor coach was defective by producing dangerous "air blasts" because there is no evidence to support that claim.

DATED this 22nd day of January, 2018.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of January, 2018, a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 7 TO EXCLUDE ANY CLAIMS THAT THE SUBJECT MOTOR COACH WAS DEFECTIVE BASED ON ALLEGED DANGEROUS "AIR BLASTS"** 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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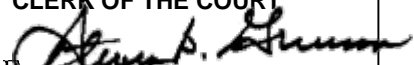
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**DISTRICT COURT**

**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

Case No.: A-17-755977-C

Dept. No.: XIV

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

Hearing Date: January 29, 2018

Hearing Time: 9:30 AM

1 Arizona corporation; EDWARD HUBBARD, a  
 2 Nevada resident; BELL SPORTS, INC. d/b/a  
 3 GIRO SPORT DESIGN, a Delaware corporation;  
 4 SEVENPLUS BICYCLES, INC. d/v/a PRO  
 CYCLERY, a Nevada corporation, DOES 1  
 through 20; and ROE CORPORATIONS 1  
 through 20,

5 Defendants.

6  
 7 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

8 “When *I* use a word,” Humpty Dumpty said, in rather a scornful tone,  
 9 “it means just what I choose it to mean—neither more nor less.” “The  
 10 question is,” said Alice, “whether you *can* make words mean so many  
 different things.” “The question is,” said Humpty Dumpty, “which is  
 to be master—that’s all.”<sup>1</sup>

11 MCI’s motion is very simple. Dr. Cunitz’s opinion that MCI’s alleged failure to warn was a  
 12 substantial cause of the accident must be excluded because the opinion is based incorrect  
 13 assumptions. In Nevada, expert testimony based on assumptions is deemed unreliable and, thus  
 14 inadmissible. *See Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008).

15 In their Opposition, Plaintiffs spend several pages discussing Dr. Cunitz’s qualifications and  
 16 how Nevada allows human factors experts to provide opinions. MCI’s motion did not address Dr.  
 17 Cunitz’s qualifications. Similarly, MCI never argued that human factors are not a recognized area  
 18 of expertise in Nevada. This part of Plaintiffs’ Opposition is simply a red herring and has no  
 19 bearing on MCI’s motion.

20 Next, Plaintiffs insist that the driver of the subject motor coach, Mr. Hubbard, testified that  
 21 had he been “warned” “he would have altered his behavior [at the time of the incident] as a result of  
 22 such warning.” Opposition at 9:15-16. This is false. First of all, the exact warning that Dr. Cunitz  
 23 claims MCI should have given to Ryan’s Express and Mr. Hubbard is unclear. *See* Motion, Exhibit  
 24 “1”, at 45:19-23 (where defense counsel asked what the “warning” would look like and Dr. Cunitz  
 25 indicated he had not designed a warning). This is because Dr. Cunitz does not know what speed  
 26 would allegedly represent a threat or what a “safe proximity” is while a coach is passing a cyclist.

27  
 28 <sup>1</sup> CHARLES L. DODGSON, *Through the Looking-Glass*, p. 205 (1934), first published in 1872.

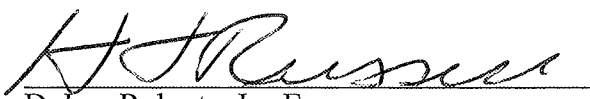
Consequently, Mr. Hubbard was never presented with a realistic "warning" that could be applied to this case. Rather, Plaintiffs' counsel presented Mr. Hubbard with improper hypotheticals, not based on the facts of this case. For example, Mr. Hubbard was asked to assume that if he got a bulletin from the bus manufacturer that said, "our bus creates a 10-foot air blast on the front, would you have taken that into account when you were driving the bus tomorrow, the next day, on?" See Opposition at 9:17-21. He said "yes." To say that you would have taken a hypothetical warning, unrelated to the facts of this case, "into account," is not the same as to say that you would have "altered" the way you drove the day of the incident. Respectfully, neither Dr. Cunitz nor Plaintiffs can choose what "to take something into account" means. Such testimony certainly does not mean that an unclear warning would have altered the manner Mr. Hubbard drove the day of the incident. This testimony cannot be the basis for Dr. Cunitz to state that Mr. Hubbard testified that "had adequate warnings and training materials been provided by the manufacturer . . . that he would have given bicycles greater clearance during passing maneuvers." This opinion is based on in false assumption and must be excluded.

Plaintiffs also accuse MCI of improperly manipulating the testimony of various witnesses. Rather than engaging Plaintiffs in insulting rhetoric, MCI directs the Court to the various depositions transcripts attached to MCI's motion.

### CONCLUSION

For the reasons set forth above and in its moving Memorandum, MCI respectfully requests that this Court exclude Plaintiffs' expert witness, Robert Cunitz, Ph.D., from testifying because his opinions cannot assist the trier of fact because they are not reliable since they are based on assumptions.

DATED this 22nd day of January, 2018.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of January, 2018, a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION IN LIMINE NO. 13 TO EXCLUDE PLAINTIFFS' EXPERT WITNESS ROBERT CUNITZ, Ph.D., OR IN THE ALTERNATIVE, TO LIMIT HIS TESTIMONY** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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*Edward Hubbard*



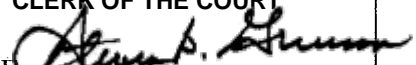
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**DISTRICT COURT**

**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

Case No.: A-17-755977-C

Dept. No.: XIV

**DEFENDANT'S REPLY IN SUPPORT  
OF MOTION IN LIMINE NO. 17 TO  
EXCLUDE CLAIM OF LOST INCOME,  
INCLUDING THE AUGUST 28  
EXPERT REPORT OF LARRY  
STOKES**

Hearing Date: January 29, 2018

Hearing Time: 9:30 AM

1 Arizona corporation; EDWARD HUBBARD, a  
 2 Nevada resident; BELL SPORTS, INC. d/b/a  
 3 GIRO SPORT DESIGN, a Delaware corporation;  
 4 SEVENPLUS BICYCLES, INC. d/v/a PRO  
 CYCLERY, a Nevada corporation, DOES 1  
 through 20; and ROE CORPORATIONS 1  
 through 20,

5 Defendants.

6  
 7 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

8 In this motion, Defendant Motor Coach Industries, Inc. ("MCI") seeks to "*preclude*  
 9 *Plaintiffs from claiming, arguing or presenting evidence that they are entitled to recover Dr.*  
 10 *Khiabani's 'lost income.'*"

11 In response, Plaintiffs acknowledge that their claims under the wrongful death statute are  
 12 limited to "lost support", but take *dicta* out of context to argue that the measure of Dr. Khiabani's  
 13 lost income is equal to the heirs' loss of support. This is not the law – at least not under the facts of  
 14 this case where the sole heirs will soon be adults and had no reasonable expectation of receiving a  
 15 half a million a year from their father if he had not passed away. Plaintiffs must be precluded from  
 16 presenting misleading expert opinions and arguments that lack an evidentiary basis and that attempt  
 17 to confuse the jury and distort the heirs' allowable recovery for loss of probable support.

18 **There is No Presumption that Adult Children Are Entitled to Lost Support in Any Amount**

19 Under N.R.S. 41.085(4), heirs have a claim for lost support – not lost income. There is no  
 20 presumption that children are entitled to lost support in any amount once they reach majority. There  
 21 is certainly no presumption that adult children would have received all of the decedent's lost income  
 22 less personal consumption, as apparently presumed by Dr. Stokes.

23 Rather, it is well established that "Recovery for loss of support requires some showing of  
 24 dependence on the decedent or an expectation of support. ... *A child who is a minor at the time of*  
 25 *its parent's death can recover damages for the presumed loss of parental support until the age of*  
 26 *marriage or majority*, and for any other pecuniary loss that can be shown for the period before and  
 27 after marriage or majority. Stein on Personal Injury Damages, § 3:8 (3d ed.)(October 2017 Update)  
 28 (emphasis added).

1 This rule was followed in *Saunders v. Consolidated Rail Corp.*, 632 F.Supp. 551 (E.D. Pa.  
 2 1986). The court stated that “the law creates a rebuttable presumption that minor children suffer a  
 3 pecuniary loss when one of their parents dies. *Id* at 553. Emancipated children, however, “must  
 4 affirmatively show direct pecuniary loss ..., *[d]amages are never presumed.*” *Id.* (citations  
 5 omitted)(emphasis added). Following this general rule, the court denied recovery to an adult child  
 6 for loss of support arising out of the wrongful death of his father. In so doing, the court pointed out  
 7 that pecuniary loss in this context “is not a matter of guess or conjecture, but must be grounded on  
 8 reasonably continuous past acts or conduct of the deceased.”

9 This has long been the majority approach. In *DeMoss v. Walker*, 242 Iowa 911, 48 N.W.2d  
 10 811 (1951), the court stated that “... the universal rule is that the law implies damages to minor  
 11 children but adult children must prove their pecuniary loss. *In such cases adult children are not*  
 12 *entitled to recover on the basis of their relationship alone*”. 48 N.W.2d at 812-13 citing 25 C.J.S.,  
 13 Death, § 118; *South Texas Coaches v. Eastland*, Tex.Civ.App., 101 S.W.2d 878 and cases there  
 14 cited; and *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (emphasis added). See also *Alden v.*  
 15 *Maryanov*, 406 F.Supp. 547 (D. Md. 1976) (“a child who is a minor at the time of a parent’s death  
 16 can recover damages for a presumed loss of parental support until the age of marriage or majority  
 17 and for any other pecuniary loss that can be shown for the period before and after marriage or  
 18 majority”).

19 This majority rule is grounded in common sense. Everyone knows that most adults do not  
 20 give their children 100% of their disposable income. It simply isn’t “probable”. While no one  
 21 doubts the emotional loss to the minor sons of Dr. Khiabani, their pecuniary recovery is limited to  
 22 the pecuniary benefit they would *most likely* have received had Dr. Khiabani lived. This requires  
 23 proof, not speculation or unwarranted presumptions. There is no bonus or extra support because  
 24 their father died.

### 25 **Plaintiffs are not Presumptively Entitled to the Decedent’s Lost Income**

26 Plaintiffs contend that this majority rule as described above does not apply in Nevada based  
 27 on language drawn from *Alsenz v. Clark County Sch. Dist.*, 109 Nev. 1062, 864 P.2d 285 (1993).  
 28 In *Alsenz*, the Court stated that an heir’s loss of probable support “translates into, and is often

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measured by, the decedent's lost economic opportunity". *Id.* at 287. This statement is pure *dicta*, as the question before the court was not the measure of loss of support, but rather whether the estate could maintain a claim for lost income. If so, any recovery by the heirs for lost support would be a double recovery. It was not necessary for the court to reach the issue of how much support a specific heir would be entitled to recover under the wrongful death statute. Even to the extent this quote from *Alsenz* is a correct statement of Nevada law, the fact that loss of support is "often" measured by the decedent's lost economic opportunity does not mean this measure would be appropriate in this case. In stating that this is "often" the measure of lost support, the court may have been referring to the situation of a spouse who might be entitled to this presumption under the majority rule. The use of "often", by definition, also implies that there are times when this is not the correct measure and lost income does not translate into lost support. There is no reported Nevada case which implies that this *dictum* should be extended to children once they have become adults.

In fact, there is ancient Nevada authority which indicates that Nevada does not always follow the dicta in *Alsenz*. In *Christensen v. Floriston Pulp & Paper Co.*, 29 Nev. 552, 92 P. 210, 218 (1907), the court stated that the rule governing recovery for death of an adult son is thus stated:

When the action is by a parent for the death of an adult son, substantial damages are recoverable only by showing that the deceased had been of actual pecuniary benefit to his parent, or that such benefit might be reasonably expected by the continuance of his life, the reasonable character of such expectation to appear from the facts in evidence. Otherwise, only nominal damages may be recovered.

If a parent can only recover nominal damages for the death of an adult son in the absence of specific proof of lost support, there is no reason why the recovery of an adult son for the death of a parent should be any different. The court in *Christiansen* certainly did not hold that the measure of damages was the son's lost income. In fact, the Court reversed a judgment of \$10,000 in lost support as clearly excessive under the facts of the case.

Plaintiffs also contend that Nevada's pattern jury instruction, Nev. J.I. 10.13, supports their interpretation of Nevada law. Wrong. If Plaintiffs interpretation of *Alsenz* was correct, the instruction would simply say that Plaintiff's could recover probable support in the amount of the

1 decedent's lost income. Instead, the instruction explains that recovery is based on "the financial  
 2 support, *if any*, which the heir would have received from the deceased except for his death..." Nev.  
 3 J.I. 10.13 (emphasis added). The decedent's earning capacity is only one of eight factors the jury  
 4 may consider in determining loss of probable support. Another one of the factors is the age of both  
 5 the decedent and the heir. This is separate and apart from their respective life expectancies. The  
 6 eighth factor is a catch all for "Any other facts shown by the evidence indicating what benefits the  
 7 heir might reasonably have been expected to receive from the deceased had he lived." This element  
 8 would be wholly unnecessary if the measure of damage were simply the lost earning capacity of the  
 9 decedent.

10 While the loss of support is necessarily limited by the lost earnings, there is no presumption  
 11 under Nevada law that *all of the lost earnings* would have gone to lost support. Nev. J.I. 10.13 is  
 12 consistent with the majority rule, and inconsistent with Plaintiffs' position that the lost income of  
 13 the decedent is the sole and equivalent measure of lost support.

#### 14 **Dr. Stokes Report is Misleading and Inadmissible**

15 Plaintiffs seek to use Dr. Stokes' report to argue that they are entitled to recover 100% of  
 16 Dr. Khiabani's lost income less his personal consumption. [See Opp. at 4:11-12 ("Accordingly,  
 17 Keon and Aria's claim for loss of probable support is properly premised on their deceased father's  
 18 lost income, which Dr. Stokes opines is more than \$15 million")]. Dr. Stokes, however, cites  
 19 absolutely no evidence in support of this opinion. He simply presumes that as adult children the  
 20 Plaintiffs would have received all of Dr. Khiabani's money in the form of support. This is error as  
 21 a matter of law and is without legal or scientific basis.

22 Of note, Dr. Stokes does not actually opine on Dr. Khiabani's lost earning capacity, one of  
 23 the factors the jury is allowed to consider under Nev. J.I. 10.13 ("6. The earning capacity of the  
 24 deceased"). Instead, the only calculation he provides is *earning capacity less personal*  
 25 *consumption*. This calculation is not a factor listed in the standard jury instruction, but an obvious  
 26 attempt to mislead the jury into thinking that the heirs are entitled to receive earning capacity less  
 27 personal consumption – an incorrect statement of Nevada law. Moreover, this is an outrageous  
 28 presumption where income less personal consumption exceeds \$500,000 per year and no evidence

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1 is considered by Dr. Stokes other past income and statistical tables of common personal  
2 consumption. Dr. Khiabani probably would not even have had this much left over after paying  
3 taxes, and money Dr. Khiabani paid in taxes would not have been available for support of adult  
4 children.<sup>1</sup>

5 Dr. Stan Smith, a well know economist who often testifies in this jurisdiction, opines that  
6 the assumptions made by Dr. Stokes with regard to loss of support constitute "significant economic  
7 error." See December 21, 2017 Report, attached as Exhibit "A". Dr. Smith explains this opinion in  
8 detail in his attached report:

9 Instead of calculating loss of economic support to the children; Stokes  
10 calculates a loss of income to them, after Mrs. Barin's death, through  
11 Dr. Khiabani's life expectancy, taking into account Dr. Khiabani's  
12 personal consumption, assuming he had lived to age 80. Stokes  
13 attributes an income loss of over \$500,000 annually to the surviving  
14 children through Dr. Khiabani's worklife to age 69 and lower six  
15 figure amounts thereafter, during their adult years. It is understandable  
16 to assume that Dr. Khiabani would have provided support to his  
17 children through their age 22, when they would be expected to  
graduate college, at Dr. Khiabani's age 60. Stokes, however, assumes  
that Dr. Khiabani's children, as adults, would continue to receive the  
entirety of his income after his own personal consumption in excess of  
over a half of a million dollars-per year. It is significant economic  
error to assume that he would have contributed such large sums to his  
children through his working life and retirement. The likelihood of that  
level of economic support is not only improbable, but vanishingly  
small.

18 *Id.* at page 1.

19 Dr. Smith's opinion that the likelihood of support at these levels is "vanishingly small" is  
20 supported by an independent government study. According to a U.S. Census Bureau study  
21 published in 2002, the probability that any adult will provide support to *any* non-household adult,  
22 including adult children, was only 3.7%. See U.S. Census Bureau Study, WHO'S HELPING OUT?

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24 <sup>1</sup> See Stein on Personal Injury Damages, § 3:8 (3d ed.)(October 2017 Update) ("To begin with, in personal injury cases,  
25 courts usually adopt the gross earnings as the true measure of the injured person's earning capacity. But gross earnings  
26 are obviously not available for the support of the family. Initially, gross earnings are reduced by the amount of income  
27 taxes withheld at the source. Until the taxes have been paid, nothing is available for the day-to-day living expenses of  
28 the worker or the support of the family. But not even all of the net pay is available for the support of the family.  
Obviously, the cost of the police officer's uniforms, a lawyer's law books, or the steelworker's safety shoes has to be  
paid from earnings, thus diminishing the amount available for the family support. These are but examples of the myriad  
of the wage-earner's expenses which have to be met so that the family income can continue").

1 Financial Support Networks Among American Households: 1997 at pages 4-5, attached as Exhibit  
 2 "B".<sup>2</sup> By the time the Plaintiffs reached adulthood, Dr. Khiabani would have been a widower. The  
 3 percentage of widowed adults who supported a non-household adult in 1997 was only 1.2%. *Id.*  
 4 Just as important, the "Median Support" provided by the top quartile of high income households  
 5 who actually supported another adult was only \$4,000 per year. Exhibit "B" at page 1, Figure 1a.  
 6 In other words, in the unlikely event that an adult is actually supported by another adult, the amount  
 7 of support is probably \$4,000 or less per year. If the chance of a widowed adult providing any  
 8 support to another adult is only 1.2%, and most of those lucky 1.2% receive under \$4,001 per year,  
 9 the chances of an adult providing a half a million a year in support to another adult is indeed  
 10 "vanishingly small".

11 Both legally and scientifically, loss of probable support must be based upon the "financial  
 12 support, if any, which the heir would have received from the deceased except for [his] [her] death . .  
 13 . ." See Nevada Jury Instruction 5PID.5 and Nev. J.I. 10.13. Dr. Stokes calculations of lost income  
 14 are inadmissible as a matter of law. If, as Plaintiffs now contend, Dr. Stokes calculations of lost  
 15 income less personal consumption were intended instead to be calculations of lost support -- they  
 16 are pure speculation. As there is no evidence cited by Dr. Stokes that would support the probability  
 17 of lost support at these levels, Stokes' testimony must be excluded. Such speculative, unreliable,  
 18 irrelevant evidence and testimony does not meet the standards for expert opinion in Nevada.

### 19 CONCLUSION

20 Although N.R.S. 41.085 allows heirs to recover damages for "loss of probable support", Dr.  
 21 Stokes offers no *admissible* opinion as to the loss of probable support of the heirs. Plaintiffs should  
 22 be precluded from offering irrelevant and prejudicial evidence of damages that are not recoverable  
 23 as a matter of law. For the forgoing reasons, Defendants respectfully request that the court preclude  
 24 any and all evidence or argument suggesting or contending that the Plaintiffs have a legal claim for  
 25 Dr. Khiabani's loss of future income or lost earning capacity.

26 ///

27 \_\_\_\_\_  
 28 <sup>2</sup> <https://www.census.gov/prod/2002pubs/p70-84.pdf> (last retrieved on January 22, 2018).

1 DATED this 22nd day of January, 2018.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of January, 2018, a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION IN LIMINE NO. 17 TO EXCLUDE CLAIM OF LOST INCOME, INCLUDING THE AUGUST 28 EXPERT REPORT OF LARRY STOKES** 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 A

# EXHIBIT A

---

## Smith Economics Group, Ltd.

A Division of Corporate Financial Group  
*Economics / Finance / Litigation Support*

*Stan V. Smith, Ph.D.*  
*President*

December 21, 2017

Mr. Lee D. Roberts  
Weinberg Wheeler Hudgins Gunn & Dial  
6385 South Rainbow Boulevard, Suite 400  
Las Vegas, NV 89118

Re: Khiabani v. Motor Coach Industries

Dear Mr. Roberts:

You have asked me to review the plaintiff economic report of Dr. Larry Stokes ("Stokes") dated August 28, 2017 in regards to the economic damages he calculated as a result of the death of Dr. Kayvan Khiabani. Dr. Khiabani was a Professor of Surgery at the University of Nevada, Reno who died on April 18, 2017, leaving a wife and two surviving children, age 13 and 16. His wife subsequently died in October of 2017.

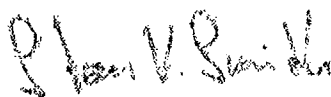
The following are my comments regarding Stokes' report:

1. At the time of his death, Dr. Khiabani's wife, Mrs. Barin, had been diagnosed with cancer. Stokes assumes that she would have survived through the end of 2018. However, Mrs. Barin passed away in October of 2017. As a result, Stokes overstates the loss to her by approximately 7.9 percent of salary for roughly 14 and a half months, amounting to approximately \$100,000.
2. Instead of calculating loss of economic support to the children, Stokes calculates a loss of income to them, after Mrs. Barin's death, through Dr. Khiabani's life expectancy, taking into account Dr. Khiabani's personal consumption, assuming he had lived to age 80. Stokes attributes an income loss of over \$500,000 annually to the surviving children through Dr. Khiabani's worklife to age 69 and lower six figure amounts thereafter, during their adult years. It is understandable to assume that Dr. Khiabani would have provided support to his children through their age 22, when they would be expected to graduate college, at Dr. Khiabani's age 60. Stokes, however, assumes that Dr. Khiabani's children, as adults, would continue to receive the entirety of his income after his own personal consumption in excess of over a half of a million dollars per year. It is significant economic error to assume that he would have contributed such large sums to his children through his working life and retirement. The likelihood of that level of economic support is not only improbable, but vanishingly small.

SEG

---

If you have any questions, please do not hesitate to call me.  
Sincerely,



Stan V. Smith, Ph.D.  
President

# EXHIBIT B

# EXHIBIT B

# WHO'S HELPING OUT?

## Financial Support Networks Among American Households: 1997

*Household Economic Studies*

Issued May 2002

P70-84

What financial aid do households directly provide to other households within the United States? This report covers monetary assistance regularly furnished by households to specific individuals in separate households, especially child support resulting from divorce or separation. The report does not cover sporadic financial aid or nonmonetary support, such as services or tangible gifts.

This report uses data collected during the months of August through November 1997 for the 1996 panel of the Survey of Income and Program Participation (SIPP), a national longitudinal survey conducted by the Census Bureau.<sup>1</sup> Some comparisons are made with the 1988 data appearing in the previous report of this series on "helping out."<sup>2</sup>

### HIGHLIGHTS

Substantial differences were evident in the

regular financial support provided to designated individuals residing in different households. Several notable differences among providers are the following.

- Financial aid and household income were correlated. Higher-income providers supplied more outside monetary assistance in absolute dollars, yet such aid was a lower percentage of their household income (Figures 1a, 1b).

Figure 1a.  
**Median Support Provided by Household Income Quartile: 1997**

(Thousands of dollars)

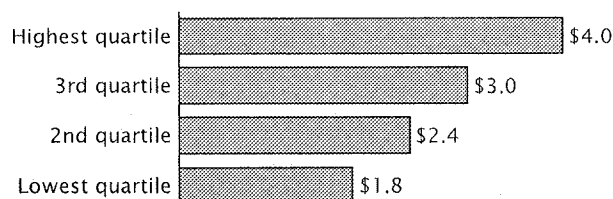
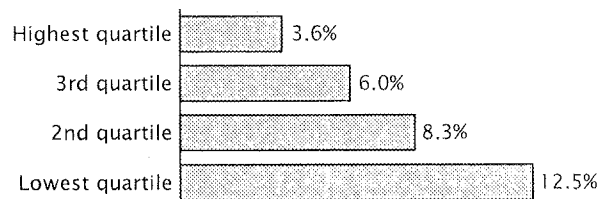


Figure 1b.  
**Amount of Support Provided as a Percentage of Household Income by Household Income Quartile: 1997**



Source: U.S. Census Bureau, Survey of Income and Program Participation, 1996 panel, Wave 5 topical module.

<sup>1</sup> The estimates of this report are based on responses from a sample of the population. As with all surveys, estimates may vary from the actual values because of sampling variation or other factors. All statements in this report have undergone statistical testing and passed the Census Bureau's standards for statistical accuracy.

<sup>2</sup> Jennings, Jerry and Robert Bennefield, *Who's Helping Out? Support Networks Among American Families: 1988*, Current Population Reports, P-70, No. 28, 1993.

### Current Population Reports

By Wilfred T. Masumura

Demographic Programs

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- On average, Hispanics supported more recipients than did Blacks, who, in turn, supported more people outside their households than did non-Hispanic Whites<sup>3</sup> (Figure 1c).
- On average, recipients of male providers received larger monetary aid than did those financially assisted by women (Figure 1d).

## RECIPIENTS

As shown in Figure 2, at least 90 percent of individuals obtaining regular financial support from outside their households (and reporting a relationship) may have previously been members of the providers' household. These recipients included children, parents, spouses, ex-spouses, and "other relatives," such as siblings.

More than three-quarters (78 percent) of all recipients of regular financial support were the children of the support providers, compared with nearly two-thirds (66 percent) supported in 1988. Readers should keep this in mind when interpreting the information on the financial providers, since their characteristics were related to the recipients they supported.

Of the remaining recipients, the largest group was parents, with 9 percent in 1997 and 13 percent in 1988 receiving support.

<sup>3</sup> Because Hispanics may be of any race, data in this report for Hispanics overlap slightly with data for the Black population and for the Asian and Pacific Islander population. Based on Wave 5 of the 1996 Survey of Income and Program Participation (SIPP), 1.5 percent of the Black population 18 years and over and 0.4 percent of the Asian and Pacific Islander population 18 years and over were of Hispanic origin. Data for the American Indian and Alaska Native population are not shown in this report because of their small sample size in the SIPP.

Figure 1c.  
**Average Number of People Supported by Race and Ethnicity of Provider: 1997**

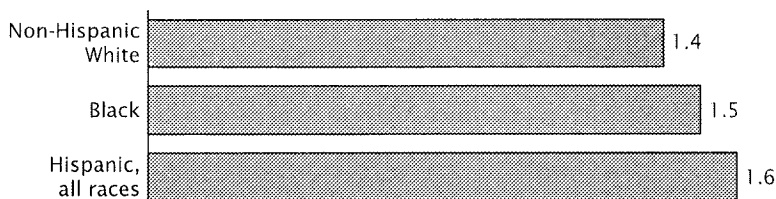
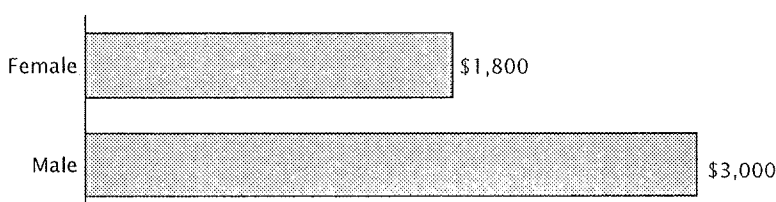


Figure 1d.  
**Amount of Support Provided by Gender of Provider: 1997**



Source: U.S. Census Bureau, Survey of Income and Program Participation, 1996 panel, Wave 5 topical module.

## NUMBER OF PEOPLE SUPPORTED BY THE PROVIDERS

In 1997, 7.2 million people, or 3.7 percent of the U.S. population 18 years of age and over, provided regular financial support to others outside their immediate household. As Table A shows, on average, 1.5 recipients were assisted by a single financial provider, suggesting that one or two individuals were the most frequent number of recipients.

**Household Income.** As shown in Table A, the numbers of recipients per provider were similar across income categories.

**Race and Ethnicity.** Table A also shows that, among financial

providers, non-Hispanic Whites, on average, supported fewer recipients than did Blacks, but Blacks supported slightly fewer recipients than Hispanics.

**Sex.** Among providers of regular financial aid, men supported somewhat more people than did women.

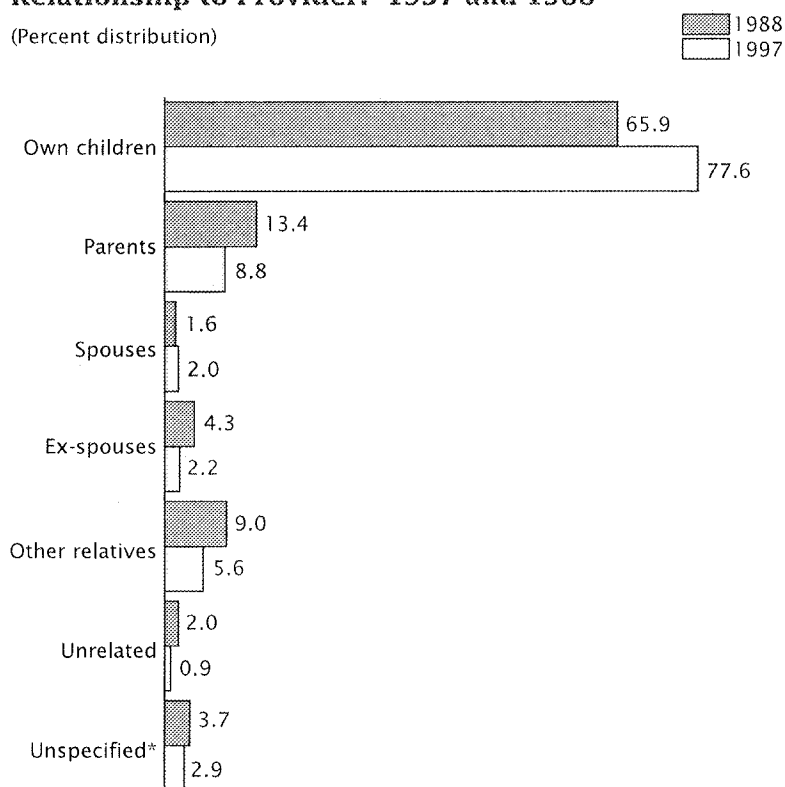
**Age.** Not unexpectedly, among the four age categories of monetary providers, those in the oldest age bracket, 65 years of age and over, supported, on average, the least number of recipients.

**Marital Status.** Complementing the above finding with regard to age, providers who were widowed typically supported the fewest number of recipients.



Figure 2.  
**Nonhousehold Financial Support Recipients by  
Relationship to Provider: 1997 and 1988**

(Percent distribution)



\*People for whom no relationship data were obtained. Information was collected only for first two mentioned people other than own children.

Source: U.S. Census Bureau, Survey of Income and Program Participation, 1987 panel, Wave 3 topical module and 1996 panel, Wave 5 topical module.

### AMOUNT OF REGULAR ANNUAL FINANCIAL SUPPORT

Table A also reports the median annual amount of support provided (\$2,940), as well as the median percentage of support provided relative to the provider's annual household income (6 percent). Because many providers assisted more than one recipient, the average amount provided to a single recipient was considerably less than \$2,900. The amounts and percentages varied, however, by the characteristics of both providers and recipients.

**Household Income.** There are two contrasting findings here. The higher the income bracket, or quartile, the greater the absolute amounts given by the provider. However, the higher the income bracket, the lower the financial support given as a proportion of household income. That is, those with the lowest income paid out proportionally more. As noted earlier, the number of people financially assisted does not vary significantly by household income of the provider.

**Race and Ethnicity.** In absolute amounts, non-Hispanic Whites

provided more financial support than either Hispanics or Blacks. However, comparing the proportions of median annual financial support relative to the median annual household income of providers shows no statistically significant differences between any of the groups with regard to proportional financial support. That is, among providers, each of the three racial and ethnic groups furnished financial aid proportional to their household incomes. Thus, on average, non-Hispanic Whites provided the most monetary support because they had considerably higher household incomes.

**Sex.** Both the absolute amounts and the percentages tell the same story with regard to gender differences. Among financial providers, women furnished less assistance overall. Despite being in households with comparable median annual household income, women provided substantially less than men did. Among financial providers, women proportionally supported only 13 percent fewer people (1.3 vs. 1.5), but their ratio of annual financial support to annual household income was 41 percent less (4.2 percent vs. 7.1 percent). In cases of divorce and separation, however, women may more often have custody of their own children in their own households.

**Age.** Financial providers in their prime working years (aged 25 to 64) supplied more outside support to nonhousehold members in absolute dollars. Despite the apparent variations in the percentages of household income used for outside financial support; there are no statistically significant differences in providing financial aid among the four age categories. This is partly

Table A.  
**Financial Support and the Number of People Supported by Nonhousehold Members: 1997**

Characteristic	Median household income of providers (dollars)	Median financial support given by providers			Mean number of people supported
		Amount (dollars)	Percentage of household income	Standard error	
<b>All providers</b> .....	<b>43,488</b>	<b>2,940</b>	<b>6.4</b>	<b>.66</b>	<b>1.5</b>
<b>Race/ethnicity:</b>					
Non-Hispanic White .....	46,656	3,000	6.6	.79	1.4
Black .....	36,384	2,400	6.7	2.02	1.5
Hispanic, all races .....	35,400	2,335	5.9	1.77	1.6
<b>Sex:</b>					
Male .....	43,416	3,000	7.1	.78	1.5
Female .....	44,184	1,800	4.2	1.15	1.3
<b>Age:</b>					
18-24 years .....	47,640	1,800	4.0	2.59	1.4
25-44 years .....	41,064	3,000	6.8	.86	1.5
45-64 years .....	53,244	3,024	6.0	1.20	1.4
65 years and over .....	32,844	1,800	5.6	2.67	1.2
<b>Marital status:</b>					
Married, spouse present .....	51,912	2,756	5.0	.90	1.4
Separated* .....	32,640	3,000	7.7	2.25	1.8
Divorced .....	40,512	3,600	8.5	1.33	1.5
Widowed .....	29,844	1,200	5.1	3.90	1.1
Never married .....	36,480	2,000	5.7	1.81	1.3
<b>Household income:</b>					
Lowest quartile .....	15,840	1,800	12.5	2.15	1.5
Second quartile .....	31,128	2,400	8.3	1.44	1.5
Third quartile .....	50,628	3,000	6.0	1.21	1.5
Highest quartile .....	91,464	4,000	3.6	.97	1.4

\*Includes married, spouse absent.

Source: U.S. Census Bureau, 1996 Survey of Income and Program Participation.

due to the small numbers of providers in the youngest and the oldest age brackets and thus the lower statistical reliability of the derived percentages (see Table B).

**Marital Status.** Since approximately three-fourths of the recipients were own children, it is to be expected that providers giving the most monetary support would be married, divorced, or separated, as appears in Table A. Among the differences in proportions of household income given, the only one that is statistically significant is that between the divorced and the married, with divorced people providing more monetary assistance, presumably for alimony and child support. Proportionally, married people

furnished no more financial assistance than did the widowed or never married.

#### DISTRIBUTION OF SUPPORT PROVIDERS

As shown in Table B, in 1988 and 1997, approximately 4 percent of the adult population provided regular financial support to designated individuals outside their household. Though the difference could be considered small, a larger number and proportion of the adult population were support providers in 1988, as compared to 1997. Moreover, these providers were *not* evenly distributed throughout the adult population. On the other hand, one can also see from Table B that by

provider attributes such as race and ethnicity, sex, age, marital status and household income, the distribution of support between 1988 and 1997 has remained the same.

**Race and Ethnicity.** Both in 1988 and 1997, regular financial assistance providers were found proportionally more often among Hispanics than non-Hispanic Whites. (The difference between Hispanics and Blacks in 1988 was not statistically significant.)

**Sex.** There was a gender gap among providers in 1988 and 1997. Just as women provided substantially less support than men did, considerably fewer women provided any regular financial assistance.

Table B.  
**Selected Characteristics of Providers of Financial Support for Nonhousehold Members:  
 1997 and 1988**

Characteristic	Total population 18 years and over (1,000)		Support providers					
			Number (1,000)		Percent	Standard error	Percent	Standard error
	1988	1997	1988	1997	1988	1988	1997	1997
<b>Total</b> .....	<b>179,324</b>	<b>196,145</b>	<b>8,008</b>	<b>7,210</b>	<b>4.5</b>	<b>.29</b>	<b>3.7</b>	<b>.10</b>
<b>Race/ethnicity:</b>								
Non-Hispanic White .....	141,335	146,853	5,923	5,190	4.2	.31	3.5	.11
Black .....	19,794	22,831	909	838	4.6	.53	3.7	.29
Hispanic, all races .....	12,840	19,392	889	971	7.0	.80	5.0	.37
<b>Sex:</b>								
Male .....	85,620	94,343	6,082	5,618	7.1	.51	6.0	.18
Female .....	93,704	101,802	1,925	1,592	2.1	.27	1.6	.09
<b>Age:</b>								
18-24 years .....	25,688	24,893	292	301	1.2	.40	1.2	.16
25-44 years .....	79,062	83,887	4,660	4,430	5.9	.49	5.3	.18
45-64 years .....	45,819	55,211	2,327	2,080	5.1	.60	3.8	.19
65 years and over .....	28,756	32,064	730	391	2.3	.52	1.2	.14
<b>Marital status:</b>								
Married, spouse present .....	105,274	110,447	3,859	3,111	3.7	.34	2.8	.11
Separated* .....	6,090	6,874	785	743	12.9	2.51	10.8	.86
Divorced .....	15,138	19,236	2,144	2,235	14.2	1.66	12.1	.54
Widowed .....	13,124	13,933	421	168	3.2	.90	1.2	.21
Never married .....	39,698	45,655	798	864	2.1	.42	1.9	.15
<b>Household income:<sup>1</sup></b>								
Lowest quartile .....	(NA)	49,516	(NA)	1,251	(NA)	(NA)	2.5	(NA)
Second quartile .....	(NA)	49,142	(NA)	1,946	(NA)	(NA)	4.0	(NA)
Third quartile .....	(NA)	49,057	(NA)	2,022	(NA)	(NA)	4.1	(NA)
Highest quartile .....	(NA)	48,430	(NA)	1,949	(NA)	(NA)	4.0	(NA)

NA Not available for 1988.

\* Includes married, spouse absent.

<sup>1</sup>Income quartiles were not used in the earlier 1993 cited report that used 1988 data and therefore comparisons between the two years is not possible.

Source: U.S. Census Bureau, Survey of Income and Program Participation, 1988 and 1996.

**Age.** In 1988 and 1997, compared with other age groups, those in a prime working age bracket, aged 25-44, had the highest percentage of providers. People in the other principal working age bracket, aged 45-64, had the next highest proportion of providers.

**Marital Status.** As expected, in 1988 and 1997, the divorced and separated were represented among providers proportionally much more often than people of other marital statuses.

**Household Income.** As mentioned before, among providers, those in the lowest household income bracket, or quartile, bore the greatest burden. However, proportionally fewer people in that income bracket were found among regular financial providers.

### ACCURACY OF THE ESTIMATES

Statistics from surveys are subject to sampling and nonsampling error. All comparisons presented in this report have taken sampling error

into account and meet the U.S. Census Bureau's standards for statistical significance. Nonsampling errors in surveys may be attributed to a variety of sources, such as how the survey was designed, how much nonresponse occurs, how respondents interpret questions, how able and willing respondents are to provide correct answers, and how accurately the answers are coded and classified. The Census Bureau employs quality control procedures throughout the production process including the overall design

of surveys, the wording of questions, review of the work of interviewers and coders, and statistical review of reports.

The Survey of Income and Program Participation (SIPP) employs ratio estimation, whereby estimates are adjusted to independent measures of the national population by age, race, sex, and Hispanic origin. This weighting partially corrects for bias

due to undercoverage, but how it affects different variables in the survey is not precisely known. Moreover, biases may also be present when people who are missed in the survey differ from those interviewed in ways other than the categories used in weighting (age, race, sex, and Hispanic origin). All of these considerations affect comparisons across different surveys or data sources.

For further information on statistical standards and the computation and use of standard errors, contact Mahdi Sundukchi at 301-457-4192.

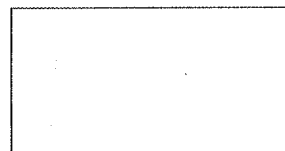
Data Contact:  
Wilfred T. Masumura  
301-457-6685  
*wilfred.t.masumura@census.gov*

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U.S. Department of Commerce  
Economics and Statistics Administration  
U.S. CENSUS BUREAU  
Washington, DC 20233

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*Steven D. Grierson*

1 **JOIN**

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3 NEVADA BAR NO. 6648  
4 JERRY C. POPOVICH [PRO HAC]  
5 CALIFORNIA BAR NO. 138636  
6 WILLIAM J. MALL [PRO HAC]  
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19 Attorneys for Defendants MICHELANGELO  
20 LEASING INC. d/b/a RYAN'S EXPRESS and  
21 EDWARD HUBBARD

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 KEON KHIABANI and ARIA KHIABANI,  
25 minors by and through their natural mother,  
26 KATAYOUN BARIN; KATAYOUN BARIN,  
27 individually; KATAYOUN BARIN as  
28 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.: XIV

**DEFENDANTS MICHELANGELO  
LEASING, INC. D/B/A RYAN'S EXPRESS  
AND EDWARD HUBBARD'S JOINDER  
TO PLAINTIFFS' MOTION FOR  
DETERMINATION OF GOOD FAITH  
SETTLEMENT WITH MICHELANGELO  
LEASING, INC. D/B/A RYAN'S EXPRESS  
AND EDWARD HUBBARD**

**DEFENDANTS MICHELANGELO LEASING, INC. D/B/A RYAN'S EXPRESS  
AND EDWARD HUBBARD'S JOINDER TO PLAINTIFFS' MOTION FOR  
DETERMINATION OF GOOD FAITH SETTLEMENT WITH MICHELANGELO  
LEASING, INC. D/B/A RYAN'S EXPRESS AND EDWARD HUBBARD**

Defendants, MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS and EDWARD HUBBARD, by and through their attorneys of record, Selman Breitman, LLP, hereby submit this Joinder in the foregoing Plaintiffs' Motion for Determination of Good Faith Settlement with Defendants Michelangelo Leasing, Inc. d/b/a Ryan' Express and Edward Hubbard on Order Shortening Time, pursuant to NRS 17.245.

This Joinder hereby adopts and incorporates by reference the legal arguments and analysis detailed in Plaintiffs' Motion as if stated herein. This Joinder is further based upon the pleadings and papers on file with this Court and other such evidence as may be offered at the time of the hearing of this Motion.

DATED: January 22, 2018

SELMAN BREITMAN LLP

By: /s/ Eric O. Freeman  
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EDWARD HUBBARD

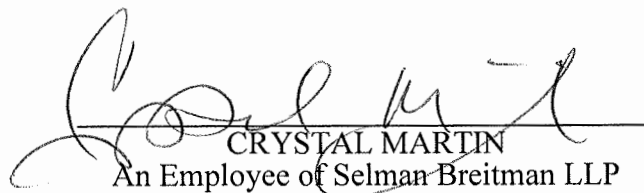


## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Selman Breitman LLP and, pursuant to:

☒ **BY E-MAIL/ELECTRONIC SERVICE:** N.R.C.P. 5(b), I caused the foregoing document to be served upon the persons designated by the parties in the E-Service master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

a true and correct copy of the above and foregoing **DEFENDANTS MICHELANGELO LEASING, INC. D/B/A RYAN'S EXPRESS AND EDWARD HUBBARD'S JOINDER TO PLAINTIFFS' MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT WITH MICHELANGELO LEASING, INC. D/B/A RYAN'S EXPRESS AND EDWARD HUBBARD**, this 22 day of January 2018.

  
CRYSTAL MARTIN  
An Employee of Selman Breitman LLP

Selman Breitman LLP  
ATTORNEYS AT LAW

*57*

*57*

1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 \* \* \* \* \*

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

17 Plaintiffs, )

18 vs. )

19 MOTOR COACH INDUSTRIES, INC., )  
20 a Delaware corporation; )  
21 MICHELANGELO LEASING, INC. )  
22 d/b/a RYAN'S EXPRESS, an )  
23 Arizona corporation; EDWARD )  
24 HUBBARD, a Nevada resident, et )  
25 al., )

Defendants. )

21 REPORTER'S TRANSCRIPTION OF PROCEEDINGS

22 BEFORE THE HONORABLE ADRIANA ESCOBAR  
23 DEPARTMENT XIV

24 DATED TUESDAY, JANUARY 23, 2018

25 RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

1 APPEARANCES:

2 For the Plaintiffs Keon Khiabani and the Estate of  
3 Kayvan Khiabani, M.D.:

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5 BY: ERIC M. PEPPERMAN, ESQ.  
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- AND -

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1 APPEARANCES (CONTINUED) :

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3 Giro Sport Design:

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10 For the Defendants Michelangelo Leasing, Inc., doing  
11 business as Ryan's Express and Edward Hubbard:

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18 For the Nonparty New Flyer Industries:

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24 (702) 792-3773

25 \* \* \* \* \*

1 LAS VEGAS, NEVADA, TUESDAY, JANUARY 23, 2018;

2  
3 P R O C E E D I N G S

4 \* \* \* \* \*

5  
6 THE COURT: Okay. This is *Barin v. Motor*  
7 *Coach Industries*, and today we have a few motions and  
8 other matters to review.

9 I'd like your appearances, please. Slowly.

10 MR. KEMP: Your Honor, Will Kemp on behalf of  
11 plaintiffs.

12 MR. CHRISTIANSEN: Good morning, Your Honor.  
13 Pete Christiansen, Kendelea Works, and Whitney Barrett  
14 on behalf of the plaintiffs.

15 MR. GODFREY: Good morning, Your Honor, Shane  
16 Godfrey, Las Vegas Legal Video presentation on behalf  
17 of the plaintiffs.

18 THE COURT: Very good.

19 MR. PEPPERMAN: Good morning, Your Honor.  
20 Eric Pepperman for plaintiffs as well.

21 THE COURT: Good morning.

22 MR. STOBERSKI: Good morning, Your Honor.  
23 Michael Stoberski for Bell Sports, Inc.

24 THE COURT: Good morning.

25 MR. FREEMAN: Eric Freeman on behalf of

1 Edward Hubbard and Michelangelo Leasing.

2 THE COURT: Thank you.

3 MS. WELCH-KIRMSE: Good morning, Your Honor.

4 Whitney Welch-Kirmse on behalf of New Flyer.

5 THE COURT: Good morning.

6 UNIDENTIFIED SPEAKER: Say that again.

7 MS. WELCH-KIRMSE: Whitney Welch-Kirmse on  
8 behalf of New Flyer.

9 MR. ROBERTS: Good morning, Your Honor. Lee  
10 Roberts for Motor Coach Industries.

11 THE COURT: Good morning.

12 MR. HENRIOD: Joel Henriod and Dan Polsenberg  
13 for Motor Coach.

14 THE COURT: Good morning.

15 MR. RUSSELL: Howard Russell for Motor Coach  
16 Industries.

17 THE COURT: Good morning, Counsel.

18 All right. Let's start with -- first I'm  
19 going to take the motion for summary judgment. Excuse  
20 me one moment. Oh, yeah.

21 MR. KEMP: Your Honor, out of courtesy to  
22 Mr. --

23 THE COURT: -- good-faith settlements.

24 MR. KEMP: Mr. Stoberski has the good-faith  
25 motion. That's all he's here for.

1 THE COURT: That's right.

2 MR. KEMP: So he wanted to --

3 MR. STOBERSKI: If I may, Your Honor.

4 THE COURT: You absolutely may. Just give me  
5 one moment. All right. So we have actually today  
6 two -- two motions for good-faith settlement. They are  
7 one with Michelangelo Leasing, dba Ryan's Express, an  
8 Arizona corporation, and Edward Hubbard; correct?

9 MR. STOBERSKI: That's one of them that's  
10 there.

11 THE COURT: And the second is Bell  
12 Sports, Inc. --

13 MR. STOBERSKI: Correct, Your Honor.

14 THE COURT: -- dba Giro Sport Design, a  
15 Delaware Corporation.

16 MR. STOBERSKI: Thank you, Your Honor. This  
17 is our motion for good --

18 THE COURT: Let me see. Your name for --

19 MR. STOBERSKI: Mr. Stoberski for Bell  
20 Sports. This is our motion for good-faith  
21 determination, Your Honor. Our motion is also  
22 confidential, so --

23 THE COURT: Yes.

24 MR. STOBERSKI: -- we also have a  
25 contemporaneous motion to seal. We've submitted --



1 UNIDENTIFIED SPEAKER: Your Honor, could you  
2 please ask him to speak up.

3 THE COURT: Contrary to popular belief, and I  
4 don't know why, our mics are terrible here. So,  
5 Mr. Stoberski, if you would bring your microphone  
6 closer, perhaps.

7 MR. STOBERSKI: Sure. I can speak up, Your  
8 Honor. No problem.

9 THE COURT: You can speak up too. I have  
10 a -- my voice isn't that loud, so I actually had to  
11 order one because that one wasn't good enough.

12 MR. STOBERSKI: I'm so close to you, I don't  
13 want to shout at you.

14 THE COURT: No, no. It's okay. It's okay.  
15 Go ahead, please.

16 MR. STOBERSKI: Okay. Michael Stoberski for  
17 Bell Sports, Inc. This is our motion for good-faith  
18 determination.

19 THE COURT: Yes.

20 MR. STOBERSKI: Our motion is slightly  
21 different because as part of our settlement, our  
22 motion -- or our settlement is confidential, and so we  
23 have a contemporaneous motion to seal the record --

24 THE COURT: Correct.

25 MR. STOBERSKI: -- on our motion for good

1 faith.

2           However, we have to tell the amount in the  
3 record for later purposes of setoff, et cetera. So we  
4 have submitted to Your Honor in camera, and I've copied  
5 other counsel, the settlement amount. And there's been  
6 no opposition to the amount of the settlement or to the  
7 motion for good-faith determination. We've laid out  
8 the factors, the MGM factors in our motion.

9           THE COURT: You have.

10          MR. STOBERSKI: There's been no opposition,  
11 so --

12          THE COURT: Would you like to review those  
13 just quickly for the record.

14          MR. STOBERSKI: Certainly, Your Honor.

15          THE COURT: Thank you.

16          MR. STOBERSKI: The amount paid is  
17 reasonable. There's no one that disputes that the  
18 amount that Bell Sports is making in settlement is  
19 unreasonable.

20                The settlement proceeds will be allocated  
21 among the decedent's heirs and their counsel.

22                The settlement falls within the disclosed  
23 policy limits of Bell Sports. This defendant's  
24 financial condition is protected by way of the  
25 insurance payment of the settlement amount.

1           There's been no collusion, fraud, or tortious  
2 conduct occurred in reaching this settlement, and the  
3 matter has been negotiated in good faith and submitted  
4 to the Court in good faith.

5           THE COURT: Okay. The motion to seal is  
6 granted, and the -- the -- I believe -- this appears to  
7 be a good-faith settlement, so that is granted as well.

8           MR. STOBERSKI: Thank you, Your Honor.

9           THE COURT: Thank you. Have a good day.

10          MR. STOBERSKI: You too.

11          THE COURT: Okay. Do we have the other  
12 party? Yes?

13          MR. FREEMAN: Yes. Excuse me. Eric Freeman  
14 on behalf of Edward Hubbard and Michelangelo Leasing.

15          THE COURT: Yes, Mr. Freeman.

16          MR. FREEMAN: Plaintiffs actually filed the  
17 motion. We joined it.

18          THE COURT: Yes.

19          MR. FREEMAN: If you would allow me to -- to  
20 argue it to resolution.

21          THE COURT: Sure.

22          MR. FREEMAN: Okay. Again, our -- our  
23 settlement is confidential also. I have prepared --  
24 there -- there is a confidentiality agreement among all  
25 the parties as to the amount. If you'll allow me to

1 approach, I have the in camera submission. This is for  
2 Michelangelo Leasing and Edward Hubbard.

3 THE COURT: Yes.

4 MR. FREEMAN: I ask that because the amount  
5 is -- is in the record that we either be allowed to  
6 file a motion to seal or if you'll allow us to join the  
7 other motion to seal that's been filed in this case as  
8 it pertains to Michelangelo and Hubbard. However you  
9 would like us to proceed with that.

10 THE COURT: Okay. I'd prefer you file -- I'm  
11 going to order -- grant a motion to seal and grant this  
12 good-faith settlement. Okay.

13 MR. FREEMAN: Okay.

14 THE COURT: I've just reviewed the number.  
15 It seems reasonable. And it looks like it comports  
16 with all of the factors.

17 MR. FREEMAN: Yes. If you'd like me to go  
18 over those?

19 THE COURT: Yes, for the record.

20 MR. FREEMAN: Okay. Again, the -- the  
21 settlement was negotiated in good faith.

22 The settlement amount, financial conditions,  
23 and policy limits have all been taken into  
24 consideration, along with the strengths and weaknesses  
25 of the claims and defenses.

1           The amount -- it involves minors, and so  
2 we'll be coming forward with a minor compromise --

3           THE COURT:   Yes.

4           MR. FREEMAN:  -- for you with those allocated  
5 amounts.  There's going to be a structure involved, and  
6 so we're getting all that together as -- as I speak.

7           Also, there is no collusion, fraud, or  
8 tortious conduct in any -- any of the dealings.  And,  
9 again, this was negotiated in good faith.

10          THE COURT:  Great.  Okay.  Very good.

11          MR. FREEMAN:  Okay.  Thank you.

12          THE COURT:  Both are granted.  Okay.

13          MR. FREEMAN:  All right.  And I will prepare  
14 the motion to -- to seal?

15          THE COURT:  Absolutely.

16          MR. FREEMAN:  Okay.  Thank you very much.

17          THE COURT:  Have a good day.

18          MR. FREEMAN:  You too.

19          THE COURT:  Okay.  All right.  Let's go now  
20 to the Motion for Summary Judgment on Foreseeability of  
21 Bus Interaction With Pedestrians or Bicyclists,  
22 Including the Said In Bicycle Movement.

23          MR. KEMP:  Good morning, Your Honor.

24          THE COURT:  Good morning.

25          MR. GODFREY:  Excuse me, Ms. Recorder.

1 THE COURT: We have a reporter.

2 MR. GODFREY: A recorder.

3 THE COURT: No.

4 MR. GODFREY: Would you change it to us --

5 THE COURT: I'm sorry. A recorder.

6 MR. GODFREY: -- if you wouldn't mind. Thank  
7 you.

8 MR. KEMP: Your Honor, this is our motion for  
9 summary judgment on foreseeability. Foreseeability is  
10 one of the elements of proof in a products case. And  
11 specifically what we have to prove is "The product was  
12 used in a manner which was reasonably foreseeable by  
13 the defendant."

14 In this case, we have a bus as the product.  
15 The bus is driving down a public street next to a bike  
16 lane. So we contend that as a matter of law, it's used  
17 in a manner in which was reasonable -- reasonably  
18 foreseeable by the defendant.

19 Alternatively, we argue that the testimony of  
20 the PMK that he knew this exact incident could  
21 potentially happen, which they have not opposed, they  
22 haven't controverted that, alternatively, we are  
23 arguing that there's no issue of fact left for the jury  
24 given that testimony.

25 When we talk about foreseeability, what we

1 usually go back to is the Palsgraf case. I don't know  
2 if you remember that case from law school --

3 THE COURT: Of course I do, and I've reviewed  
4 it again before today.

5 MR. KEMP: You know, it kind of makes more  
6 sense to me now four years later.

7 But in any event, in Palsgraf, we have a  
8 train conductor that knocks a person over on a railroad  
9 platform, and that person had a package that had a bomb  
10 in it. The bomb blows up and hurts Mrs. Palsgraf.  
11 Mrs. Palsgraf sues the railroad. The jury finds in  
12 favor of Mrs. Palsgraf. The railroad loses. They  
13 appeal it, and then ultimately it winds up in the Court  
14 of Appeals of New York, which is the supreme court of  
15 New York.

16 So Justice Cardozo in the favor -- in that  
17 famous decision decides that despite the jury verdict  
18 that this is just too remote. That it's not  
19 foreseeable, and they enter judgment in favor of the  
20 railroad. They made a policy decision in that case.  
21 And that's what we're doing with foreseeability --  
22 foreseeability. We're making a policy decision as to  
23 whether or not something is too remote.

24 Now, in our state, we have two cases that --  
25 that pretty much have made the policy decision for us.

1 We have *Andrews versus Harley-Davidson*. That's the  
2 case where someone is zipping down the road on a  
3 motorcycle who's intoxicated.

4 THE COURT: DUI, yeah.

5 MR. KEMP: And they get into a car accident  
6 and they sue the Harley-Davidson company for making a  
7 defective motorcycle. And if my memory's right, the  
8 defect in the case is the gas cap flipped this way. So  
9 when he slid the motorcycle, it ripped his groin as  
10 opposed to flipping this way where it would have just  
11 put itself down. But in any event, the Court held in  
12 that case that intoxication, negligent driving, all  
13 foreseeable.

14 Now, in this case, what they're arguing is  
15 that, oh, this bus driver, Mr. Hubbard, was so  
16 reckless, so outrageous drive -- driving this bus that  
17 it wasn't foreseeable to us. Well, let's break that  
18 down a little bit.

19 First of all, Mr. Hubbard wasn't even cited  
20 by Metro. So I -- I don't know where they think all  
21 this reckless intentional conduct is going to come  
22 from. But in any event, that's what they say. But  
23 that's covered by Harley-Davidson, Your Honor. Because  
24 in Harley-Davidson, they said that you -- as the  
25 manufacturer of the product, and that was -- it wasn't



1 an automobile, but it was similar to an automobile  
2 product -- the manufacturer has to foresee that there's  
3 potential misuse of its product. In that case, it was  
4 the intoxication.

5 Now we move to the second case, and I think  
6 this is really the decisive case, *Price versus Blaine*.  
7 That was a case, what happened is there was a political  
8 rally. Someone was wearing one of these big George  
9 Bush masks, and apparently someone didn't like the  
10 George Bush mask, so they -- they push him from behind.  
11 That causes him to tip over and injure himself. Okay.  
12 So the manufacturer of the mask argued, oh, well, we  
13 couldn't foresee that someone would push someone from  
14 behind at a political rally.

15 Well, the Court held that you don't really  
16 look at the specific injury, which is what MCI wants us  
17 to do. They want to -- they want a standard where you  
18 have to have subjective foreseeability. You have to  
19 foresee the specific accident as opposed to objective  
20 foreseeability which is what we have in *Price*. And in  
21 the *Price* court, this is the key part, and it's in our  
22 reply on page 3, the key part is that you determine  
23 foreseeability "in light of the nature and extent of  
24 the injury attributed to the product defect, thus  
25 focusing on whether the harm is of a kind and a degree

1 that is so far beyond the risk foreseeable to the  
2 manufacturer that the law would deem it unfair to hold  
3 the manufacturer of the product responsible."

4           So we look at the harm. In this case, the  
5 harm was Dr. Khiabani got run over by a bus, the rear  
6 tires of the bus. So is that harm so out there, so  
7 fore-- unforeseeable, like the Palsgraf case, the  
8 exploding bomb, that as a matter of law, we're going to  
9 make a policy decision that -- that they're not going  
10 to be liable? I submit it's not, Your Honor.

11           And the -- the next authority we cite -- in  
12 fact they cited. They cited Amjure. They didn't cite  
13 the section on foreseeability. They cited another one.  
14 But they have a rule that's comparable to what Price  
15 said. The actor -- in this case the actor is MCI, the  
16 bus company, the bus manufacturer. The actor need only  
17 foresee an injury of the same general character as the  
18 actual injury and need not anticipate the extent of the  
19 injuries or the precise manner in which the accident  
20 occurred. So can they foresee that a bicyclist could  
21 potentially be run over by the rear tires of a bus? I  
22 mean, I -- I think as a matter of law, they can, Your  
23 Honor, but we'll get to what their PMK said in a  
24 minute. That is the issue here.

25           Now, what they want to do is they want to run

1 to the jury and create some kind of defense where they  
2 say, oh, oh, this isn't foreseeable. This accident is  
3 just so, so strange. You know, how could we have ever  
4 anticipated something like this occur? That's not a  
5 defense, Your Honor. That is not a defense because if  
6 they can anticipate the harm, as Price said, or the  
7 general character of the actual injury, their -- their  
8 authority, Amjure, says that -- that ends the  
9 foreseeability analysis and it's not a defense to a  
10 case. Now, that's why I say that under Andrews and  
11 Harley-Davidson -- or, excuse me, Andrews and Price,  
12 we're entitled to judgment as a matter of law.

13 But let's say it's an issue of fact. Okay?  
14 Let's say it should go to the jury, even though I will  
15 point out that in the Palsgraf case, they took it away  
16 from the jury. It's a policy decision. You know, we  
17 cannot have the jury upstairs make one policy decision,  
18 the jury side of us make another policy decision. It's  
19 a policy decision. It's a legal decision that the  
20 Court should make. It's not a decision for jurors.  
21 But let's just assume that it is an issue of fact, it  
22 isn't a policy decision.

23 This is the testimony of their PMK. Can I  
24 have it? This is Mr. Hoogestraat. They produced him  
25 as the PMK with regards to prior incidents. And when I

1 used the term PMK, I'm talking about a 30(b)(6)  
2 witness. We gave them -- for Mr. Hoogestraat, we gave  
3 them 22 areas in their 30(b)(6), one of them being  
4 prior accidents, one of them being how they designed --  
5 thanks.

6 I'm going to let you do it, Shane.

7 And this is what he said. So I ask him:

8 "Do you recognize that there's a  
9 theoretical potential that pedestrians or  
10 bicyclists could potentially be run over by  
11 rear tires of a bus under some scenario?"

12 That's the harm. That's the harm under  
13 Price. So he says:

14 "ANSWER: There may be a scenario where  
15 that could occur.

16 "Okay. And generally -- you understand  
17 generally that could happen under some  
18 scenario.

19 "ANSWER: It's possible that that could  
20 happen."

21 Can I have the -- the rest of the testimony.

22 And I said:

23 "Well, let's put it differently. You knew  
24 back in, say, 2000" --

25 The bus in this case was manufactured in 8000

1 [sic], so that's why we use the term 2000.

2 -- "2000 that this was a potential  
3 scenario."

4 He goes:

5 "ANSWER: That is a potential that a bus  
6 tire could roll over something; that's correct.

7 "Okay. Including people?

8 "Anything, yes. Tires on all vehicles  
9 could run over something.

10 "Okay. You knew that back in 2000.

11 "Yes. Probably before that time.

12 Probably before that time."

13 They knew and foresaw of the exact harm in  
14 this particular case. We cited that in the motion.  
15 They didn't cite any contradictory testimony. They  
16 don't have the president of MCI or the general counsel  
17 or the claims manager or anyone saying, oh, we can't  
18 foresee harms of this type because it's obvious they  
19 can, Your Honor.

20 But now they come to court and the lawyers,  
21 the lawyers argue to you, oh, this isn't foreseeable.  
22 Well, what did they do last week, Your Honor? Last  
23 week they came out with this press release. And this  
24 is unbelievable.

25 THE COURT: By the way, I want you to know

1 something about me and this court. I don't look at the  
2 media. I don't read anything. And I don't watch  
3 television because I -- I -- I'm really serious. So --  
4 so you know, this is the first time I'm going to see  
5 anything. I haven't researched the case. I don't -- I  
6 don't like that. I like what's in front of me. I did  
7 the same thing on the public utilities commission a  
8 decade ago. I cut the clipping service.

9 So go on.

10 MR. KEMP: This was -- this was an obscure  
11 industry press release, but it was still a --

12 THE COURT: I don't know. I purposely avoid  
13 anything. It's better that way.

14 MR. KEMP: Probably good policy given the way  
15 the industry has been in the last year, Your Honor.

16 THE COURT: All right.

17 MR. KEMP: Again, New Flyer has purchased  
18 MCI. So New Flyer is the -- is the company in Canada  
19 that specializes in --

20 THE COURT: I thought they were a nonparty.  
21 Oh, they are a nonparty.

22 MR. KEMP: Well, they say they're a nonparty,  
23 Your Honor. They're --

24 THE COURT: Okay.

25 MR. KEMP: They're really the only -- they're

1 the parent company. Okay? So what happened is in the  
2 fall of 2016, they purchased MCI. I'm not trying  
3 to -- to preargue the other motion. I'm just pointing  
4 out something so you'll understand the context of this.

5 So they bought MCI. MCI -- for some reason,  
6 they make all these buses in Winnipeg. I -- I don't  
7 know why. I asked a couple of witnesses. No one seems  
8 to know why. But MCI is in Winnipeg with one of their  
9 factories. New Flyer's in Winnipeg. New Flyer bought  
10 MCI. So as of -- I think it -- the merger was  
11 completed the end of 2016. But for whatever reason,  
12 New Flyer is now the parent company running the show  
13 for MCI.

14 Anyway, so this is what New Flyer said last  
15 week, and I want you to contrast this with what the  
16 lawyers are saying to you now. Last week, New Flyer --  
17 this is the senior vice president of engineering and  
18 service for New Flyer America -- says, "Buses are long  
19 vehicles and they're operating in an urban environment  
20 so they don't have the same maneuverability as a  
21 passenger car."

22 Okay. I mean, they -- they could foresee  
23 that there's -- there's problem -- there's going to be  
24 problems in a lot of environments. But this is the  
25 key. "Traveling in the right-hand lane, buses are by

1 default always traveling in close proximity to  
2 pedestrians and cyclists." You know, how could they  
3 argue with a straight face that they can't foresee that  
4 there might be an accident with a cyclist after their  
5 own company makes this kind of statement just last  
6 week?

7           And so he continues and says, "It makes a ton  
8 of sense to start exploring these type of  
9 technologies." And we'll get to this in the summary  
10 judgment -- in the next summary judgment. But what  
11 they're doing, what their parent company is doing is  
12 they're putting proximity sensors on buses in L.A.  
13 That's what they're doing.

14           So -- but getting back to this motion, Your  
15 Honor, based on the testimony of the person most  
16 knowledgeable, Mr. Hoogestraat, that we already showed,  
17 based upon this public statement by New Flyer, their  
18 parent company, that by default, they're always  
19 traveling in close proximity, there can be no true  
20 issue of fact for the jury with regard to that, if it  
21 is a jury question.

22           So for those reasons, Your Honor, we submit  
23 that the summary judgment motion should be granted,  
24 this element should not be resolved by the jury.  
25 And -- and before I forget, you know, I -- I always



1 have to argue this motion. I had to argue it with  
2 Judge Williams. You know, I attached -- when we did  
3 the Meyers case, they wanted -- they want to come into  
4 the Meyers case and -- and try to defend the client by  
5 pointing to Dr. Desai and saying, oh, look, he's a  
6 criminal. We could never have foreseen the criminal  
7 actions of Dr. -- for Dr. Desai.

8 But, you know, we attached Judge Williams'  
9 opinion. Judge Williams wrote a pretty long opinion.  
10 I think it was 18 pages long on this exact issue. And  
11 he said, look, it's foreseeable. It is foreseeable  
12 that in that particular case, the medical provider  
13 would potentially commit malpractice. You don't have  
14 to foresee exactly how he would commit malpractice.  
15 You know there's a potential for malpractice. It's  
16 just like this case. If you could foresee the  
17 potential harm, which they did, as Mr. Hoogestraat  
18 said, they can't argue foreseeability/nonforeseeability  
19 to the jury. So for that reason, we'd ask that summary  
20 judgment be granted.

21 THE COURT: Thank you.

22 MR. HENRIOD: To some extent, it is a policy  
23 decision, and like any element, it includes a policy  
24 evaluation. As with any element, the Court can grant  
25 summary judgment when there is no dispute as to the

1 facts or reasonable inferences that can be drawn from  
2 those facts. But just because summary judgment can be  
3 granted doesn't mean that an element is then  
4 exclusively for the Court. And in both of those cases,  
5 Andrews and Price, what you have is the supreme court  
6 reversing a summary judgment decision by the district  
7 court.

8           You don't see the Court faulted for letting  
9 the jury weigh in on this element. As they point out  
10 in their motion, this is not just an affirmative  
11 defense. It is an element in their prima facie case  
12 that is listed in the jury instruction. Typically they  
13 have to prove it. And it's not just that it is  
14 foreseeable. It's that it's reasonably foreseeable.  
15 And that term shows up a lot in the jury instructions,  
16 and I suggest that it's not superfluous. And the  
17 reason that it's not superfluous is because there is in  
18 that determination the assessment by the jury as to  
19 whether or not the designer, the manufacturer ought to  
20 have foreseen, ought to be responsible for foreseeing  
21 particular conduct.

22           Now, in their brief, they make an argument  
23 that's a little bit different from today. And they  
24 even start today by pointing to the element that they  
25 have to show that the manner in which it was used was

1 reasonably foreseeable. And then they quickly pivot to  
2 whether or not the injury was reasonably foreseeable.  
3 And I recognize that in Price that was the issue. It  
4 can be both. And this is why you need to look at it  
5 from a defect or an alleged defect-by-defect basis.

6 For instance, if the S-1 Gard were their only  
7 alleged theory, then perhaps in that circumstance, it  
8 wouldn't matter why the collision took place if that  
9 were the only allegation. But here, that's not the  
10 only allegation.

11 There's also the fault alleged that there are  
12 not proximity sensors. And that there is a blind spot  
13 that is too prominent. Well, in that case, you're not  
14 looking at the injury. That then goes to the element  
15 that's in the instructions, more appropriately, which  
16 is the manner of the driver's use.

17 Now, what exactly would need to be  
18 foreseeable, then, when we talk about the manner of the  
19 driver's use? I don't care what was in the police  
20 report. I care about the witnesses who were in the bus  
21 who testified as to the dialogue they had with this  
22 driver and the observations they had both of the  
23 driver's conduct and Dr. Khiabani and the way that the  
24 bus was interacting with Dr. Khiabani. And perhaps a  
25 jury may find that the driver here was merely

1 negligent. But there are facts, there is testimony  
2 from which a reasonable jury could infer that his  
3 conduct was much more than negligence. And the  
4 doctrines that we're talking about just go to the  
5 negligence of the user, not a gross negligence,  
6 recklessness. We lay these things out in our brief.  
7 Those can show that something is reasonably  
8 unforeseeable. Because the manufacturer of a coach, of  
9 a bus does not have to anticipate and plan around a bus  
10 driver being reckless, being grossly negligent.

11 Here, we have a circumstance where passengers  
12 were joking with the driver about how close he was, and  
13 how they thought it would be funny for him to get even  
14 closer to raise the doctor's heart rate. It's sick.  
15 But a reasonable jury could infer that he knew, that  
16 the bus driver knew the doctor was down there  
17 immediately to his right, that he saw him, and that he  
18 chose not to get over into the left-hand lane, though  
19 he had the option to do so.

20 The deposition of Mr. Hubbard is -- is  
21 telling in this respect because while he was still a  
22 party in this case, tell you Mr. Christiansen does a  
23 very good job at making him face how dangerous his  
24 conduct was that day, what he did see. He may not have  
25 known at any given second exactly where Dr. Khiabani

1 was in relationship to the length of the bus, but that  
2 really doesn't matter. If he knew he was down there  
3 and he chose to stay in that lane deliberately, and if  
4 he did it to be funny, well, that is nothing that a  
5 designer has to plan around with proximity sensors or  
6 eliminating blind spots. And I don't think eliminating  
7 blind spots is even possible.

8           So that's the foreseeability that we're  
9 talking about. That's what we would, as a matter of  
10 law, have to have a reasonable responsibility to do  
11 given the theories of defect that are alleged, that we  
12 could have a driver know that somebody is down to his  
13 side, be aware of that, be aware that there's the --  
14 the option of moving over and choosing not to do so.

15           Now, let's assume that in -- in some sense  
16 this is foreseeable. What is the result of that? And  
17 I'm afraid that there is a suggestion that you should  
18 go beyond even making a foreseeability assessment and  
19 assume certain implications of that even if you were to  
20 make that finding. One of those is that a duty is  
21 created, that because it is foreseeable that a bicycle  
22 can collide with a bus and that that would be very  
23 dangerous, and I can't really dispute that.

24           Another motion for summary judgment that we  
25 will decide today is on product defect, because I think

1 it's a matter of common sense that when a bicycle does  
2 collide with a bus at 25 miles an hour, that there's  
3 going to be an injury. I think that's obvious. But  
4 just because a plane can injure passengers when it  
5 crashes does not mean that a aircraft company has a  
6 legal duty to make the airplane crashworthy. And here  
7 we're not even talking about crashworthiness for the  
8 bus or for the passengers. In Nevada, we have not  
9 extended crashworthiness to bystanders.

10 But even if you were to do that, and we  
11 haven't, there, the issue -- well, yeah, we haven't.  
12 So the crashworthiness cases don't apply. But even if  
13 they did, we would be talking about that, and it would  
14 be relevant and you would exclude evidence from the  
15 jury only if their only theory went to that S-1 Gard,  
16 which is supposed to assume some type of collision.  
17 And that's Andrews. That's the case and -- and other  
18 crashworthiness cases. The idea that you assume auto  
19 accidents can happen, and so you need to make it safe  
20 for occupants.

21 Here, we are out on the fringe. Here, we are  
22 saying that you need to make an automobile not only  
23 safe for the occupants, but to try to prevent injury to  
24 anyone who might be impacted by the vehicle. By this  
25 rationale, somebody driving a smart car that collides

1 with a Suburban would make the Suburban defective as a  
2 matter of law because it is foreseeable that a Suburban  
3 is bigger than a smart car. They can collide, and so  
4 somebody in the smart car would be injured because the  
5 collision is foreseeable. So I -- the doctrine doesn't  
6 apply. And even if it did, it would only be to that  
7 defect.

8 We talk about what New Flyer knew, and Your  
9 Honor recognized that New Flyer is not a party in the  
10 case. The response to that was, well, New Flyer is the  
11 parent corporation. Well, Nevada still respects the  
12 corporate form, so I think that that is a meaningful  
13 distinction, and I don't think it can be disregarded.

14 We talked about the hepatitis case. And  
15 Judge Williams did make that determination in the  
16 hepatitis case. It was up on appeal. The case settled  
17 before it was decided. So it was error there. It  
18 would be error here. And Judge Williams is not the  
19 only one that decided that case in all of the hepatitis  
20 litigation. Judge Herndon also evaluated that  
21 question, came to the exact opposite position. And --  
22 and that -- that case turned out very differently. The  
23 litigation ended very soon after that.

24 And I think what we need to do, this is a  
25 motion for summary judgment. Reckless conduct, gross

1 negligence can constitute reasonably unforeseeable  
2 misuse. Now, I think the time to decide this, we can  
3 take this up again when we're deciding jury  
4 instructions. They'll have an opportunity to make a  
5 JMOL motion under Rule 50(A) if they think the evidence  
6 does not support a reasonable inference that the driver  
7 was more than merely negligent, but was reckless in a  
8 way that a manufacturer should not have a reasonable  
9 obligation to plan around. We don't need to decide  
10 this today. The appropriate time to decide this would  
11 be in 50(A) motions, when we're doing jury  
12 instructions, because at very least, there is a set of  
13 facts, there is testimony on which a reasonable jury  
14 could rely in inferring that this was conduct that  
15 would have led to this injury regardless.

16 Does Your Honor have any questions?

17 THE COURT: No, thank you.

18 MR. KEMP: Your Honor, just briefly. The  
19 issue here is the same issue we had in Price. Whether  
20 they can say that the bus driver's conduct was a  
21 superseding cause, a superseding cause in a products  
22 liability action. So the test is not the conduct. Our  
23 supreme court says it must be determined in light of  
24 the nature and extent of the injury attributable to the  
25 product defect, thus focusing on whether the harm --



1 the harm. It's not the conduct. You look at the  
2 harm -- whether the harm is of a kind and a degree that  
3 is so far beyond the risk foreseeable to the  
4 manufacturer that the law would deem it unfair to hold  
5 a manufacturer of the product responsible. So that's  
6 exactly the mistake that we said they were making, and  
7 they're making it again. They are trying to run away  
8 from the real test, the harm, and to characterize the  
9 conduct.

10 Now, they say that gross negligence and  
11 recklessness can never, can never be foreseeable.  
12 Well, Your Honor, in the Andrews case, it was  
13 intoxication. It was a DUI. It was a criminal act  
14 that was deemed foreseeable. In the Price case, it was  
15 criminal battery that was deemed foreseeable. The --  
16 the protester that pushed the person with a -- the  
17 George W. Bush mask, he was arrested and convicted by  
18 the Reno Police Department -- the rally was up in  
19 Reno -- convicted by the Reno Police Department. So we  
20 have two cases where our Court has held that criminal  
21 acts are foreseeable because you're not looking at the  
22 conduct. You're looking at the harm.

23 So for them to come in and say, oh, this is  
24 gross negligence and recklessness, you know, he was  
25 under the speed limit. He was going 25 miles per hour.

1 He was under the speed limit. He was in his lane. He  
2 wasn't in the bike lane. So for them to argue that  
3 this is outrageous or intentional conduct, I think -- I  
4 think is inappropriate. But where's the evidence?  
5 Under *Woods versus Safeway*, they have the obligation to  
6 come forward with evidence, and they haven't done that,  
7 Your Honor.

8           So for these reasons -- oh, final point.  
9 They say, well, let's delay this. Let's do this during  
10 jury instructions. Well, what that lets them do is  
11 during the entire trial, they're going to point the  
12 finger at the bus driver and argue to the jury that  
13 this is some sort of superseding cause that relieves  
14 them of liability. That's -- you -- you can't cure  
15 that at the end of the trial with a jury instruction,  
16 Your Honor. That's why we filed the motion for summary  
17 judgment up front, and that's why we -- we try to take  
18 this -- this whole false defense away from the jury up  
19 front.

20           And so for those reasons, we submit that the  
21 summary judgment motion should be granted. You know,  
22 they didn't -- they didn't point out anything that  
23 contradicted Mr. Hoogestraat's testimony, the PMK, that  
24 they foresaw this exact type of harm over 20 years ago.

25           And, you know, the harm does not turn on the

1 product theory. You know, they come up and say, oh,  
2 well, you know, this motion for summary judgment should  
3 be granted with regards to the S-1 Gard but not the  
4 proximity sensors. What kind of sense -- what -- what  
5 kind of rationale is that, Your Honor? It's the exact  
6 same harm. How could they foresee the harm in one case  
7 and not the other? It's the exact same harm. And for  
8 that reason the summary judgment should be granted,  
9 Your Honor.

10 THE COURT: I'm -- I'm ready to -- the  
11 Court -- I would say I'm in receipt of everything you  
12 provided me with, all parties, and this Court grants  
13 plaintiffs' motion. In -- in my view, and relying on  
14 *Andrews v. Harley-Davidson*, *Price v. Blair*, any  
15 collision between a bus and a bicycle that was caused  
16 by a bus driver would be foreseeable as a matter of law  
17 under both of these cases. The Court may decide issues  
18 of foreseeability as a matter of law, as opposed to  
19 determination of causation, which is not implicated by  
20 granting this motion. So for those reasons, and the  
21 light -- in light of the evidence presented by  
22 plaintiff, this motion is granted.

23 All right. Next, we move to the Motion for  
24 Summary Judgment on Punitive Damages.

25 Do you want to take -- I'm sorry. I

1 overheard you.

2 MR. RUSSELL: We -- we were just talking  
3 possible housekeeping. We'll go ahead with this one --

4 THE COURT: I'm happy to -- to change motions  
5 around. I'm prepared for all of them.

6 MR. RUSSELL: I think this one is -- can  
7 stand on its own. We can get through this one.

8 THE COURT: Okay. But if anyone has a  
9 request, please feel free. Okay.

10 MR. RUSSELL: Howard Russell for Motor Coach  
11 Industries. Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. RUSSELL: As we've pointed out, and I --  
14 I think we've tried to encapsulate this as best we can  
15 in our reply brief, that with everything that's been  
16 sort of thrown at the Court, the question is this:  
17 First, is there substantial evidence of conduct that  
18 would warrant a punitive damage claim? And not conduct  
19 that can warrant a punitive damage claim by  
20 preponderance of the evidence. Conduct that shows  
21 clearly and convincingly that MCI engaged in punitive  
22 conduct.

23 This is a slightly different standard than a  
24 typical summary judgment motion. This is not simply  
25 looking at the evidence in a light most favorable to

1 the nonmoving party. The Court understands that. The  
2 Court has to find substantial evidence, and it has to  
3 find substantial evidence that could then meet the  
4 higher standard of clear and convincing evidence to  
5 support a punitive damage award.

6 The Court has a different gatekeeping role in  
7 this situation, and it needs to look very closely at  
8 the evidence that the plaintiffs are proposing allows  
9 the Court to present punitive damage claim to the jury.

10 Part of looking at the substantial evidence  
11 is that it has to be admissible evidence. You can't  
12 talk about arguments or theories at this point. We're  
13 past that. It's what is the admissible evidence that a  
14 jury could look at and find clearly and convincingly  
15 that Motor Coach Industries had specific knowledge of  
16 the probable risk of a harm, a willful -- willful and  
17 deliberate, that's -- that's the key word here --  
18 willful and deliberate failure to remedy that potential  
19 risk? Is there substantial evidence of that?

20 So what is the substantial evidence of  
21 knowledge of a probable harmful consequence and a  
22 failure to act? Well, we have to break down the  
23 various theories. Mr. Henriod has -- has laid them  
24 out.

25 First is this -- what plaintiffs have dubbed

1 their air blast theory. And the theory is that as the  
2 coach drives down the road, it displaces air as it  
3 moves, which is a completely unremarkable physical  
4 principle. As I walked from my chair to the lecturn, I  
5 displaced air. Not as much as a motor coach, I hope,  
6 although Christmas was not good on the waistline. But  
7 that's a physical principle that you can't avoid. All  
8 right?

9           The theory is that as the coach drives by  
10 Dr. Khiabani, it displaces air, not only so much that  
11 it pushes him away first, but then the back wheels of  
12 the bus create a vacuum which sucks him back into the  
13 bus. That's their theory.

14           Now, picture maybe for a moment whether  
15 there's actually any evidence that could support that  
16 speculative theory. All they've shown is that MCI has  
17 a general knowledge that moving vehicles displace air.  
18 You're right. Everyone in this room has that general  
19 knowledge. The question is: Did they have a specific  
20 knowledge of a risk created by that? Well, the risk is  
21 you push the bike out of the way and it gets pulled  
22 back into the side of the bus. No evidence that that  
23 has ever happened involving an MCI coach, not only not  
24 in this case but ever. Not a single accident, not a  
25 single report of that happening. They've got a couple

1 academic articles which are hearsay to try to support  
2 that theory, but the alleged risk is the disturbance of  
3 air as a cyclist goes by.

4           Where is the evidence that MCI had any  
5 knowledge this was a specific risk associated with this  
6 Motor Coach? They want to keep talking about  
7 aerodynamics and the wind tunnel size and that sort of  
8 thing. All well and good. They've once again done  
9 nothing but offer, you know, truisms like, well, if  
10 it's more aerodynamic, it will displace less air. That  
11 may well be true. How much less air? What's the  
12 difference?

13           They've talked about their bullet train. How  
14 much air does a bullet train displace when it goes by a  
15 bike at 25 miles an hour? How much air does a Setra,  
16 made in Europe, displace as it goes by a cyclist at  
17 25 miles an hour? We don't know because there's no  
18 evidence of that.

19           So not only have they not shown that MCI had  
20 knowledge of some risk of cyclists getting pushed aside  
21 and then pulled back into the side of the bus, they  
22 haven't shown that other manufacturers have these big  
23 issues. They haven't shown that other manufacturers  
24 have done any better. All they've said, well, other --  
25 other manufacturers and -- and other vehicles they're

1 more aerodynamic. Okay. They might be. They might  
2 have a less -- less of a drag coefficient. They might.  
3 But they haven't shown you that there's a specific risk  
4 related to this coach that MCI somehow failed to  
5 address. General knowledge of -- of a risk is not  
6 enough. Statistics are not enough.

7           Next we move on to blind spots. Again, all  
8 vehicles have blind spots. Whatever you drove to the  
9 courthouse today, the car that I drove to the  
10 courthouse today, Mr. Kemp's car that he drove to the  
11 courthouse today, they've all got a blind spot unless  
12 you drive in a plastic bubble, which none of us do.  
13 There are blind spots. MCI acknowledges that, because  
14 they have to because it would be foolish to say that a  
15 solid pillar on the side of the bus doesn't create some  
16 sort of blind spot. The human can't see through that.  
17 All right? But the question is: Did they disregard  
18 some specific risk related to this coach because of a  
19 blind spot? No.

20           Mr. Hoogestraat testified to line of sight  
21 studies. Now, the line of sight studies were done on  
22 an earlier version, the E Coach, but the J Coach is  
23 a -- an offshoot of that. And there's been no evidence  
24 and no testimony, no expert for the plaintiff or for  
25 anybody has come in and said that the visibility lines



1 on the E Coach are any different than on the J Coach.  
2 Okay?

3           So there were line of sight studies done.  
4 Mr. Hoogestraat testified that they have a driver sit  
5 in there in different positions and that's how they do  
6 it. They're not computer generated. It's just an  
7 engineering study they do. Why? Because they  
8 understand, look, a vehicle has blind spots. So let's  
9 try and do something about it.

10           Now, the plaintiffs don't like the result.  
11 They don't like the design we came up with. But that's  
12 not a basis to award punitive damages.

13           Is there substantial admissible evidence that  
14 Motor Coach Industries in the wake of knowing that all  
15 vehicles have blind spots simply did nothing and took  
16 no steps to try to remedy that issue? No, there is no  
17 evidence of that. The only evidence is that they did  
18 line of sight studies that the plaintiffs just don't  
19 think are good enough.

20           The other issue we have with blind spots  
21 is -- and we've talked about this -- is the absence of  
22 other accidents. And that is important in this case.  
23 And it's particularly important in the context of  
24 punitive damages because, once again, there has to be  
25 knowledge of a specific risk related to this product.

1 Well, if MCI's not getting reports that drivers are  
2 having trouble with line of sight, if MCI's not getting  
3 reports that the J Coach has been in dozens of  
4 accidents because the -- the bus drivers couldn't see  
5 well -- well, that's a different story. But in 20  
6 years, the E and the J Coach combined, according to  
7 MCI's records, there's been three accidents. Three.  
8 None of them involving cyclists, mind you. But three  
9 in 20 years. Okay?

10 Plaintiffs throughout the -- the statistic  
11 of, well, in 2015, there were 818 accidents in where  
12 a -- a cyclist was injured by a motor vehicle. Five of  
13 them, Your Honor, 5 of them in the country, .06 percent  
14 of all of those accidents related to a bus. And we  
15 don't know what -- why they happened. Did the bus  
16 driver not look out the left side as opposed to the  
17 right? Did somebody cross a crosswalk when they  
18 shouldn't have? Could have been any reason. Might  
19 have had nothing to do with the blind spot.

20 They gave you some general statistic and  
21 said, well, MCI knows that there's accidents with buses  
22 and, therefore, they have to take every step to remedy  
23 every accident. That's not the standard. There is no  
24 evidence that MCI had any specific knowledge of a blind  
25 spot problem with this bus, and there's certainly no

1 evidence that they failed to take efforts to address  
2 blind spot issues because the evidence is they did.  
3 Plaintiffs' dissatisfaction with that is not  
4 substantial evidence to prove clearly and convincingly  
5 that Motor Coach Industries should be subject to  
6 punitive damages.

7           And the next alleged defects are proximity  
8 sensors. Well, the evidence is undisputed. MCI did  
9 not in 2007 have any knowledge of a proximity sensor  
10 that it believed was appropriate for its coach or that  
11 would work appropriately with its coach.

12           Now, Mr. Kemp very adeptly in depositions has  
13 brought out this spreadsheet that shows all these  
14 proximity sensors on passenger cars and said, well,  
15 look at all these proximity sensors. They're making  
16 proximity sensors everywhere. Well, some of them were  
17 adaptive cruise control, which means as you get closer  
18 to a vehicle in front of you, it slows your car down.  
19 Well, that doesn't have anything to do with this case.  
20 Some of them are rearview cameras. That has nothing to  
21 do with this case. Right?

22           Where is the evidence that MCI was aware in  
23 2007, 2008 when this coach was sold that there was some  
24 proximity sensor that it could have put on its coach  
25 that would have made a difference in this accident?

1           Now, plaintiffs want to talk about passenger  
2 vehicles. They want to call a former, I believe,  
3 General Motors, it may be Ford, I apologize, I forgot,  
4 but a former general -- auto industry employee who has  
5 never tested a proximity sensor that he is talking  
6 about in this case. He's never worked on motor  
7 coaches. They want to throw in a bunch of inadmissible  
8 articles from magazines that MCI may or may not have  
9 ever read or received. But none of those are evidence.

10           We have given the Court -- the Court some  
11 cases in our reply brief about knowledge of a general  
12 issue in the industry is not knowledge of a specific  
13 defect or problem with your product. You can't rely on  
14 the general. Once you get to the punitive damage  
15 stage, you have to show specific knowledge by the  
16 defendant of a problem with their product that they  
17 failed to address.

18           Important to remember as far as the proximity  
19 sensors goes, well, is it's inextricably tied with the  
20 blind spot issue. The idea is that, well, the  
21 proximity sensor takes over when the driver can't see  
22 something. Well, as I've already pointed out, MCI did  
23 address concerns about blind spots when they designed  
24 this line of coaches. So the fact that there was no  
25 proximity sensor as opposed to a different blind spot,

1 again, these are all Monday morning quarterbacking,  
2 we're not happy with your design. That's not the test.

3 The test is what did the defendant know at  
4 the time the product was put on the market about  
5 proximity sensors? And the evidence is MCI did not  
6 know of any that were appropriate for its coach. We  
7 can't look with hindsight on punitive damage issues  
8 about what we might know now. It's what did the  
9 defendant know then.

10 There was no regulation, law, standard,  
11 requirement for proximity sensors on coaches in 2007,  
12 2008, or forward, 2009, 2010, 2011. No expert has come  
13 in and said, well, they -- they were required to do  
14 this. Here's CFR this number requiring them to do  
15 this. Here's SAE this number requiring them to do  
16 this. No one said that.

17 Finally, the S-1 Gard. Again, yes. And the  
18 Court has now pointed out in -- in ruling on the last  
19 summary judgment motion, there is general knowledge  
20 that if someone gets run over by the rear tires of any  
21 vehicle, they will be injured. That is not a surprise  
22 to anyone. And we didn't suggest it was a surprise to  
23 us. Mr. Hoogestraat testified, yeah, of -- of course  
24 we know that if you -- somebody gets under the rear  
25 tires and run over, they're going to be injured. How

1 foolish would we have sounded to say no to that  
2 question? If asked, well, didn't you know people might  
3 get caught under the rear tires and hurt, and he said,  
4 well, I've never heard of such a thing, that would have  
5 been ridiculous. Of course we understand that.

6 But, again, that's general knowledge of an  
7 undeniable physical principle. If that was the  
8 standard, if, hey, you know people can get run over by  
9 a motor vehicle, how can there be any motor vehicles on  
10 the road without every single manufacturer being  
11 subject to punitive damages? They could get run over  
12 by the front tires. There's no discussion about a  
13 guard for the front tires. So yes, there's general  
14 knowledge that if you get caught under the rear tires  
15 of a motor coach, you're going to suffer significant  
16 injuries.

17 But in 20 years of the E and the J Coach  
18 being on the market, no accidents have been reported to  
19 MCI of somebody getting caught under the rear tires on  
20 one of these coaches, on the E or the J Coach. Three  
21 accidents involving pedestrians. Didn't involve rear  
22 tires. None involving cyclists. How can that possibly  
23 translate into specific -- substantial evidence of  
24 specific knowledge that would clearly and convincingly  
25 tell a jury that this company could be subject to

1 punitive damages? It simply does not meet the test.

2 And as far as the S-1 Gard goes, they rely on  
3 Mr. Fierros' deposition testimony. Mr. Fierros was an  
4 employee of a different company. Yes, it was a company  
5 just like the New Flyer-MCI issue that we're going to  
6 deal with here in a bit. MCI owned Universal Coach  
7 Parts. That is true.

8 THE COURT: I'm sorry. Repeat the last  
9 statement.

10 MR. RUSSELL: Universal Coach -- MCI. Yeah,  
11 MCI owned -- essentially, Universal Coach Parts, to --  
12 to -- to give the best analogy, is sort of like a --  
13 was sort of like a captive Napa for MCI buses. If you  
14 needed an MCI part, you would call Universal Coach  
15 Parts and say, I need a replacement part. So it only  
16 stocked what was on MCI buses. So whatever MCI put on  
17 its products, on its -- on its coaches or on its buses,  
18 Universal Coach Parts would sell those replacement  
19 parts. Okay?

20 So the story is that the maker of the S-1  
21 Gard went up to Mr. Fierros at a trade show in 1997, or  
22 1998, before the J series, mind you, was, you know,  
23 even out there on the market. He went -- met up with  
24 him at a trade show and said, Hey, I've got this thing.  
25 Are you interested in it? And Mr. Fierros, since that

1 wasn't part of a standard -- that wasn't a part of  
2 MCI's line, said, Well, there's no demand for that. I  
3 don't -- I don't carry this part. I don't need this  
4 part. He never saw one of these guards. You know,  
5 this Mr. Barron or whoever approached Mr. Fierros at  
6 this trade show didn't bring him the guard. They  
7 showed him a flyer. They didn't give him any data on  
8 it.

9           But importantly, Mr. Fierros is not an  
10 employee of MCI, was not an employee of MCI. To  
11 sustain a punitive damage award, you have to have an  
12 officer, director, or managing agent of the defendant  
13 as the one engaging in punitive conduct. They never  
14 asked Mr. Fierros, Well, you know, were you involved in  
15 the design of these buses? And the answer, he wasn't.  
16 They didn't ask him, Did you understand that people  
17 might get run over by rear tires? They didn't ask him  
18 that. There's no evidence that an officer, director,  
19 or managing agent of MCI ever knew of some specific  
20 problem with this coach to warrant investigating the  
21 S-1. So they've completely failed to meet their burden  
22 of proof and provide the evidence, admissible evidence  
23 to the Court on these issues.

24           And finally, another issue we've raised in  
25 our -- in our briefing, and that is: Even if you



1 can -- even if you can tip the scales -- and we're  
2 going to -- I know we're going to hear that at trial  
3 about I just need to tip the scale, I just need to get  
4 past the 50-yard line, whatever it may be, whatever the  
5 analogy is chosen, that's not the test on a summary  
6 judgment motion. It's not is there enough evidence to  
7 just tip the scales to get to 51 percent. No.

8           There has to be evidence to show clearly and  
9 convincingly that punitive damages are warranted, and  
10 that clear and convincing standard has to apply across  
11 the board, including causation. You need to establish  
12 not only by clear and convincing evidence that the  
13 defendant had knowledge and willfully or deliberately  
14 failed to address it, you also have to prove that --  
15 clearly and convincingly that that type of conduct is  
16 what caused the harm. We don't get to that point.

17           Their air blast theory, complete speculation.  
18 No one is going to be able to come into this courtroom  
19 and say that they know that Dr. Khiabani was pushed to  
20 the right because of some wind blast. No one. The  
21 driver that was behind the bus, Ms. Bradley, they're  
22 going to talk about it. She can't say that. She's  
23 driving behind the bus. She doesn't know what  
24 Dr. Khiabani felt, what he saw, what he experienced.  
25 She can't testify to some invisible air blast coming

1 from the bus. They have a completely speculative  
2 theory. Even if the Court were to allow that theory to  
3 go to the jury on a compensatory claim, you can't allow  
4 it to go there on a punitive claim because it's not  
5 clear and convincing evidence.

6           The blind spot theory, their own experts  
7 testify that to understand the blind spot, you have to  
8 know how far the bike is away from the bus. As you --  
9 as -- as the Court can probably appreciate, if an  
10 object is 20 or 30 feet to your right, it doesn't  
11 matter where your A-pillar is or your door is. You're  
12 going to be able to see it. Similarly, if it's right  
13 next to your car, you're going to be able to see it  
14 because it's going to be tall enough to go over the  
15 window.

16           There's a specific point in time that their  
17 experts say, well, here's the blind spot, and they've  
18 come up with illustrations to show where's the blind  
19 spot. Their experts acknowledge that to know anything  
20 about the blind spot, you have to know where the  
21 cyclist is in relation to where the driver -- where the  
22 bus is, and you have to know where the driver was  
23 looking. If the driver is looking over here to the  
24 left in the couple of seconds of time that the cyclist  
25 is in the purported blind spot, the blind spot doesn't

1 matter. It obviously couldn't have caused the accident  
2 because he's looking over here. They have a very, very  
3 thin, we would say completely failed, case on the blind  
4 spot theory, but they certainly don't have the clear  
5 and convincing evidence that the failure to address the  
6 blind spot was the cause of this accident.

7           The proximity sensors suffer from the same  
8 failed analysis. Their expert, Mr. Flanagan, says,  
9 Well, the proximity sensor laterally is the same no  
10 matter where somebody is. He basically -- he described  
11 it as a rectangle. As you're going down the road, sort  
12 of a rectangle that catches everything. All right?

13           And what he admitted to in deposition is that  
14 let's say that rectangle is 6 feet wide, and so if  
15 there's something, a pedestrian, a bike, whatever, in  
16 that 6-foot span, then the blue light will go on or a  
17 noise will go off. However, once you're in that box,  
18 you don't -- the proximity sensor that he's imagining  
19 in his head wouldn't change at all. If a -- if a  
20 yellow light turned on as the cyclist came within  
21 6 feet, it would stay a yellow light if they got within  
22 1 foot.

23           So now, again, you have to establish, well,  
24 where was Dr. Khiabani in this box? No one knows. No  
25 one can testify to that. No one can testify when he

1 would have entered this imaginary proximity box and how  
2 much time Mr. Hubbard would have had to react to it.  
3 Pencil thin case that they have on compensatory. You  
4 can't extend that to allow a jury to consider punitive  
5 damages.

6 And finally on the S-1 Gard, no testing by  
7 plaintiffs' experts. Most of them haven't even seen an  
8 S-1 Gard. They've looked at some literature. No one's  
9 come in and testified that if the S-1 Gard had impacted  
10 Dr. Khiabani what the injuries or consequences would  
11 be. Would it still have rendered a fatal blow? Would  
12 he have been seriously injured? We don't know. All  
13 right? Maybe the -- do they tip the scales to get to a  
14 jury on a compensatory claim? Maybe. Do they have  
15 clear and convincing evidence, substantial admissible  
16 clear and convincing evidence that the failure to  
17 include an S-1 Gard would warrant punitive damages?  
18 Absolutely not.

19 So we'd like you to recall the very strict  
20 and exacting standard the plaintiffs have to meet to  
21 sustain a punitive damages claim, and we would submit  
22 that they simply have not done that. Thank you.

23 MR. KEMP: You know, Your Honor, the real  
24 reason that they file these motions for summary  
25 judgment is they want to see our best stuff, you know,

1 because they know we've got to come with our best stuff  
2 because we can't take a chance that our punitive claim  
3 will be dismissed. So that's the real reason they do  
4 it. And I'm going to show them some of our best stuff,  
5 not all of it, but some of it.

6 And I'd like to start out with how did this  
7 accident happen based on the witnesses? And I think  
8 the Court probably has a pretty good understanding of  
9 it, but I want to make sure you have a complete  
10 understanding of it because you need that. It's pretty  
11 obvious how the S-1 Gard would have saved Dr. Khiabani.  
12 But -- but the proximity sensor and the aerodynamic end  
13 of it needs -- meets -- I need to make sure you  
14 understand exactly how the accident happened.

15 Your Honor, what I'm setting up for you is a  
16 picture -- can you see the top of that, Your Honor?

17 THE COURT: I'm sorry?

18 MR. KEMP: Can you see the top of the table?

19 THE COURT: Yes, I can.

20 MR. KEMP: All right. What I have in my hand  
21 is a scale model of an MCI J4500 that was used in this  
22 case. This is the exact scale model, Your Honor, that  
23 the license is to whatever company this is.

24 So in any event, to orientate the Court, we  
25 have (inaudible).

1           THE COURT: Can you hear? Wait just a  
2 moment.

3           THE COURT RECORDER: I can, but this is low,  
4 so if you could keep it up.

5           MR. KEMP: If I can keep it up? Okay. Can  
6 you move the microphone just a bit.

7           Okay. All right. So, Your Honor, this would  
8 be where Red Rock is --

9           THE COURT: Yes.

10          MR. KEMP: -- where I'm pointing with my --  
11 is that picking -- okay.

12          Coming down here is Charleston. So what the  
13 testimony is, is --

14          THE COURT: For the record, you're pointing  
15 to the west.

16          MR. KEMP: Right. The testimony is, is that  
17 the bus came down Charleston and it followed  
18 Dr. Khiabani. Dr. Khiabani was on his bike. Let me  
19 get the bike. The bike traveling down Charleston. And  
20 the bus driver testifies that he did see Dr. Khiabani  
21 sometime during the -- the trip down Charleston. Okay?  
22 Dr. Khiabani turned, went into the bike lane here, and  
23 the bus was still following him.

24          Now, according to their expert, and I'll  
25 accept their expert's testimony on this point, they say

1 Dr. Khiabani was going about 17 miles per hour on his  
2 bike. We know the bus at this point was going about  
3 25. We don't know exactly how fast the bus was going  
4 at this point, but let's just assume it's 25. So the  
5 bus turns. Dr. Khiabani's in front of the bus.

6 Now, there's a dispute here. One of the fact  
7 witnesses say that the bus driver turned into this bus  
8 stop lane. The bus driver denies that. I don't know.  
9 I don't know what happened, but that there's going to  
10 be a factual dispute there. In any event, what we do  
11 know is that the bus came out into this lane, and at  
12 the time of the accident, the bus and the bike were in  
13 this exact position.

14 Now, this is a key fact on the proximity  
15 sensor case. The bus driver testified that although he  
16 saw Dr. Khiabani on Charleston, he did not see  
17 Dr. Khiabani again for the next 400 feet until  
18 immediately before the accident. Our contention is  
19 that that's because there's a blind spot on this bus.  
20 And since Dr. Khiabani's on his right side, that  
21 (microphone interference). But in any event, that's  
22 going to be the undisputed testimony, that he did not  
23 see him for 400 feet. And this is -- starts where  
24 Charleston is. I got it marked here 300, 250, 200,  
25 there's 150.

1           Now, let me just point out where the  
2 witnesses were that we're going to refer to. This is  
3 not a picture at the time of the accident. This is  
4 another picture that was blown up. So these cars are  
5 not intended to be the cars at the time of the  
6 accident. Erica Bradley was in this lane following the  
7 bus. She was with her husband. She was driving. The  
8 husband was playing with his phone. So he didn't see  
9 any of the accident. So Erica Bradley is a key  
10 witness. There were two people in the bus who were  
11 sitting in the front seat, Mr. Pears was in the far  
12 right seat, right here. And then --

13           MR. CHRISTIANSEN: Plants. Plants.

14           MR. KEMP: Plants. That's right. Plants was  
15 sitting behind the driver, so those two people  
16 testified. Pears is probably the key witness. There  
17 was a gardener right here, standing right here that had  
18 the -- probably the best view, unobstructed view  
19 because he was closest. And he testified as well.

20           When we show you the video, which I'm going  
21 to show you in a minute, there were two motorcyclists  
22 that ran across the street. The only relevance for --  
23 for today's testimony is that they say that right  
24 before they went into the intersection, this is the  
25 intersection, the bus and bike were even, and



1 Dr. Khiabani was in the bike lane, the bus was in the  
2 far right travel lane. As Joel indicated or someone  
3 indicated, they did not move over to the left lane,  
4 stayed in the far right lane. And that's pretty much  
5 how the accident happened, Your Honor.

6 So with that, with the bus and the bike being  
7 even, let's start out with -- can I just put it -- Your  
8 Honor, there is remarkably little dispute about the  
9 facts of the accident, and the reason for that is that  
10 there was a video taken from this vantage point by Red  
11 Rock. And I'm going to show you video in a second and  
12 some imagery taken from the video.

13 Okay. Can we -- can we just have -- this is  
14 just a part of video. Can we have the video, please.

15 (Video clip was played.)

16 MR. KEMP: That's the bus coming through.  
17 Your Honor, you see he starts moving to the left. Now,  
18 let me break down the video a little bit.

19 First, before I do that, there's been some  
20 allegation made at some point that the (inaudible) we  
21 had something to do with it. What I prepared is the  
22 wind before the accident, the wind at the moment of the  
23 accident, and the wind after the accident so the Court  
24 can see for itself that at the exact time of the  
25 accident, there's relatively little wind. See, this is

1 before, after. You see during the accident where the  
2 bus comes in, there's virtually no winds, Your Honor.  
3 We'll get to that in another motion, but I thought this  
4 was a good place to point that out.

5 And next one, Shane.

6 This, if you take a look, because of the  
7 nature of the Red Rock video, because of its capture  
8 speed, it's not a high-resolution video. It's  
9 relatively slow resolution. So because of that, you  
10 don't see Dr. Khiabani's image clearly. So what you're  
11 seeing there is you see the circle, and then you see  
12 that kind of -- that black spot in front of the tire,  
13 that's Dr. Khiabani.

14 Okay. Let's see the next one. Can I see the  
15 next one? Next one.

16 He's on the right-hand side of the bus. Now,  
17 that's important for a couple of reasons, Your Honor.  
18 I told you that this was -- this was what they observed  
19 at the time of the accident. This is confirming that.  
20 They've -- they've continued on slightly into the  
21 intersection.

22 The reason it's important is it proves that  
23 Dr. Khiabani at a critical time was directly in the  
24 right-side blind spot of this bus. And I'm going to  
25 show you some proximity sensors on other buses in a

1 minute, but that's the exact area where a right-side  
2 proximity sensor would have been installed.

3           Now, we have three design defects. And I --  
4 I would point out that they have not challenged -- we  
5 have failure to warn theory, too, that they should have  
6 warned about the aerodynamics. That has not been  
7 challenged to the summary judgment motion. You know,  
8 they haven't -- they haven't asked for a summary  
9 judgment on that issue. I don't know why, but -- so  
10 I'm not going to talk about it other than to point out  
11 that we do have a failure to warn theory that has not  
12 been challenged.

13           These are the three design defects that we're  
14 alleging in this case. First, aerodynamic air blast.  
15 Second, the right side proximity sensor. And third,  
16 the rear tire protective barrier, which one type of  
17 rear tire protective barrier is an S-1 Gard. I'm going  
18 to show you other types. They could have designed  
19 their own type. I don't want to get overly focused on  
20 the S-1 Gard because that -- the reason we -- we like  
21 that one so -- well, you'll -- you'll understand when I  
22 show you the testimony (inaudible).

23           Next one, Shane.

24           This is a video I want to show you that shows  
25 what happens in terms of air blast when a big moving

1 vehicle, in this case it's a truck, passes a bicyclist.  
2 This is an actual video, Your Honor. And the reason  
3 it's important, I think, is because when we took Erica  
4 Bradley's deposition -- and, again, Erica Bradley was  
5 the person in the car behind. When we took Erica  
6 Bradley's deposition, we showed her this video, and she  
7 testified that this was substantially similar to what  
8 she saw. Substantially similar.

9 Go ahead, Shane.

10 (Video clip was played.)

11 MR. KEMP: Is that when the large object, in  
12 this case the truck, comes up upon the bicyclist, it  
13 causes a wobble. You saw the wobble. And then it went  
14 out of control.

15 Now, let's go to the next slide.

16 This is Dr. Kato's paper. It came out in  
17 1981. In 1981, again, the bus was made in 2008. So it  
18 came out 27 years before the bus in this case was made.  
19 This is admissible evidence because it's a learned  
20 treatise. It was published in the American Engineering  
21 Society -- SAE, the Society of Automotive Engineers.  
22 And this article explored the reasons why a bicycle is  
23 caused to wobble by a passing vehicle, the aerodynamic  
24 effects. And what Dr. Kato did in this case is he  
25 built a wind tunnel and he built a model bus and he put

1 it through the wind tunnel. And he had a bicycle  
2 there, and he measured exactly the airflow when a  
3 bicycle comes up to a -- or, excuse me, a bus comes up  
4 to a bicycle. And most importantly for this case, he  
5 measured the airflow in the exact configuration that we  
6 have here.

7 Can I have the next one, Shane?

8 What he found is that you have a peak force,  
9 peak force of the air blast right when the front of the  
10 vehicle is even with the rear of the bicycle. So now  
11 we -- we have your air blast comes out and it causes  
12 the bicycle -- it pushes the bicycle away. The  
13 bicycle's natural reaction is going to be turn left  
14 into it to stay upright. And then there's a second  
15 peak that occurs when it becomes even with the bicycle  
16 that now pulls the bicycle into the bus. So push away,  
17 pull back right at the -- at the end of the bike.

18 Next one, Shane.

19 These were the conclusions. The force acting  
20 on a stationary body, that's the air blast, it moves in  
21 a direction away from the vehicle. The bus pushes --  
22 as the bus goes, the air blast comes out, and -- and --  
23 right when the passing begins and then it pulls it  
24 back. And the closer the bicycle is, the more -- more  
25 force you see. So -- so as you can see, the -- the

1 bike lane I think is about 6 feet. The testimony is  
2 all over the place. I'll admit that, Your Honor.  
3 That, you know, the -- Mrs. Bradley thinks they're  
4 2 feet away, 3 feet away. The gardener thinks they're  
5 1 feet away, 2 feet away. The accident reconstruction  
6 experts, they found a mark right here on the side of  
7 the bus that was made by the handlebar of the bike.  
8 And so based on that, they're -- some of them are  
9 saying that it was 3 or 4 feet away, but I think it's  
10 clear that whatever it was -- we -- we can play the  
11 video again -- whatever it was, it was close enough  
12 to -- to have an impact.

13 Let me have the next one, Shane.

14 Okay. We started with Dr. Kato. This is  
15 Dr. Cooper's article. Dr. Cooper's an important person  
16 because they hired Dr. Cooper six years later to do  
17 these testings. So Dr. Cooper comes out with this  
18 article, and what he finds is that when you simply  
19 round the corners of these buses, in other words,  
20 rather than having moving breadboxes which is, in  
21 effect, what we have today, when you round the corner  
22 of the bus and when you round the front of the bus --  
23 and I'm going to show you some pictures from their wind  
24 tunnel test in a minute -- he finds that you can  
25 greatly reduce the air blast, which is called drag

1 coefficient. Drag coefficient is the term we hear or  
2 coefficient of drag. All right.

3 Next one.

4 And he says that the drag reducing potential  
5 of the edge rounding is better for a bus because it's a  
6 simple body than it is for a truck or a trailer. And  
7 the reason for that is because a truck, for example, it  
8 goes up, down, it comes over here. There's all kinds  
9 of things happening with a truck. It's hard to do an  
10 efficient aerodynamic science on a truck. It's hard.  
11 Harder I should say.

12 And then he also said that when you -- when  
13 you do do it right, when you do the aerodynamic design  
14 so you get the edge flow along the side of the bus,  
15 that you can get a constant value, which means you can  
16 decrease it at a constant rate by rounding the front.

17 And this may sound like Greek, Your Honor,  
18 but it's going to make sense to you in two seconds.

19 Next one.

20 So what they did, these people who say they  
21 don't know anything about aerodynamics, this is a  
22 surprising subject to them, they went out and hired  
23 Dr. Cooper in 1993. This is the wind tunnel test  
24 report that they produced, Motor Coach Industries'  
25 Engineering Test Report. And I emphasize that because

1 they actually filed a motion in limine saying they  
2 didn't know anything about this report. It's not one  
3 of their business records. It shouldn't be admitted.  
4 We'll get to that on Monday or Tuesday. But right  
5 there on the title, Motor Coach Industries' -- look at  
6 the date, August 1993. Seven years before the bus  
7 series was started. The J4500 started in 2000. A full  
8 15 years before the bus in this case was made.

9           So what did they do here? Like Dr. Sato did,  
10 they put buses -- they made model buses. They didn't  
11 put the whole bus. They made one full-size bus. They  
12 put it in a wind tunnel and they -- they tried  
13 different shapes. They designed different shapes for  
14 the front of the buses so they could solve the  
15 aerodynamic problem.

16           And what was the problem that they wanted to  
17 solve and counsel says they didn't know anything about?  
18 They wanted to solve the problem of the aerodynamic  
19 side force which was important to handling because they  
20 provide a disturbance that deflects a bus from its  
21 paths in the presence of side winds. That's the whole  
22 reason they did this, Your Honor. The air blasts.  
23 Okay?

24           Next one, please.

25           Okay. This just shows them, you know, in the



1 wind tunnel. They put all these little model buses in  
2 the wind tunnel. What they did is they made different  
3 bus fronts, different bus backs, and they changed it.  
4 And they did -- so this is pretty sophisticated testing  
5 back in 1993. They did this so they could come up with  
6 the best design for the front of the bus to reduce the  
7 air blast, to reduce the drag coefficient.

8           Next one, Shane.

9           Okay. This is what we wound up with. The  
10 one on the left is the -- their standard bus at the  
11 time. Remember, this was 1993. So this was seven  
12 years before the J4500. So their standard bus at the  
13 time was the CJ3. That was the front of the CJ3 they  
14 put in the wind tunnel.

15           The one on the right is what's called MCI,  
16 Motor Coach Industries, Proposal No. 1. That is the  
17 one that they had Dr. Cooper design to be more  
18 aerodynamically efficient. And if the Court looks at  
19 it, you see in the front of the one on the right, you  
20 see how it's more rounded at the bottom there? If you  
21 see how it tapers back more on the top. That's all  
22 they had to do to make the bus in this case more  
23 aerodynamically efficient. That's all they had to do,  
24 and they actually did it. They made the safer  
25 alternative part back in 1993.

1           And then they tested it. What did they find?  
2 Here's what they found. They found that the new MCI,  
3 the alternative I'm talking about, has a .34  
4 coefficient of drag, air blast, compared to their  
5 current model, the CJ3, which was .6. Half as much.  
6 Half as much air blast they could have done just by  
7 changing the front of the bus. And they call it the  
8 best aerodynamic configuration for a new bus. That's  
9 what they called it.

10           And the reason they were doing this at this  
11 time is they knew they were getting ready to design the  
12 J4500. So they were looking for the best aerodynamic  
13 front.

14           Next one, Shane.

15           Okay. What do all these numbers mean? This  
16 is a document that Tesla produced. Tesla's coming out  
17 with a aerodynamically efficient truck, electric truck.  
18 So that's a picture of the Tesla truck on the left. So  
19 Tesla says, oh, look at what a great vehicle we have.  
20 We can get a .63 drag coefficient, which is better than  
21 a Bugatti. The Bugatti is the most expensive sports  
22 car on the market today. More expensive than a  
23 Ferrari, a Maserati. Bugatti -- I don't know if you  
24 saw that James Bond movie *Spectre* where they had the  
25 electric Bugattis chasing each other down the streets

1 of Rome. That was a Bugatti.

2 Okay. A Bugatti has a drag coefficient of  
3 .38. The most expensive sports car in the world is  
4 .38. Their CJ3, which counsel said they modeled the  
5 J4500 on, is .60. The alternative they could have made  
6 would have been .34. Better than a Bugatti. They  
7 could have made a bus better than a Bugatti just by  
8 using the safer aerodynamic front. Didn't do it, Your  
9 Honor.

10 Next one, please. This is Mr. Couch's  
11 testimony. Mr. Couch was the head designer on the  
12 J4500. He was the vice president of MCI design. So I  
13 asked him, Why are you trying to improve the drag  
14 coefficients? And he said two reasons. Two reasons.  
15 One, fuel economy. The better drag coefficient you  
16 have, the -- the less gas you have to spend because,  
17 you know, you're just cutting through air. You're not  
18 fighting air as much. And then the other one was they  
19 didn't want to have the air blasts create dust. They  
20 wanted to reduce -- this is his testimony, was one of  
21 the reasons to attempt to reduce air displacement that  
22 a bystander or bicycle would see, well, that would be  
23 the effect. They knew what they were doing, Your  
24 Honor. They had specific knowledge that reducing the  
25 air blast would reduce the air displacement that a

1 bystander or bicyclist would see.

2           And, again, this is the head designer. This  
3 isn't some -- some person that's in the parts  
4 department. We're going to get to him in a minute.  
5 But this is the head designer of the J4500 saying they  
6 were trying to reduce the drag coefficient to -- to --  
7 to reduce the air displacement that the bicyclists  
8 would see.

9           Okay. Next one.

10           This is Mr. Hubbard's -- from Mr. Hubbard's  
11 deposition because -- and, again, this really is more  
12 on the failure to warn case. We asked Mr. Hubbard,  
13 Well, if you knew that there was an air blast -- and no  
14 one knows that these buses cause air blast. You know,  
15 counsel comes up now and says, oh, everybody knows  
16 buses cause air blast. Well, we took the deposition of  
17 their primary salesman who's been selling this bus for  
18 20 years, Mr. Gerber, and he testified he didn't know  
19 about the air blast. He was the one who sold the bus  
20 to the predecessor in interest -- well, this actual  
21 bus, he sold this bus. He didn't know about the air  
22 blast. We asked Mr. Bartlett, Bartlett's quotation, he  
23 was the safety director that trained Mr. Hubbard,  
24 What -- what do you know about air blast? Oh, I've  
25 never heard about air blasts. He didn't know anything

1 about air blasts. We asked Mr. Hubbard, the bus  
2 driver, if he knew anything about the air blast. He  
3 didn't know anything about the air blasts. You know,  
4 clearly MCI did because we've already gone through the  
5 wind tunnel test.

6 So we asked him, If you got a bulletin from  
7 the bus manufacturer that our bus creates a 10-foot air  
8 blast on the front -- and, again, the reason the bus  
9 creates an air blast is when it's going through the  
10 air, the air has to go somewhere. It can't go through  
11 the bus, so it comes out to the side, and that's where  
12 it hits the bicyclist.

13 If you knew that this happened, would you  
14 take that into account? He says yes, he would have  
15 followed a directive from the manufacturer.

16 Next one, please.

17 And the reason is because, you know, he would  
18 have taken into account as part of his creating what he  
19 told him.

20 Next one.

21 This is Erica Bradley. Okay? Again, she is  
22 the one right behind the bus, okay, driving. Now,  
23 counsel says, oh, we -- we can't -- can't give any  
24 credence to this testimony because air is invisible,  
25 you know. Since -- since we didn't have pink smoke

1 coming out of the bus, we can't let any testimony come  
2 in on what the cause was. We asked her -- again, we  
3 showed her the video, the one you saw of the truck and  
4 the motorcyclists -- Do you know what made the bicycle  
5 swerve?

6 I don't know.

7 Could it have been the air blast?

8 She goes, Possible.

9 Next one, please.

10 And so there's two operating theories here,  
11 either it's an air blast or there was something wrong  
12 with Dr. Khiabani. The coroner's office tested his  
13 electrolytes. He wasn't dehydrated. The defendants  
14 don't have any testimony that there's any other cause  
15 other than the air blast.

16 So I say:

17 "Anything you can think of (inaudible)  
18 here today which makes more sense to you?

19 "After discussing wind drafts, that could  
20 make more sense.

21 She's the eyewitness right behind. The  
22 eyewitness right behind.

23 Next one, please.

24 This is Mr. Pears. Okay? He is in the  
25 right-hand front seat. He testifies that the

1 displacement of the air sucked the doctor into the bus.  
2 It's not the doctor's fault. So I have two  
3 eyewitnesses that say that the air blast contributed to  
4 this accident.

5 Next one, please.

6 Let's talk about right-side proximity  
7 sensors.

8 Go ahead. Next one, please.

9 This is Dr. -- excuse me, the PMK's  
10 deposition again. Okay? This is where he admits that  
11 there is a right-side blind spot in this particular  
12 bus. And, you know, at the beginning of the case, they  
13 were saying, oh, there is no right-side blind spot.  
14 You know, there's no blind spot in this bus. We  
15 actually took two or three depositions where they tried  
16 to claim this.

17 Finally, at least Mr. -- Mr. (inaudible) was  
18 honest. He said, Yes, there is a right-side blind  
19 spot. And he just says it's because the A-pillar --  
20 the A-pillar is the pillar here. They call them both  
21 A-pillars. I don't know why. But that's the pillar  
22 here the window looks out to. So he claims that  
23 there's a blind spot there.

24 As we see, there's a much bigger blind spot  
25 because of the angle of the driver to the bus. And

1 what we will have is we've had people -- I prefer not  
2 to take it in this motion. We've had people set up a  
3 laser apparatus, and so we can show the jury -- we will  
4 show the jury exactly how much the bus driver -- the  
5 bus driver would see of a bicyclist at any particular  
6 spot, moving it 2 feet away, 3 feet away, behind,  
7 forward. They're going to see exactly how big of a  
8 blind spot there is on this bus.

9 Defense experts, let's just use their --  
10 their -- they conceded it's about 4 feet. It's a lot  
11 bigger than that, but let's just use 4 feet for now.

12 Okay. Next one, please.

13 This is Mary Witherell's deposition. She was  
14 the safety analyst in Reno for the bus company. She  
15 testified with regards to the blind spot on the J4500,  
16 that's the bus we're talking about here, the closer you  
17 get to a bicycle when you're overtaking it, the more of  
18 a problem the blind spot becomes. As you are  
19 overtaking it, there will be a spot where you have to  
20 adjust and look.

21 So this is a -- this is a bus driver  
22 testifying not only is there a blind spot, it's a blind  
23 spot in the specific area that we're having a problem  
24 here. And, again, like I already said, for 400 feet,  
25 Mr. Hubbard testified he did not see Dr. Khiabani.



1           Next one.

2           Okay. She continues on to explain it more.  
3 The closer you get, the more of a blind spot. You have  
4 to pay more attention. It's a bigger problem. So when  
5 you're 400 feet, 350, 250, it's hard to determine how  
6 close you are to the bicycle. I mean, they're driving  
7 a big bus. It's right next to a bicycle, the driver  
8 can't tell if he's a foot away, 2 feet away, 3 feet  
9 away, or he has difficulty doing so. But especially  
10 where you have a blind spot there.

11           Next one.

12           All right. They say, Judge, Judge, you can't  
13 render punitive damages against us because we didn't  
14 know that there were proximity sensors available. We  
15 didn't know that. You know, all these passenger cars  
16 zip around, we didn't know that. This is a blind spot  
17 detector, one of the leading ones made by a company  
18 called Eaton, E-a-t-o-n. It's called the VORAD.

19           You know, as counsel indicated already that  
20 they make a lot of different kinds of proximity  
21 sensors. They make front proximity sensors, side  
22 proximity sensors, collision avoidance sensors. What  
23 we're talking about is what we're calling VOR -- what  
24 VORAD -- Eaton calls the VORAD blind spot. And take a  
25 look at the date of this.

1           Back -- back up, Shane.

2           The date is July 2005. July 2005 Eaton is  
3 out there selling this stand-alone proximity sensor.  
4 This is two or three years before the bus in this case  
5 is made. And this is the Eaton product literature.  
6 They're putting it on a bus. Gee. And so they say  
7 this is what we want you to do. It gives you an  
8 audible visual alert, and it -- it warns the driver if  
9 there's obstacles in the blind spot. And the blind  
10 spot we're concerned with is the right-side blind spot.  
11 This is product literature that was out there in 2005,  
12 Your Honor. And counsel says they didn't know about  
13 VORAD.

14           This is -- this is from the installation  
15 guide. This is where you put the VORAD. You see where  
16 Sensor 2 is? It's right here above the rear tire of  
17 the bus. Right where, in this particular case, it  
18 would have done the most good because the bicyclist was  
19 riding on the right side of the bus. So this is why  
20 VORAD recommended to them -- Eaton, excuse me.

21           Next one.

22           This is just a picture of the bus, kind of  
23 gives you an idea how this thing works. It shoots  
24 radar out and if it -- if anything, the radar detects  
25 any type of metal, like a bicycle, or in this case

1 Dr. Khiabani was wearing a lycra shirt which would have  
2 also triggered the sensor. But in any event, it -- it  
3 bounces back and then it sounds the alert.

4 Next one, please.

5 This is an advertisement that Eaton put out  
6 in September 2005 where they're advertising their  
7 product to be cost-effective radar-based object  
8 detection system for buses. They're out there trying  
9 to sell the product. They're advertising. Counsel  
10 says they didn't know about the blind spot detection.  
11 Really?

12 Next one.

13 This is a publication from *Bus & Motorcoach*  
14 *News*. This is the No. 1 publication of the bus  
15 industry. MCI subscribes to this, Your Honor. They  
16 don't just get one edition of it. I believe they get  
17 20, 25. But in any event, this is the bible for the  
18 motor coach industry. October 15, 2007.

19 Why is this important? This is at the time  
20 frame the bus in this case was made. This is a  
21 competitor bus. This is a competitor bus made by a  
22 company called BCI. It's an Australian company. I  
23 can't remember off the top of my head what BCI stands  
24 for. It's a Falcon 45. 45 means it's 45-foot long.  
25 And this is what they say.

1           "The company also plans to zero in more on  
2 safety and will offer as standard equipment the Eaton  
3 VORAD anticollision radar warning system. It helps"  
4 keep -- "helps drivers keep a safe distance from  
5 bicyclists. It warns them of things on the side of  
6 it."

7           So this company at the exact same time this  
8 bus was made put the Eaton system in as a standard  
9 feature. Now, they say, Oh, gosh, Judge, we didn't  
10 know about the Eaton. This was debuted at the annual  
11 industry trade show that they had dozens of people at.  
12 So you're telling me that they're really going to try  
13 to convince the jury that they're at a trade show with  
14 a brand-new bus, and they didn't -- they didn't check  
15 it out? We don't even need that, Your Honor. We're  
16 sure there's more testimony on that.

17           Next. This is yet another type of blind  
18 spot. You know, we've talked about Eaton. There was a  
19 paper done by Fang who -- I can't remember -- he was a  
20 Ford engineer we cited in the opposition. But he says  
21 that there's five different kinds of blind spots that  
22 could be used. He took Eaton and -- and tested it, and  
23 he tested the other four. And he was trying to  
24 evaluate which was the best. He published that in the  
25 SAE article, too, back in 2005.

1 But in any event, this in the *Bus &*  
2 *Motorcoach* magazine is different. This is the Voyager.  
3 And when it comes to buses, the term "blind spot" seems  
4 to be a bit of an understatement. I think Dr. Khiabani  
5 would agree with that. But in any event, this is  
6 another side system that was offered prior to the time  
7 this bus was made that they could have used for the bus  
8 had they wanted to.

9 Next.

10 This is the Mercedes bus. Daimler is  
11 technically the manufacturer. I call it the Mercedes  
12 bus. It's really Daimler makes Mercedes. The Mercedes  
13 bus, so this is a big double-decker. And they have two  
14 kinds of proximity sensors. They have the side guard  
15 and the front collision automatic braking.

16 Yeah. That's it right there.

17 See, they employed the radar -- same kind of  
18 thing as the -- the radars, the VORAD system. So it's  
19 just another bus company using this.

20 When you add them all up, it will be Volvo,  
21 BCI, Mercedes, and now, guess who's -- guess who's  
22 putting blind -- blind spot detectors in now, Your  
23 Honor? Hard to imagine.

24 Next, please.

25 It is New Flyer. This is the New Flyer bus.

1 And, again, this is MCI's parent. So the parent can  
2 use blind spot detectors because safety is a higher  
3 priority for the parent, but apparently not to MCI.

4 Next, please.

5 So, again, I showed you this already. The  
6 parent recognizes that you're going to be right next to  
7 bicyclists. So it makes a ton of sense to the parent.  
8 You know, to defense counsel, it doesn't make any  
9 sense. Makes a ton of sense to the parent to use a  
10 blind spot detector to reduce these type of accidents.  
11 Now, New Flyer kind of woke up on this a little late.  
12 They should have been doing it ten years earlier, but  
13 at least the parent is doing something.

14 Now, counsel says, Judge, you cannot award  
15 punitive damages against us because we just didn't know  
16 about that. We're the biggest bus manufacturer in the  
17 world, and we just didn't know about blind spot  
18 detectors. This is the testimony of the PMK who was  
19 produced on the subject of blind spot detectors. This  
20 is binding them. They can't run away from this.

21 "Do you know there's an aftermarket kit  
22 for proximity sensors which would serve as some  
23 sort of warning for side detections?

24 "I'm sure there is."

25 He knew about it. Of course they knew about

1 it, you know. They're the biggest bus company in North  
2 America.

3 Next one, please. Again, this is  
4 Mr. Hubbard. We're asking him -- Mr. Hubbard would be  
5 the bus driver:

6 "If we had had a proximity sensor in there  
7 and you'd seen a red light in your mirror" --  
8 that's the way my Mercedes and you have a Mercedes,  
9 too, right, Ryan?

10 But anyway, that's the way the Mercedes one  
11 works. It's kind of a flashing red light in the  
12 mirror. But he says if he had been alerted by a blind  
13 spot detector, he would have taken evasive action to  
14 move from the bike.

15 Next one.

16 And if he'd have given some sort of warning  
17 at the 50-foot mark or the 100-foot mark, he would have  
18 taken -- remember you saw the video where he started  
19 taking evasive action here? He would have taken  
20 evasive action here. And why is that important?  
21 Because the testimony is going to be that the right or  
22 the rear tire barely caught Dr. Khiabani's leg. If he  
23 had moved over 6 inches, all the experts are going to  
24 agree this accident wouldn't have happened. So if he  
25 had taken evasive action earlier because warned by a

1 blind spot, we wouldn't have had an accident.

2 Next one, please.

3 All right. Let's talk about protective  
4 barriers, another thing they claim they don't know  
5 anything about. Protective barriers, if Your Honor has  
6 ever seen a movie, a locomotive in the 1880s or 1860s,  
7 right in the front, they have that metal device that's  
8 called the cow catcher.

9 THE COURT: I've seen it.

10 MR. KEMP: That's a protective barrier. All  
11 right? Basically that's what we have now. We have a  
12 cow catcher for buses. So let's -- let's take a look  
13 at a couple of them.

14 Next one, Shane. This is the PMK again,  
15 Mr. Hoogestraat. You know (inaudible). He recognizes  
16 the scenario that -- that, you know, a bus can run over  
17 bicyclists.

18 Next.

19 Knew about it after 2000.

20 Next.

21 So he knows of the harm that we need to  
22 protect against. So I'm talking about three types of  
23 protective barriers now. They're trying to -- to pin  
24 the case down to the S-1 Gard. That's not our case.  
25 Our case is protective barriers of which the S-1 Gard



1 is one potential example.

2 Let's start off with spats because spats is  
3 easy to understand. This is the testimony of  
4 Mr. Hoogestraat.

5 "Do you know what spats are?"

6 Do we have the spat picture here, Shane?

7 This is a bus that's actually used here in  
8 Clark County. It's a CAT bus, Your Honor. You see how  
9 they have a protective barrier that's designed to  
10 protect people from being exposed to the tire? That  
11 thing is -- that's bolted on the bus. That's called a  
12 spat. So that's one type of protective barrier.

13 Now, so we asked Mr. Hoogestraat:

14 "Well, you know, have you ever heard of  
15 protective barriers?"

16 He goes:

17 "Yes, I have heard of spats.

18 "That would have precluded units from  
19 coming into contact with the tires."

20 He agrees. Then he says, in this bus, if you  
21 look at this bus, there is no protective barrier here  
22 between the tires and the outside. None whatsoever.  
23 They didn't put a spat on. As we'll see, they could  
24 have got S-1 Gards for free, and they didn't want to do  
25 that.

1 But in any event, this is where he's  
2 admitting to knowing about protective barriers and also  
3 admitted to knowing that the tires were exposed. So  
4 they knew about the precise risk in this case. This is  
5 PMK testimony, Your Honor. It's binding on the  
6 company. Again, this is the -- the spat that's used on  
7 the CAT bus.

8 Next, please. Next, please.

9 Okay. Now we're getting into another type of  
10 protective barrier, the one we probably spent more time  
11 on in the case. And I'll show you why we spent more  
12 time on it. This is an actual S-1 Gard, Your Honor.  
13 It's really not that heavy. You know, I find it useful  
14 for a number of things. But in any event, what they do  
15 is the rear tire of the bus is -- is here. So they  
16 just mount it on the bus like this. And the idea is  
17 that when someone's here, acting like a cow catcher, it  
18 moves it out. So there's a picture of it right there.

19 Now, this is product literature. Remember,  
20 counsel conceded that --

21 THE COURT: Where is the picture?

22 MR. KEMP: Right there. That's a photograph  
23 of the S-1 Gard.

24 THE COURT: Okay. Thank you.

25 MR. KEMP: It's actually the same one I got

1 here.

2 This is their product literature. This is  
3 kind of dated. They say it was installed on 30,000  
4 buses. It's been installed on 50,000 buses as we  
5 speak. 50,000 buses since 1993.

6 Next, please.

7 Okay. This is how it works. This is a video  
8 that the S-1 Gard company produced to show exactly how  
9 it works.

10 Go ahead, Shane. Okay. Stop.

11 That's where Dr. Khiabani was run over. He  
12 was run over by the rear -- this bus only has one rear  
13 tire. This one has two. He was run over by the front  
14 rear tire. So if the S-1 Gard here pushes him out of  
15 the way, it wouldn't have happened and this case  
16 doesn't happen.

17 Next one, please.

18 I think this is just doing it a little slower  
19 so Your Honor can clearly see how the S-1 Gard's  
20 working.

21 Okay. Next one.

22 This is a bicycle that's hit by a bus and  
23 falling under the wheel. Okay? That's what -- that's  
24 what it simulates. The exact same thing we have here.

25 Next one.

1           This is a little slower just so you can see  
2 clearly how the -- the -- the S-1 Gard feature's  
3 working. Pretty simple. You know, cow catchers were  
4 simple too. The railroads used them.

5           The next one.

6           All right. This is their brochure where they  
7 talk about an accident that happened in Los Angeles in  
8 April of 2003. And this is five years before the bus  
9 in this case was made. You see this guy. He went  
10 under the rear tires of a bicycle -- on a bicycle just  
11 like Dr. Khiabani did and he survived. Not only did he  
12 survive, we took his deposition last month. We went  
13 down to L.A., found this guy, took his deposition. And  
14 we said, Well, Mr. Parada what happened with you? Were  
15 you saved by the S-1 Gard? And showed him the product  
16 literature and this picture. He describes how he was  
17 saved by the S-1 Gard. A testimonial.

18           Next one, please.

19           These are the bus companies, manufacturers  
20 that use S-1 Gards. New Flyer, again, that's the  
21 parent of MCI, they use S-1 Gards. Daimler buses,  
22 that's Mercedes, they use S-1 Gards. Volvo buses they  
23 use S-1 Gards. There's only one company that doesn't  
24 use S-1 Gards, MCI. They've given no reason  
25 whatsoever. Cost is not an objective. And this says

1 "as well as other major theme parks and international  
2 shuttles." They're used down in Disney World. All the  
3 buses down in Disney World have S-1 Gards. The Santa  
4 Monica big bus that you see running up and down Santa  
5 Monica Boulevard, that has an S-1 Gard. Okay?  
6 Everybody has an S-1 Gard except MCI. And counsel  
7 wants to tell you that it's because they didn't know  
8 about it. 50,000 buses worldwide and they don't know  
9 about it?

10 Next one.

11 This is a letter written in 1998 by a New  
12 Flyer engineer named Brad Ellis where he is talking  
13 about S-1 Gards. You remember this is back when S-1  
14 Gards --

15 THE COURT: It looks like it says 2009.

16 MR. KEMP: 2008.

17 THE COURT: Excuse me, 2008?

18 MR. KEMP: Did I say -- yeah.

19 THE COURT: 1998.

20 MR. KEMP: Okay.

21 THE COURT: 2008.

22 MR. KEMP: He takes the position, and this  
23 is -- this is at the time period the manufacturer of  
24 the bus in this case. He takes the position on behalf  
25 of New Flyer engineering that the installation of the

1 S-1 Gard does not compromise the integrity or the  
2 chassis of the coach. In other words, this thing  
3 works. And he uses the term "coach." You know, they  
4 try to say, oh, we're a coach. We're not a bus. He  
5 uses the term "coach" twice in this one.

6 Next one.

7 This is his testimony -- this is New Flyer's  
8 engineer. It's his testimony, and the bottom I think  
9 is the key part.

10 "QUESTION: And would that be a good  
11 safety feature for buses in general?

12 "ANSWER: Again, it is my personal  
13 opinion. I would say yes."

14 This is an engineer from the parent company  
15 that uses the S-1 Gard saying that all buses should  
16 have them. You know, I don't need an expert in this  
17 case, Your Honor. I have their people.

18 Next one.

19 This is Mr. Barron's deposition. Mr. Barron  
20 is the inventer of the S-1 Gard. Actually, he's kind  
21 of an interesting person. He lives in Quincy Jones's  
22 former house in L.A. Mr. Pepperman got to go meet him  
23 and enjoyed the experience.

24 But in any event, this is what he says:

25 "Do you believe that you have offered that

1       you met with representatives or subsidiaries of  
2       Motor Coach Industries and offered to sell the  
3       S-1 Gard to the manufacturer?

4               "Not sell. At that time, (inaudible) I  
5       was willing to do is safety is hard to sell  
6       (inaudible) safety is hard to sell. People  
7       don't want to pay for safety."

8               So -- so the inventor of the S-1 Gard, the  
9       president of the company says, I wanted to let them --  
10      give them parts at no cost to get them on the bus.  
11      They didn't have to pay for these S-1 Gards. He was  
12      going to give MCI S-1 Gards at no cost to put them on  
13      the bus because he wanted to build an industry standard  
14      that would promote safety.

15              This testimony is hard to believe, Your  
16      Honor, that at no cost, at no cost, they refused.

17              Next one, please.

18              They didn't even want to evaluate it. They  
19      were going to give it to them for free, and they didn't  
20      even want to evaluate it. This was back in the late  
21      '90s, eight years before the bus in this case was made.  
22      I can't imagine a greater case of conscious disregard.  
23      And I've had, you know, some punitive damages  
24      successes. I cannot imagine a greater case of  
25      conscious disregard than them being offered the safer

1 alternative product for free. For free. And they  
2 won't even test it. They won't even test it. And  
3 that's the testimony, Your Honor.

4           So in any event, these the three design  
5 defects in the case. And they say, ah, there's no  
6 evidence that we knew about any of them. On the  
7 aerodynamics, I showed you the evidence. Not only did  
8 they know about it, but they tested it and came up with  
9 their own alternative product specifically to stop the  
10 air blast.

11           And the right-side proximity sensor, you saw  
12 the ad from Eaton in 2005. You saw Mr. Hoogestraat's  
13 testimony that they knew about proximity sensors. They  
14 knew about these things, Your Honor. They just didn't  
15 want to use them. And the rear protective barrier,  
16 they knew about spats. They knew the tires were wide  
17 open. They were offered the S-1 Gards for free. They  
18 didn't do anything, Your Honor. And that's conscious  
19 disregard. That's why this is a punitive case.

20           And for -- for those reasons, we think the  
21 punitive damages claim is well pled and should be  
22 presented to the jury.

23           THE COURT: Thank you.

24           We're going to take a five- to ten-minute  
25 comfort break. Okay?



1           THE MARSHAL: All rise. Court is in recess.  
2 Ten minutes.

3                       (Whereupon a short recess was taken.)

4           MR. RUSSELL: Thank you, Your Honor. Your  
5 Honor, I'll try to be brief.

6           The vast majority of Mr. Kemp's argument was,  
7 of course, theory. It was, of course, argument. We  
8 are here about evidence. He says we wanted to see his  
9 best stuff. We knew his best stuff. We knew his  
10 theories. We knew the inadmissible and misleading  
11 evidence he was going to try to use. We've talked  
12 about some of those things. But this is why I didn't  
13 want to conflate issues of punitive damages with a  
14 compensatory claim because that's just what happened.

15           A lot -- you heard a lot of argument about  
16 what might be sufficient to get past a basic  
17 compensatory claim. Might be. Certainly not a  
18 punitive damages claim. Most of what you just heard  
19 had nothing to do with MCI's knowledge of certain  
20 risks. And that's the important question before the  
21 Court right now.

22           I do want to point out some things that were  
23 just -- they were -- they were misconstrued or  
24 inaccurate or misleading. And I don't want to get  
25 overly engaged too intricately in some factual issues

1 that have nothing to do with MCI's knowledge. But I  
2 think it's important for the Court to understand this.

3 For example, Mr. Kemp showed you his  
4 demonstrative and said, well, when Mr. Hubbard turned  
5 the corner, the bike was ahead of him and he didn't see  
6 him again for 400 feet until he got right next to him.  
7 You remember he said that. He showed the bus coming up  
8 and said, Until he got right next to him, he didn't see  
9 him for 400 feet. I think the Court can appreciate how  
10 there can't be a blind spot issue for a football field.

11 And I asked their expert that. Their expert,  
12 Mr. Flanagan, I asked him -- when I'm talking about  
13 him, it's Mr. Hubbard.

14 "Do you recall his testimony that he could  
15 not recall seeing the cyclist for -- well, what  
16 do you recall what he said?"

17 The answer:

18 "This is the driver, yes."

19 Answer from Mr. Flanagan:

20 "He saw him when he turned the corner,  
21 basically didn't see him for 400 feet  
22 thereafter, and then the collision occurred.  
23 And at that point in time, somewhere in there,  
24 he saw -- I think he saw him through the door."

25 So just like Mr. Kemp just explained to you,

1 for 400 feet as he's approaching Dr. Khiabani,  
2 Mr. Hubbard doesn't see him.

3 Well, so then I asked Mr. Flanagan:

4 "We're talking about a football field  
5 really.

6 "Roughly a football field."

7 300 feet would be a standard American  
8 football field. He's talking about 400 feet. Okay.  
9 Now, I ask him:

10 "As we sit here today, are there any  
11 visibility issues in this coach which would  
12 preclude a driver from seeing a cyclist a  
13 football field away?

14 "ANSWER: At that distance, no. But at  
15 the end zone, there's some problem."

16 I said:

17 "I understand. I'm talking about the  
18 300 feet."

19 He said:

20 "300 feet, no. If he was attentive, he  
21 would have seen him."

22 So this whole notion about, well, we think  
23 it's a blind spot because he couldn't see him for  
24 400 feet, their expert completely destroys that theory.  
25 And common sense destroys that theory. You can't drive

1 behind something for over a football field and not see  
2 it because of some blind spot on your right side. It  
3 doesn't make any sense. It goes back to what Mr. --  
4 Mr. -- Mr. Henriod was talking about earlier that maybe  
5 we can't trust the driver's testimony, but so be it.  
6 The point being is that that plainly can't be evidence  
7 of causation of a blind spot when their own expert  
8 says, no, there's no blind spot for 100 yards down  
9 the -- down the road.

10 Then -- and, again, I mentioned to you  
11 earlier, there's a big issue about where Dr. Khiabani  
12 was in relation to the bus. Now, Mr. Kemp said, well,  
13 we -- we all know he's right here because of this  
14 shadow. Well, this is what their expert said. I asked  
15 him:

16 "I think we've covered this, but do you  
17 have an opinion as to where the bicyclist would  
18 need to be orientated vis-a-vis the bus in  
19 order for the cyclist to be in the right front  
20 blind spot?"

21 He asked:

22 "Where he would have to be?"

23 I said:

24 "Correct."

25 He asked:

1 "Laterally or longitudinally? You  
2 understand the difference?

3 "Both."

4 Mr. Flanagan said:

5 "To be in the blind spot, I'd have to lay  
6 it out from the driver's eye point based on  
7 Joshua's work" -- Joshua Cohen is the  
8 illustrator in there they've used -- "and then  
9 move the bike up and down the sides of the pie,  
10 the rear tire towards the rear of the pie, the  
11 front tire."

12 Then I asked him:

13 "And you've not done those calculations;  
14 correct?

15 "No I have not.

16 "And that calculation, whatever it may be,  
17 would also be dependent on where or how the  
18 driver himself is orientated in the seat;  
19 correct?

20 "Absolutely."

21 Their own expert says, I don't know where he  
22 was. I would have to do those calculations. I haven't  
23 done it. I can't tell you that he was in the blind  
24 spot because I haven't done those calculations. But  
25 now, Mr. Kemp comes in here and argues that everybody

1 knows where Dr. Khiabani was. Well, their expert, the  
2 one they're going to put up on the stand to tell you  
3 about the blind spot, he doesn't know.

4           We've seen his best stuff. He mentioned the  
5 wind tunnel stuff, and you've been provided this  
6 exhibit, so I'll invite the Court to look closely at  
7 it. But I want to highlight one thing. And this is  
8 actually the -- the paragraph that Mr. Kemp read, "The  
9 aerodynamic side force, rolling moment, and yawing  
10 moment are important to handling because they provide a  
11 disturbance that deflects a bus from its path in the"  
12 side -- "in the presence of side winds or passing  
13 vehicles."

14           That entire wind tunnel study dealt with a  
15 side force on the bus and how it would affect the bus's  
16 handling. There is certainly no argument in this case  
17 that Dr. Khiabani created some side force that  
18 deflected Mr. Hubbard off his path when he was driving  
19 down the road. There is nothing in this wind study,  
20 nothing about bicycles, nothing about air blasts,  
21 nothing about trying to reduce air blasts.

22           The purpose of the study is right in the  
23 introduction, and there's nothing in here about trying  
24 to reduce side air disturbances on a cyclist or  
25 pedestrian. Nothing. It is about fuel economy and

1 aerodynamic performance of the bus. That's what that  
2 wind tunnel study was about. To say that it had  
3 anything to do with determining the side impact or side  
4 force on a cyclist or pedestrian is just blatantly  
5 false.

6           And you heard Mr. Kemp read from Mr. Couch's  
7 testimony. And about, well, was the attempt to reduce  
8 air placement that the bystander would -- was the  
9 attempt to reduce the air displacement that the  
10 bystander or the bicycle would see. And he answered,  
11 you saw it, well, that would be the effect. He very  
12 clearly didn't say that was the reason. He said that  
13 be would the effect.

14           Then the next set of questions was:

15           "Okay. Was that a safety concern?"

16           Mr. Couch answered:

17           "I don't know."

18           Mr. Kemp answered -- asked again:

19           "In other words, was there any sort of  
20 concern that if you had a higher amount of air  
21 displacement, it would potentially cause a  
22 bicyclist to wobble or pedestrians to, you  
23 know, be disrupted in some way?"

24           Mr. Couch said:

25           "Not to my knowledge."

1           None of this aerodynamic testing, aerodynamic  
2 discussion, articles about aerodynamics have to do with  
3 the side forces that is the central theory to their  
4 case. And as I told you in the beginning, and it's  
5 interesting that Mr. Kemp did not address this, there  
6 has never been a witness, document, test, study showing  
7 what the difference in air displacement would be  
8 between some theoretical aerodynamic vehicle and the  
9 coach at issue. I don't know what the air displacement  
10 on a Tesla truck is, not that it matters because this  
11 isn't a Tesla truck. I don't know what the air  
12 displacement is on a Bugatti, 'cause -- but it doesn't  
13 matter because this case doesn't have anything to do  
14 with a Bugatti.

15           What plaintiffs have tried to do in this  
16 case, and they're trying to substitute these  
17 theoretical things to show knowledge on MCI's part,  
18 which they can't do, what they're trying to do is take  
19 these general notions of, well, something that's more  
20 aerodynamic will have less air displacement. I don't  
21 think anybody has disputed that.

22           The question is: Did MCI have any reason to  
23 know that the air displacement caused by its coach, the  
24 J4500, not the Tesla, not the bullet train, not the  
25 Bugatti, did MCI have any reason to know that the air



1 displacement caused by its coach caused such a  
2 dangerous condition that it could be subject to  
3 punitive damages? There has been no evidence of that  
4 whatsoever. All you've heard is evidence about  
5 aerodynamic principles in general. The law is clear  
6 that generalized -- generalized knowledge is not a  
7 basis for punitive damages.

8           Now, we sat through a great deal of  
9 presentation that Mr. Kemp wanted you to consider that  
10 a jury will never hear. That video, the S-1 -- let's  
11 take the S-1 Gard video. As you saw, the bus in that  
12 video was moving a few miles per hour. It certainly  
13 wasn't moving 25 miles per hour. The video is  
14 inadmissible. But importantly, we actually sent a  
15 subpoena to Mr. Barron. We sent a subpoena to the S-1  
16 Gard people, said, Please send us all your testing  
17 data. Please verify that this video on the Web is an  
18 accurate depiction. They said, We don't have any  
19 record of that. We don't know what that is. We didn't  
20 do that video. We have that. That's been disclosed.  
21 There's been no foundation laid for that video  
22 whatsoever. The touted maker of the S-1 Gard doesn't  
23 even -- can't even verify its accuracy. We didn't do  
24 the testing. We don't know -- somebody else did it for  
25 us. That's not admissible evidence. That video is

1 never going to be shown to a jury.

2           The video of a truck on a highway passing a  
3 bike at probably 70 miles an hour on the left-hand  
4 side, how can a jury see that? That is not -- that is  
5 not indicative of anything that happened in this  
6 accident. Nothing. Dr. Khiabani was on the right  
7 side. The bus was going 25 miles an hour on a -- on an  
8 urban street, not a cyclist going on the left side of  
9 the vehicle down a highway. Inadmissible.

10           Under Mr. Kemp's theory, you could now, Your  
11 Honor, you could now testify to the accuracy of his  
12 theory because you've watched that video. Erica  
13 Bradley watched that video. So that was enough to  
14 provide a foundation for her to testify as to  
15 Dr. Khiabani wobbling and why he wobbled. That's his  
16 theory. You watch this video and then I ask you, Well,  
17 could that have happened? Her answer, It's possible.  
18 It's possible would never get past the jury because  
19 it's possible is not the standard of proof. Even on a  
20 compensatory claim it has to be probable. And  
21 Ms. Bradley never said that. She just said, well,  
22 yeah, that could have happened. It's possible.  
23 Inadmissible.

24           Dr. Kato's article, inadmissible.  
25 Dr. Cooper's article, inadmissible. Hearsay. Hearsay.

1 Well, they're learned treatises. Who has established  
2 that? There's been no establishing these are learned  
3 treatises. They're trade journals. Okay?

4 And Dr. Kato's 1981 study, if you saw, had to  
5 do with a -- Mr. Kemp even put it on the screen, a  
6 stationary item. A stationary bike. Dr. Khiabani was  
7 not stationary. He was traveling somewhere between 10  
8 and 15 miles per hour, maybe even up to 17 miles per  
9 hour. But it doesn't matter whether it's 10 or 15 or  
10 17. He wasn't stationary. So Dr. Kato's research from  
11 1981 on a stationary bike is irrelevant in addition to  
12 being hearsay. A jury can't see it. A Court can't  
13 consider it now on summary judgment.

14 The advertisements, the newsletters, again,  
15 inadmissible or hearsay. But at best, at best what  
16 Mr. Kemp is saying is, well, there's all these trade  
17 journals out there. There's all these advertisements  
18 out there. How can you say you didn't know about it?  
19 Basically, he wants to call our witnesses liars,  
20 saying, How can you say you didn't know about it? It  
21 was out there.

22 Well, the law is very clear on that.  
23 Constructive knowledge. Should have known. That's not  
24 sufficient for a punitive damage award. You can't say,  
25 well, you should have been reading the trade journals.

1 This advertisement was out there. It was a trade  
2 journal. You should have seen it. Should have, might  
3 have, could have, that is not substantial evidence that  
4 a jury can consider on a punitive damage claim to  
5 establish clearly and convincingly that MCI knew of a  
6 substantial risk of harm and failed to do anything  
7 about it. That evidence just cannot be used.

8 Now, you heard the term "air blast" a lot.  
9 You've seen it in a lot of the pleadings. You've seen  
10 it in a lot of the exhibits. And Mr. Kemp keeps  
11 saying, well, how did they not know about air blast?  
12 Nobody knew about air -- the drivers didn't know about  
13 an air blast. The salesmen didn't know about an air  
14 blast.

15 Mr. Kemp came up with a -- with a phrase  
16 called "air blast." It was a word he used. He said,  
17 Well, have you ever heard of an air blast? And they  
18 said, Well, no, I've never heard of an air blast. Did  
19 he ask them, Do you know that a vehicle moving through  
20 space displaces air to the side? Did he ask him that?  
21 No. He -- he wanted to use his catch phrase air blast.  
22 But his catch phrase, again, isn't evidence. And more  
23 importantly, it's not evidence that MCI knew that some  
24 air blast was a danger such that a bicyclist was going  
25 to be pushed aside at 25 miles an hour and sucked back

1 into the bus. It had never happened before. And we  
2 don't know that it happened this time.

3 Even now, even now that alleged defect is  
4 only a theory being held together by a witness sitting  
5 behind the bus. Okay. Certainly there's no evidence  
6 of knowledge by MCI that this was some pervasive  
7 problem that they had to address and, therefore, you  
8 can't award punitive damages, a jury can't consider  
9 punitive damages, and the Court in its gatekeeper role,  
10 can't let that question go to the jury because there is  
11 no substantial evidence to support it.

12 Just because Mr. Kemp doesn't like the  
13 testimony of witnesses, also is not evidence. Well,  
14 how do they -- how could they say they didn't know  
15 about a proximity sensor? I pulled this magazine out.  
16 I pulled this trade show brochure out. How could they  
17 say they didn't know? He may not like the testimony.  
18 That doesn't -- that's not evidence. The evidence is,  
19 look, when we put this thing on the market, to our  
20 knowledge, there were not any sensors that were going  
21 to work with our coach. They didn't say they were --  
22 they didn't know of any sensors in the world. They  
23 didn't say that, no, we've never heard of a proximity  
24 sensor. They didn't say that there might not be a  
25 theoretical one out there.

1           They're saying we looked. We didn't know of  
2 any proximity sensors that would work. So even if you  
3 don't want to -- even if you want to think that maybe  
4 they should have looked harder, the point is, is that's  
5 not enough. Should have known, might have done, that  
6 is not specific knowledge.

7           He mentioned the 2018 article from New Flyer,  
8 the 2018 article. That's not going to be evidence of  
9 what MCI knew in 2007 and 2008. So what New Flyer may  
10 have said in 2018 when talking with a Las Vegas --  
11 Los Angeles transit company is not evidence of what MCI  
12 knew back in 2007 and 2008.

13           I found interesting, actually, that Mr. Kemp  
14 brought up Mr. Parada. And the reason I found it  
15 interesting because I expected to see some of his  
16 testimony in the briefing and I didn't. And I knew why  
17 I didn't because I was at his deposition. And this is  
18 why today's the first time you heard about Mr. Parada.  
19 Okay. You've seen the picture. All right? But then  
20 they didn't cite his deposition testimony in the brief.  
21 You know why? Because this is what Mr. Parada  
22 testified to. Let me find the right page here. If the  
23 Court would like us to supplement with this deposition  
24 transcript, I'm happy to do so.

25           Mr. Pepperman, Mr. Kemp's colleague, asked:

1 "After the bus contacted your left  
2 handlebar and you were thrown off your  
3 bicycle" -- and let me give you some context.

4 This was a similar scenario where the cyclist  
5 is on the right -- right side of the bus. And  
6 Mr. Prada's testimony was he goes through an  
7 intersection, a Los Angeles transit bus comes up on his  
8 left side, clips his handlebar. We don't know what  
9 part of the bus. I don't recall if he said, but he  
10 clips his handlebar and he falls off his bike.  
11 Actually, he actually goes over the top of his  
12 handlebars, falls forward. Pepperman asks:

13 "After the bus contacted your left  
14 handlebar and you were thrown off your bicycle,  
15 did you fall? Did any part of your body fall  
16 underneath the bus?

17 "ANSWER: No.

18 "QUESTION: Do you -- were -- were -- were  
19 any part of your body in the pathway of the  
20 rear wheel of the bus?

21 "No."

22 Then he showed him the article or the  
23 advertisement that Mr. Kemp showed you. Under  
24 Accident, it says, "Bicyclist caught under bus."  
25 Mr. Parada said:

1 "No, no, not that I recall. I never said  
2 that."

3 Just to make sure I heard him right, then I  
4 asked him at page 30 -- I apologize, Your Honor. And  
5 you said -- I asked him:

6 "And you said when the bus clipped your  
7 handlebars, you went over the top of your  
8 handlebars; correct?

9 "Yes, sir.

10 "And I heard you say to Mr. Pepperman, to  
11 the best of your recollection, no part of your  
12 body was in the path of the rear wheels;  
13 correct

14 "Yes, sir."

15 According to Mr. Parada, he was never in the  
16 path of the rear wheels of the bus which is exactly  
17 where you would have to be for the S-1 Gard to make any  
18 difference.

19 Now, I don't know how -- I can't explain his  
20 story. Okay. He says he got pushed out of the way by  
21 something. He doesn't know what because he didn't see  
22 it. All right? I don't know how the S-1 Gard was  
23 installed on that MTA bus. I don't know how Mr. Parada  
24 fell. But Mr. Parada is very clear that his body was  
25 not in the rear pathway, the pathway of the rear wheels



1 of that bus. That's why you didn't see his deposition  
2 testimony because he can't offer any admissible  
3 testimony, because even if there had been an S-1 Gard,  
4 it wouldn't matter according to Mr. Prada's own  
5 testimony. So that's inadmissible.

6 The point being, Your Honor, that all of  
7 these theories and partial deposition transcripts and  
8 sound bites from articles from 30 years ago don't  
9 change the fact that there is no evidence to support  
10 the theory that MCI had specific knowledge of a  
11 potential risk in its product and failed to address it.  
12 Statistics, general knowledge, theories, trade show  
13 journals, all of these things make for fine argument.  
14 They are not evidence and they are not evidence that a  
15 jury could ever use to find clearly and convincingly  
16 that MCI is guilty of conduct that would warrant  
17 punitive damages.

18 Thank you, Your Honor.

19 THE COURT: Okay. Defendants' motion is  
20 denied because plaintiffs have produced substantial  
21 evidence that would support a punitive damages  
22 instruction. Pardon me?

23 All right. Now, with respect to the -- the  
24 next motion, I don't know if you prefer to take a  
25 lunch, a quick lunch break perhaps? Or -- or --

1 MR. HENRIOD: Your Honor, I don't mean to  
2 belabor any points. I mean, I think we could be done  
3 with this one in probably 10, 15 minutes --

4 THE COURT: Sure. And there may be -- I have  
5 to give them a lunch break. That's fine.

6 MR. HENRIOD: I'm sorry.

7 THE COURT: It's not me. No. Yeah. So --  
8 so we can take the next motion or we can go to lunch  
9 now. I'm fine with taking the next motion.

10 MR. HENRIOD: Excellent. Let's go.

11 THE COURT: All right. So --

12 MR. HENRIOD: The next one, I assume we're  
13 talking about the Motion for Summary Judgment on  
14 Product Defect? There was one other before the Court  
15 today.

16 THE COURT: Yes. I'm on -- let me just move  
17 this stuff. So the next motion I'm taking is  
18 Defendants' Motion for Summary Judgment on All Claims  
19 Alleging a Product Defect. I have it here as No. 3 on  
20 the calendar. Okay.

21 Did you hear me?

22 THE CLERK: No, Your Honor.

23 THE COURT: It's -- it's the third in line on  
24 the calendar matter. It's Motor Coach Industries,  
25 Inc.'s Motion for Summary Judgment on All Claims

1 Alleging a Product Defect.

2 THE CLERK: Your name?

3 MR. HENRIOD: Joel Henriod, Bar No. 8492.

4 MR. KEMP: That's why I said earlier that we  
5 should do this one first.

6 MR. HENRIOD: We've heard over the last hour  
7 the -- the essence of plaintiffs' claim is that this  
8 coach could have been safer with some modifications.  
9 That's not the test in Nevada for a product defect.  
10 Where consumer expectation tests jurisdiction, the  
11 supreme court just reiterated that in the Trejo case.

12 And what does that require them to show? It  
13 requires them to show much more than risk analysis  
14 tests would require, that there are modifications that  
15 were feasible that could have made it safer. While  
16 those may be relevant, the ultimate test is the same.  
17 The jury would have to find that this coach was more  
18 dangerous, not just dangerous but more dangerous, than  
19 the reasonable person with ordinary knowledge from what  
20 is available in the community would ordinarily expect.

21 So it's not whether or not it exists and  
22 whether or not something might make it safer. It's  
23 whether or not the reasonable person based on ordinary  
24 knowledge in the community would have expected those  
25 functions and been surprised that they weren't there.

1 And it's not retrospective. To be a product defect in  
2 Nevada, it had to have existed when the product left  
3 the manufacturer. So what we're looking at is the  
4 reasonable expectations of the ordinary person back in  
5 2007.

6 Now, I don't want to be accused of waiving  
7 anything, so as we say in our motion, Nevada has not  
8 gone so far as to say that strict liability even  
9 provides a remedy to bystanders. But let's assume for  
10 the sake of argument today that it does. What it would  
11 provide at most is a remedy to bystanders. It does not  
12 inform the consumer expectation test.

13 For instance, if it applies, it's similar to  
14 a case where somebody buys a lawn mower and there isn't  
15 a guard and so a rock goes flying, hits somebody  
16 walking on the sidewalk. The test, assuming it  
17 provides liability, remedy, a remedy to bystanders at  
18 all, it does not make everyone the consumer and does  
19 not make everyone's expectations at issue. It's the  
20 user. And with a passenger vehicle, the user is the  
21 driver. In some circumstances, it might be the  
22 passengers, but that's not the kind of case we have  
23 here.

24 So let's talk about what the evidence could  
25 possibly show, even with all inferences drawn in their

1 favor. What could the ordinary consumer based on the  
2 ordinary knowledge in the community have reasonably  
3 expected with sensors? Well, there's no testimony from  
4 anybody that these drivers, that these passengers  
5 expected that a 2007 vehicle would have had these  
6 sensors. I don't drive a Mercedes so -- and -- and I  
7 will admit, I also don't drive junkers. I drive a 2012  
8 Volvo. And it does not have these sensors in it. My  
9 wife's Acura only two years old does. But it's not the  
10 norm. Certainly was not the norm back in 2007. Nobody  
11 said that it was the norm. Today we look at some  
12 statistics, but those are not 2007 statistics to say  
13 how regular it is. As a matter of fact, you'll notice  
14 that plaintiff has gone all the way to Australia to  
15 find an example of coaches that use these at all.

16 So I don't think that there is any evidence  
17 or even reasonable inferences that can be drawn from  
18 the evidence we had that the ordinary person based on  
19 what was known in the community in 2007 would have  
20 expected that this would have a sensor on it and been  
21 surprised or disappointed that it wasn't there.

22 Air blasts, as Mr. Russell points out, this  
23 term "air blast" is thrown about to elicit particular  
24 answers from the witnesses. But if what we're just  
25 talking about air displacement in general or

1 disturbance, I think the ordinary consumer, the  
2 ordinary person with knowledge in the community would  
3 not be surprised that a massive vehicle causes some  
4 displacement around it. It's a reason why when I'm on  
5 the freeway, and I doubt I'm the only one, I hate being  
6 right next to a truck because there's masses -- they're  
7 massive and you can feel it. So the issue is even  
8 assuming that it's dangerous, assuming that the jury  
9 can infer that it's a dangerous condition, what is the  
10 evidence that it would come as a surprise that it's  
11 more dangerous than anybody would ordinarily expect?

12           The S-1 Gard, well, there were 30,000 when  
13 the chart was made. There were 50,000 since I don't  
14 know when, but we need to put ourself back to 2007.  
15 And then, very few people knew about them, which is why  
16 they were giving them away for free in some cases so  
17 that they could get them on the market. I've been  
18 looking all around town for them. I don't see them.  
19 They're not in the state of Nevada.

20           Now, what that goes to is, is the ordinary  
21 user honestly surprised that this does not have an S-1  
22 Gard? That's the test. Is it more dangerous than the  
23 reasonable person would expect given the ordinary  
24 knowledge back in 2007? And even at that, even if it  
25 would be a modification that might make it safer in the

1 city, I don't know that it does barreling down the  
2 highway. Nor is there any evidence that in addition to  
3 the S-1 Gard, nor is there any evidence from any of the  
4 witnesses that the reasonable ordinary person with  
5 regular typical knowledge would expect any type of  
6 device on a bus that would cushion and impact with a  
7 bicycle. Is there any evidence that the ordinary  
8 person with typical or ordinary knowledge in the  
9 community would have any expectation that a bicycle  
10 could collide safely with a bus? I don't think we have  
11 any evidence of that.

12           The big point. You have to show more than  
13 that some of these devices might be a good idea, that  
14 they're available, that they might make it safer. The  
15 issue is, is there an unexpected danger? And really,  
16 there is no evidence of that.

17           I have to address this warning claim issue.  
18 We moved for summary judgment on all product defect  
19 claims. Period. And a -- a product is defective  
20 either in manufacture or design or warning. Those are  
21 three different ways that a product can be defective.  
22 And it cannot be defective in warning if the danger is  
23 not latent, if it is obvious. And as we go -- as we  
24 explained in our brief in some detail, there's nothing  
25 latent about these inherently dangerous conditions. So

1 that -- that claim is subsumed in the defect.

2 Thank you.

3 MR. KEMP: Your Honor, just briefly. I think  
4 in the punitive damage argument, defense counsel  
5 admitted that we have sufficient evidence on the  
6 compensatory claim. They called our case pencil thin,  
7 but they admitted that it was pencil thin. I -- I  
8 think he said on his rebuttal that maybe we have enough  
9 evidence for a compensatory case, but not a punitive  
10 case. I think the decision on the punitive really  
11 resolves this. But in any event, let me just quickly  
12 address the points that were just brought up.

13 On the bystander claim, their argument is  
14 that you got to be a user of the product, you can't be  
15 a bystander. That's been rejected by virtually every  
16 court that's considered the issue. That's on page 28  
17 and 29 of our brief. And we start off with the  
18 New York decision, which I think came out in '67. And  
19 then we follow up with the California, the Arizona.  
20 You know, he -- he says that Nevada has not  
21 specifically considered that issue. And I will concede  
22 that that has not been framed for a specific issue for  
23 the Nevada Supreme Court. But given -- given  
24 Justice Stiglich's decision that just came out in *Ford*  
25 or *Trejo versus Ford Motor* which was very -- you know,



1 very expansive in her view of product liability, that  
2 was a unanimous decision by the Nevada Supreme Court, I  
3 can't imagine that the Nevada Supreme Court would be so  
4 reactionary that it would adopt this bystander rule  
5 that they're advocating. But in any event, the  
6 briefing's on 28 and 29 of our -- our opposition.

7           On consumer expectations, you know, they're  
8 making kind of a different argument than they made in  
9 the briefing. In the briefing they argued that, well,  
10 it's not really consumers, Judge. You should look at  
11 bus drivers, what their expectations are. I think  
12 they're running away from that because we cited Dorr,  
13 Hubbard, Bartlett. None of the bus drivers knew about  
14 this air blast. Some of the bus drivers, like  
15 Mrs. Witherell, testified that she thinks a proximity  
16 sensor would be a good idea. You know, their own  
17 engineers said that the S-1 Gard -- and refer to their  
18 own engineer, I'm talking about Mr. Ellis, the New  
19 Flyer engineer, said that the S-1 Gard should be put on  
20 all buses. So -- and -- and this was eight years  
21 before the bus was made that he gave that testimony.

22           So for those reasons, Your Honor, I think  
23 there's -- if we did have to have testimony from  
24 professionals that were involved in the industry that  
25 they expect these type of products to be used, we have

1 it. The consumer expectations really doesn't go to  
2 that in a case like this. You know, this is an  
3 ordinary product. It's an automobile product. It's  
4 a -- it's a bus. It's a bigger version of an  
5 automobile, but it's still a means of transportation  
6 that runs down the public highway.

7 Consumers are familiar with that. This is  
8 not a case -- you know, I was trying to think of the  
9 most exotic case I had to -- to be an example where  
10 consumer expectations would be a tough test to apply.  
11 I had a case in front of Judge Pro one time where I  
12 sued the federal government because our claim was that  
13 an atomic bomb was defective because it -- it vented  
14 the wrong way. They -- they didn't put the shielding  
15 in appropriately. So I sued the federal government on  
16 behalf of people. The whole plateau collapsed and they  
17 were injured.

18 And in that case, I think, you know, you'd  
19 have trouble with the consumer expectations test  
20 because most people don't have experience with atomic  
21 bombs much less in designing, you know, the barrier  
22 that they vent out of for testing purposes. So that is  
23 an example -- you know, maybe somebody driving an F-15  
24 jet fighter, it would be tough.

25 But in this case, the consumer -- and we've

1 cited the cases from Oregon and Alaska that says, the  
2 consumer this is -- this is the type of thing that they  
3 use on their vehicles, proximity sensors. You know,  
4 people are familiar with these. Barrier protection,  
5 that was the Robinson case from 20 years ago. The  
6 Nevada Supreme Court said that a consumer can -- can  
7 understand -- a jury can understand a barrier  
8 protection in the context of a box crushing machine.  
9 So these are not exotic safety devices.

10           You know, air blasts, they -- they keep  
11 flipping back and forth, you know. A couple of minutes  
12 ago, they did not know there was an air blast risk.  
13 Now everybody knows about air blasts, you know. But  
14 regardless, I think that's the kind of thing that  
15 people can understand. You know, Mrs. Bradley, she --  
16 she certainly understood it when we showed her the  
17 video, and she said it was substantially similar. She  
18 understood it.

19           But the consumer expectation test, if you  
20 apply it to this case, you know, I think it -- there's  
21 no element of surprise. You know, their argument that,  
22 oh, you have to show that the consumer would be  
23 surprised, where is that at? You know, that's not in  
24 the consumer expectations test. What they're really  
25 doing is they're trying to argue that consumer

1 expectations means commonly used products. So it's  
2 still -- until the product is commonly used, you can't  
3 pass the consumer expectation test. That is not the  
4 law, Your Honor. In fact, we shouldn't even encourage  
5 that because what that means is that there will be no  
6 incentive to make safe products which is the whole  
7 purpose of strict liability in the first place.

8           So for -- for those reasons, I think -- and  
9 especially, you know, the admissions in the first  
10 argument that we do have a pencil thin -- in their  
11 view, at least they admitted it. I don't think it's  
12 pencil thin -- thin. I think it's overwhelming, but in  
13 their view, they conceded we have a compensatory case.  
14 And for those reasons, I think we should be allowed to  
15 present it to the jury, Your Honor.

16           And -- and before I forget -- no, I'm -- I'm  
17 done, Your Honor.

18           THE COURT: You sure?

19           MR. KEMP: Yeah, I'm sure.

20           THE COURT: Okay.

21           MR. HENRIOD: I'm a little disturbed by that  
22 statement that we conceded they have a compensatory  
23 case. I think Mr. Russell was clear that for purposes  
24 of punitive damages, the analysis was different and was  
25 willing to assume for sake of argument that even if a

1 consumer -- even if a compensatory claim could be made,  
2 punitive certainly couldn't. I believe he said even if  
3 at least four times. So I think that's clear.

4 Even if -- I'll go on to say here, even if  
5 the ordinary user or consumer could be deemed to be  
6 your every person on the street, well, I think with  
7 this product, that only makes my point. Everyone is  
8 familiar with a bus. Everyone is generally familiar  
9 with its attributes. And everyone is largely familiar  
10 with how the modifications that are being suggested  
11 here as improvements are not on the buses with which  
12 they are familiar, that there is no expectation or  
13 disappointment.

14 I don't have a lot to add. Looking at that  
15 video where this truck hits the bicyclist, I get a pit  
16 in my stomach, because you look at that and you don't  
17 know exactly what's going to happen, but it's an  
18 inherently dangerous situation. And when you see that  
19 collision, it's not any surprise. When you see it, you  
20 get that sick pit because you know that there is a very  
21 good chance of something catastrophic happening given  
22 the -- the proximity of those vehicles to each other.  
23 And the disparity between the size of the truck and the  
24 bicycle and the potential catastrophe of an impact.

25 In Nevada, we don't look just at whether

1 something or not could be better. We look at whether  
2 or not there is some type of malfunction or, in the  
3 case of a design defect, something surprising about  
4 this product that makes the ordinary person with the  
5 knowledge to everybody in 2007 surprised that this  
6 thing is unreasonably dangerous. And I still even in  
7 opposition to this motion don't hear any evidence to  
8 support that.

9 That's it.

10 THE COURT: That's all? Well, I'm going to  
11 defer my decision on -- on this motion until after  
12 lunch. We're going to take a -- a break. So an hour  
13 and 15 minutes. So --

14 MR. POLSENBERG: Your Honor, I think this  
15 last motion is probably a short one.

16 THE COURT: Okay.

17 MR. POLSENBERG: If you want to do that and  
18 not take lunch, we don't have to come back.

19 MR. RUSSELL: There's two more, I think.

20 THE COURT: I think we have a couple more.  
21 We do.

22 MR. RUSSELL: We have the motion to dismiss,  
23 the motion to add.

24 MR. POLSENBERG: You're right. You're right.  
25 We might as well take a break then. Right. I know

1 staff has got to go.

2 THE COURT: So be back in an hour and 10  
3 minutes, so 1:10, 1:15?

4 MR. KEMP: That's fine, Your Honor.

5 THE COURT: Does that work?

6 MR. CHRISTIANSEN: An hour and 10 would be  
7 wonderful. 1:30, 1:40.

8 THE COURT: 1:30 -- 1:40.

9 THE MARSHAL: All rise.

10 (Whereupon a lunch recess was taken.)

11 THE COURT: Good afternoon. I hope you had a  
12 nice lunch. Yes? No?

13 MR. ROBERTS: Yes.

14 THE COURT: Yes.

15 MR. ROBERTS: Capriotti's.

16 MR. POLSENBERG: He has a special lunch  
17 preordered at Capriotti's.

18 THE COURT: Oh, well, I could say that I --  
19 it's a closed company, but I have stock in it. I just  
20 wanted to disclose that.

21 MR. POLSENBERG: Well, the third week of  
22 trial, we'll tell you what his special was.

23 THE COURT: Okay. All right. Let's get back  
24 to the moment here. Okay. With respect -- with  
25 respect to the defendants' motion on all claims

1 alleging product defect -- Motion for Summary Judgment  
2 Alleging Claims -- All Claims -- excuse me, Motion for  
3 Summary Judgment on All Claims Alleging a Product  
4 Defect, let me get that right, this is the holding.  
5 Okay. The motion for summary judgment, as you're all  
6 very aware, needs to -- you know, is required to be  
7 reviewed in a light most favorable to plaintiffs. So  
8 from the Trejo case, as we've discussed earlier today,  
9 the Nevada Supreme Court recently reaffirmed this test.  
10 They cited -- is it Ginnis v. Mapes or Hotel or Ginnis,  
11 I'm not sure. Okay. And they've -- again, the test is  
12 plaintiff must prove product fail -- the product failed  
13 to perform in the manner reasonably to be expected in  
14 light of its nature and intended function, and that the  
15 product was more dangerous than would be contemplated  
16 by the ordinary user having the ordinary knowledge  
17 available in the community.

18           So in my view, it comes down to who the user  
19 is. Okay? So the definition of user, we've seen that  
20 it's the owner or the buyer, the drivers, the  
21 consumers. And in my mind, the consumers can  
22 absolutely be the passengers. I -- I think it's --  
23 that -- that's how I view this. I mean, it's -- I -- I  
24 think that that is a reasonable interpretation of the  
25 consumer expectations test. That's what the bus does



1 all the time. It -- and so it fits into this category.  
2 So the consumer, in my view, are the passengers.

3 So because the user and the consumer are used  
4 in this text, the consumers, including passengers, are  
5 included as users. I want to make sure I wrote that  
6 out so I could get my thoughts out clearly.

7 Looking at the various defects in this case,  
8 it looks to me like each theory has a genuine issue of  
9 material fact remaining, thus the motion is denied.

10 MR. POLSENBERG: Your Honor, if I may.

11 THE COURT: Yes, you may.

12 MR. POLSENBERG: I -- I think that we said in  
13 our motion that we were considering -- at least in  
14 the -- all the briefing we had today, that we're  
15 considering issues like crashworthiness to extend even  
16 to passengers and to occupants. But the plaintiffs'  
17 decedent here wasn't a passenger in the bus.

18 THE COURT: Yes. I actually have a note on  
19 that --

20 MR. POLSENBERG: Uh-huh.

21 THE COURT: -- so --

22 MR. POLSENBERG: I figured you did. And I  
23 just want to make sure we are --

24 THE COURT: So I didn't enunciate it, but I  
25 will tell you, as I said, because the user and the

1 consumer are used in this text, the consumers,  
2 including passengers, are included -- passengers, in my  
3 view, are included as consumers. Okay?

4 And I have here just a side note for myself  
5 that even though Dr. Khiabani is not a consumer for the  
6 purpose of -- of this test, I do not believe it changes  
7 the standard.

8 MR. POLSENBERG: Thank you, Your Honor.

9 THE COURT: Thank you for asking that  
10 question. It's a very good question.

11 All right. So one moment. My calendar.  
12 Give me one moment. Did I leave it? If not, if you  
13 could just get another one for me, please. Sorry. Do  
14 I have a copy of that? Yeah. I left mine. All right.  
15 All right. Thank you. Oh, it's fine. All right. I  
16 lost my map here, but -- all right.

17 So next we have Defendants' Motion to Dismiss  
18 the Wrongful Death Claim for Death of Katayoun -- it's  
19 not spelled right -- Barin.

20 MR. POLSENBERG: Great, Your Honor. Dan  
21 Polsenberg for MCI. This is -- this is my Palsgraf  
22 motion.

23 THE COURT: Is it?

24 MR. POLSENBERG: It is. And you had said  
25 that you'd read Palsgraf again and so did I. And I was

1 very impressed how close Mr. Kemp got to the facts.  
2 And this is a 12(b) motion, 12(b)(5) in state court,  
3 12(b)(6) in federal court where what we're doing is  
4 testing the legal sufficiency of the allegations.  
5 Yeah, I have to assume the allegations to be true.  
6 Remember the last time I argued in front of you, I was  
7 saying that this is a very interesting case. We've got  
8 some really interesting science in it. And I -- I  
9 think it is a far-fetched claim. I -- I think it goes  
10 a couple of steps too far, and that's why we're making  
11 this now as a motion to dismiss 'cause we're only  
12 testing the legal sufficiency of it, not the factual  
13 sufficiency. But that's why I think it's like  
14 Palsgraf.

15 Remember, Mr. Kemp said Palsgraf is -- tests  
16 the limits. It's a matter of policy. And -- and in  
17 Palsgraf, what happened was two passengers were getting  
18 on a -- on a Long Island railroad train. A conductor  
19 in the car helped one in, tried to help the second one  
20 in. An employee on the platform tried to push him up  
21 and the box which, while not a bomb, had fireworks in  
22 it. The fireworks went off and it knocked over a scale  
23 and it injured Mrs. Palsgraf. And the majority of the  
24 Court said in Justice Cardozo's opinion, yeah, that  
25 goes too far. And what they actually said was, yeah,

1 there might be a claim, there might be a tort committed  
2 as to the passenger who was trying to get up onto the  
3 car, but not Mrs. Palsgraf. Mrs. Palsgraf, she's too  
4 far away.

5 Now, Justice Adams' dissenting -- Andrews,  
6 sorry, dissenting said, well, no, look, it is direct  
7 causation 'cause it's this step and then this step and  
8 then this step and then this step, and then you get  
9 there. But no, as a matter of law, we cut things off  
10 as a certain part -- at a certain point. And I think  
11 the claim for wrongful death of Dr. Barin is several  
12 steps too far. Here's why I think that.

13 There are three different types of claims.  
14 There are direct claims. Now, they use the word  
15 "victim" in their opposition. I'll use the word  
16 "victim." There's the claims where you have a direct  
17 victim, where the wrong is committed against that  
18 person. You have the bystander claims, and we set out  
19 the three types of emotional distress claims including  
20 bystander claims. And then you have claims that are  
21 wholly derivative. Survival claims, wrongful death  
22 claims, they're created by statute, almost next to each  
23 other. And, in fact, they don't exist in the common  
24 law at all. So we have to construe the statute to  
25 determine whether they exist.

1           And they don't in this circumstance because  
2 Chapter 41 and Chapter 40 are the two sets of statutes  
3 that do an interesting thing. They set out that the  
4 elements of a cause are established outside the  
5 statute, but that the recovery is inside the statute.  
6 Let me give you the -- the example of the statute we're  
7 looking at here, the wrongful death statute, 41.085.  
8 Subsection 2 says that you can bring a wrongful death  
9 claim when the death of any person is caused by the  
10 wrongful act or neglect of another. In other words,  
11 you can only have a wrongful death action when the  
12 death is caused by a wrongful act. In other words,  
13 it's a direct victim claim. That's when you can have a  
14 cause of action here. And they don't meet that here.

15           What they do is they fall under the -- the  
16 third area. They're not claiming that -- that they're  
17 a direct -- that Dr. Barin was a direct victim.  
18 They're not even -- when we set out and say, look,  
19 here's the bystander recovery. If you're going to  
20 recover as a -- as a bystander for negligent infliction  
21 of emotional distress, you have to meet the test. It  
22 used to be the zone of danger. It used to be the  
23 impact rule. Now, under *State versus Eaton*, you have  
24 proximity. They don't have any of those. And so they  
25 don't -- they're not a direct victim. They're not a --

1 a bystander. They try to do it derivatively by saying,  
2 oh, because she has a claim for wrongful death.

3 And one of the elements she's allowed to  
4 recover is grief and sorrow, that if her -- if she died  
5 because of her grief and sorrow, then she has a  
6 wrongful -- then her heirs have a wrongful death  
7 action. But that's just -- that's just going too far.

8 I mean, the direct action is for the death of  
9 her husband not for her -- I mean, it's the Palsgraf  
10 situation, where it's step after step after step. She  
11 would have to be a direct victim in order to recover  
12 this. And grief and sorrow is not the same as  
13 emotional distress, and they're not claiming a  
14 bystander claim. Their whole argument is based on the  
15 eggshell plaintiff theory. And that is, you have to  
16 take your plaintiff as you find him. You have to take  
17 your victim as you find him. But the victim here in  
18 the direct cause of action is her husband and not her.  
19 So legally, there isn't a claim for her wrongful death.

20 Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. CHRISTIANSEN: Good afternoon, Judge.

23 THE COURT: Good afternoon.

24 MR. CHRISTIANSEN: Pete Christiansen for the  
25 plaintiff. I apologize a bit for the fashion in which

1 this argument's framed, but I framed it from how the  
2 defendant wrote their motion and their reply. And if  
3 you sort of go through that carefully, you -- you see  
4 where they start is -- maybe. But -- I don't know if  
5 you remember, Judge, but some months ago, Mr. Roberts  
6 came in here with a -- a statistical analysis by an  
7 epidemiologist named Stephen Day. And -- and this was  
8 the Defendant MCI's effort to postpone our November  
9 trial date. Katy -- Dr. Barin was still alive, and  
10 they had a statistician epidemiologist opining that she  
11 wasn't as sick as she said she was, and that  
12 statistically she was going to live another 1.7 years.

13 That statistical analysis has sort of carried  
14 itself with the defense through all the deposition of  
15 her treating physicians, of Dr. Panigrahy, the Harvard,  
16 maybe the most recognized world-renowned expert on  
17 cancer that exists who's our expert in this case. But  
18 I wanted to back away from statistics and point out to  
19 you that Katy Barin was a wife, a mom, a dentist who,  
20 in spite of her cancer diagnosed January the 27th of  
21 last year, continued practicing full time up unto the  
22 time April the 18th that her husband tragically was  
23 killed because of the defective bus that this defendant  
24 put on the road.

25 As I said in the reply brief, it's -- it's

1 the footnote. The defendants can contend that it's  
2 factually the plaintiff can't put this case together.  
3 Plaintiffs face a significant uphill battle to ever  
4 establish causation, which the Court can appreciate  
5 because of the factors that (microphone interference)  
6 are too enumerable to point to a single cause. So --  
7 so that's the position they take in both their brief,  
8 the motion to dismiss, which they filed in December,  
9 and response to our amended complaint which was filed  
10 November the 11th, as well as the very last thing they  
11 tell you in their reply brief. And it's not lost on me  
12 that -- that clever Mr. Polsenberg had the time to look  
13 through the opposition and maybe go read the  
14 depositions of the treating physicians, some of which  
15 had not come in. Dr. Breitah's deposition had not --  
16 we all hadn't received it.

17 And -- and so today when the argument is  
18 made, no mention of their primary thrust is said to you  
19 at all, because their whole contention in the opening  
20 brief and the reply brief is factually we don't have  
21 doctors to support our theory. And -- and I can't  
22 emphasize how dead wrong that is. Dipak Panigrahy is a  
23 cancer doctor who works at Harvard. They argue that  
24 because he's not an oncologist, he's unqualified.  
25 And -- and if you'll indulge for me a second, I'll walk



1 you through his qualifications which are unmatched.  
2 And -- and I would point out to the Court that the  
3 defendants do not have an expert to say Dr. Panigrahy,  
4 his opinions about stress aggravating cancer and  
5 accelerating metastases are wrong. They simply have an  
6 oncologist, Dr. Stahl, that they hired to say, well,  
7 Katy had this really tough B-Raf strain of colon  
8 cancer; therefore, she was going to die anyway, which  
9 I'll get to in a minute, flies directly in the face of  
10 the guy they brought in front of you which held up and  
11 waved at you in November to tell you that Katy was  
12 going to live six more months, or 1.7 more years, so  
13 you should kick the trial out so they shouldn't have to  
14 go to trial in November. So they went and removed it,  
15 had the case sent back after one week -- Judge Boulware  
16 one week to send the case back. And when we went to  
17 the argument, you know what he did, Your Honor -- it  
18 was my motion -- to have it sent back? He said, Which  
19 one of you 20 lawyers intends to argue this removal is  
20 proper? And Mr. Roberts drew the short straw that day.  
21 So he called him to the bench and -- or to the -- the  
22 lecturn and -- and forced the defense to answer  
23 questions and sent the case back the next day.

24           So I simply am trying to create an accurate  
25 picture background wise for you to understand this

1 effort to say that there aren't doctors that predicted  
2 she would live longer when three months ago they had a  
3 doctor they were waving a report of in front of you to  
4 get the trial continued is disingenuous at best.

5 Dr. Panigrahy, he is a track assistant  
6 professor at Harvard Medical School. He's got two of  
7 the largest grants for the study of cancer that exist  
8 from the federal government. He's a young man that  
9 went from high school into the University of Boston to  
10 a combined undergrad in medical school. The guy's like  
11 a Doogie Howser. He went from high school to medical  
12 school, if you've ever heard of such a thing.

13 THE COURT: Actually, they do do that in  
14 South America and Europe.

15 MR. CHRISTIANSEN: I -- I know you do, Your  
16 Honor, in different countries. I have a -- a daughter  
17 that's in college in Scotland, so I know that.

18 THE COURT: They do.

19 MR. CHRISTIANSEN: So Dr. Panigrahy has  
20 studied probably more than anybody else the effects of  
21 stressors, including social stressors, the loss of  
22 spouses, et cetera, on persons who have cancer. And  
23 his paper that -- his opinion that he wrote is 60-some  
24 pages. And I'll be honest, I've never seen anything  
25 like it in my life. 248 peer-reviewed medical

1 literature, all of which would qualify as learned  
2 treatise -- treatises that he supports his opinions  
3 with. 248. And the defense couldn't find -- his  
4 theories are so clear and so concise and so spot on  
5 that the defense couldn't find a doctor to oppose him,  
6 a cancer specialist to stand up and say, hey, yeah,  
7 stress doesn't aggravate cancer.

8 In 2003 he was selected to the Harvard  
9 Medical School where he continues to be on faculty.  
10 He's an assistant professor of pathology. The articles  
11 he's written -- if I could snap forward a bit, Your  
12 Honor, stem from a doctor who is without a doubt the  
13 preeminent cancer studying research doctor on the  
14 planet, Dr. Folkman. And this is a guy who -- who  
15 wrote dozens of papers on the issue. And Dr. Panigrahy  
16 studied with him on -- he's -- he's -- 14 regional  
17 presentations, accepted invitations to speak on a  
18 national level 32 times, 16 international presentations  
19 regarding his findings and research.

20 And over the past decade, what he's done is  
21 focus his research and teaching on stress-induced  
22 cancer models and the role of stress in cancer.  
23 That's -- that's what this guy does. And I apologize  
24 for belaboring the point, but his qualifications are so  
25 great, Your Honor, that I sort of felt like we needed

1 to go through it.

2 He reviewed all of Katy's records. He  
3 reviewed -- he wasn't tainted by a single deposition of  
4 a treating physician, depositions of anybody. He gave  
5 his deposition first. He wrote his paper based on his  
6 opinion based on her USC and her Comprehensive Cancer  
7 Centers of Nevada, CCCN. That's where she treated here  
8 locally with two doctors, Dr. (inaudible) and  
9 Dr. (inaudible).

10 Maybe most telling, and -- and I didn't pull  
11 it up, but Mr. Roberts asked Dr. Panigrahy at the  
12 conclusion of his deposition after the doctor says,  
13 hey, after her husband died, I would propose that she  
14 had -- I would have theorized that she had about six  
15 months to live. But Mr. Roberts took umbrage with that  
16 and said to him:

17 "Do you mean to tell me she's going to die  
18 in the next 22 days?"

19 And Dr. Panigrahy, he said:

20 "Candidly, if you told me the day her --  
21 after her husband died, I would have said six  
22 months. so if that's the math, that's the  
23 math."

24 Dipak Panigrahy was wrong. She died nine  
25 days later.

1           And -- and, here, Your Honor, just by way of  
2 a simple, easy, silly illustration, this is the first  
3 page of his -- doesn't even represent a tenth of the  
4 references he's incorporated. And if I just fly out of  
5 the references, of the 20 on that page, he wrote 9 of  
6 them. Nine of the articles on this area of medicine.

7           And -- and so in terms of what he was asked  
8 to do, I try to just pull relevant portions out to form  
9 opinions as to whether exposure to severe stress, such  
10 as the death of a loved family member, can accelerate  
11 tumor progression. And it's a pretty simple thing that  
12 he's asked to do. Does it also accelerate or decrease  
13 the way somebody's ability is to -- you know, to fight  
14 the cancer.

15           And in forming those opinions, he uses  
16 background and training and years of research and the  
17 mechanisms related to the stress-induced cancer. I've  
18 also reviewed numerous materials, 240 to be precise,  
19 and he -- and I venture to guess if you ask  
20 Mr. Roberts, he would concede that Dr. Panigrahy, he  
21 knew footnotes. I mean, the guy had footnotes from  
22 articles written in 1970s committed to memory and would  
23 cite them throughout the three- or four-hour  
24 deposition.

25           The summary of his opinions are -- are

1 simple. And at the time he writes this, Your Honor,  
2 remember, this is written in October of this year.  
3 Katy Barin is still alive. So it's written from the  
4 standpoint of the stress is likely to cause, the stress  
5 is likely to do this, likely to do that. She -- she  
6 hadn't passed yet. So he's sort of prognosticating  
7 what -- what he believes, and ultimately he's right.

8           And he doesn't just do it to cancer in  
9 general. He does it to colon cancer. So he has not  
10 just articles about breast cancer or lymphoma or  
11 whatever. He's got articles and relies on dozens of  
12 them about metastasized colon cancer, multi-organ colon  
13 cancer, which is what -- including B-Raf, the strain  
14 B-Raf, and it's a nasty strain of colon cancer,  
15 including what Katy had. So I'm not even -- he's not  
16 even opining into the theoretical. He's opining  
17 specifically under Hallmark to assist the jury as to  
18 what this lady had and how it was exacerbated by her  
19 cancer -- by the stress caused by the death of her  
20 19-year married spouse, father of her two children, and  
21 the grief, sorrow, and anguish she had to go through,  
22 frankly, in dealing with her boys and then having to  
23 ultimately tell her boys that she herself was going to  
24 pass, and that they'd be uprooted and move to Montreal  
25 where they currently reside as American citizens with

1 their uncle Babak Barin, who's a fed -- our version of  
2 a federal judge in -- in the Quebec province.

3 And what you see, Your Honor, from  
4 Dr. Panigrahy's report is that from January 27th when  
5 Katy's diagnosed -- Dr. Barin. I apologize. I -- I  
6 knew her personally, so --

7 THE COURT: Fine.

8 MR. CHRISTIANSEN: -- I -- I refer to her as  
9 her first name.

10 -- when she was diagnosed with cancer, she's  
11 immediately put on a very strict chemo regimen every  
12 two weeks; right? And there -- the goal is, and this  
13 is by all accounts. There's no dispute. The goal is  
14 to treat her for three months to reduce her tumors --  
15 her tumor in her colon so it can be resected,  
16 surgically removed.

17 And by the end -- I'm sorry, the beginning of  
18 April, April the 2nd, her tumor's growth has been  
19 suppressed 50 percent. Her counts are all -- have all  
20 improved. They're making plans to send her to Dr. -- a  
21 doctor named Dr. Lenz who is a German trained  
22 colorectal oncologist at USC for her to undergo the  
23 surgery.

24 April the 18th, Kayvan Khiabani is hit by the  
25 MCI bus, and that afternoon, Katy Barin learns of her

1 husband's death.

2 By May the 4th -- this is a timeline  
3 unfortunately I know pretty well. By the May 4th, her  
4 next visit that I see in -- in her records back in  
5 Comprehensive Cancer Centers of Nevada, she's weak.  
6 She's needing antibiotics. They're screening her for  
7 depression. And she goes downhill until she dies in  
8 October the 22nd of this year.

9 So the event that occurs in between is her  
10 husband's death. And -- and it's noted by both of her  
11 treating physicians, Breitah and Nguyen, that that  
12 change was obvious and drastic. And it was a change in  
13 her course and treatment, and it was a change in their  
14 expected outcome, their as her treating physicians,  
15 expected outcome of her.

16 He goes through her -- he, Dr. Panigrahy,  
17 goes through her cancer markers. They use different  
18 cancer markers to denote the cancer. And as you see at  
19 the very last sentence, she developed -- by June 5th,  
20 she developed a progressive disease with lung  
21 metastases and enlargement of hepatic metastases. So  
22 her husband's killed in April after her tumor has  
23 decreased 50 percent, her markers are all getting  
24 better after two and a half months of treatment. By  
25 June, she's got cancer in other organs in her body.



1 And by October, she's dead. Dr. Panigrahy has written  
2 papers on the body responding to stress and what he  
3 calls protumorigenic molecules. He actually drew us a  
4 little chart that sort of makes some sense. If you  
5 subject a body to repeated social defeat, the death of  
6 a spouse, and you'll see in a minute he talks about the  
7 bereavement, it creates the hepatic, pituitary, adrenal  
8 glands, and it takes the immune -- they call it  
9 dysregulation. So it makes your body less able to  
10 fight. And all the potential effects are about as  
11 common sense as you have an increase in inflammatory  
12 mediators, an increase in tumor growth, an increase in  
13 the migration invasion of tumor cells, all of the  
14 things you can see just from looking at Katy Barin's  
15 medical records. She -- she -- all of this happened to  
16 her after her husband died.

17           It talks about the psychological stressors,  
18 and I won't go through all of it. It is a lengthy  
19 report. In the last decade Dipak Panigrahy spent  
20 almost exclusively dealing with how stress stimulates  
21 cancer at Harvard. And I think -- I think it's 48.  
22 Yeah, I skipped it. He cites 48 peer-review articles  
23 in this section of his paper to support his contention  
24 that it exacerbates cancer generally, it exacerbates  
25 colon cancer, it stimulated Katy's cancer, and it was

1 the cause of Katy's death. Unopposed. They don't have  
2 a counter -- an expert to say different.

3           Stress and colon cancer and stress  
4 stimulating algo -- angiogenesis, that's a typo. It  
5 should be an "i" not an "l", and inflammation in the  
6 tumor microenvironment. He cites 47 more articles. So  
7 it -- it stimulates essentially the blood growth to the  
8 tumors because it suppressed her immune system. And --  
9 and this is all widely accepted medical fact that he  
10 applies both generically and then specifically to  
11 Dr. Katy Barin. Obviously also interferes with her  
12 immune system.

13           He talks at great length about that area as  
14 well, and the distress that goes along with the cancer  
15 diagnosis. He talks about multiple epidemiologic  
16 studies that link stress to enhanced progression of  
17 established malignant disease. And I put this quote in  
18 here because this is the National Comprehensive Cancer  
19 Network. It is an entity that Dr. Day, the  
20 epidemiologist the defense hired to tell you in  
21 November that Katy was going to live another 1.7 years,  
22 that's to -- the entity to which he cited in his paper.

23           The stress stimulates metastases, we -- he's  
24 actually got pictures of different metastasized cancer  
25 from biopsies taken from persons who weren't stressed

1 undergoing stress, whether it was psychosocial, whether  
2 it was operations versus -- or not. And then he talks  
3 about the bereavement, and -- and that similarly makes  
4 all the sense in the world.

5           So a type -- I now want to tie this in with  
6 her treating physicians. Dr. Nguyen, he began seeing  
7 Katy January of 2017. He is a University of California  
8 Irvine trained oncologist. He, as you'll see,  
9 personally lived through a father dying of lung cancer,  
10 has very specific opinions. And he was asked:

11           "Can you state to a reasonable degree of  
12 medical probability that due to her husband's  
13 death, she" -- being Katy -- "succumbed to her  
14 cancer earlier than she would have otherwise?

15           "I think yes."

16           That's his answer. And this is given to  
17 Mr. Russell in the deposition that was taken  
18 December 18th. And -- and he goes on to describe, as  
19 you see, Your Honor, the next page on line 20:

20           "My father was a nonsmoker who had lung  
21 cancer and he was Stage 4. the Prognosis at  
22 that time was six months. He lived for three  
23 and a half years. Every second, the spouse,  
24 not me, the spouse is the one that pushed him  
25 hard, hardcore. He lives through this. They

1 help you through it. I believe this. Now,  
2 this is not scientific on any paper or  
3 anything. It's something I have seen,  
4 something I believe. I could be wrong, but I  
5 don't think so. I think that every case is  
6 very different, but I think that the person you  
7 love, if it's a good relationship, if you have  
8 a crappy relationship, I don't think it's the  
9 same thing."

10 And he goes on to say:

11 "So when your spouse or your loved one, it  
12 doesn't have to be your spouse, it can be  
13 somebody that just takes care of you, that  
14 person is now gone tragically and overall  
15 you're fighting alone now, I think it's hard."

16 I ask him:

17 "I'm asking you a very" --

18 I'm sorry. This is Mr. Russell:

19 "I'm asking you a very specific question.

20 To a reasonable degree of medical probability  
21 that her husband's death accelerated or altered  
22 the progression of Katy Barin's cancer.

23 "ANSWER: Yes."

24 That's a treating physician to the standard  
25 we need him to testify opining that Kayvan Khiabani's

1 death sped and/or caused Katy Barin's death. And it's  
2 not just Dr. Nguyen.

3 Dr. Panigrahy, he has three sections about  
4 stress and health, bereavement to the immune function,  
5 bereavement in colon cancer, cites 27 peer-review  
6 articles, and concluded that the conclusion from both  
7 the treating experts and the physicians is that's what  
8 it -- is caused.

9 I question Dr. Panigrahy:

10 "Just a few follow-up questions for you.  
11 Have any of the questions posed to you by  
12 Mr. Roberts changed your opinions contained in  
13 October 3rd report?

14 "No.

15 "Is it your opinion to a reasonable degree  
16 of medical probability and certainty that the  
17 day before Katy Barin died, Katy Barin's cancer  
18 was survivable?

19 "ANSWER: Yes, correct.

20 "QUESTION: Is that opinion taking  
21 everything particular to Katy and the things  
22 that you told Mr. Roberts about over the last  
23 three hours into account?

24 "ANSWER: Correct.

25 "Is it your opinion the day after

1 Dr. Khiabani was hit and killed by the Motor  
2 Coach Industry bus that Katy's prognosis had  
3 changed?

4 "ANSWER: Correct.

5 "And is that" an opinion -- "is that  
6 opinion to a reasonable degree of medical  
7 probability and certainty?"

8 There's an objection posed.

9 "ANSWER: Yes."

10 And the --

11 "QUESTION: Did the change, in your  
12 opinion, just sort of in laymen's terms mean  
13 that Katy's cancer had become terminal?

14 "ANSWER:" Yes -- I'm sorry. "Correct."

15 "And terminal because of the loss of her  
16 husband?

17 "ANSWER: Correct.

18 "QUESTION: And if taking all the factors  
19 that you talked" about -- "talked to us today  
20 and looking at the medical records that you  
21 have up through June or July of this year of  
22 Katy Barin, would you predict that she survives  
23 another six months?

24 "Objection. Form."

25 He asks:

1 "After the accident?

2 I say:

3 "After."

4 He says:

5 "Correct. She wouldn't survive.

6 "QUESTION: Is that an opinion to a  
7 reasonable degree of medical probability?

8 "ANSWER: Correct."

9 Dipak Panigrahy's deposition was taken  
10 10/18 of 2017. Katy Barin died four days later.

11 Dr. Breitah is an oncologist that specializes  
12 in palliative care, and his --

13 MR. POLSENBERG: Excuse me, Your Honor. I  
14 hate to interrupt counsel, but this is not what my  
15 motion is about.

16 MR. CHRISTIANSEN: It's exactly what the  
17 written motion is about.

18 MR. POLSENBERG: It is not what the written  
19 motion is about. The written motion is a 12(b)(5)  
20 motion, and the only footnote in the motion says that  
21 "myriad factual and scientific flaws in this claim will  
22 be addressed in defendants' motion to exclude the  
23 opinions" and -- of the doctor that you just finished  
24 doing the deposition of. And then the footnote  
25 continues, "The motion is focused solely on the legal

1 viability of this new cause of action plaintiffs wish  
2 to pursue." I even said I have to assume the truth of  
3 their allegation. So this is all stuff for next week.

4 MR. CHRISTIANSEN: I'll move on, Your Honor.  
5 I'm getting to the law. I oppose the response, the  
6 response to the written motion which accuses me of not  
7 having --

8 MR. POLSENBERG: It doesn't, Judge. You can  
9 read this.

10 MR. CHRISTIANSEN: Dr. Breitah takes over  
11 Katy Barin's treatment in June, Your Honor. And even  
12 when he takes it over, he calls his initial output as a  
13 curative one where he's looking to cure her. So even  
14 in June -- by this time, she's got lesions on her  
15 lungs. So they still believe she -- she's going --  
16 trying to get better. And he's asked -- his -- his  
17 deposition was only taken January the 5th, wasn't  
18 available when we did our opposition, and there was a  
19 footnote saying we would supplement, and I hope the  
20 Court will take this as a supplement.

21 But he talks about a British study. The  
22 question:

23 "Is the British study you're taking about  
24 that anecdotally people who have psychological  
25 stressors have worse outcomes?"



1 And his answer to that question by  
2 Mr. Russell was:

3 "I'm not sure why we take out the word  
4 anecdotally because a study, by definition, is  
5 not" an anecd -- "about anecdotes. It's about"  
6 system -- "systematic review of multiple  
7 studies. That's why I want to be careful. The  
8 word "anecdotally" means it's one case here or  
9 there. In our world, that's how I understand  
10 it. The study showed, because this is a study  
11 of multiple studies, this is a meta analysis  
12 and it showed that there is a correlation of  
13 both psychological stressors and worsening of  
14 the outcome of different cancers in patients."

15 He goes on to say that study is what he  
16 believes happened to Katy Barin. And he believes it to  
17 a reasonable degree of medical probability. Not one,  
18 not two, but now three doctors, two of which are  
19 treating physicians, not retained experts, that echo  
20 that same theory. And I won't quote just for the sake  
21 of time.

22 But as you can see, multiple other sponsor,  
23 Dr. Nguyen, Dr. Breitah, and Dr. Panigrahy, all  
24 articulate to the exact standard we need to get in  
25 front of the jury that the grief and sorrow which is

1 cognizable under NRS 41.085 for Katy for what she was  
2 going through for the loss of her husband, exacerbated,  
3 accelerated, and ultimately caused her -- her demise.

4           Again, I go back to the reply brief. And so  
5 I wanted to give the Court just by way of background,  
6 the three doctors. You got Harvard, University of  
7 Irvine, and Yale. And -- and we also have their  
8 doctor, whose deposition I'm going to take next week.  
9 Dr. Day who Mr. Roberts, you know, waved his report in  
10 front of you back in November of this year in an effort  
11 to move the trial opining statistically that Katy was  
12 going to live -- (microphone interference) alive eight  
13 months post diagnosis. This is a colon cancer  
14 long-term survival. This is what Katy's got. This is  
15 written in August. So this is eight months after Katy  
16 had the cancer. So he is opining of those who are  
17 alive eight post months post diagnosis, remaining life  
18 expectancy was approximately 2.3 years. So their own  
19 epidemiologist echos our experts. And that last  
20 footnote, he says that's even being a little harsh.

21           The -- the legal argument for -- is that the  
22 damages listed in the wrongful death statute are  
23 exclusive. And because Katy died because of the grief  
24 and sorrow which is a -- listed in the wrongful death  
25 statute, we can't, on behalf of her two orphan sons,

1 pursue claims for her death. And -- and when  
2 Mr. Polsenberg read to you the statute, the death of  
3 any person that's caused by the wrongful act of  
4 another, he's told you that only means direct, that it  
5 only means direct like Dr. Khiabani. But did he point  
6 out to you where the word direct was in the statute,  
7 Your Honor?

8 THE COURT: I have it right here.

9 MR. CHRISTIANSEN: It's not in the statute.

10 To be clear, what we're seeking is exactly  
11 what is in the statute. Katy's grief, sorrow, loss of  
12 probable support, companionship, society, and comfort,  
13 all expressly listed in NRS 41.085. And it cannot be  
14 Keon and Aria Khiabani's fault, the 16- and 14-year-old  
15 boys, that their mom was so sick that the death of her  
16 husband killed their dad [sic] and that they can't now  
17 pursue a claim for that. It can't really fall on those  
18 boys' shoulders.

19 The -- the -- the notion that we're trying to  
20 create a new claim is just fantasy. There -- there is  
21 no case that they have pointed to saying that this is  
22 disallowed. They've not shown you a single published  
23 opinion where a spouse has died and a surviving spouse  
24 has suffered damage as a result of that, that a Court  
25 had limited the surviving spouse's ability to pursue

1 the damages they've suffered, because it doesn't exist.

2 And as the Court knows, you take your  
3 plaintiff as you find them. Katy Barin was sick. But  
4 she was sick, continuing to work full time, continuing  
5 to be a mother and a wife, and the prognosis for her  
6 was good according to the physicians and -- and  
7 according to the defense expert.

8 We -- we cited for you the -- this Pierce  
9 case. It's a Ninth Circuit case where the Ninth  
10 Circuit in a federal claims act says that emotional  
11 damage that ultimately manifests itself into physical  
12 harm is recoverable. It's exactly what happened to  
13 Katy. She suffered the ultimate physical harm. She  
14 died from the emotional damage caused by the direct  
15 consequences of the wrongdoing of the defendants in  
16 this case -- the defendant left in this case.

17 And I'm not sure how this argument goes, but  
18 in the reply, MCI contends Katy was not an (microphone  
19 interference) plaintiff because she wasn't generally  
20 more susceptible to grief or stress as a fragile  
21 person. That flies in the face of every bit of common  
22 sense. All the doctors that have testified and the 248  
23 articles that Dipak Panigrahy cited in his 60  
24 some-odd-page paper.

25 Every single thing that we're asking for --

1 to be able to recover for Katy Barin is listed right in  
2 the statute for you. NRS 41.085 lists the very items  
3 for which her sons now seek to recover. There's  
4 nothing new or unique about this.

5 What they suggest to you is because her  
6 death, in their mind, wasn't foreseeable, that the  
7 grief -- I'm sorry, that Katy's death was not  
8 foreseeable, her emotional distress as a result of her  
9 husband's death was undeniably foreseeable. Your  
10 Honor, you can't really argue that you didn't think the  
11 wife was going to suffer emotional distress when her  
12 husband died.

13 And I see no requirement in the law anywhere  
14 nor case cited by MCI that says that the bus company or  
15 a defendant anywhere needs to know the physical  
16 condition of the surviving spouse in order to be held  
17 responsible for the damage the surviving spouse suffers  
18 as a result of the death of the deceased.

19 Second amended complaint was filed November  
20 the 11th. It was never answered. It was met only by  
21 the -- the motion to dismiss. And -- and as  
22 Mr. Polsenberg correctly pointed out to you, the  
23 Court's got to take every inference and everything as  
24 true in the complaint. The complaint is very specific.  
25 It is supported factually everywhere. Her treating

1 physicians, our experts. And for -- for those reasons,  
2 as well as they have not cited a single case, and as  
3 much as I respect Mr. Polsenberg, his opinion about  
4 what the law should be isn't what controls. And I  
5 mean, if he's got a case to show you that this doesn't  
6 go to a jury, ask him for it. He didn't cite one. You  
7 take the plaintiff as you find them. Katy Barin was  
8 sick. It's not her sons', my clients', fault. And  
9 they shouldn't be precluded from pursuing a claim for  
10 the -- for her -- their mother's death that was caused  
11 by this defendant.

12 THE COURT: Thank you, Counsel.

13 MR. POLSENBERG: You see what plaintiffs do.  
14 They come in here, and they use that old saying when  
15 the law is against you, pound the facts. So they come  
16 in here and even though at the very end, they say that  
17 I was right, I have to accept their allegations in  
18 their complaint as true, they still go on and on. What  
19 did counsel say? Sorry for belaboring the point, and  
20 then went on and on some more about the evidence that  
21 they say shows this causal relationship.

22 I'm not talking about some factual issue  
23 here. I started out by saying this is a 12(b)(5) legal  
24 issue. It's not a summary judgment motion. And I've  
25 already read to you from our footnote in our motion

1 where I say, look, these -- these issues in this motion  
2 are purely legal. The factual issues will come up next  
3 week in our motion to exclude certain opinions. This  
4 motion -- "This motion is focused solely on the legal  
5 viability of this new cause of action plaintiffs wish  
6 to pursue." This is new. This is novel. Never seen  
7 anything like it anywhere in the country. But they're  
8 coming in here and saying they can prove it. Well,  
9 that's like saying, well, Helen Palsgraf was hurt.

10 \$6,000 worth. But that isn't enough to get you there.

11 And I went through the analysis. There are  
12 two ways that you -- you have to -- to get there. One  
13 is have to -- establishing a common law cause of  
14 action, and one is looking under the statute. And they  
15 don't fall under common law cause of action. This is  
16 not bystander liability. This is not negligent  
17 infliction of emotional distress. She wasn't a  
18 bystander. They don't argue that she falls under any  
19 of the cases in Nevada which, honestly, have a rambling  
20 history of trying to figure out what NIED is. They  
21 don't argue any of that. They don't argue a direct  
22 action against her. All they're pleading is a  
23 statutory derivative claim. And they're allowed to  
24 only get the benefit -- the -- the damages under that  
25 claim. And now they're claiming that those damages

1 create yet a second cause of action upon a cause of  
2 action. And that goes too far under the common law.  
3 That's not supported by the statute. There isn't a  
4 case anywhere in the country like that.

5 But I think you would be led into error if  
6 you made your decision based on the bulk of their  
7 argument today by saying, look, this is scientifically  
8 valid or, look, we've got a lot of proof. Because  
9 that's not the issue that would go up on appeal. The  
10 issue that would go up on appeal is just whether a  
11 cause of action exists.

12 Thank you, Your Honor.

13 THE COURT: All right. All right. This is a  
14 wrongful -- wrongful death is a statutory claim  
15 pursuant to NRS 41.085. It's obviously not a common  
16 law action. Specifically the elements, death must be  
17 caused by the wrongful act or neglect of the defendant.  
18 And here the statute must be strictly construed as it  
19 is in derogation of the common law. Therefore, there's  
20 no clear -- it's interesting. There's no clear  
21 requirement of proximate cause. Nevada has not  
22 addressed whether a wrongful death claim requires a  
23 death be proximately caused by defendant.

24 However, I was doing research last night  
25 because I need to research. As the judge, I need to



1 make sure I -- I find -- you know, I -- I really  
2 understand the legal issues. The Ninth Circuit, which  
3 is not binding, it's just persuasive. It's the only  
4 case I found. It's called *Tubbs v. Gorman*. That is --  
5 I don't have the cite here. 590 -- 539 Fed -- one  
6 second -- 7233 2013 case. I believe it's out of  
7 Washington State.

8 Here, this case, the Ninth Circuit required  
9 this in examining almost identical -- the statute from  
10 Washington was almost identical to the statute that we  
11 have in Nevada, NRS 41.085. And the claim -- so the --  
12 there they discussed the requirement of proximate cause  
13 by the defendant.

14 So they're -- they discussed the requirement  
15 of proximate cause by the defendant. The -- moreover  
16 as the claim couched in an alleged negligence, the  
17 policy of proximate cause, I -- in my view, applies  
18 here. Dr. Barin's death is not foreseeable by  
19 defendant at the time the bus was designed. It was not  
20 foreseeable. Just as in *Palsgraf*, this can be decided  
21 as a matter of law. Therefore, the alleged negligence  
22 of defendant cannot have proximately caused Dr. Barin's  
23 death. I agree it's too far removed for -- with  
24 respect to causation.

25 Without proximate cause, plaintiffs'

1 wrongful -- excuse me, wrongful death claim fails as a  
2 matter of law. I'm going to grant this motion.

3 MR. POLSENBERG: Thank you, Your Honor.

4 THE COURT: Now, we're going on to the next  
5 motion, which is -- thank you -- defendants' motion for  
6 leave to file a third-party complaint. And I  
7 understand that's moot depending on what happened with  
8 this motion.

9 MR. RUSSELL: Yes. If there -- if there  
10 cannot be for her physical manifestation --

11 THE COURT: Correct.

12 MR. RUSSELL: -- then UMC would not need to  
13 be in --

14 THE COURT: Right. Okay. So that's moot.  
15 All right.

16 MR. RUSSELL: And -- and just --

17 THE COURT: That was in your pleadings.

18 MR. RUSSELL: Right. And -- and just a point  
19 of clarification, however. To the extent that evidence  
20 comes in about her grief and sorrow, her emotional  
21 damages, not her physical damages, to the extent that  
22 evidence comes in at trial, we would reserve the right  
23 to just bring the letter and evidence of UMC's conduct  
24 as impacting that grief and sorrow, but we don't need  
25 them as a party.

1 THE COURT: We'll defer that.

2 MR. RUSSELL: Thank you, Your Honor.

3 THE COURT: Now we go to -- I spent a lot of  
4 time with this one. Okay. Defendant -- Nonparty  
5 Defendant New Flyer Industries Lack of (inaudible).  
6 Let's see. Objection to Special Master Hale's  
7 January 4th, 2018, opinion or recommendation. Okay.

8 UNIDENTIFIED FEMALE SPEAKER: Good morning or  
9 good afternoon.

10 THE COURT: Good afternoon.

11 MS. WELCH-KIRMSE: I'll be brief. I'm sure  
12 everybody wants to be out of here.

13 THE COURT: You can be brief. You need to  
14 make sure you, you know, do your -- that's what we're  
15 here for, so go on.

16 MS. WELCH-KIRMSE: Thank you, Your Honor.

17 It's a fairly narrow issue. I represent New  
18 Flyer. And -- oh, okay. Thank you.

19 As you know, New Flyer is the parent of MCI  
20 and is not a party to this case. Nevertheless,  
21 plaintiffs sought to depose New Flyer's CFO, Mr. Asham.  
22 Now, New Flyer sought a protective order from Special  
23 Master Hale to prevent Mr. Asham's deposition to move  
24 forward. And we brought that motion based on the law  
25 that clearly prohibits Mr. Asham's deposition under

1 these circumstances; namely that New Flyer is not a  
2 party, the CFO is an apex employee entitled to certain  
3 protections if he does not have any particularized or  
4 special knowledge regarding the underlying case which  
5 is -- is the exact circumstance presented here. So we  
6 brought the motion for protective order to prevent  
7 Mr. Asham's deposition to go forward.

8 Now, New Flyer submits that in ruling against  
9 New Flyer's motion, Special -- Special Master Hale  
10 misread the Dillard's case and bought into plaintiffs'  
11 misinterpretation of the ruling in that case. So  
12 I'll -- I'll focus on Dillard.

13 What happened in Dillard's, both the parent  
14 company and the subsidiary were named as defendants.  
15 It was an employment -- wrongful employment dispute.  
16 Now, that is not the case here. New Flyer is not a  
17 defendant in this action. And that is important  
18 because the Court repeatedly said nationwide worth of a  
19 defendant is admissible. Okay? And that's what  
20 plaintiffs hang their hat on; namely is that, you know,  
21 that that -- that ruling is expanded beyond defendants,  
22 okay, in the case such as New Flyer. But there's no  
23 reasonable reading of the Dillard case that would allow  
24 for that interpretation.

25 Now, from the language in Dillard's saying

1 that nationwide worth of a defendant only is  
2 admissible, plaintiffs offer their own interpretation  
3 of what nationwide worth is. But that does not include  
4 worth beyond the defendant, which is what they're  
5 trying to do here. And on that basis, we believe that  
6 Special Master Hale erred in denying the protective  
7 order and that Mr. Asham, there's no reason to depose  
8 him. He should not be deposed, and that's why we  
9 brought the motion for protective order and the  
10 subsequent objection.

11 THE COURT: Okay. Thank you.

12 MR. PEPPERMAN: Good afternoon, Your Honor.  
13 Eric Pepperman for plaintiffs. I'm going to start with  
14 what counsel said about Dillard's, saying that it --  
15 it -- and I wrote it down. Nationwide talks about  
16 nationwide worth of a defendant is admissible. But  
17 that is exactly what we're talking about here, the  
18 nationwide worth of MCI. MCI's nationwide worth  
19 necessarily includes that of its parent company, New  
20 Flyer, which is exactly what Special -- Special  
21 Master Hale determined. And counsel said that Special  
22 Master Hale misread Dillard's, but there's no dispute  
23 about what Dillard's says. Dillard's plainly says --  
24 and just so the Court has a factual background,  
25 wrongful discrimination -- wrongful --

1 THE COURT: I read the case. I know it.  
2 I -- I could recite it to you.

3 MR. PEPPERMAN: Okay. Great. So you have  
4 Dillard's Nevada, a division of Dillard's Department  
5 Store. They're saying, hey, only Dillard's --

6 THE COURT: This is --

7 (Multiple speakers)

8 MR. PEPPERMAN: It's -- you know, true. It's  
9 only Dillard's Nevada. And they said, no, it's not  
10 limited to Dillard's Nevada even though it's a separate  
11 entity, a subdivision. It's the nationwide worth. You  
12 got to consider the worth of it in relation to its  
13 parent company 'cause it's the same business. You  
14 can't just subdivide it based on their individual  
15 choices on how to incorporate their divisions of the  
16 same company. And that's what it says, and that's what  
17 Special Master Hale interpreted it as. That's what we  
18 interpret it as. That's what they interpret it as.

19 They just try to distinguish the whole thing  
20 and say, well, that doesn't apply here, because  
21 Dillard's department store was a -- a party to that  
22 case. And in order to be able to present evidence of  
23 nationwide worth of a company, you have to sue every  
24 little individual subdivision that's separately  
25 incorporated. And -- and Dillard's says nothing about

1 that. And that is exactly why Special Master Hale  
2 said, hey, I have a Nevada Supreme Court case, it's  
3 directly on point. It allows nationwide worth. That's  
4 what we're talking about here, the nationwide worth of  
5 the defendant, MCI, and I'm going to allow it.

6 And -- and I think that's important, that  
7 really what we're doing here today is rearguing the  
8 exact same thing. These were the same arguments that  
9 were made to Special Master Hale. The briefs are the  
10 same briefs that were before Special Master Hale. He  
11 looked at everything. He made his decision. They  
12 disagreed with it, but I think in -- it's a common  
13 practice that these discovery arbiters, whether it's  
14 Discovery Commissioner Bulla or special master like  
15 Special Master Hale, the -- the common practice is to  
16 give deference to them. And we're not here arguing new  
17 facts or new law. It's just the same arguments that  
18 were previously decided in a -- in a fair forum, and  
19 for good reason.

20 And I think importantly in the context of  
21 this, you know, we're talking about an hour deposition.  
22 You know, we estimate it will last an hour, maybe that.  
23 Special Master Hale in his order said no more than two  
24 hours. And -- and Mr. Kemp will be taking the  
25 deposition, and I venture to guess it won't be anywhere

1 near two hours. We're going to do it over  
2 videoconference. Mr. Asham won't have to travel more  
3 than a few blocks to the closest location that has a --  
4 a verifiable videoconference connection. We're not  
5 talking about a lot of time.

6 At first, you know, Special Master Hale was  
7 going to allow us to do it through interrogatories.  
8 But we have a trial date in, you know, three weeks at  
9 this point. Mr. Asham was on vacation until fairly  
10 recently, and he said, you know, I'm just going to  
11 allow the deposition. I'm not going to spend the time  
12 with the -- with the interrogatories 'cause that's just  
13 going to waste the time. It's an hour deposition. I'm  
14 going to allow it to go forward. Dillard's is on  
15 point. It's -- and the national worth of MCI, and  
16 there's no real reason to preclude a deposition on a  
17 relevant issue that is relevant in this case,  
18 especially today considering the ruling on the motion  
19 for summary judgment on punitive damages.

20 So we ask you to -- to affirm Special  
21 Master Hale and allow the deposition to go forward.

22 MS. WELCH-KIRMSE: Your Honor, you stated  
23 that you could recite the Dillard's case, so I  
24 apologize if I'm going to again --

25 THE COURT: No, go ahead.



1 MS. WELCH-KIRMSE: -- recite a few lines  
2 here, but I think it is important to consider. And --  
3 and specifically the emphasis on the word "defendant."  
4 That is --

5 THE COURT: Where are you in Dillard's?

6 MS. WELCH-KIRMSE: Page 7. So at the end  
7 where it says "punitive damages."

8 THE COURT: Okay. Mine only goes page 6.

9 MS. WELCH-KIRMSE: So let me see where I can  
10 find the -- I think 14.

11 THE COURT: Okay.

12 MS. WELCH-KIRMSE: Okay. So if you go to the  
13 punitive damages section, it says, "Dillard objected to  
14 the trial judge's decision to allow nationwide worth  
15 rather than just the worth of Dillard's Nevada"; right?  
16 "We had previously allowed that nationwide worth  
17 specifically while the defendant is directly relevant  
18 to the size of award which is meant to defer the  
19 defendant from repeating his misconduct as well as to  
20 punish him for past behavior."

21 There -- there's nothing in the decision that  
22 would logically include such a broad reading that  
23 defendant is to mean the entity sued and any  
24 potentially related entity. That is simply a  
25 ridiculous reading based on logic, because if that were

1 the case, you could sue the defendant and then get a  
2 punitive damages claim against -- you know, basically  
3 award against any related company. And if you look at  
4 the well-settled precedent of contract law or corporate  
5 law, a parent company is not liable for the acts of its  
6 subsidiaries. There's no mechanism for a -- a award to  
7 be bound against New Flyer here. So that reading is  
8 simply just not logical. And for that reason, the  
9 nationwide worth of the defendant here, MCI, does not  
10 extend to New Flyer.

11 As I stated before, there is no reason to  
12 interpret the use of nationwide worth here in that term  
13 in such a broad sense to include any related entity.  
14 That is simply not the reading here. If you look at  
15 the plain language, the Court focused on the word  
16 "defendant," and that is simply the -- the ruling and  
17 it should not be interpreted in that broad sense. And  
18 for that, we feel that the -- the information that  
19 Mr. Asham does possess regarding New Flyer's financials  
20 are irrelevant. Because he's an apex employee and in  
21 order to depose him, there would have to be some sort  
22 of relevant, unique information that he has, and he has  
23 none. And on that basis, a protective order should  
24 issue, and we would ask that the special master ruling  
25 be overturned.

1 THE COURT: You know, I -- I have a question  
2 for you.

3 MS. WELCH-KIRMSE: Sure.

4 THE COURT: Because somewhere in my readings  
5 of the cases, I saw a case *United States v. Best Foods*.  
6 Did you cite that?

7 MS. WELCH-KIRMSE: I believe so. I believe  
8 that was --

9 THE COURT: I thought it was you.

10 MS. WELCH-KIRMSE: -- in the -- discussing  
11 the liability nexus between --

12 THE COURT: I'd like you to -- to discuss  
13 that case.

14 MS. WELCH-KIRMSE: Sure.

15 THE COURT: I took a look at it, and --

16 MS. WELCH-KIRMSE: Just --

17 THE COURT: If you want, I have my copy here.  
18 I'm not being facetious.

19 MS. WELCH-KIRMSE: Oh, no, that's okay. I --  
20 I have -- I believe that was the one that we cited for  
21 the proposition that a subsidiary or a parent company  
22 is not liable for the acts of its --

23 THE COURT: Correct.

24 MS. WELCH-KIRMSE: -- subsidiaries, or the  
25 parent company is not liable for the acts of its

1 subsidiaries. And I believe, you know, if you -- if  
2 you look at those cases with Dillard's, it -- it makes  
3 sense, right, that the nationwide worth of a defendant  
4 could not extend to that of a parent company when the  
5 defendant is a subsidiary. And that's why we cited to  
6 that case.

7 THE COURT: Okay. Thank you.

8 MS. WELCH-KIRMSE: Thank you.

9 THE COURT: I -- I have a question for  
10 plaintiffs. Mr. Pepperman, I -- I tend to agree with  
11 the nonparty. If you -- you know, I -- I reviewed --  
12 with respect to Dillard's Department Store, okay, the  
13 parent company was a party to the action. Okay? They  
14 were actually a named defendant. Okay? And I think  
15 that that distinguishes that -- that case from -- from  
16 the present case.

17 MR. PEPPERMAN: Well, if I can, again, Your  
18 Honor, we're not seeking to establish liability against  
19 New Flyer. The -- the punitive damages award, if any,  
20 would be levied against MCI.

21 THE COURT: Correct.

22 MR. PEPPERMAN: And the question will be what  
23 is the amount of punitive damages that would suffice  
24 the policy for the damages, which is to deter future  
25 conduct and punish for past conduct.

1 THE COURT: Right.

2 MR. PEPPERMAN: And that's why the nationwide  
3 worth of the defendant, the defendant, MCI, is relevant  
4 to that determination. Because if -- if -- if you had  
5 all these divisions and you're -- you're a company --  
6 New Flyer and MCI, they make buses. They make and they  
7 sell buses. Now, they have some -- you know, they have  
8 a bunch of divisions, transit buses design, sales,  
9 motor coaches. And they're, you know, separately  
10 incorporated. And the -- if they can separate --  
11 separately incorporate and then one of the -- the  
12 divisions, the MCI, the motor coach manufacturing  
13 division is sued, and as punitive damages and their  
14 financials are all consolidated into one company under  
15 New Flyer, and we -- we're limited to the worth of a  
16 division of the company, then that's just going to be a  
17 punitive damages based on the worth of a division not  
18 the company.

19 Which is exactly the situation from  
20 Dillard's, Dillard's Nevada and Dillard's, you know,  
21 national. It was a nationwide worth, and the supreme  
22 court said, hey, we're not going to just let you  
23 consider the worth of the -- the division, the Nevada  
24 division of Dillard's. We're going to let you consider  
25 the worth of the whole company, which is what the case

1 says and what -- what it holds. And yes, in that case,  
2 Dillard's, Incorporated, was a named defendant, but the  
3 rationale behind it, the purpose of it, the wealth of  
4 the defendant, the punitive damages weren't against  
5 Dillard's, Inc. Dillard's, Inc., all they did was --  
6 all they were were the parent company of Dillard's.  
7 And so Dillard's Nevada was the one who the punitive  
8 damages were levied against.

9 THE COURT: I know.

10 MR. PEPPERMAN: And they were -- and the  
11 evidence of the parent company who wasn't liable for  
12 the punitive damages, their national wealth was  
13 admissible. And it's the same exact situation here.  
14 We're asking for --

15 THE COURT: They were -- they were a party to  
16 the Dillard's case. They were a party there.

17 MR. PEPPERMAN: But whether they were a party  
18 or not, the punitive damages were levied against  
19 Dillard's Nevada. And in determining the amount, the  
20 Court and the Nevada Supreme Court affirmed that  
21 evidence of the national worth which included the worth  
22 of Dillard's national was totally fair game because of  
23 the reasoning that I just explained that, hey, if we  
24 limit it to just Dillard's Nevada and don't let you  
25 include evidence of the national worth of Dillard's

1 Incorporated, whether they're a party or not, the  
2 punitive damages aren't going against them, then the  
3 punitive damages award isn't going to be enough to  
4 deter or punish because it's limited to the -- the  
5 defendant who the punitive damages are against.

6           So the party distinction is meaningless. All  
7 that matters is the punitive damages are against  
8 Dillard's Nevada. They're not against Dillard's, Inc.  
9 And Dillard's, Inc., evidence of their wealth as the  
10 national wealth of Dillard's Nevada was admissible.  
11 It's the same thing here. Punitive damages are against  
12 MCI. Whether New Flyer is a party or not, their  
13 punitive damages aren't against New Flyer. But New  
14 Flyer's wealth as the parent company of MCI is relevant  
15 to the amount that -- of punitive damages that are  
16 going to have any meaningful impact on MCI.

17           And, again, I'll remind the Court, this is  
18 just a discovery deposition related to New Flyer's CFO  
19 who has consolidated financials. Even if you later  
20 decide that evidence of New Flyer's financials or  
21 national wealth are not admissible, we still want to  
22 take the deposition because we have questions for this  
23 CFO related to MCI. So regardless of your ultimate  
24 decision on this, we still want to take the deposition  
25 of the CFO for reasons that have to do with MCI's

1 punitive damages.

2 Now, we contend that the New Flyer financials  
3 are going to be relevant and admissible on this  
4 question. But even if you were to decide that they're  
5 not, when and if that point comes down the road, we  
6 still want to take the simple discovery deposition of a  
7 witness who has knowledge about the financials of MCI  
8 as well as New Flyer. And they're consolidated  
9 financials. So we would still submit that this  
10 deposition, the short discovery deposition should be --  
11 should be allowed.

12 THE COURT: Okay. Thank you.

13 MR. ROBERTS: Your Honor, may I address this  
14 briefly?

15 THE COURT: Yes.

16 MR. ROBERTS: I believe that now that we've  
17 gotten into a discussion about the potential relevance  
18 of this evidence, it is something I'd like to say for  
19 the record, that MCI believes that the financials of  
20 its parent company are going to be completely  
21 irrelevant to the proper amount --

22 THE COURT: I'm sorry, irrelevant?

23 MR. ROBERTS: -- of punitive damages.

24 THE COURT: I'm sorry. Would you repeat what  
25 you just said.



1 MR. ROBERTS: Yes. And -- and I -- I'm  
2 hope --

3 THE COURT: I think it was just me.

4 MR. ROBERTS: MCI's position is that the  
5 financials of its parent company, New Flyer Industries,  
6 are completely irrelevant and inadmissible concerning  
7 the question of the proper amount of punitive damages.

8 If -- if the Court will recall, the standard  
9 instruction on punitives is punitive damages cannot be  
10 so great as to annihilate --

11 THE COURT: Yes.

12 MR. ROBERTS: -- destroy the company.

13 THE COURT: Yes.

14 MR. ROBERTS: So what we're -- what we're  
15 going to have is a situation where they would -- under  
16 their theory here, Your Honor, is that it's not how  
17 much cash you have in the bank. The maximum amount  
18 that the jury can award in punitive damages without  
19 annihilating the company is the amount that the company  
20 can borrow based upon its free cash. That's their  
21 theory. And it's a theory that's been used before.

22 So they want the parent company's ability to  
23 borrow, which their expert has already opined upon,  
24 that it's in the amount of \$737 million is what he  
25 opines New Flyer can borrow on, could borrow based on

1 its free cash. They want to get that evidence in front  
2 of the jury to come up with the biggest possible award.

3 But the problem is: If the jury is told that  
4 the max -- that the amount that's relevant to  
5 annihilation is what the parent company can borrow,  
6 that amount is going to be so great that it would  
7 destroy the subsidiary. And New Flyer isn't -- is not  
8 a party. The judgment is not going to be against  
9 New Flyer. A parent isn't presumptively liable for the  
10 debts of its subsidiaries. Nevada respects the  
11 separate corporate form. And so the judgment that they  
12 got based on the financials of a nonparty would be so  
13 large that it would annihilate MCI and would be  
14 unconstitutional. And, therefore, this is just a -- a  
15 rabbit trail they're going down.

16 There's no way this evidence is going to be  
17 admissible against Motor Coach Industries. And -- and  
18 I don't believe from read -- I don't have a copy of the  
19 Dillard's decision in front of me, but I don't believe  
20 that the financials of the parent came in for the  
21 purpose of determining the amount of punitives against  
22 the subsidiary. I don't recall seeing that anywhere in  
23 the case.

24 MR. KEMP: Judge, just briefly on the point  
25 that Mr. Roberts read.

1 THE COURT: Certainly.

2 MR. KEMP: This is a publicly traded  
3 corporation, referring to New Flyer. One of its  
4 divisions is MCI, which is a separate company. They do  
5 not have two sets of books.

6 THE COURT: I'm sorry. They do not what?

7 MR. KEMP: They do not have two sets of  
8 books. He just --

9 THE COURT: Who's "they"?

10 MR. KEMP: He just --

11 THE COURT: Who is "they"?

12 MR. KEMP: They do not -- they being --

13 THE COURT: Who is "they"?

14 MR. KEMP: -- MCI and New Flyer.

15 THE COURT: Okay.

16 MR. KEMP: He just got up and said, well, we  
17 can't have the financials of a nonparty, implying  
18 somewhere that there's financials of MCI. There are  
19 not publicly reported financials of MCI.

20 So what he's telling the Court is we can't  
21 explore -- the only financials that exist -- remember,  
22 there's insider trading rules. There's all kinds of  
23 SEC laws. They cannot sit there and say, hey,  
24 Mr. Kemp, here's your set of books that you can go use  
25 for the trial and that's -- that's something that's

1 different than the public books. These are the only  
2 financial records available for us to offer proof.

3           So what we're getting into is we're getting  
4 to what I call the Terrible Herbst problem. And what  
5 happened is about eight years ago, they had a case  
6 involving Terrible Herbst, and they awarded punitive  
7 damages against Terrible Herbst. And it was time to go  
8 into the punitive phase. Because remember, in the  
9 compensatory phase, you just check yes or no. And then  
10 in the punitive phase, you offer the evidence of the  
11 financials. So they hadn't done any discovery on the  
12 financial net worth of -- of Terrible Herbst. They had  
13 to stop the trial for a week. And then they lost a  
14 juror and it turned into a huge mess. Okay.

15           So what we want to do is we want to take the  
16 deposition of the New Flyer person, Mr. Asham. We want  
17 to establish, first of all, are these the only records,  
18 publicly available financial records you have of the  
19 operations of this company, including, but not limited  
20 to MCI. He's going to say yes, Your Honor. He's got  
21 to say yes.

22           THE COURT: Including New Flyer and MCI?

23           MR. KEMP: They -- it's a consolidated  
24 financials. If they -- if they broke them down  
25 separately and one reported in one SEC filing --

1 remember they file 10-Ks and 10-Qs. 10-K means their  
2 annual financial report. 10-Q is their quarterly  
3 report.

4 THE COURT: Mm-hmm.

5 MR. KEMP: If they filed separate ones, you  
6 know, maybe Mr. Roberts' approach would -- would at  
7 least be a discovery option, that we could do one and  
8 then we could do the other.

9 So I expect when we take the deposition of  
10 this guy, he's going to say, No, we don't break it down  
11 like you're suggesting, Mr. Kemp. And I'm going to  
12 say, Well, can you give it to me? And he's going to  
13 say no, because that's an SEC violation. So the only  
14 financial information that we're going to be able to  
15 get is the financial information of the consolidated  
16 entity. That's all that's out there.

17 So what he's really saying to you is, oh,  
18 Judge, you can't use the financials of a nonparty.  
19 Those are the only financials. There are no other  
20 financials. How are we going to explain to the jury  
21 what an appropriate amount of punitive damages is to  
22 deter future misconduct if we have no financials?

23 So that is why I say we -- and remember, this  
24 is at the discovery phase, and we emphasized that to  
25 Special Master Hale. We're just trying to get the

1 discovery present. We are not asking you to make a --  
2 a ruling right now that if, indeed, we get to that  
3 punitive phase, that this -- this evidence is  
4 admissible, whether it's the New Flyer evidence,  
5 whether it's a sub portion. We're not asking that at  
6 this point. All we're asking is let's not have a  
7 Terrible Herbst problem where we got to stop the trial  
8 for a week and all of a sudden go do financial  
9 discovery. And that -- that's why I think Special  
10 Master Hale's order was appropriate, because he sat on  
11 it as a discovery ruling and he says go get the  
12 discovery and then come back to me. Or go back to the  
13 judge with it.

14           So for those reasons, Your Honor -- and --  
15 and like Mr. Pepperman said, the last deposition I did  
16 like this, I did it I think in January of last year,  
17 and Mr. Roberts was in that case as well. I took the  
18 deposition of the -- I can't remember if he was the  
19 treasurer or what, but he was of Worthington  
20 Industries, another publicly traded company. And we  
21 got done in less than an hour. Well, actually, I guess  
22 we got done in 62 minutes, but that was with a break.

23           So we're going to be quick, Your Honor. It's  
24 limited to the publicly reported financials. I mean, I  
25 can't -- that's what we're using for the deposition.

1 And the fundamental question is what Mr. Roberts  
2 alluded to: How much can you pay without becoming  
3 annihilated. That's the question. And there's only  
4 one person at their company who could answer that  
5 question, and that's the treasurer, and that's the guy  
6 we want to ask the question of.

7 THE COURT: How much can -- okay. When you  
8 say --

9 MR. KEMP: How much can you afford to pay --

10 THE COURT: Who is "you"?

11 MR. KEMP: -- as a defendant without being --  
12 you being, our position -- well, I'm going to get both  
13 answers, Your Honor, just -- just out of an abundance  
14 of caution because I got to have something to tell the  
15 jury.

16 THE COURT: Understood.

17 MR. KEMP: So it -- it's the smaller figure  
18 for MCI, which will probably be about 380 million. You  
19 know, at least we'll have that on the record. We can  
20 play that for the jury. If it's the larger figure  
21 for -- for New Flyer and MCI combined, which I think's  
22 about 758 million, you know, we'll -- we'll -- we'll  
23 offer that to the jury. But that's a ruling you will  
24 decide at a later point in time. Either way, we're  
25 entitled to take his deposition to get both figures

1 because then we -- then we -- we have the discovery  
2 necessary to present it to the jury.

3 And remember, we have an accountant on  
4 this -- or, excuse me, an economist who's going to give  
5 an opinion. They do not have an economist, but I don't  
6 just want to walk in there with my economist's opinion  
7 because they're going to be able to cross-examine him  
8 and say, oh, well, Mr. Stokes -- his name is Stokes --  
9 Mr. Stokes, you've just looked at the consolidated  
10 financials. Why don't you try to break them down.  
11 Like I said, they can't be broken down, Your Honor.  
12 But at least I'll have the testimony in the record from  
13 their treasurer that says they can't be broken down.

14 And if this ever goes up to the supreme  
15 court, we can say to the supreme court, well, look, you  
16 know, they reported this consolidated financials.  
17 That's their decision. This is the only figure that  
18 could possibly be used. That's their decision. And so  
19 I think that that will end the analysis there, if we  
20 ever take it that far. But all we're asking is to be  
21 allowed to do the discovery on this point.

22 THE COURT: Thank you.

23 MR. ROBERTS: Your Honor, I can get you case  
24 law if it's important to you. There's case law that  
25 says that consolidated --



1 THE COURT: I know this is a surprise to  
2 everybody, but case law is important to me.

3 MR. ROBERTS: Consolidated financial  
4 statements are accepted by GAAP and they don't destroy  
5 the corporate form of each of the separate  
6 subsidiaries. I know we've been in a rush here, but  
7 the problem is we got trial February 12th. The proper  
8 thing to do, there's no discovery to MCI asking how  
9 much it can borrow. There's no discovery to MCI asking  
10 what its gross sales and revenues are. There's no  
11 30(b)(6) notice to MCI to testify to these topics. You  
12 don't get to go straight to the parent company and ask  
13 the parent company how much it can borrow, which is  
14 what Mr. Kemp told Mr. Hale he wanted to do, before you  
15 even try to get the discovery that's relevant to the  
16 party.

17 If -- if we're running out of time, that's  
18 not our fault. This trial schedule has been pressed by  
19 Mr. Kemp. He needed to do it right when he had time to  
20 do it right. You don't get to go straight to an apex  
21 employee of a parent to find out what he wants to know  
22 about a subsidiary.

23 Thank you, Your Honor.

24 THE COURT: Thank you. All right. What I'm  
25 going to do is I'm going to issue a minute order on

1 this either today or by tomorrow.

2 MR. ROBERTS: Thank you, Your Honor.

3 THE COURT: Okay. So that I can --

4 MR. PEPPERMAN: Your Honor, if I could add  
5 one thing.

6 THE COURT: Yes, you can.

7 MR. PEPPERMAN: And it's in the brief.

8 Actually, there's a letter that we've attached as an  
9 exhibit dated, I think, August the 23rd or 28th.

10 THE COURT: Let me just get there because  
11 I -- I have everything tabbed. Hold on.

12 Is that your objection?

13 MR. PEPPERMAN: No. It's a letter from  
14 Mr. Kemp to Mr. Roberts telling him that we want to  
15 depose Mr. Asham on these topics --

16 THE COURT: Just -- just give me a moment.  
17 Do you know what exhibit number it is?

18 MR. PEPPERMAN: I believe it's 2 or 3 to  
19 our -- I think it's --

20 THE COURT: To Mr. Roberts?

21 MR. PEPPERMAN: Yeah, Exhibit 3 to our  
22 opposition.

23 THE COURT: It's August 23rd?

24 MR. PEPPERMAN: August 23rd letter.

25 THE COURT: Okay.

1 MR. PEPPERMAN: So it -- or 28th maybe.

2 THE COURT: (Inaudible) Asham.

3 MR. PEPPERMAN: So we -- in terms of  
4 timeliness and being late, we've been trying to take  
5 this deposition since August 23rd. So I don't think it  
6 should be held against us, you know, that there's short  
7 amount of time or that we haven't tried to, you know,  
8 get this discovery because we certainly have.

9 THE COURT: Okay. Understood.

10 MR. POLSENBERG: And, Your Honor, I think the  
11 delay in the Terrible Herbst trial was more like two  
12 hours than two weeks because I took a nap over -- I was  
13 in the trial.

14 MR. KEMP: Yeah, but they didn't -- so at the  
15 end of the day, they never came up with the full  
16 financials from Terrible Herbst. They -- they came up  
17 with a shortcut, and it was at least a day.

18 MR. POLSENBERG: Yeah, it was two hours. We  
19 called up the treasurer. She lives a couple of blocks  
20 from here. She gave the number and Judge Gonzalez gave  
21 that number.

22 MR. ROBERTS: So the letter, if you look,  
23 Your Honor, requested that the CFO of the nonparty that  
24 I don't represent in connection with a report of Larry  
25 Stokes, the only thing Larry Stokes opines on is the

1 ability of the largest verdict against New Flyer  
2 Industries that could be entered without annihilating  
3 New Flyer Industries. And of course, I said, no, I'm  
4 not going to give you that info. That's the exact  
5 issue we've got here today. They never asked for the  
6 relevant discovery from MCI.

7 THE COURT: I would like to discuss very  
8 briefly with you about this apex issue -- apex issue.  
9 Why is that such a -- I understand that every slip and  
10 fall or small -- small -- just so you know what I'm  
11 thinking about that -- small accident you wouldn't call  
12 the CEO to -- to give a deposition. But this is a  
13 significant case. This is not your everyday case.  
14 And, you know, I would imagine that the apex CEO should  
15 have tremendous knowledge about MCI, of a subsidiary.

16 MR. KEMP: That is -- that is the only  
17 person, the treasurer is the only person who can give  
18 you a valid opinion as to what the company can borrow  
19 based on its cash flow --

20 THE COURT: I mean, I -- you know, this is  
21 not my first --

22 (Multiple speakers.)

23 MS. WELCH-KIRMSE: (Microphone interference.)

24 THE COURT: Well, yeah. This is not my first  
25 rodeo. I mean, I -- I've worked in business, you know,

1 and I've been on -- the apex thing doesn't move me as  
2 much, to be honest with you.

3 MR. POLSENBERG: What does bother me is  
4 they're allowed to ask an expert opinion of the other  
5 side. And none of this has been briefed for you. And  
6 you can tell we offer very strong opinions on it, and I  
7 agree with counsel that this goes beyond the objection.

8 MR. PEPPERMAN: But I -- I think you're  
9 exactly right, and that's what the case law says that's  
10 cited, that -- they all mention, hey, you can't ask for  
11 the deposition of a CEO in a slip and fall. The CEO of  
12 Kroger or whatever is -- is not appropriate.

13 MS. WELCH-KIRMSE: Your Honor, the apex  
14 standard --

15 THE COURT: Yes.

16 MS. WELCH-KIRMSE: -- appropriately states  
17 that somebody who's at the top of the company cannot be  
18 deposed, (microphone interference) to be deposed unless  
19 they have specific unique knowledge about what's going  
20 on in the case. And that makes sense, right, because,  
21 otherwise, it would be (microphone interference). And  
22 it's a proportionality thing, a discovery. And  
23 especially when it comes to nonparties as -- as  
24 inquired in the case now.

25 We're hearing argument today about, you know,

1 whether or not things are going to be admissible down  
2 the line and let's just do the discovery and then we  
3 can hash it out later. Well, that's not the position  
4 of New Flyer because New Flyer shouldn't have to do  
5 that because they're not a party. If you're a party to  
6 a lawsuit and you've been sued and there are actual  
7 grounds against you, okay, then you're opened up to  
8 discovery. But as a nonparty, for New Flyer to have to  
9 just, you know, concede to things that are not  
10 proportional and that are not irrelevant that may be  
11 hashed out later, Your Honor, that's not what the  
12 Nevada law provides for. And that's why the apex  
13 standard is there. And -- and courts are even more  
14 inclined to prevent apex employee depositions when it's  
15 a nonparty.

16 THE COURT: Understood. Okay.

17 MS. WELCH-KIRMSE: And that's the focus of  
18 the objection, not all these other things.

19 THE COURT: Okay. Have a good day.

20 MR. KEMP: Thank you, Your Honor.

21 MR. ROBERTS: Thank you for all your time.

22 See you next week.

23 THE COURT: See you next week. That's right.

24

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1 DISTRICT COURT, CIVIL DIVISION  
2 CLARK COUNTY, NEVADA  
3 \* \* \* \*  
4  
5 KATAYOUN BARIN, )  
6 Plaintiff, )  
7 vs. ) Case No. A-17-755977-C  
8 MOTOR COACH INDUSTRIES, INC., ) Dept. XIV  
9 Defendant. )  
10

11 TRANSCRIBER'S TRANSCRIPT  
12 OF  
13 MOTIONS IN LIMINE  
14 BEFORE THE HONORABLE ADRIANA ESCOBAR  
15 DISTRICT JUDGE

16 Taken on Monday, January 29, 2018  
17 At 9:30 a.m.

18 **APPEARANCES:**  
19 For the Plaintiff: WILLIAM SIMON KEMP, ESQ.  
20 ERIC PEPPERMAN, ESQ.  
21 PETER S. CHRISTIANSEN, ESQ.  
22 KENDELEE LEASCHER WORKS, ESQ.  
23 For the Defendant: D. LEE ROBERTS, JR., ESQ.  
24 HOWARD J. RUSSELL, ESQ.  
25 JOEL D. HENRIOD, ESQ.  
DANIEL F. POLSENBERG, ESQ.  
ABE SMITH, ESQ.  
DARRELL BARGER, ESQ.  
MICHAEL TERRY, ESQ.

Transcribed by: Maureen Schorn

MAUREEN SCHORN, CCR NO. 496, RPR  
(Retired)

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1 LAS VEGAS, NEVADA. THURSDAY, JANUARY 18, 2018, 9:53 A.M.

2 \* \* \* \*

3

4 THE COURT: Good morning. I hope you all  
5 had a nice weekend. Today we are going to address Motions  
6 in Limine. I received Defendant's first so I'm going to  
7 start there.

8 Your appearances for the record, please?

9 MR. KEMP: Your Honor, Will Kemp on behalf  
10 of Plaintiffs.

11 MR. CHRISTIANSEN: Pete Christiansen and  
12 Kendelea Works for Plaintiffs as well.

13 MS. WORKS: Good morning, Your Honor.

14 MR. ROBERTS: Good morning, Your Honor. Lee  
15 Roberts for Motor Coach Industries.

16 MR. HENRIOD: Good morning. Joel Henriod,  
17 Dan Polsenberg and Abe Small for Motor Coach.

18 THE COURT: Good morning.

19 MR. TERRY: Michael Terry, MCI.

20 MR. BARGER: Darrell Barger, good morning,  
21 MCI.

22 MR. RUSSELL: Good morning. Howard Russell  
23 for Motor Coach Industries.

24 THE COURT: Good morning. Are you ready?  
25 All right. So I show Defendant's first Motion in Limine

MAUREEN SCHORN, CCR NO. 496, RPR  
(Retired)

002999

1 to Limit Opinions by Plaintiffs' Expert Robert Caldwell.

2 MR. KEMP: Your Honor, we had anticipated  
3 Plaintiffs were going to go first and the Defendants, I  
4 don't mind the Defendants going first, but the first two  
5 Mr. Pepperman had been assigned.

6 THE COURT: Okay. Understood.

7 MR. KEMP: And he's not here, he's down with  
8 Judge Leavitt. So if you want to go with the Defendants,  
9 the first one would be 3, 4 and 5 we're ready to talk  
10 about. Or we could do Plaintiffs first, Your Honor.

11 Mr. Pepperman doesn't have --

12 THE COURT: Do you want to start in  
13 chronological order?

14 MR. ROBERTS: We did agree with Mr. --

15 THE COURT: I was starting by how we  
16 addressed them, but that's fine, we can do that.

17 MR. ROBERTS: We had agreed with Mr. Kemp  
18 that the Plaintiff's motions could go first, but what  
19 happened with the state of that schedule.

20 THE COURT: Well, let's stick to the  
21 schedule then. I'm pretty flexible. I was taking them as  
22 I received them. Let me just reorganize my things then.

23 Sorry about that. Let's start then with  
24 Plaintiff's first Motion in Limine to Preclude Reference  
25 or Argument Regarding alleged Negligence of Third Parties.

MAUREEN SCHORN, CCR NO. 496, RPR  
(Retired)