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

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VOLUME 13
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MR. KEMP: Good morning, Your Honor. Will Kemp on behalf of the Plaintiffs. Your Honor, I'll be relatively brief. This is the follow-up to the Motion for Summary Judgment on foreseeability.

In fact, if you take a look at our reply, we start by saying as our first point: "As Plaintiffs establish in a Motion for Summary Judgment on foreseeability, the alleged negligence or recklessness of the bus driver is foreseeable as a matter of law under applicable Supreme Court precedent.

This Court, as you remember last week, granted the Motion for Summary Judgment on foreseeability. Therefore, as a matter of law it's for foreseeable.

Now we flip over to the Price case which says that, quote, "An intentional intervening act by a third party which is both unforeseeable in the proximate cause of the injury may insulate the manufacture of a de facto product from liability."

So they've got to show both. They have to show that it's unforeseeable and a proximate cause. They can't show it's unforeseeable at this point because it's foreseeable as a matter of law.

So for that reason, they shouldn't be allowed to point the finger at the bus company or the bus driver, Mr. Hubbard.

I mean, I point out we attached Judge Williams' decision in the Meyer case, which was the largest verdict in the history of Nevada, although last week Mr. Roberts told me the Mark Trouton (phonetic) case he substantially exceeded our real verdict. (Laughter)

But in any event, in that case, I don't know, that was kind of a mixed compliment I thought that he gave me.

THE COURT: I was just have to say before we get started --

UNIDENTIFIED SPEAKER: I think he was bragging.

THE COURT: -- I do know what a picot is. I was thinking about it this weekend. I just wanted you to know that. Go on.

MR. KEMP: Okay. You know what, but in any event, same situation in Judge Williams, he wrote this pretty impressive order. He went on and on and on about foreseeability and why you can't talk about negligence.

But for that reason, since the Motion for Summary Judgment was granted, this motion should be granted too, Your Honor.

THE COURT: Okay. Very good.

MR. HENRIOD: We pointed out in our opposition to the summary judgment motion on

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1 foreseeability, our concern is that this is where they
2 were going to turn a foreseeability summary judgment
3 motion into an evidentiary issue.
4 And I understand that the Court's determination
5 last week is that the Court was granting their Motion for
6 Summary Judgment, that the Court was reserving judgment on
7 the admissibility of evidence.
8 We have a right to dispute that the proposed
9 modifications to this vehicle would have made any
10 difference. Here there is substantial evidence that the
11 modifications they're suggesting would not have made any
12 difference.
13 That goes to their prima facie case of -- it goes
14 to their prima facie case of providing causation. I mean,
15 the gravamen of their claims on several of these theories
16 is that if the driver had had more information about where
17 Dr. Khibani was, that he would have made different
18 decisions in the way that he drove.
19 That is their causation theory as it relates to
20 the sensors, the blind spot, the warning about so-called
21 blasts.
22 And there is substantial evidence from which a
23 jury could infer that even if those things make the bus
24 defective somehow, that they're being included, either a
25 sensor or a narrower blind spot would not have made a

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1 difference.

2 Because the driver already knew that Dr. Khibani

3 was there. He understood the proximity. There is a law

4 that required him to move over to the left once he saw

5 him. And I understand that Mr. Hubbard is saying he was

6 not aware of that, but the law presumes that people know

7 the law.

8 And we can see why he wouldn't have moved left,

9 because he was intending to turn into a parking lot only a

10 few hundred yards away.

11 Now, perhaps Mr. Hubbard is saying plainly in his

12 deposition that he would have moved over had he seen

13 Dr. Khibani more than he did. His testimony that if he

14 had been aware of these so-called blasts, air blasts, had

15 he been warned about that, that he would have moved over

16 to the left.

17 Or if a sensor had gone off, then perhaps he

18 would have moved over to the left. But the jury is

19 entitled to disbelieve that testimony, especially when it

20 is given by somebody who is personally being accused of

21 killing a bicyclist.

22 I sympathize for Mr. Hubbard. I imagine I would

23 have trouble sleeping too. But a jury can disbelieve his

24 claim. The fact that he claimed he would have moved over

25 but for may allow them to go to a jury. It is enough of a

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prima facie case for them to go forward, but it does not mean that the jury has to accept it.

And in this way it is like BMW, where the Plaintiff there was claiming that the seat belt was defective, that the safety feature should have been better than it was.

And what the Supreme Court says is, well, you can get into the fact, at least the evidence, that the Plaintiff wasn't even wearing the seat belt, not availing herself.

Here we have an analogous situation where the circumstantial evidence is enough to support a jury inference that this driver would not have availed himself of any of these additional features. And there is no heeding presumption in Nevada. It is their burden to show that it would have made a difference.

Reference was made last week and in this reply, and I do object to the briefing here where the motions are two pages long citing to one case, and then we get sand-bagged with a reply that's 13 pages long.

The reference to Price versus Blane I think is overstated, because that was a summary judgment case. And so the Supreme Court is saying that we cannot grant summary judgment in favor of the Defendants because of what the jury might reasonably conclude.

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1 But it is not a case of taking away evidence from
2 the jury. I think by Plaintiff's rationale in this
3 motion, the outcome of Banks versus Sunrise Hospital would
4 have been different.
5 Plaintiffs seem to be saying that they have a
6 theory, and that that theory is supported by some
7 evidence, because their theory contradicts ours, ours must
8 be excluded.
9 By that rationale, the Supreme Court was wrong in
10 Banks v. Sunrise Hospital, because in that case the
11 Plaintiff was saying that the anesthesia machine was at
12 least part of the reason that the anesthesiologist had to
13 make so many bad decisions.
14 And the hospital, the Defendant said, no, he
15 would have made those decisions regardless. And the jury
16 at least has a reasonable basis to be able to be free to
17 decide that the outcome would not have been different.
18 That is not our affirmative defense, that is
19 their prima facie case. And, Your Honor, we can't be
20 precluded from introducing the evidence, the facts of what
21 happened to dispute that the alleged defects here didn't
22 make any difference. A reasonable jury could reach that
23 conclusion.
24 THE COURT: Thank you. Did you have
25 something else?

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MR. HENRIOD: I don't, I don't. I just wanted to make sure you didn't have any questions. Thank you.

MR. KEMP: Judge, I think we have just started arguing four other Motions in Limine, but I'm going to try to stick with this one.

We are not arguing that the heeding evidence comes out. And what I call heeding evidence is evidence that Mr. Hubbard would or would not have heeded an air blast warning, or he would or would not have heeded a proximity sensor alert. That's heeding evidence.

We understand that's coming in, and we have not asked that that be thrown out, and we make that crystal clear. I think it's the Motion to Exclude Cunitz, it's a Defense motion.

But that is completely different than allowing them to come to the jury and say: Oh, he's negligent, that's a defense. That's what they can't do, Your Honor, and that's what we're asking to be put out.

So I recognize that in Nevada there's no what they call a heeding presumption. In some jurisdictions if there's a failure to warn, it's assumed that the actor would have heeded the warning.

That's not the law in Nevada. We do have to prove that Mr. Hubbard would have heeded a warning. And

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1 I, as Mr. Henriod said, the driver testified during his
2 deposition that if he had been given a directive from the
3 manufacturer about the air blasts, he would have taken
4 different action and would have given the bicyclist wider
5 berth.
6 And he also says that if he had a proximity
7 sensor light that flashed on, he would have started his
8 turn to the left. He tried -- I don't know if you
9 remember the Red Rock video, but when the collision was
10 imminent, he did try to turn to the left.
11 Hubbard testified that if he had had an earlier
12 proximity sensor warning, he would have started that turn
13 a little earlier, and that would have precluded the whole
14 accident, because the Defendants say that only
15 three-fourths of an inch would have made a difference in
16 whether Dr. Khibani got crushed, his skull got crushed or
17 it didn't.
18 But in any event, we understand that we have to
19 present his evidence or his testimony on that point. We
20 are not asking that that be excluded.
21 What we are asking be excluded is their argument
22 or suggestion to the jury that he was negligent in that
23 this is some sort of defense that they have. And that's
24 why the motion should be granted for the reasons I've
25 already alluded to in Price versus Blane.

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And I think I'll leave the (inaudible) motion, the BMW motion for its appropriate place.

MR. HENRIOD: Your Honor, if I may, I'm concerned about suggestions as to the theory. And I understand the issue of evidence of facts versus arguments and theories, and we're not talking about comparative negligence per se.

I'm wondering if it is helpful to determine now exactly what facts that I mentioned that Plaintiff thinks ought to be out? I'm not sure, except for the Hubbard testimony that they want to use it permanently, what we can talk about and what we can't talk about. I don't know what they're envisioning by this.

If we can't talk about -- well, we can -- the fact that the driver had seen Dr. Khibani down there. At least there is evidence from which a jury could reasonably infer that.

While there was the law a professional driver would be aware of on which a reasonable jury could infer that his decisions would not have made a difference. It is their burden, and I think we are entitled to confront that burden, to cross-examine Mr. Hubbard regarding the veracity of his claims that are so easy to make.

Now, if we need to get into substantive theory and what is going to be admissible at the end of the day,

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1 I would understand if Your Honor wants to reserve judgment
2 on this motion until after all the substantive theories
3 are heard.
4 But I know nobody at this table wants to violate
5 your orders, and I'm not clear, exactly, what comes in and
6 what does not if you were to grant, so I would ask for
7 some specificity.
8 MR. KEMP: Judge, the three points he
9 raised; one, he said that the driver saw Dr. Khibani on
10 Charleston. I've always said that they can argue that.
11 I've never asked that that be excluded.
12 The second point, that there's some sort of
13 statute. That the driver violated the statute, that's
14 just trying to tell the jury that he was negligent per se,
15 so that should be completely out.
16 And then the third point that he brought up is
17 the heeding, and I've already said to the Court that I
18 think that evidence should come in because that's our
19 burden of proof.
20 So the only argument that I've heard from him
21 today that should not be allowed, is for them to come up
22 to the jury and say: Hey, there's this law that he should
23 have changed lanes and he violated the law.
24 And that is arguing a negligence per se argument
25 to the jury suggesting that that's a defense to the

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product liability claim, and it's not. So that's my response. If he has more specific other points --

MR. HENRIOD: I do.

THE COURT: I just want your last comment again, please?

MR. KEMP: I don't -- the last comment is that what they're trying to do is, they're trying to argue negligence per se and that's what's precluded. That's foreseeable as a matter of law that people drive buses badly.

MR. HENRIOD: Asking the driver about proper driving about what he is required to do to determine what he would do in the normal course. While the statute would support negligence per se, it is not relevant only to that.

And one of our problems with all these motions is that they're premised on the idea that they could go to one thing, they can't be allowed for anything else. The jury can be instructed that they are not to adjudicate the negligence of third parties.

But the fact that he made the decisions he did regardless of the law, does tend to show that he would not have heeded any of the additional warning information that he would have gotten anyway.

Just because it would be relevant to negligent

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per se doesn't mean that it's out for everything else.

MR. KEMP: Yeah. Judge, you can't be dancing around the negligence fire the whole case like he's suggesting. We can't do that, because sooner or later someone will step into the fire and will get burned. That's what's going to happen. That's why you've got to keep it out now.

And I've already said that what he saw, what he saw I have no problem with what he saw. But for them to stand up and argue: Oh, Judge, it's relevant that if he knew the law, and he said he didn't, but if he knew the law, he wouldn't have done this. That's just arguing negligence per se to the jury. That's what they're trying to do.

Especially where he testified, number one, he didn't know the law about moving over to the other lane. And, number two, he didn't even know the doctor was there the last 400 feet. He saw him on Charleston, they turned, he continued over 400 feet.

And his testimony is that he never once saw the doctor during that time. So for them to suggest that he had some sort of legal obligation to move over lanes when he didn't even know the bicyclist was there, I mean, how does that make any sense?

MR. HENRIOD: Because a jury could infer

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that he did know he was there based on the testimony of Mr. Peers, Mr. Plants. They were talking about him being down there.

I understand that Mr. Hubbard denies that he knew, but that is not outcome determinative, especially from a witness who had so much reason to deny, deny, deny.

MR. KEMP: The Peers/Plant conversation he's referring to what took place when he was following him on Charleston, Your Honor.

Peers and Plant didn't say that when they were approaching the intersection where the accident happened, didn't say that they had a conversation: Oh, the bicyclist was over there. That was on Charleston before the bike made the turn, and before the bus made the turn.

So to suggest that is some sort of evidence that Hubbard should have known that the bicyclist was there is just not right. There is no evidence that Mr. Hubbard knew the bicyclist was there.

The only evidence we have is his testimony, and he says it is pretty clear this was a point -- if one point was hammered in the deposition, it was this point. There must have been at least 50 questions on it by five different attorneys.

He unequivocally said he never saw the doctor again after he turned. The last 400 feet he did not see

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the doctor or the bike.

MR. HENRIOD: Mr. Peers and Mr. Plants both testified that they did. And the fact that they did is enough for a reasonable jury to find that Mr. Hubbard is not being truthful either with them, or perhaps even himself, when he says that he was not aware that Dr. Khibani had made that turn right before the bus did.

When the two people behind the driver saw Dr. Khibani make the turn onto Pavilion Center, a reasonable jury could infer that Mr. Hubbard did too.

MR. KEMP: See what we're doing, Your Honor? We're running all the way back 400 feet to the Charleston thing, the activity on Charleston to try to impute knowledge that the bicyclist was there for the last 400 feet.

And that's where the lane change issue comes. There's no lane change issue on Charleston. The lane change issue starts when you get to Pavilion Center.

They're arguing that when he was driving down Pavilion Center for that 400 feet, he had an obligation to move from the right lane, which was by the bicycle lane to the left lane, and because he didn't do that he violated a Nevada Revised Statute.

So they want to argue negligence per se, that's what they're trying to argue as some sort of defense to a

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1 product liability case. You just can't do that. That is
2 precluded because that's foreseeable, and under the Price
3 case it has to be both unforeseeable and a separate
4 proximate cause.
5 So if it's foreseeable and it's not a defense,
6 they shouldn't be allowed to argue that he was either
7 negligent or negligent per se.
8 They can argue everything they want to about him
9 knowing about the bicyclist observing him on Charleston.
10 I have no problem with that. I have no problem with him
11 getting into Peers and Plain testimony about what they saw
12 and didn't see about the bicyclist. I have no problem.
13 I don't think it's quite what he said it is, but
14 I have no problem because we're just playing videos.
15 Neither one of those people are coming to the trial. I
16 have no problem introducing that.
17 What I have a problem with is them suggesting to
18 the jury that this was some kind of negligent or negligent
19 per se conduct, and then implying that this is a defense.
20 That's what I have a problem with, Your Honor.
21 MR. HENRIOD: If this rationale were
22 correct, then the doctor and the things can come in for
23 one even if they're excluded for another would be
24 vitiated. That's not the law.
25 We don't need to argue negligence. We just need

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to point out that: Mr. Hubbard, you already had reason to move over and you chose not to, which undermines the claim that he would have moved over if he had any more information.

Because Peers and Plants did see him turn, did see Dr. Khibani turn, it is not dispositive that Mr. Hubbard does not also admit having seen the doctor on Pavilion Center. There is sufficient evidence from which a reasonable jury could infer that.

MR. KEMP: Judge, what he just said is, they want to argue to the jury that there's Nevada law that requires a lane change, and that under that Nevada law Mr. Hubbard didn't make a lane change and so he violated Nevada law.

So they want to argue negligence per se, and they want to do it as some sort of defense or implied defense to the jury. And that's exactly where they can't go, Your Honor. That is exactly where under our law, since it's foreseeable -- it's foreseeable that he could have been intoxicated.

They can't tell the jury if he was intoxicated, under Andrews they can't tell the jury that. Certainly, they can't tell the jury that there's some sort of traffic violation that they think is in play. And, by the way, he wasn't even cited for a traffic violation. Metro didn't

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cite him for this traffic violation.

So to suggest that they have some secret evidence that's going to come up, there is no secret evidence. There's the videos of Plants and Peers which are going to be played to the jury, and there's Hubbard's testimony. Where is the secret evidence that they're going to offer at this point, Your Honor. I don't see it and I don't hear it.

MR. HENRIOD: We don't need secret evidence. There is sufficient evidence in just Peers and Plants and the probability that what they saw is what he saw. There isn't any secret evidence. I think we're conflating here.

An affirmative defense of foreseeable misuse, which I understand you've ruled upon, with evidence that comes in purely to negate Plaintiff's prima facie case of causation.

BMW I think makes clear that the Court can draw the line so that we can get into the fact and how that affected Mr. Hubbard's decisions or did not, and that that is a line that we can respect.

MR. KEMP: Judge, I don't want to repeat what I've said, but any reference to the Nevada Revised Statute on the lane change, or that he violated the law, that just shouldn't come in.

THE COURT: Very good. So it's good to

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1 address this. My task, my goal is to be fair, impartial
2 and get the right decision, so I'm going to defer this and
3 give it a little bit more thought after your argument,
4 okay.
5 Let's go to Plaintiff's Motion in Limine No. 2.
6 This Is to preclude reference to the settling Defendants.
7 MR. KEMP: Your Honor, in the last motion
8 you said were going to defer it until before trial?
9 THE COURT: Of course. Anything I defer
10 will be with you very quickly. Sometimes when I write
11 things out it's easier for me, and more clear for you.
12 MR. KEMP: Your Honor, No. 2 --
13 THE COURT: I know you need these very soon.
14 MR. KEMP: No. 2, I don't think it's
15 contested at this point because we settled it, right?
16 MR. HENRIOD: With one caveat.
17 MR. KEMP: Your Honor, maybe I should hear
18 the caveat first.
19 THE COURT: Maybe you should.
20 MR. SMITH: Your Honor, Abe Smith for Motor
21 Coach Industries.
22 THE COURT: Good morning.
23 MR. SMITH: I think the only caveat we would
24 have is that evidence of settlement, it wouldn't come in
25 as substantive evidence, but it can come in for

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1 impeachment purposes.
2 The case that they cite, the Moore versus Bannon,
3 it talks about a judicial doctrine about excluding
4 settlements for the reason that you don't want the jury to
5 speculate that the plaintiff has already been compensated.
6 But when it comes to issues about bias, a witness
7 bias or motive, number one, a settlement can come in to
8 show that the witness might have had a particular motive
9 for giving testimony one way versus another.
10 Also, I think in this case I don't know that we
11 would need to get into the settlement necessarily, but we
12 would need to introduce, for example, if they put
13 Mr. Hubbard on the stand, that the jury would need to be
14 aware of the fact that when he was giving his testimony
15 during his deposition, he had a pending claim against him
16 for his own fault in causing the accident.
17 That wouldn't be something that would be
18 precluded under the Bannon rule, under the Moore rule.
19 And, also, under Nevada Revised Statute 48.105, that talks
20 about settlement, when evidence of settlement can come in
21 or compromising a claim.
22 It can't come in for liability, we acknowledge
23 that, but it can come in for the other purposes such as
24 proving bias or prejudice of a witness.
25 So it may make sense to defer ruling on this as

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1 well since, again, we're not disagreeing with the general
2 proposition that evidence of a settlement, or the amount
3 of a settlement doesn't come for substantive evidence to
4 the jury, but we would reserve our right if Plaintiffs
5 open the door, or if we need it for impeachment evidence.
6 MR. KEMP: Well, Your Honor, what I hear him
7 saying is, if I put Mr. Hubbard on the stand, I've opened
8 the door for them to walk up to him and say: Hey,
9 Mr. Hubbard, didn't your company pay $5 million, so what
10 you're saying now is different than what you said before?
11 That's what he just said they're going to try to
12 do, Your Honor, and that does not come in. They cannot
13 suggest to the jury that there was either a claim made
14 against Mr. Hubbard or his company, or that time claim was
15 settled.
16 That is out, because what they're trying to do
17 is, they're trying to put a red badge on Mr. Hubbard.
18 They're trying to suggest to the jury: Oh, ladies and
19 gentlemen, he's really at fault because he settled his
20 case. We're not at fault, we're just left over.
21 So for that reason, that evidence shouldn't come
22 in, Your Honor.
23 MR. SMITH: So, again, Your Honor, just to
24 be clear, we're not talking about the amount of the
25 settlement coming in before the jury, or even necessarily

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the fact of settlement.

But just for the jury if they do put Mr. Hubbard on the stand, he needs to be aware -- we need to be able to ask Mr. Hubbard: At the time you gave this testimony, did you not have a claim pending against you?

Weren't plaintiffs suing you for the wrongful death of Dr. Khibani? That's pertinent for the jury to understand potential motive or bias in his testimony.

That's different from the Slayden rule, which is what the Nevada Supreme Court adopted in Moore versus Bannon, and they take a case from Vermont. Vermont has made abundantly clear since Moore was decided, that that rule was not absolute, even for evidence of a settlement.

But here we're not even talking about evidence for a settlement or the amount of the settlement. We're just talking about the existence of a claim against one of the parties that's going to be standing as a witness.

MR. KEMP: Your Honor, this is not what they argued in their opposition. They did not -- there was not one word that they thought if we called Mr. Hubbard to the stand they could sit there and say: Oh, you were sued, Plaintiffs sued you and now they didn't sue you.

I mean, that's just telling the jury that there's a settlement. And even worse, it's suggesting to the jury that the Plaintiffs took the position that it was

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Mr. Hubbard's fault in the accident.

MR. SMITH: They did take that position.

MR. KEMP: But that doesn't come out in front of the jury because that negligence was foreseeable. That does not come in front of the jury, Your Honor.

So for them to be allowed to argue settlement, I mean, it's dangerous for a number of reasons, it's a violation for a number of reasons.

Number one, they're arguing, basically, that he was negligent and Plaintiff agreed with it because we sued him. Two, they're suggesting to the jury that he settled so he paid his amount, and so they're telling the jury that the Plaintiff had been compensated, don't give him any more money.

There's no reason to allow this testimony to come in, Your Honor. They didn't even argue this point in their opposition, which is why in the reply we just kind of said that they've conceded this, which they did, because they said, quote:

"Evidence with settlements with the codefendant was generally inadmissible, and MCI does not intend to introduce such evidence at trial," unquote. That's what they said in the opposition.

Okay. Now they stand up and it's a completely different position. They say: Oh, Judge, we're allowed

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to say that the Plaintiffs sued him, and that he settled the case.

Well, how is that consistent with what they said in the opposition? Quote: "Evidence of settlements with the codefendant is generally inadmissible, and MCI does not intend to introduce such evidence at trial," unquote.

That's what they said. That should be the rule, and that should be the rule.

MR. BARGER: Judge, we're not in front of the jury, and I don't want to start double-teaming, but would it be possible for me to make a comment?

THE COURT: No. I'm going to allow a comment, and what I'm thinking of doing, I have reviewed everything, but I may just publish a minute order on each one between today and Wednesday, so that I can calmly review everything once again. I don't mind putting the time in.

So go on, as long as Plaintiff's counsel Mr. Kemp has the last word. Your name?

MR. BARGER: Darrell Barger, Your Honor, for MCI. We are not going to stand up and tell this jury there's a settlement. Under no circumstances are we going to do that, much less tell them for what the amount was.

But you judge a witness by their credibility, and his credibility where they call him a liar, or show him on

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1 the video is in play for the jury to judge. And I think
2 you're entitled to show when you gave this testimony that
3 you never saw Dr. Khibani.
4 He was being accused of doing something wrong. I
5 mean, we don't have to say it's by the Plaintiff or by
6 anybody. Who cares who was accused of anything. The fact
7 is, the credibility of the witness is in play, and his
8 bias or his inherent own testimony about I didn't see
9 anybody can be judged, particularly when the jury knows he
10 was being accused of doing something wrong.
11 That's all we want to do, and I think that goes
12 to the credibility of the witness, not to he's a fall or
13 anything else. And so I think that we should be entitled
14 to show that under those circumstances.
15 Not talking about settlement, not talking about
16 amounts, or even the fact that he was sued by the
17 Plaintiffs. Thank you.
18 MR. KEMP: Your Honor --
19 MR. BARGER: I just want to say one thing.
20 You indicated you were going to carry some of these and
21 make a ruling. We are doing the mediation on February the
22 7th, which is next Wednesday or Thursday, so just for the
23 Court to know that we are going to mediation.
24 MR. KEMP: That means you should rule
25 against them, Judge, give them some incentive.

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In any event, Your Honor --

MR. BARGER: I'm sorry, I missed that.

MR. KEMP: In any event, Your Honor, when they say that you were sued, I mean, that's what they want to bring up with Mr. Hubbard: You were sued, I mean, what's the jury going to think? They're going to think that the plaintiff sued him.

It doesn't take a genius to figure that out on a jury, and that's why we had a good faith hearing. We got them out of the case, they're gone. They shouldn't be in the case anymore.

But anyway, I don't want to repeat everything I've just said. I understand the Court's going to defer ruling on Wednesday.

THE COURT: I am. I could come up with everything tomorrow, and spend the evening working out the written decision.

MR. KEMP: Your Honor, we're moving to 3.

THE COURT: Yes, we are.

MR. KEMP: And 3 kind of expanded and changed in the opposition. I filed a motion to preclude them from arguing that the decedent was contributory negligent this time.

THE COURT: Right.

MR. KEMP: And they said, well -- this is

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where the BMW argument was actually made. They say, well, we can't argue contributory negligence, Judge, but if we're clever little Defense attorneys and we call it assumption of risk, we can still do it.

That's just not the case, Your Honor, because there is no evidence of assumption of risk. And I've got three quick slides. The first one, this is their affirmative defense.

The Ninth Affirmative Defense, Plaintiff decedent knowingly and voluntarily accepted and/or assumed all the risks. So Dr. Khibani knew about all the risks of this particular product, and knowingly accepted and assumed all the risk.

That's what they have to prove, Your Honor. And that's the fundamental difference between this case and BMW. In BMW it was a defective seat belt case, so the Plaintiff had to prove the seat belt was on and fastened at the time, or there could be no argument that it was defective and that's why -- I think he got thrown out of the vehicle, but I could be wrong.

But in this case we don't have to prove that there was seat belt on. So we are not proving a cause and they're trying rebut it. This is their affirmative defense. They have to prove the affirmative defense.

And so what do they say in their opposition that

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1 we heard last week -- excuse me, this is the jury
2 instruction. They have to show the Plaintiff Dr. Khibani
3 actually knew and appreciated the particular risk or
4 danger created by the defect.
5 So Dr. Khibani somehow knew that this bus didn't
6 have proximity sensors, knew that this bus didn't have
7 barrier protection like an S1 guard, appreciated this and
8 appreciated the danger, and then he voluntarily
9 encountered that risk. And the decision was made, or his
10 actions in doing so was unreasonable.
11 They can't prove this, Your Honor. First of all,
12 Dr. Khibani doesn't have eyes in the back of his head, so
13 he didn't even know the bus was coming, much less know
14 that: Oh, this is a bus, we've got a proximity sensor. I
15 don't know how you can determine that from an outside
16 view, or didn't have a protective barrier.
17 Next one. And this is why in their Motion for
18 Summary Judgment, this is what they say. They say no one,
19 no one, and that includes them, no one has any idea why
20 the bicycle entered the bus's travel lane.
21 That's their argument, that's their admission,
22 that no one knows it. Well, if no one knows it, how are
23 they going to prove that Dr. Khibani voluntarily assumed
24 the risk in this particular case?
25 It just can't be done, Your Honor, and especially

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1 when you look at what their expert said. Their expert
2 said they have no opinion as to any of the other potential
3 causes, which are dehydration and suicide by bus, if they
4 had found a 95-page suicide note that I'm going to wait in
5 front of Red Rock Casino and wait for a bus, and then jump
6 under it. That would be one thing, Your Honor. They
7 don't have that in this case.
8 So their experts can see there's no evidence of
9 these other causations, and that they have no opinions on
10 these other causations.
11 So the next one I have is Mr. Peers' deposition.
12 this Is the only testimony we have in the whole case about
13 what Dr. Khibani's mindset could have been. Mr. Peers
14 again, he was in the front seat of the bus and he was in
15 the right-hand passenger seat.
16 So he would have been the passenger in the bus
17 that is closest to Dr. Khibani when the bus overtook him
18 and Dr. Khibani hit the side of the bus.
19 He said that Dr. Khibani had a look of shock, a
20 look of shock on his face that he's crashing into this
21 bus. Now, the Defendants want to tell you that they can
22 prove that he voluntarily assumed the risk that he had the
23 look of shock.
24 Next one, please? Oh, there is no next one. So,
25 Your Honor, for those reasons, even if they try to pervert

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1 the contributory negligence defense into assumption of
2 risk, they can't prove that defense in this case and it
3 should be out; contributory negligence, assumption of
4 risk, it should be out of the case.
5 MR. HENRIOD: Plaintiff jumps to and then
6 addresses only an alternative argument assumption of the
7 risk. The primary argument as we set out in B1 of the
8 opposition, is that the doctor veered into the path of the
9 bus six feet. He turned left into the path of the bus.
10 That is the sole proximate cause of his injuries,
11 he turned left. Mr. Peers and Mr. Plants both testified
12 that close to the intersection he takes his left hand off
13 the handlebars and then -- which a reasonable jury could
14 find an intent to signalling, he's signalling to turn
15 left, he then turns left by six feet.
16 Now the look of shock does make sense. I'm sure
17 I'm going to be accused snidely of suggesting that
18 Dr. Khibani committed suicide by bus by turning in front
19 of him.
20 No. He did have that look of shock and surprise
21 that there was a bus there when he was turning left in
22 front of it, right in front of an intersection where if
23 somebody wanted to turn left, they would be turning left
24 at that time.
25 That is a sole proximate cause issue, goes

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1 directly to Banks versus Sunrise. The reason that this
2 happened is because he turned left into the path of that
3 bus because he didn't know it was there.
4 Alternatively, if he did know it was there, then
5 everything that you need to know about a bus to stay clear
6 of it if the bus is not giving you the berth that it
7 should, a reasonable person with ordinary knowledge about
8 a bus in this community would know enough to stay clear if
9 the bus isn't moving over as it should.
10 And if somebody says: Wow, this is too close for
11 comfort and that person should be moving over, but I'm
12 going to maintain my path anyway because I'm feeling lucky
13 today, then that is assumption of the risk.
14 But I think what probably happened by the
15 evidence that he is turning left six feet, is th at he
16 intended to turn left and that's why it happened.
17 Now, I understand they're going to say: Well, he
18 didn't turn left, it was a wobble because he was thrown
19 off balance by an air blast. But you don't assume that
20 their theory is true when it's only one of the reasonable
21 inferences that the jury could draw.
22 There is substantial evidence from which they
23 could infer that showed he intended to turn left, and he
24 was surprised because he didn't know the bus was there
25 which is why he turned left.

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It doesn't matter of sole proximate cause. Assumption of the risk is an alternative argument. I think it really goes to whether or not the jury decides that he was aware of the bus being there, or not aware of the bus being there.

If he was not aware of it being there and was surprised to see it, then it could be -- a reasonable jury could find that it is just as likely that he was turning left before he saw it.

And it's not our burden to prove that that's what did happen. We are negating their prima facie case of causation. It is enough for a jury to find that it is just as probable and, therefore, Plaintiffs haven't carried their burden.

There is substantial evidence it goes to sole proximate cause primarily. Thank you.

MR. KEMP: Judge, if you remember the video, and we have pictures and testimony that both say this, Dr. Khibani and the bus, the bike and the bus were both at the exact same point of the crosswalk.

So, for example, when I have the street going down there was a crosswalk at that intersection. Right before the accident they were at the exact same point that the front wheel of the bike and the front of the bus were at the front of the crosswalk. That's just a fact.

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1 There's pictures of that, okay, they can't dispute that.
2 So what he suggested to you is that a bike that
3 is right at the crosswalk is all of a sudden turning using
4 the crosswalk as a turn lane and going through one travel
5 lane, two travel lanes, and then there's a third, there's
6 a turn lane as opposed to making that motion a lot sooner,
7 that's just not a plausible argument.
8 But even if it was, it's not a defense, because
9 in a products case negligence is not a defense. We cited
10 Young versus Machine, Young versus something, it was the
11 Young case. And the Young case holds that the only
12 defenses are misuse of product or assumption of risk.
13 They can't come in and say that: Oh, Dr. Khibani
14 was contributory negligent because he turned. They just
15 can't do that, Your Honor, because contributory negligence
16 is not a defense.
17 And you just heard counsel say that's what he
18 wants to argue to the jury, that the doctor was negligent
19 and that was the sole proximate cause of the injury.
20 That's just out.
21 And now with regards to the wobble, he says: Oh,
22 Dr. Khibani was six feet over into the bike lane. Well,
23 you know where they get that six feet, Your Honor?
24 That's when the bike has already turned, he's
25 completely lost control and the bike's turned at

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1 approximately a 40 degree -- let me see if I get my clock
2 right -- at under 90 degrees. He's lost control at that
3 time.
4 So they measure the point where he hits the bus,
5 that's the point where the tire of the bike was, and
6 that's where they get the six feet. You know, he was
7 actually slightly outside the bike lane, I'll admit that,
8 but he was not six feet into the lane.
9 And the reason, we think the reason that he
10 wobbled was the air blast. That is the only reason that
11 could be advanced to the jury, because we have Bradley's
12 testimony to that point. We have Peers testimony that it
13 was air blast, we have our expert's testimony on that
14 point.
15 And these other causes, they don't have any
16 evidence. They admitted it, they have no idea. I showed
17 you the slide. They have no idea why there was a wobble.
18 They have no expert opinion. All the experts say they
19 can't tell us what the alternative cause.
20 So the jury is going to hear air blast or no air
21 blast. That's all they're going to hear. They're not
22 going to hear them saying: Oh, the wobble was caused by
23 this, or suicide by bus or whatever. You're not going to
24 hear that, Your Honor, because they don't have any
25 evidence of it.

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1 But anyway, getting back to the thrust of the
2 motion, the motion is pretty simple. They shouldn't be
3 allowed to argue contributory negligence of the doctor as
4 a defense.
5 They can call it the unique, sole, only
6 infintamental (phonetic,) whatever term they want to call
7 proximate cause. What they're arguing is negligence as a
8 defense, and that's just not allowed under the Young case,
9 Your Honor.
10 THE COURT: Thank you.
11 MR. HENRIOD: Your Honor, we didn't mean to
12 be sneaky.
13 MR. KEMP: Your Honor, what is this? It's
14 me, him, me. You know, I let it go the first two motions,
15 but I think I'm --
16 THE COURT: All right. We'll do the same
17 thing, we're hearing the other side.
18 MR. HENRIOD: So you don't want to hear
19 anything further on this? One minute?
20 THE COURT: I'll allow this, then we're
21 going to the classic way.
22 MR. HENRIOD: Okay. Very good.
23 Young/Machine itself on Page 24 talks about how the lower
24 Court had allowed in all of the testimony for purposes of
25 sole proximate cause.

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1 But then the Court applied the law to not
2 instruct on comparative or contributory negligence, and
3 that's what we're talking about. We're not talking about
4 an affirmative defense.
5 Their witnesses say he wobbled. Our witnesses
6 say it looked intentional, that it was clear. He didn't
7 make a 90-degree turn at the crosswalk.
8 The impact happens a little bit into the
9 intersection where somebody would be turning if they
10 wanted to turn, and Metro said that it was six feet into
11 the lane of the bus.
12 There is more than sufficient evidence for us to
13 be allowed to present this to rebut their prima facie
14 case.
15 THE COURT: Thank you, Mr. Henriod.
16 Mr. Kemp?
17 MR. KEMP: Well, Judge, I'm pretty familiar
18 with the testimony since I took all the depositions in
19 this case. I would like to know which witness he thinks
20 said that Dr. Khibani intentionally ran in front of the
21 bus? I'd just like to know who that is.
22 MR. HENRIOD: Nobody said intentionally.
23 MR. KEMP: You said, quote, "looked
24 intentional."
25 MR. HENRIOD: Okay, all right. Not a

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wobble, but it appeared that he was turning. We can't say intentional because this is a circumstantial evidence case. We can't talk to Dr. Khibani one way or the other.

Everyone is looking at this on the circumstantial evidence, as they're allowed to do, as we're forced to do, and figure out what probably happened, and the jury can make this determination.

When they say he didn't intend it based on the wobble as their witnesses -- the term their witnesses use to describe the action, they are guessing as to what Dr. Khibani intended just as much.

You have two witnesses, one says he turned, the other says he wobbled. In either case, what the jury has to do is look at the objective indicia that the different witnesses are describing, and then it is for them to determine what happened.

MR. KEMP: Judge, I don't know how it could be a circumstantial evidence case when we have a videotape taken from Red Rock that I showed you. I showed you where Dr. Khibani was, exactly, okay, and at that time he wasn't in the six feet travel lane like they're saying.

What happened is, the bus driver pulled away, the bike fell against the side of the bus. At that point he was six feet away, but in those earlier shots when Dr. Khibani is right beside the bus, he's not six feet

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1 away, Your Honor.
2 And with regards to the two witnesses, I don't
3 really know that that's germane to this motion, but the
4 two witnesses, Bradley and Peers, both said wobble. None
5 of them said that there was some sort of intentional
6 conduct on the part of Dr. Khibani here.
7 And if that's what they're hanging their hat on,
8 on an assumption of risk, it's not enough because you saw
9 the assumption of risk has to relate back to the product.
10 They have to know about the defect of the product and then
11 assume the risk.
12 You know, a case like that would be if you were
13 turning a motorcycle and trying to cut in front of a train
14 or something, and you knew the train didn't have a cow
15 catcher or something like that. That would, I think, be
16 an argument of assumption of risk.
17 There's no evidence like that in this particular
18 case, Your Honor.
19 THE COURT: Thank you. Let's go to
20 Plaintiff's Motion in Limine No 4.
21 MR. CHRISTIANSEN: Good morning, Your Honor.
22 Pete Christiansen for Plaintiff.
23 THE COURT: Good morning.
24 MR. CHRISTIANSEN: By the end of Wednesday I
25 might be your favorite lawyer, because I do criminal work

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so I talk a lot less than all these civil guys.

This is simple, and at the time the motion was written, Defendants had proposed in a jury questionnaire questions relative to Persian or Iranian backgrounds. That was ruled by Special Master Hale, he took it out.

All our motions sought at the time and all we seek now is to preclude the Defendants from attempting to identify persons who would be protected under the Batson decision, which under Edmondson versus Louisville applies in civil cases as well as criminal cases, such that our client can get a fair cross-section of the community including, if possible, anybody of similar background.

The Defense forwards this theory that somehow because we're going to explain how Dr. Khibani came to the United States via escaping to Pakistan, and then to Montreal, and then emigrating the U.S., that somehow that entitles them, and I'm just reading it, entitles them to figure out if somebody is going to be sympathetic to him.

That's an absolute Batson violation. So, in other words, if they preclude somebody because they're Persian, that violates Batson. If I raise a Batson objection, what most civil lawyers don't litigate this Batson issue.

In the Connor v. State case, our Nevada Supreme Court went to great lengths to talk about how it's done

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and done properly. If they preclude that, Your Honor, they move to peremptory strike an Iranian person, and I make a Batson objection.

They thereafter have to make a race-neutral reason that they're attempted to exclude him; for example, he's Katie Barin's second cousin happens to make our panel, that's a race-neutral reason, should be biased one way or another.

But because he's Iranian, that's a race based reason. That's a reason he stays on the jury, and they get sanctioned for trying to get rid of him. So I just simply want everybody to follow Batson. It applies in civil cases.

When we wrote this, you have to understand they were asking for a question in the questionnaire. The Special Master took that out, and that's all the motion states, Your Honor.

MR. KEMP: Your Honor, I have two cents on this too. I think Batson is going to be a hot issue during jury selection, and I think that just because I looked at the first 40, 50 jurors, and there's a lot of people I think the Defense are going to hate having on this jury, and so I think Batson is going to be a really hot issue.

And that's why I don't want to get started down

1 the road with: Oh, Persian, Persian, Persian, which is,
2 you know, it was really so offensive the question they
3 posed in the jury questionnaire. I had a vehement
4 objection to it, and like Mr. Christiansen said, we want a
5 Special Master.
6 THE COURT: Thank you.
7 MR. HENRIOD: Thank you, Your Honor. As far
8 as the jury questionnaire, as they pointed out, it's not
9 in the jury questionnaire. We raised it, we discussed it
10 with Special Master Hale.
11 Special Master Hale at the end of the conference
12 we had we said we'd withdraw it, let's move on. So let's
13 move on from it. This is not about Batson. This is not
14 about racial issues in jury selection.
15 The Plaintiffs have gone extremely out of their
16 way to create a story of Dr. Khibani's life. They want to
17 play the video of Dr. Barin in which she talks about his
18 escape from Iran essentially as a political refugee, going
19 to Pakistan and making his way to Canada.
20 The reason they want to do that is because they
21 want to make his life story so compelling that the jury is
22 moved by that. First and foremost, they're not allowed to
23 do that, because the value of his life is not an element
24 of damages.
25 We've provided to the Court with the case law

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that says that, and they have not responded to that in any meaningful way. So they should not be allowed to speak about the value of his life, and his life is more valuable because of his back story. But that's what they want to do. We shouldn't be allowed to even hear that evidence in the first place.

If they are allowed to play that evidence, however, if they're allowed to tell his back story, we are allowed some latitude with the jury, not to talk about racial issues, but does anyone have a similar history? Is anyone here a political refugee?

If we were in south Florida and one of the parties playing for a defendant had escaped Cuba and Communism and landed in Florida, you would be allowed to ask the jury: Has anyone had a similar experience like that, not because they're going to be favorable or unfavorable to that party because they're Cuban, but they might have a connection to that party, good or bad.

Perhaps there's someone that doesn't want people escaping Communism into south Florida, and the Plaintiffs should want to know that. Or perhaps they are a business owner who is happy to have political refugees come work for him because he thinks it's important.

Well, that would be important for the other party to know, because that might create an unfair bias. It has

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1 nothing to do with the fact that it's a Cuban immigrant.
2 It has to do with the fact that this is a person who for
3 political reasons escaped a regime, and is now living in
4 south Florida, how do you feel about that?
5 We're in the same situation here. It doesn't
6 matter that he's Iranian or Persian. The story they want
7 to tell is that he should be commended because of his
8 bravery leaving Iran and going to Pakistan and then
9 getting to Canada.
10 It is, it's a compelling story. If they're
11 allowed to tell that story which, again, we don't think
12 they should be able to tell in the first place. But if
13 they're allowed to tell that story, we should be allowed
14 to poll the jury and say: Do you have experience like
15 this? Do you know anyone who is a political refugee?
16 Have you ever been a political refugee? Has any
17 of your family members been a political refugee? Do you
18 have experiences like these?
19 So that's the purpose of what we want to
20 understand, we understand what these peoples' background
21 is, not because of their race, but because of the back
22 story they want to tell about Dr. Khibani.
23 Now, what's interesting is the motion, and they
24 know that this is going to have to be addressed because
25 the motion, if you noticed, was no excessive reference.

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1 So it's okay for them to talk about it a little bit, but
2 they don't want excessive references.
3 Well, a Motion in Limine needs to be a little
4 more concrete than no excessive reference. Now, what's
5 excessive? Can we say it two or three times? Can we ask
6 the jury one question about it and not others? Do we get
7 to ask any witnesses about it?
8 It's really unclear about what the excessive
9 references are. Again, this isn't a racial thing, so
10 Batson is not at issue because we're not asking to exclude
11 jurors based on their race, or even their nationality.
12 But we are certainly allowed, if they get to talk
13 about Dr. Khibani's back story which, once again, isn't an
14 element of damages, but if they're allowed to talk about
15 it, we should equally be allowed to ask the jury did they
16 have a similar experience so we know how they're going to
17 judge these parties. Thank you.
18 MR. CHRISTIANSEN: Judge, I don't even
19 understand the notion behind a back story. Am I supposed
20 to tell somebody else's story to the jury about
21 Dr. Khibani?
22 Because what is at issue is the value of life and
23 the loss thereof to his wife and children. That is
24 central to this case. And that somehow that because he's
25 got a particular story they, therefore, think they should

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1 have more leeway to racially designate, profile and
2 preclude potential jurors is a Batson violation.
3 They shouldn't be allowed to do it. He's of the
4 background that he's of. I mean, Lady Justice is blind
5 for a reason, right, because it doesn't matter what color
6 somebody is, or where they came from.
7 His story is his story. There's no countermotion
8 to stop me from talking about how he got out of Iran.
9 They dump it in the middle of an opposition that says,
10 well, we shouldn't be able to talk about it. I mean, it's
11 ludicrous.
12 So what do you want me to say? He got out of
13 Nigeria? Would that make you feel better? I mean, he
14 came from Iran, and the way he came is relevant to his
15 wife and his children.
16 And it was relevant to Katie. And she testified
17 to it before she passed, and they had a right to cross
18 her, and none of them did on the issue. So I think the
19 motion should be granted.
20 THE COURT: With respect to this motion, I
21 understand the Batson issues very well, and it is very
22 concerning for me. It does sound like this is the
23 Plaintiff's history, and I would not allow questions, as
24 in any trial, concerning race.
25 My thought is, if it goes to the general

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contention of having to flee a country in general, it doesn't matter which country, and having that sort of experience, or possibly family members, I wonder if that's not something that my thoughts are that perhaps that is something that would be pertinent, and it would have to be treated very delicately, very delicately.

But that has to do with no racial issue, just having a similar, a general similar experience. So i will not allow questions concerning -- and I will put this in writing because I will be very specific.

But just so you have an idea where I'm coming from, not race related, not culturally related, anything to do with that, but perhaps a general question. And, again, I will put this in writing and clear concerning someone who has had a like experience, or perhaps a close member of their family.

But the questions have to be very constrained because of that, and very much just what I'm saying with that in mind. So that's where my thoughts are there, okay.

Let's go on to the next one.

MR. KEMP: This is Motion in Limine No. 5, Your Honor, and it pertains to the Stacowitz case. So let's start with the Stacowitz case.

This is the Stacowitz case. In the Stacowitz

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there was an accident up in Reno in the early 80's, and what happened is, there was a malfunction of the steering wheel of a Nissan.

In any event, the only testimony before the jury was the testimony of the Plaintiff in the case, and she was trying to steer and the wheel wouldn't steer, and so the Defense moved to throw that out because there's no expert and a number of things.

Anyway, out of that case came this rule. It has been held that a specific defect in the product is not an essential element in establishing the cause of action.

Just in the field of products liability focuses on the product, and not necessarily on (inaudible.) That's the Nevada Supreme Court. So we as Plaintiffs do not have to prove a specific defect in this case.

I mean, we're trying to prove air blasts, we're trying to prove proximity sensors, we're trying to prove the protective barrier, but we don't have to prove any specific defect. That's what the case holds.

Let's have the next one? There's a Footnote 23 that should be up there somewhere. Anyway, this is what's in Footnote 23. The Court says: "We agree with those Courts that hold the specific cause of malfunction need not be shown."

Indeed, we reached -- excuse me, this is the next

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1 case, Nevada Contract Services: "We reached a similar
2 conclusion."
3 In their opposition they say: "Oh, well,
4 Stacowitz only applies to crash worthiness cases, or cases
5 where there's an unexpected malfunction." In fact, I
6 think what they -- unexpected dangerous malfunction.
7 That's the only time we apply Stacowitz.
8 This case, Nevada Contract Services apply in
9 Stacowitz. This was an argument that a liquor dispensing
10 machine malfunctioned, okay. There's no car, there's no
11 crashworthiness, there's no danger. This is an economic
12 loss case.
13 The bar is saying because the gun wasn't working
14 we lost money, and we should get it back from you, you
15 made that liquor dispensing machine. So I think that
16 disproves the notion here that Stacowitz is somehow
17 limited to Nissan car accidents, which is their underlying
18 argument.
19 We also cited Judge Gordon's decision, of course
20 that's not binding, but it's interesting. And Judge
21 Gordon applied Stacowitz to a house fire.
22 And the reason I thought that was interesting is
23 because in the opposition they say, well, you never apply
24 Stacowitz to a house fire because house fires could have
25 so many causes. It just proves that --

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1 THE COURT: Is this the one with the fan?
2 MR. KEMP: No. That's in their opposition.
3 THE COURT: Sorry.
4 MR. KEMP: In their opposition they say that
5 you can never apply Stacowitz to a house fire because
6 there's so many other causes.
7 THE COURT: Right.
8 MR. KEMP: They say, quote: "You only apply
9 Stacowitz in freak accidents, steering wheels that freeze
10 up or act erratically during highway driving, sudden brake
11 failure, exploding bottles or appliances and the like,"
12 unquote.
13 They said Stacowitz is limited to those cases.
14 Well, clearly, that's not true, Your Honor, because as I
15 said to Nevada Contract Services, it's just a bar gun.
16 It's a liquor dispensing machine.
17 Judge Gordon's case is a fire, which they said
18 later on that -- this is their opposition, quote: "The
19 product malfunction theory does not apply to those
20 catastrophes that frequently occur without a defect. A
21 house fire may be caused by a toaster that is defective,
22 or by one that's simply worn out, or by faulty outlet."
23 So Judge Gordon clearly didn't see it that way,
24 because he applied Stacowitz in this house fire case. So
25 for those reasons, there's no limitation to Stacowitz.

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1 And the reason we filed this motion is, you know,
2 we have a consumer expectations test, so at the end of the
3 day the jury goes back, and is the bus more dangerous than
4 they reasonably expect. That's the end of the day, that's
5 the decision that they made.
6 We all want the Defense attorneys to be arguing
7 during trial: Oh, they didn't prove any specific defect.
8 They didn't prove that the steering wheel broke or that
9 the tire blew out or, you know, whatever.
10 And that's what they do, Your Honor. They try to
11 set up a straw man and then knock it down, so that's why
12 we're filing this particular motion.
13 THE COURT: Thank you. Counsel?
14 MR. POLSENBERG: And, Your Honor, Dan
15 Polsenberg. Pacific Indemnity Company was the fan
16 amphitheater, it wasn't just a theater that blew up and
17 nobody knew why. It was the fan that kept overheating,
18 and Nevada Contract Services case.
19 You know, all the time that I'm arguing illegal
20 issues, we try to find some bizarre case that nobody else
21 can find, and we call that a squirrel case. And here is a
22 case that they cite that actually one of the parties is
23 named Squirrel, so I thought that was fascinating.
24 But that's a warranty case, as he says, it's a
25 business interruption case. It's not a product defect

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1 case, and Stacowitz is the reading authority on that. And
2 Stacowitz I have said for decades is a great case. It
3 makes a lot of sense.
4 When it came out, Mitch Cobiea used to complain:
5 Oh, look, now all you have to do is show a photograph of
6 an accident and you win the case. Well, no, that's not
7 what Stacowitz says.
8 Stacowitz makes a lot of sense. What Stacowitz
9 says is, if there's an unexpected malfunction, that the
10 malfunction of the product can create the inference that
11 there was a defect that caused the malfunction. It makes
12 a lot of sense.
13 The Stacowitz case even uses the language,
14 "unexpected dangerous malfunction." We use dangerous in
15 our case and in our brief, because that's what Stacowitz
16 says.
17 I don't think we need to say dangerous because
18 it's almost redundant, because to be a defective product
19 it has to be unreasonably dangerous. That's what the case
20 law says, that's what the statement cites.
21 So dangerous lines up with the whole idea.
22 Stacowitz goes to what do you need to prove a prima facie
23 case. Now, Justice Stephan used to always raise an oral
24 argument that Stacowitz is really like a burden shifting
25 issue. It's like reverse res ipsa loquitur where a

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1 Plaintiff come in and says my steering didn't work, and
2 then we were in that accident.
3 And remember the circumstances in Stacowitz. It
4 was a Datsun, actually, but it was manufactured by Nissan.
5 It was a new vehicle, it hadn't been in any accidents
6 before, it hadn't been driven very long. It hadn't been
7 worked on, so nobody interfered with the vehicle.
8 So it was essentially in the condition it was
9 when it left the dealer, when it left the hands of the
10 Defendant. So those all added to the idea that this
11 malfunction must have been from a defect that existed in
12 the hands of the Defendant.
13 So all those circumstances make sense, and that
14 doesn't mean they win. That means they've made a prima
15 facie case. And what Justice Stephan would say is: Okay,
16 now the Defendant who made the car can come in and explain
17 why this would have happened, other than from a defect.
18 This is a completely different kind of case.
19 This is a case where they are coming in here, and yet I
20 think we overstated in the brief when we said freak
21 accident, but it does have to be an unexpected, dangerous
22 malfunction.
23 So they're coming in here and they're not showing
24 a malfunction in the sense of Stacowitz. They're not
25 showing that the steering didn't work, or the braking

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1 didn't work. They're coming in on a design case.
2 And a design case is different, and they actually
3 have several. By my count I usually group them into four
4 groups of defects. And so they're not really coming in
5 here and saying there was a malfunction. They're saying
6 there was a safer way to do this.
7 They are actually coming in and proving specific
8 defects. And last week Joel argued that as a matter of
9 law, some of these defect claims, these design defect
10 claims are not legally recognized.
11 And,in fact, at one point you said, well, even if
12 the S1 guard is a legitimate legal claim, the others
13 clearly are not.
14 So I think not only is it important to say that
15 they have to come in and talk about the specific defects,
16 I think we actually have to have the jury decide the
17 specific defects. Because I think at least three of the
18 four, and I'm a lawyer so I'm going to say all four, but
19 at least three of the four claims are not legally valid.
20 And so we have to have the jury decide which
21 defects they are that think are the cause of the injuries
22 in this case. Because under the case of Allstate versus
23 Miller, if we don't set that out and the Supreme Court
24 decides that any one of the four is not legally
25 cognizable, we have to try the case all over again.

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1 And it's my job to keep from having to make you
2 try this case twice. In Allstate versus Miller there were
3 three claims, three novel claims of bad faith, and the
4 Defense asked for a special verdict -- a special
5 interrogatory, not even a special verdict, an
6 interrogatory that lists out the claims that the jury
7 found under.
8 And the Judge in that case said no. The Supreme
9 Court said one of these novel theories was good law, but
10 the other two were not. And since we didn't know which
11 one it was that the jury decided on, we had to try the
12 case all over again.
13 So is Stacowitz enough under these circumstances?
14 No. Is the idea of consumer expectation in the defect
15 case whereby the way I know you've ruled that the decedent
16 is a consumer for the purposes of recovery. I got that.
17 But I also don't think that that prevents them
18 from having the prove what the alleged defect is in terms
19 of the proposals that they have.
20 So in this design defect case, maybe there are
21 other design defect cases they don't have to show that
22 but, certainly, in this one.
23 And, finally, I think the jury has to tell us
24 which defect claims they've found for Plaintiff, or else
25 we'll have to try the case over again.

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Any questions, Your Honor?

THE COURT: No, not at this time.

MR. POLSENBERG: Thank you, Your Honor.

MR. KEMP: Your Honor, I didn't realize we were going to argue a special verdict form issue, but I'll give you my two cents when we get back to the real issue.

When I did the MGM case I was on the committee with Mr. Numbelli, who is a famous Plaintiff's lawyer, and he had a saying or a rule that he lived by, which is that if it takes longer to fill out the verdict form than it does to put your order in at a sushi bar, you've made a mistake.

And so what the Defendants want, and more Defendants we want this too, we want like a 300-page verdict form that they've got to check, and that creates more potential for mistake.

That's what the Defendants really want. They don't want to preserve their argument on Allstate versus Miller. So anyway, when we get down to it, we're going to be asking for a very quick, general verdict form. I am sure they're here, Mr. Polsenberg, I'm sure we're going to get a longer proposal from them.

But that really doesn't have anything to do with the issue that we're arguing about now. You know, you know you've got them, you know you've got them when the

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1 only thing they can say about a Nevada Supreme Court case
2 is, it had the word "squirrel" in it, so the Court should
3 ignore that case. See, you know you've got them when that
4 happens.
5 Let's have the Nevada Supreme Court case. This
6 is Nevada Contract Services, Inc. versus Squirrel
7 Companies, Inc. So the suggestion that we can disregard a
8 holding in a Nevada Supreme Court case because one of the
9 companies is named Squirrel -
10 MR. POLSENBERG: Your Honor, may I object?
11 Because that is not what I said.
12 MR. KEMP: That is exactly what he said,
13 Your Honor.
14 MR. POLSENBERG: I said it's a warranty
15 claim, not a product claim.
16 THE COURT: I understand what's going on, so
17 why don't we just move on.
18 MR. KEMP: Your Honor, they held in this
19 particular case that although Stacowitz is a product
20 liability case, we are adopting a similar causation
21 burden, similar causation.
22 So they take the same approach in a case that is
23 not an unexpectedly dangerous malfunction, a case that
24 does not even involve a car or crashworthiness, it is just
25 the rule that the Plaintiffs do not have to show a

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specific defect.

If you take a look at the elements of proof in Shashone and all the other products case, there is nowhere that we have to prove a specific defect.

And so they're trying to saddle us up with an additional burden that we don't have. And, true, we are trying to prove specific defects. I will admit that, we are trying to prove specific defects. The S1 guard, the proximity sensors, the air blast, we are trying to do that.

But just because we go beyond our burden of proof doesn't mean that we are increasing our burden of proof. The burden of proof is just that, it is not that we have to prove a specific defect, and that's why this motion should be granted so they can't argue to be otherwise.

THE COURT: Okay. Let's go on to No. 6.

MR. CHRISTIANSEN: Your Honor, this is our motion. It started out as our motion to preclude reference to in March of 2001 in a Court-appointed shaken baby case.

I consulted with Michael Baden, who was in New York City. I know when it was, because the towers fell six months later and I had stayed there, believe it or not. It was a shaken baby case dealing with histology slides, petechiae hemorrhages and a crushed skull on a

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1 six-month old infant if an appointed case.
2 And that's important because I lay out in the
3 reply I would need to explain to the jury how I got to
4 Michael Baden. And that is that I gave Jeff Sobel, who
5 was the trial Judge -- back in the old days, you didn't
6 have Drew Christensen appointing or giving funds.
7 You went to your trial Judge and said: Hey, can
8 I have $1,000, please, in this Court-appointed 75 bucks an
9 hour case, can I have a forensic pathologist look at our
10 Medical Examiner's conclusions and make sure he or she did
11 or didn't come to the right conclusions relative to the
12 homicide versus some other cause of death.
13 That was how I used Dr. Baden. Frankly, I didn't
14 even -- he was on a list of persons that were at the time
15 approved to do Court-appointed work and would take the
16 Court-appointed rate. I consulted with him. I never
17 designated him as an expert.
18 The case never went to trial. In an abundance of
19 caution, Mr. Kemp filed this motion which was, there is no
20 relevance as to what happened April the 18th of 2017 to
21 Kayvan Khibani on Pavilion Center riding his bicycle when
22 was struck by a Motor Coach.
23 What relevance to how Jeff Sobel appointed an
24 expert for me to consult with in 2001 could possibly leap
25 forward -- I'll focus you back on the motion I lost the

1 other day to you where you said it could never have been
2 foreseeable that Katie Barin was going to have cancer and
3 Dr. Barin was going to get hit, she was going to have
4 cancer at the time the bus was made.
5 So our motion was simply limited to that. I got
6 a countermotion that they don't want to talk about -- they
7 don't want to hear about the OJ Simpson case.
8 Well, Dr. Baden in this case opines that Kayvan
9 Khibani died instantly. In spite of the fact that
10 Dr. Khibani first made contact with the bus behind the
11 right front tire, and at least for the moments between the
12 right front tire until the bus runs his head over, he's
13 alive, so he didn't die instantly. That's absurd, even
14 though that's Baden's theory.
15 From that theory they want to preclude -- and
16 they hired him -- from that theory they want to preclude
17 reference to the OJ Simpson case where in order to
18 facilitate a defense time line, a defense that OJ couldn't
19 have done this in the time that it occurred, because Ron
20 Goldman, whose throat had been slit, had almost severed,
21 would have lived 15 minutes. That was his opinion there.
22 So, I mean, his opinion in the OJ Simpson case
23 goes directly to his opinions in this case. In this case
24 people died instantly, even though the first contact with
25 the bus isn't what killed him, and there is at least some

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period of time, agree or disagree what that period was, that he was conscious and alive before he dies.

That's what he testified similarly to in OJ, that a guy whose throat had been slit could live 15 minutes so that OJ didn't have time to get back and do it, versus that I was allowed funds by a District Court Judge in the year 2001 to consult with a guy because I represented a lady who was accused of killing her own child.

There is no relevance under 48.035 If there is arguably, it's substantially outweighed by both unfair prejudice, the waste of time and unnecessary proceedings under Subsection 2.

I might have to take the stand and say I used him, but I didn't use him, I didn't put him on the stand. I didn't disclose him to the State, and here's why, it just sort of makes a trial out of a whole separate issue.

For those reasons, we ask that you preclude any reference to my consultation with him in 2001, and we ask you deny the kind of absurd request that the Defense makes that the timing opinion in the OJ Simpson case rendered by Dr. Baden is irrelevant to his timing opinion in this case for the exact same thing. Thank you, Your Honor.

MR. KEMP: Your Honor, I just wanted to add that to my utter amazement, 25 years after the alleged murder this is still a hot issue in Nevada. I mean, he

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1 was convicted by Judge Glass. He was sitting in Nevada
2 prison, there was all kinds of headlines when we was
3 released, and now he lives in Summerlin.
4 THE COURT: I know.
5 MR. KEMP: I went and had dinner at the
6 North Italian, the new restaurant at Sahara and Fort
7 Apache the other day, he was sitting right next to me. It
8 caused a big sensation, people were coming over and taking
9 pictures with him.
10 But anyway, I don't -- they want out and hired
11 OJ's pathologist or whatever he is. Like Mr. Christiansen
12 said, he's going to tell the jury in this case that you
13 get run over by a bus you die immediately, but in the OJ
14 case you get stabbed in the throat and you live for 20
15 minutes supposedly. I mean, this guy has interesting
16 standards I would say.
17 But I don't think we -- they're dragging him into
18 this courtroom, not us. They shouldn't be allowed to
19 mitigate some of the problem they're going to have by
20 pointing to Mr. Christiansen and saying: You hired him
21 too. That's what this motion is all about.
22 MR. BARGER: May it please the Court, the
23 easy answer is, neither side refers -- I don't refer to
24 Mr. Christiansen hiring Dr. Baden. We don't retry the OJ
25 Simpson case here. That's the real answer.

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We're not going to bring a doctor in to talk about what he testified to in the OJ Simpson case and try to compare that to this. We'll be here six months with that kind of stuff.

So my recommendation is, Judge, you just -- I suggest respectfully you rule. I'm not going to talk about Mr. Christiansen hiring Dr. Baden, and they don't talk about the OJ Simpson case. That would be my response.

If they're going to talk about for some reason that he testified in the OJ Simpson case, but they can't go into what his opinions were, we'll be here forever. If they get to do that, then I want to mention that they hired Dr. Baden as well, because what's good for the goose is good for the gander.

So, respectfully, I say that none of it comes in. Secondly, if you let them say you testified in the OJ Simpson case but not give opinions, then I would like to request to say at least they hired the guy, and I think that would be fair. Thank you.

After he responds, could I step out for one minute after that?

THE COURT: Yes.

MR. BARGER: Okay. And as Mr. Roberts indicates, they would have to show substantial similarity

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with respect to trying to impeach him from some other opinions, and there's been no showing in this case of that either.

MR. CHRISTIANSEN: Judge, what's interesting, what you did not hear was how Judge Sobel giving me funds in 2001 is relevant in this case. You did not hear a single word as to the potential relevancy for this case.

So, of course, they try to lump them together because they don't like that they chose this guy who offered this ludicrous opinion about timing of death for a guy whose head had almost been severed, that contradicts the ludicrous opinion he makes in this case that Dr. Khibani dies instantly when he strikes the side of the bus, when their own doctor say it's the tire that ran him over that killed him.

So it's relevant to timing. It's irrelevant if Jeff Sobel gave me money to do my job as a Court-appointed criminal defense lawyer in 2001.

And, Your Honor, there was just a miniseries on this entire thing. I mean, all these jurors are going to know -- I think all these ended three or four months ago. Everybody Is going to know who this guy is. I mean, that's silly to think otherwise. And I didn't pick him, they did.

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THE COURT: I'm going to grant this in part. There's going to be no mention of OJ, but I will allow a hypothetical with respect to a case that he's testified in the past, and allowing the hypothetical.

I'm not trying to dictate your case, but the difference in the cases, and even though you're telling me it needs to be substantially similar.

But I will allow -- because that's very common that you can ask these questions of how they've testified before. You can ask if they've testified for the Plaintiff or the Defense.

But I'm not going to bring OJ into the equation, nor am I going to bring your hiring or consulting with him into the equation. I'm sterilizing this, okay, and it's as fair as I can be to both sides.

But you can still --

MR. BARGER: I understand the ruling. I just wonder if I could ask one clarifying question?

THE COURT: Sure.

MR. BARGER: Can we have a requirement that they outside the presence of the jury try to establish substantially the same facts before he testifies?

THE COURT: I can think about that and I will address it in writing.

MR. BARGER: Thank you.

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THE COURT: Okay. Let's go on to No. 7.

MR. HENRIOD: Judge, do you want to take a break first?

THE COURT: Yes. I think we should. Thank you.

MR. ROBERTS: And, Your Honor, just one minute. I want to give you a courtesy copy, if I could?

THE COURT: A reply?

MR. ROBERTS: So it is a response to a supplemental reply that we got on Friday. It's very short, we filed it this morning, and I just want to provide a courtesy copy to chambers. The text is very short.

THE COURT: Have you had --

MR. KEMP: I haven't seen this, Your Honor.

MR. CHRISTIANSEN: I saw it, Judge. This morning it came through right before court.

MR. ROBERTS: And, again, it's responding to something that we received Friday.

THE COURT: Okay. I'll take a look at that during the lunch break. So we'll take a 15-minute recess.

(Whereupon, a 15-minute recess was taken.)

THE COURT: Okay. Let's go on to No. 7, Plaintiff's Motion in Limine No. 7.

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MR. KEMP: Judge, we are the Plaintiff. We don't have to, but if we want to we can offer an alternative design. We don't have to, but if we want to we can under Tracheole (phonetic) we can do that.

So we are offering an alternative design in the case of proximity sensors that is a side proximity sensor with an alert. That's the apple, that's what we're offering.

To defend the case they're saying: Well, we couldn't provide a front proximity sensor with automatic braking, because that would have required us to coordinate with Bendex which makes our brakes, and Bendex didn't come out with this until 2014 or whatever, and so that's why we didn't put it on the 2008 bus.

So it's the difference between an apple, which is red, that's what we're offering, and an orange which is orange, which is what they're saying.

And just to make sure the Court knows the difference, I mean, it sounds simple, but it's amazing how much time you spend this in the case.

First slide. This is a video of a bus. When the bus proximity sensor detects the bicycle, that's kind of the front and side proximity sensor.

Let's have the next one? This is the orange. This is what they want to talk about. So what happens is,

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1 the cycle swerved in front and there was an automatic
2 braking. That's the orange in the case. That's what they
3 want to talk about.
4 These are two different types of safety
5 alternatives. This is a press release from Volvo. Go
6 ahead, can you blow that up a little bit?
7 This is the option we're talking about, a blind
8 spotting option that relays the information to the driver
9 that there's someone in its blind spot. And if you
10 remember Mr. Van Hoogestraat's testimony from last week,
11 they knew the bus had a blind spot. They admitted it.
12 Next one? Okay. I like this because this is the
13 Sentra 531. Sentra, again, is made by Daimler or
14 Mercedes. See, actually, in the literature they break out
15 the two different types of safety device.
16 The first one is the active light, the orange,
17 which turns the brake on automatically so you don't hit
18 someone in front of you. The second one is the apple,
19 what we're talking about. They have sensors to get people
20 in the left hand lane of the bus.
21 Next one? That's Mercedes. This is the option
22 we showed last week, which is the BCI, the Australian bus,
23 and they were using the side sensor, the Eaton system we
24 talked about last week. This is the apple. This is what
25 we're proposing as a safer alternative.

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1 Next one? This is the Eaton again. I'm just
2 showing that this is the blind spotter system we're
3 talking about.
4 Next one? Same thing, audible and visual alerts.
5 this Is what we're talking about. We're not talking about
6 automatic braking, okay. That wouldn't have done anything
7 in this case because the doctor didn't go to the front of
8 the bus. It wouldn't have done anything in this case.
9 Next one? That's it, Your Honor. So the real
10 issue here is, we are the Plaintiff, we choose the safer
11 alternative product to propose. They can't come in and
12 say: Oh, the apple wouldn't work because we couldn't make
13 an orange. That's what they're trying to do, and that's
14 what should be precluded.
15 MR. ROBERTS: Excuse me, Your Honor. Your
16 Honor, first to address the argument which was raised that
17 this was a straw man and he set up to knock to down, and
18 it's not their theory of the case.
19 And I understand what Mr. Kemp told the Court
20 today. But their expert on this issue, Flanagan, stated:
21 "Between 1992 and 2008, numerous front proximity sensors
22 and Ford collision warning systems and active cruise
23 control systems were available." That's what he says in
24 his report.
25 So the evidence that we put forward from

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1 Mr. Hoogestraat that those systems weren't compatible with
2 our bus rebuts their expert's alternative design claiming
3 that certain things were feasible based on the fact that
4 Ford sensing systems were available.
5 So they put it forward. We should be able to
6 rebut it if this question goes to the jury. The expert
7 that we have proposed, Dr. Krause, states: "A proximity
8 sensor alerting a driver to an object that is more than
9 three feet away and located in the designated bike lane
10 would be impractical and not useful for the warning of a
11 hazard. It could also result in overwarning, which
12 studies have shown increases the likelihood of a warning
13 being ignored altogether."
14 So that's what we've got. They cannot take away
15 the question from the jury by simply throwing how an
16 alternative design without all of the proof that that
17 alternative design was feasible and would have prevented
18 the accident.
19 That's going to be the ultimate question before
20 the jersey. We cited Robinson in our brief that's
21 808 P. 2d, 522, and this is at the Nevada Reporter, Page
22 139, there's a discussion of what the standard is.
23 And it's not just that a proximity sensor
24 allegedly was available, that someone was selling it, or
25 someone had a proximity sensor on a bus. The Court stated

1 that even though the child's action was a misuse of the
2 product, the Court found the unit defective because it did
3 not have a safety guard that would have prevented the
4 injury.
5 And then they quote Titus which states: "That if
6 a design feature which caused the injury created a danger
7 which was readily preventable through the employment of
8 existing technology at a cost consonant with the
9 economical use of the product."
10 And then they acknowledged that the fact finder
11 has to consider both existing technology and commercial
12 feasibility to determine if the product is defective.
13 Several years later in the Eades case, 847 P. 2d
14 1370, they were talking about a ladder, and they said
15 given the instruction the jury could have -- "given the
16 erroneous instruction, the jury could have easily
17 concluded that since the warning was given, the ladder Was
18 not defective, even if there was a commercially feasible
19 design available when it was manufactured that probably
20 would have prevented the accident."
21 So in light of that, if they choose to put
22 forward an alternative design, it isn't just any
23 alternative design, and our PMK admits that some after
24 market kit was available and, therefore, they've satisfied
25 their burden and we can't defend commercial feasibility

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1 anymore, that's not the case law.
2 What they've got to do to carry their burden is
3 to show that there's an available, commercially feasible
4 design that would have prevented the accident. And when
5 you look at those factors, they really can't show that
6 there's no jury question on any of those factors.
7 The testimony which they cite from Virgil, I'll
8 call him Virgil. I think his name is pronounced
9 Hoogestraat, but I think I get that wrong every time, so
10 I'll just call him Virgil if that's okay, Your Honor.
11 THE COURT: Okay.
12 MR. ROBERTS: They quote a little snippet:
13 "And do you know whether there's an after market kit for
14 proximity sensors that would serve as some sort of warning
15 of side detection?"
16 And he says, "I'm sure there is. There's a lot
17 of kits for various things out there."
18 So they're asking him currently as you're sitting
19 in this deposition in 2017, are there kits available, and
20 he says I'm sure there is. And later on on that same page
21 he says: We've got a 360 system on a new bus.
22 So he's talking in this paragraph about whether
23 things are currently available. There's no admission by
24 our PMK that a market kit was available at the time of
25 manufacture, which was commercially feasible and which

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1 would have prevented this accident.

2 That is a clear jury question, and all of this

3 goes to the jury, assuming they could even meet a prima

4 facie case to get the alternative designs that they're

5 talking about into the jury.

6 We've got a companion motion, our Defense Motion

7 No. 4 seeks to preclude them from making this argument.

8 But for now I'll simply say that there's at least a jury

9 question as to whether the alternative design they're now

10 proposing that Mr. Kemp just showed you was commercially

11 feasible and would have prevented the accident.

12 The design is a little bit of a moving target.

13 Their expert Flanagan attaches a list of bus proximity

14 sensors to his exp0ert report. That list does not include

15 the 2007 Volvo design that Mr. Kemp just showed you. It

16 doesn't include the BCI design which they mention in their

17 brief.

18 All of this is new stuff that they found after he

19 issued his report and after he was deposed that Mr. Kemp

20 has found on the Internet. This is probably about

21 Wikipedia.

22 There's no admissible evidence that these systems

23 were actually installed. You can't just Google something

24 and show it to the jury. We've got inadmissible hearsay

25 that's been produced by counsel after their expert has

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1 disclosed his report, which is now being put forward as
2 their new alternative design.
3 And even if those things are admissible, even if
4 they were feasible to put on an MCI motor coach, there's
5 still a question as to whether or not it would have
6 prevented the accident.
7 No one knows if this Volvo system mentioned in
8 the press release was effective. There's no testimony
9 that it worked. There's no testimony it would have
10 prevented this accident. The same thing with the BCI
11 system.
12 And then we look at the state of the art and the
13 very articles that they are putting forward in support of
14 their case. Their reply brief cites an article by Van Den
15 Boo, a Pedestrian Detection and Transit Bus Application
16 Sensing Technologies and Safety Solutions.
17 And they say that this article was proof that a
18 Vorad Radar System was commercially available and could
19 have been put on the MCI bus. Well, let's look at what
20 the very introduction to the article that they cite, which
21 came from 2005.
22 It says, "Pedestrian detection for transit bus
23 has the potential to be deployed in the field in the near
24 future."
25 So what this article says is, here's a list of

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1 available technologies, and some of this stuff has a
2 potential to be deployed in the near future. And this is
3 only two years before the bus was manufactured. Our motor
4 coach was manufactured in 2007.
5 And it goes on to state, "Even with the
6 advancement of sensing technologies, the application of a
7 single type of sensor for different operating conditions
8 remains doubtful. Promising candidate sensors for transit
9 bus application is further investigated through
10 experimentation in Section 3."
11 So the 2005 article they cite for the proposition
12 that technology was feasible and commercially available in
13 2007 actually says the opposite. It's being developed and
14 it may be available in the near future.
15 The Sentra 531, and that's the one Mr. Kemp
16 pointed to and told you this is the one I really like,
17 because they really differentiate between the side sensor
18 and the front sensor.
19 So what does this brochure, this inadmissible
20 brochure that he's put in front of the Court say? What It
21 says is that they have another world premier in the bus
22 and coach segment is the use of side guard assist on
23 board. A world premier in the bus and coach segment,
24 their side detection system.
25 If you turn to the last page of this press

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1 release, and you can see that it's copyrighted in 2017 by
2 Daimler. So in 2017 they put forward a side detection
3 system that Mr. Kemp wants to show the jury, that the very
4 company that put that system on their bus calls it a world
5 premier in 2017, ten years after this coach was
6 manufactured. Again, at least a jury question.
7 Moreover, you're talking about that second part,
8 the detection system that would have prevented the
9 accident. As Mr. Henriod said, one of the witnesses said
10 he turned into the bus, put his left hand up and turned
11 into the bus.
12 If that's the case, if he left his bike lane,
13 turned into the bus to a point of impact 6.1 feet outside
14 the bike lane, as Metro found in their investigation, in
15 the middle of the intersection where someone would be
16 turning left, not in the crosswalk, that's not where Metro
17 found the collision occurred, then there's no causation.
18 The side detection system wouldn't have helped.
19 Or if he was more than three feet away from the bus, our
20 expert says something more than three feet away, it's
21 trying to sense things, is it practical? It's not
22 efficient, not feasible to do.
23 And it also wouldn't have prevented the accident
24 if he turned into the bus, because the bus driver didn't
25 turn into him, which is where the press release becomes

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1 important.

2 Because what is the purpose of side guard assist

3 on board, as Daimler states in their press release. This

4 employs radar sensors to monitor the lane to the right of

5 the bus along the vehicle's entire length. Then turning

6 and cornering, it warns the driver a pedestrian, cyclist

7 and stationary object in the turning path.

8 The evidence is undisputed in this case. We have

9 video from Red Rock that the bus did not turn into the

10 bicycle. The bus was not turning off or cornering. In

11 fact, when the bus driver saw the cyclist turn into him,

12 he actually turned away from the cyclist.

13 So this system which they want to present to the

14 jury isn't even designed for the situation that caused

15 this accident. It's to alert someone who is changing

16 lanes that he's about to change lanes into the path of

17 someone already in that lane.

18 And that's not what we have here. It's

19 undisputed the bike left the bike lane, and the initial

20 point of impact was six feet outside of the bike lane.

21 In addition, the Moorhead system which they

22 recite in their brief as being available at the time of

23 manufacture, is a radar system. At Bates No. 24 of 74 of

24 the article they cite, going again to the Van Den Boo

25 article, the test result showed that the Eaton Vorad Radar

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1 has a relatively long distance detection range over 120
2 meters.
3 The shortest detection from experimental data is
4 five meters. They claim the bicycle was two to three feet
5 from the bus and in a blind spot. The system they're
6 saying couldn't detect something closer than five meters.
7 Again, how could this have prevented the accident?
8 In addition, Point 2, same page, the Eaton Vorag
9 Radar can only detect a target which is moving relative to
10 the radar due to its Doppler principle. The objects have
11 to be moving at different speeds.
12 Now, certainly, there's a jury question and
13 witnesses are all over the place about what the relative
14 speeds and relative distances of the vehicle (inaudible.)
15 But at least one of the theories that they've
16 recited is that for some period of time, the bicycle and
17 the bus were parallel to each other and moving at the same
18 rate of speed, which is why the bicycle stayed in the
19 blind spot.
20 If their theory of the case is presented in that
21 fashion, the Vorag system would not have detected the
22 bicycle because it's moving at the same rate of speed, it
23 would have disappeared.
24 In fact, Boo notes that the Eaton Vorag Radar
25 cannot detect still relative to the bus, so we will see

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1 the target lost for a few seconds, but reacquired after
2 the pedestrian picks up his speed in the other direction.
3 So what this ancient technology was, was a
4 Doppler radar that wouldn't operate at close distances,
5 and that objects disappeared if they happened for some
6 period of time to be going at the same relative speed.
7 And, again, going back to the whole purpose of
8 this detection, the reason you have proximity sensors on
9 the side, the reason you're concerned about things in your
10 blind spot is, you don't want the driver to cause a
11 collision by moving into a lane that's already occupied by
12 a person, a bicycle or a vehicle.
13 And that's not what happened here. That simply
14 isn't what happened here. The evidence is undisputed.
15 The bicycle moved into the bus lane, the bus did not move
16 into the bicycle lane.
17 And I will take that back, Your Honor. There was
18 one gardener who was standing by at the Wynn who does say
19 the bus turned into the bicycle lane and turned into the
20 bicycle. There is that eye witness testimony, but because
21 we have video, we know that didn't happen.
22 And we also have an investigation at the scene in
23 which everyone is pretty much consistent as to where the
24 initial point of impact was between the bus and the
25 bicycle, and it wasn't in the bicycle lane.

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1 So there's no credible evidence that the bus
2 turned into the travel lane of the bicycle because it
3 didn't know the bicycle was there.
4 So, Your Honor, we'll address whether they should
5 even be able to raise this issue when it comes to our
6 motion. But for the purposes of their motion, there
7 simply isn't unrebutted evidence that there was a
8 commercially feasible and available design which would
9 have prevented the accident, so that presents at least a
10 jury question, and they aren't entitled to exclude our
11 evidence on this issue.
12 With that said, Your Honor, I believe there may
13 have been one thing that I've left out. And I know I'm
14 not going to get to talk again, so Court's indulgence.
15 THE COURT: Okay.
16 MR. ROBERTS: I recall now, Your Honor, I
17 found it. One of the arguments they make is that there's
18 a difference between commercial feasibility and commercial
19 availability, and that we should be precluded from telling
20 the jury that there wasn't an off-the-shelf product
21 somewhere that we could have bought to put on our bus that
22 would have prevented the accident.
23 The question is whether there was theoretically
24 technology available from which an effective side
25 detection system could be developed by the company. But

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1 the testimony and the record is going to be that we don't
2 have the capability in-house to design proximity sensors.
3 We are buying proximity sensors from suppliers.
4 So it's like if I was being sued because some
5 system isn't on my car and, Mr. Roberts, the technology is
6 out there interest from which you could have designed and
7 installed a proximity sensor on your car.
8 But I don't have that ability. So if you are a
9 manufacturer that relies upon third party suppliers for
10 things like proximity sensors and video cameras and other
11 parts that you put on your motor coach, commercial
12 availability and commercial feasibility are one and the
13 same thing.
14 It's not feasible for us to design our own
15 product, and we have testimony to that effect, and there
16 isn't a product available that we think works for us on
17 the market, then it simply isn't commercially available
18 and it isn't commercially feasible.
19 And at the very least, again, there's a jury
20 question on whether or not the lack of an on-the-market
21 proximity sensor that would have prevented this incident
22 means that it was not commercially feasible for us to
23 install one at the date of manufacture.
24 And I know there's some evidence that they want
25 to present about after the date of manufacture, other

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1 manufacturers put sensors on. That New Flyer, the parent
2 company who makes transit buses as opposed to us making
3 motor coaches, that they want to put that in.
4 But the Robinson case is very clear, and this is
5 at 808 P. 2d. Page 505, where it says, "Unless the defect
6 could have been avoided by a commercially feasible change
7 in design that was available at the time the manufacturer
8 placed the product in the stream of commerce."
9 So the relevant time, according to Nevada law, is
10 what was in existence in 2007 when the motor coach was
11 placed in the stream of commerce, not what companies have
12 been able to do as technology has evolved over the
13 following ten years.
14 And if I could throw one more thing out there,
15 Your Honor, and that is with regard to this press release
16 which they want to put in with New Flyer is testing
17 proximity sensors in Los Angeles.
18 What it says in their press release is that
19 proximity sensors on the New Flyer Los Angeles buses as
20 being that buses by default always are by default always
21 traveling in close proximity to pedestrians and cyclists.
22 Then it goes on to state, this is cited in their
23 own brief, "traveling in the right hand lane, buses are
24 always by default traveling in close proximity to
25 pedestrians and cyclists."

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1 And that highlights the difference here between
2 the transit bus, where most of their evidence comes from,
3 and a motor coach which is what was involved in this
4 incident. A transit bus is always operating in a curb
5 lane.
6 Because it's required to operate in a curb lane,
7 we see them all around town, they're always in the curb
8 lane because they have to periodically stop at bus stops,
9 so they have to decelerate every five or ten minutes,
10 they're going along the curb and stop right at the curb to
11 pick up passengers.
12 So transit buses by default are always in the
13 curb lane and always in close proximity to pedestrians and
14 cyclists.
15 Motor coaches don't have bus stops that they
16 periodically stop at. A motor coach in this case picked
17 somebody up at Red Rock, dropped them off at the
18 Convention Center and took them back.
19 Transit buses are always in the curb lane, motor
20 coaches are not which, again, is a distinction as to some
21 of the cases they cite as to proximity sensors and
22 detection systems that people are using on transit buses
23 as opposed to the coaches.
24 Again, their motion says look at the evidence
25 we've got, they shouldn't even be able to argue that our

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1 design was not commercially feasible.
2 I'm highlighting all of the different things that
3 make this a jury question, and are the reasons why we
4 should be able to present our evidence on this issue.
5 Thank you, Your Honor.
6 MR. KEMP: Judge, I started out narrow and
7 we went broad. All I'm saying, I'm not asking the Court
8 to enter summary judgment on commercial feasibility. I'm
9 not asking that they be precluded from presenting evidence
10 about commercial feasibility.
11 I'm not asking the Court to enter a judgment on
12 causation that it would have prevented the accident, and
13 I'm not asking that they can't make the same arguments
14 they just made on causation.
15 All I'm asking is that they can't bring up this
16 proximity sensor braking system as an argument that on
17 commercial feasibility because it's a different thing.
18 It's apples and oranges.
19 Let's go to trial by Wikipedia. This is from the
20 leading trade journal. This is not Wikipedia. I went out
21 and I bought, I think I told the Court this last week, I
22 bought 20 years worth of these, and we went through every
23 one of them, unfortunately, and we found the one we liked
24 the best, which is a BCI coach.
25 This is not a transit bus. This is a coach. It

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1 used the side proximity sensor system by Eaton. This is
2 in 2007, Your Honor, the same time that the bus in this
3 case is manufactured.
4 And Dr. Fang, the 2005 article, he went out and
5 he got a New Flyer bus in 2005, and he screwed on the
6 Eaton proximity sensor. I showed you the installation
7 instructions, it's a ten-minute job.
8 It's funny, I hear a commercial all the time now
9 here in the town from Audio Express where they're offering
10 you to retrofit you with proximity sensors. So what he's
11 telling you is that MCI, the biggest bus company in the
12 world in 2007, they can't screw on an Eaton proximity
13 sensor, but Audio Express can do it for you in ten minutes
14 up there on Charleston. I don't think so, Your Honor.
15 Anyway, that's not the issue. He can argue that
16 to the jury, I'm not saying he can't. All I'm saying is
17 that when we propose a side proximity sensor with a
18 warning system as the alternative product, and remember on
19 a trio we don't even have to do that.
20 We can just say this bus is unreasonably
21 dangerous because of the blind spots, and rely on the
22 testimony of some of the bus drivers who have driven this
23 exact bus, that you have blind spots on the right side.
24 This is Mrs. Whitherall's deposition: "So if you
25 were going to put a proximity sensor on one side or the

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1 other, it should be on the right side, in your opinion?"
2 "In my opinion, yes, sir. You should put it in
3 the right side, because what happens is, when you approach
4 especially a bicycle, the right side blind spot, you can't
5 see that bike. So that's why they should at least put a
6 sensor in the right side."
7 "And what would this cost?"
8 "About $200."
9 $200 for a $400,000 bus. You know, he started
10 with Dr. Flanagan, or maybe it's Mr. Flanagan. He's our
11 proximity sensor expert. He used to be employed by Ford
12 Motor Company. So he went a little overboard, I'll admit
13 it. He prepared chart after chart after chart that has
14 every proximity sensor installation known to man, every
15 car out there, it doesn't matter.
16 And what he was trying to show is that this
17 technology goes back to 1964. This just didn't pop up in
18 2005, 2006, 2007. He shows it in 2004, and some of the
19 ones in 2004 were, indeed, as counsel rep[resented,
20 forward proximity sensors.
21 But all he's trying to show is that proximity
22 sensors are out there, so that they were commercially
23 feasible. You know, I probably should have filed a Motion
24 for Summary Judgment on commercial feasibility, because we
25 have a bus, the Australian coach, that uses proximity

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1 sensors in 2007, but I didn't do that.
2 All I'm saying is, they shouldn't be allowed to
3 defend one proposed alternative product by pointing to a
4 completely different one. He talked about Dr. Krause's
5 testimony. He's their warnings expert. They decided not
6 to get a proximity sensor expert.
7 They don't have anyone in this case that can say:
8 Oh, this is a Doppler system, it only goes out five
9 meters, two to five feet. That's why he had to read to
10 you from Dr. Fang's article from 2005, as opposed to
11 citing his expert's opinion.
12 Instead of getting a proximity sensor expert,
13 they got a warning expert, so their whole proximity sensor
14 defense boils down to Dr. Krause saying: This is too
15 distracting. We can't put proximity sensors on buses
16 because it's too distracting, the driver will be too
17 distracted.
18 You know, I didn't file a Motion to Strike
19 Kraus's testimony. We pointed out in our brief that
20 that's pretty ridiculous, because all their experts are
21 going out and paying extra for Kia's with proximity
22 sensors because they want to protect their families.
23 But they can argue that the jury. They can argue
24 that there's something about a bus driver that makes him
25 different than you and me when we're driving our car down

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1 the street, and a proximity sensor is something that we
2 can handle. They can argue that the bus driver can't
3 handle it.
4 What they can't argue is this Bendex argument
5 that they're making. They're trying to say: Oh, we
6 couldn't put proximity sensors in because we didn't want
7 just a side sensor, we wanted a front sensor and a brake
8 system, and Bendex didn't give it out until 2014.
9 That's the defense that they're trying to make in
10 this case. And I'm not asking, I'm not asking for a
11 summary judgment on causation, even though the bus driver
12 testified, quote: "So if you'd been given some sort of
13 warning at the 50 or the 100-foot mark before the
14 intersection, you would have taken evasive action
15 earlier?"
16 "Answer: Yes."
17 I am not asking for summary judgment. I could
18 probably get a summary judgment on that point, given that
19 that's the only testimony in the case.
20 All I'm asking is that they not be allowed to
21 defend our proposed alternative with this, what I call the
22 orange, the brake system, and that's all I'm asking, Your
23 Honor.
24 THE COURT: Okay. Very good. Let's go to
25 No. 8, Plaintiff's No. 8.

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MR. KEMP: Judge, it's noon now. I just point that out.

THE COURT: Maybe we should perhaps take our afternoon recess, okay. So let's take an hour.

(Whereupon, a one-hour lunch recess was taken.)

THE COURT: Good afternoon, Mr. Pepperman, how are you today?

MR. PEPPERMAN: Good, Your Honor. Thank you. For the record, Eric Pepperman for Plaintiffs.

THE COURT: All right. And this is Plaintiff's Motion in Limine No. 8, Plaintiff's Preinstruction to the Jury.

MR. PEPPERMAN: Yes, Your Honor. In this motion I assume you're asking for seven preinstructions to the jury. I don't think I'm going too far out on the limb to say that this is a complex case.

If you look at the years of experience in this room, I don't think it's a stretch to say that the jury might have a little difficulty understanding some of the complex concepts like strict liability in general.

For that reason, it's common practice in these types of complex cases to preinstruct the jury on the law. We cited several District Court examples in which they've given preinstructions in a strict liability or complex

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civil case.

We cited Judge Wiese's order in a strict liability claim case. I think he explained it pretty well: Hey, this is why we do it, and we do this a lot in our more complex cases we ask for these preinstructions.

I'm actually surprised we got an opposition this one. Usually we don't get an opposition to this type of motion. But in any event, the Defendants give you two reasons why these preinstructions should not be given.

Number one, that the instructions are not supported by the evidence. And, number two, the instructions will only somehow confuse the jurors.

The first argument I think should probably be out based on the Court's summary judgment ruling when the Defendant's made their opposition to this and said: Hey, these jury instructions aren't going to be supported by the evidence. That was before the District Court, Your Honor, granted the summary judgment, or denied that summary judgment.

So we know what the claims are. We know that we have a defective design claim, and we know that we have a failure to warn claim, and those claims are going to be the central focus of the trial.

We proposed instructions that are neutral statements of law regarding these claims. These are the

1 claims, these are the elements of the claims. This is
2 what unreasonable dangerous means in Nevada. This is the
3 consumer expectations test, this is what you're allowed to
4 consider in relation to that test.
5 There are no facts. There is no evidence. Most
6 of the jury instructions come from the pattern jury
7 instructions in Nevada, and they simply instruct the jury
8 on the law, neutral statements and then it's a foundation
9 for both parties to present their cases.
10 These are the elements. This is why we think
11 that those elements are met. This is why we think the
12 elements are not met, very simple, straightforward things.
13 We're not asking you to favor our evidence over
14 theirs, or benefit us over them. I mean, these neutral
15 statements of law are nothing more than that. And I think
16 they benefit both parties, because it allows the jury to
17 have some sort of foundational knowledge of the law in a
18 complex case before they start hearing on the parties
19 conflicting evidence.
20 And so for that reason it kind of baffles me a
21 little bit that the second argument that these
22 preinstructions will somehow confuse the jury. I think
23 that's pretty illogical on its face.
24 But I don't think you need to take my word for it
25 or rely on my view of what's logical or not, because I

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1 think in the reply we cited just a small sample of the
2 numerous studies that exist.
3 And I don't want to read from my reply, but I do
4 just want to emphasize a couple of these studies. The
5 first, the Hugh and Penrod Study found that the
6 substantive, and that's what we're talking about here,
7 substantive preliminary instructions assist the jury in
8 evaluating the evidence according to the correct legal
9 principles and aid in recall of evidence and
10 instructions."
11 The Forester, Lee and Horowitz, they found in a
12 mock jury research that jurors exposed to both
13 preinstruction and note-taking were better able to
14 organize complex case materials, and they noted that
15 preinstruction also appeared to moderate the effects of
16 complexity.
17 And that's the goal. We're not going to confuse
18 the jurors by giving them preinstructions. There's no
19 suggestion that these preinstructions are inaccurate
20 statements of the law.
21 It's a simple foundation that we give to the
22 jurors so it has their hearing the presentation of
23 evidence. They're not coming up with their own idea of
24 what does failure to warn mean? What does it mean to me
25 to find a product to be defective?

I think it's not a surprise to think that they might have preconceived notions about these very particular and complicated concepts that we're dealing with in this case. And for that reason we're asking the jury to preinstruct with the seven proposed neutral statements of law, and give the jury that foundation to hear the evidence going forward.

THE COURT: Thank you.

MR. HENRIOD: Your Honor, the opposition is primarily one of the last things Mr. Pepperman talked about, which it's our position that until admissible evidence has been put in front of a jury, the Court and the parties are not in a position to predict what instructions may be appropriate at the end of the case.

Now, very broad instructions about what an unreasonably dangerous product is put the jury in a position of thinking, well, I'm looking for something unreasonably dangerous.

I'm thinking that there must be something unreasonably dangerous here, because otherwise why would the Judge tell me that I'm looking for an unreasonably dangerous product.

They haven't heard any evidence, and now you've instructed them don't look into media accounts, don't research this case on your own, don't talk to people about

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1 the case? And, oh, by the way, this is about an
2 unreasonably dangerous product.
3 It is a very, very sensitive thing to let the
4 jury know, well, this is what I want you to look for,
5 because I'm the Judge and I'm telling you, be on the
6 lookout for an unreasonably dangerous product.
7 The standard is that juries are not preinstructed
8 on these things, and sometimes they are. I mean, it does
9 happen, but that's the exception to the rule.
10 And since the Plaintiffs brought up these studies
11 in their reply as opposed to in their main brief, I didn't
12 pull any myself, but I bet you there's plenty of studies
13 that say preinstructions have the opposite effect, that
14 they can confuse the jury, that they can confuse the
15 issues. I can find a study that would say anything.
16 The point is, the usual practice in this district
17 is that you preinstruct the jury on preliminary things.
18 Don't talk to people, don't look for media accounts, you
19 know what those instructions are.
20 You don't get into these detailed legal
21 principles, because they haven't heard the evidence yet.
22 Now, some of the specifics, we talked about the failure to
23 warn. You're going to hear a motion on their warnings
24 expert, Dr. Cunitz.
25 There's going to be argument about whether there

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1 can be a failure to warn claim, because whether they can
2 meet the causation on it. So there's going to be a
3 judgment for a motion for a matter of law at the end of
4 the trial that says they have no failure to warn claim.
5 But four weeks ago you told the jury be on the
6 lookout for a failure to warn claim. And now they don't
7 have any evidence of that, and now the Court without the
8 jury knowing it about it has stricken that on a judgment
9 for judgment as a matter of law.
10 So the risk is not just confusing the jury, but
11 the risk is prejudicing the jury. And I don't mean
12 prejudice in a perjure term, but having them prejudge what
13 they're looking for in the case. That's just not the
14 standard that included in their proposed instructions.
15 Well, I've already found elements 1, 3 and 4.
16 They want the Court to read what the Plaintiffs have to
17 prove. And I've already found 1, 3 and 4, so don't be
18 worried about those, we'll worry about these other two.
19 You tell the jury that, they already think: Boy,
20 there must be a problem here because the Judge already
21 told me there's a problem here. That's unfair to the
22 Defense to give the jury the presumption that the Court
23 has already found some problem with this motor coach.
24 Now, I'm just asking you couple of questions. If
25 offered the instruction on prior accidents, we've talked

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1 about this a bit, there are no prior accidents involving
2 this series of coach.
3 THE COURT: No. 7?
4 MR. HENRIOD: Correct, their proposed No. 7.
5 They're talking about prior accidents when there's
6 absolutely no evidence of any prior accident involving
7 these coach -- one of these coaches in which a cyclist
8 experienced an air blast and then got pulled into the bus,
9 or the cyclist would have been noticed by a proximity
10 sensor, or a cyclist would have been saved by an S1 guard,
11 no evidence of that.
12 So, again, the jury is on the lookout for other
13 accidents that never come into evidence. That's the
14 confusing part, and it prejudices us because now they
15 think the Court's made findings that haven't happened yet.
16 Until the evidence is in, we can talk about the
17 instructions at the end, and that's sufficient. Thank
18 you.
19 MR. PEPPERMAN: We're not telling the jury
20 what to look out for. We're telling them what the law is
21 applicable to the claims, so that when each party presents
22 their case, they understand the context of what it's being
23 presented in.
24 For example, the unreasonably dangerous test,
25 this is what it means for something to be unreasonably

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1 dangerous. So when the Plaintiffs present their evidence
2 of this is why the bus was reasonably dangerous, the
3 jurors have a context, they have a notion, they have a
4 basic understanding to say: Oh, this is what they're
5 trying to do, they're showing the whys, this is what
6 unreasonably dangerous is. They're presenting evidence on
7 why they think the bus is unreasonably dangerous.
8 The same exact things applies to the
9 Defense. It's not a benefit to us. That's not giving the
10 jurors a preconceived notions that anything is
11 unreasonably dangerous. It's telling them the law that
12 we're trying to prove in advance so they're not searching
13 for their own reasons of why we're doing what we're doing.
14 And it's the same thing for the Defendants. When
15 they stand up and say this is why the bus is not
16 unreasonably dangerous. It's the same benefit to them.
17 It just gives the jury a foundation to understand that the
18 evidence is being presented.
19 And what the studies show, which is common sense,
20 is that gives the jurors a tremendous benefit. It keeps
21 them engaged. It makes them have a better understanding
22 of what is going on. It makes them understand their role
23 and purpose a lot better. It makes them understand the
24 process, and it helps them process the information.
25 Now, the opposition is, well, I'm sure I can find

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1 a study, bur where is it? We don't have any studies.
2 They're the ones who made the argument in their opposition
3 that this will only confuse the jurors, but they just said
4 it. That was the time to show the evidence. Why does it
5 confuse the jury?
6 As far as I can discovery and as far as what is
7 before this Court, that evidence doesn't exist. There's
8 nothing that says that these preinstructions confuse the
9 jury, and saying I'm sure I can find them, that doesn't
10 move the ball forward at all.
11 We're not asking the jury to prejudge anything.
12 We're giving them the neutral statements of the law that
13 apply in this case. There's no question that these are
14 what the claims are, these are what the elements are.
15 This Is what the Plaintiffs are going to be
16 trying to prove. This is what the Defendants are going to
17 be trying to argue against. It gives a medium for both
18 sides to present their case.
19 And then the mention of prior accidents, well,
20 there's a difference between what the evidence will be and
21 their interpretation of the evidence.
22 There is evidence of prior accidents. We
23 identified in the reply, and Mr. Kemp talked about it
24 during the Motion for Summary Judgment, but there was a
25 bicyclist in Los Angeles, an exact same scenario, that was

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1 involved in a similar accident with a transit bus and S 1
2 guard, and walked away from that accident with minor
3 scrapes and bruises.
4 This is a prior accident. The neutral statement
5 of law is, you may consider a prior accident. Now, the
6 effect of that, the weight of it, that's what the parties
7 argue about.
8 They're not precluded from saying we didn't know
9 about that prior accident. That prior accident isn't
10 relevant for X, Y and Z, or it's different for X, Y or Z,
11 whatever. That's not the point of a preinstruction.
12 The point is, you can consider this, and if it's
13 presented you can consider it. If it's not presented,
14 then there's nothing for them to consider. It's not a
15 bias sort of thing that makes them prejudge either side's
16 case. It's a neutral statement of law that is an accurate
17 statement of law. And we believe that all seven of the
18 instructions are appropriate for the same reason.
19 And to the extent that the Court has an issue
20 with one or more instruction, that's not a reason to not
21 give any of them.
22 If there are specific concerns that the Court has
23 regarding any one of the instructions, I'm happy to
24 address them, you know, and we'll take the Court's ruling
25 as it is. But if there's one that is concerning, it's not

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1 a reason to not give the remainder.
2 Unless the Court has any questions, I will submit
3 it.
4 THE COURT: I have questions of both
5 parties. I've heard what you have to say, but just in an
6 abundance of caution perhaps, are there any instructions
7 that you do agree with in this area?
8 Is there any consensus at all?
9 MR. HENRIOD: They're opposing --
10 THE COURT: I understand where you stand and
11 why, but I thought I'd ask.
12 MR. HOWARD: As I look at them, 1 and 2 both
13 talk about a warnings claim which, as I pointed out, we're
14 not convinced that's going to ever get to a jury.
15 Three talks about, well, the Defendant was either
16 the manufacturer or the distributor. We know it wasn't
17 the manufacturer, so there's problems there. And, again,
18 I pointed out that Plaintiffs want you to tell the jury
19 you found certain elements so they won't need to concern
20 themselves.
21 THE COURT: I've read all of that. I'm just
22 wondering --
23 MR. HOWARD: I just think in this case,
24 particularly given the issues we raised with, as
25 Mr. Henriod pointed out, the nature of this product is

that it's a large moving vehicle that has inherent risks in it, and so I don't think we're ready to concede any general themes for this particular case now.

MR. HENRIOD: I will just say that their position and the facts of what the evidence will show does not change the law that is applicable in this case. Does it change what our claims are, what we have to prove, what the jury instructions are going to be?

If mean, these are just the simple statements of law.

THE COURT: So we have no consensus on any of them. All right. Let's move on to No. 9, please. Good afternoon.

MS. WORKS: Good afternoon, Your Honor. Kendelee Works on behalf of Plaintiff. This is Plaintiff's Motion in Limine No. 9 to preclude two issues. First of all, the police reports from the Las Vegas Metropolitan Police Department, and then also any officer opinion as to causation or who was at fault for the accident.

The Defendants concede a couple of things. First, that the officers, and in particular were concerned with one primary investigating officer, Detective Salisbury, that as to any officer that should testify, the Defendants concede in their opposition that they're not

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1 qualified to offer opinions as to causation.
2 And they also appear to concede that there are a
3 number of issues within the police reports themselves that
4 should not be admissible, but instead contend that the
5 Court should redact out, or that the parties should agree
6 on redactions.
7 And under normal circumstances that might be a
8 plausible alternative, Your Honor, but here the reports,
9 there are two in particular. And the first one is about
10 five pages, two pages -- I'm sorry, seven pages. Two of
11 those seven pages contain a narrative summary.
12 And no party can disagree that that narrative
13 summary is based entirely on third party witness
14 statements. The officers concede that in their
15 deposition. There's no dispute that no officer witnessed
16 any portion of the accident.
17 They interviewed several witnesses at the scene,
18 and each of those witnesses have been deposed in this
19 case, and will either testify live, or have their video
20 deposition played because they're outside of the
21 jurisdiction.
22 So any of the information that would be available
23 and usable from the report itself is already readily
24 available through the third party witnesses. So there's
25 no reason to redact out the significant amount of

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1 information that would have to be pulled from the report
2 to make it admissible at all in the first place.
3 The second report is about, I believe, 90 pages
4 total, Your Honor. 71 pages of that by my count, and give
5 or take a couple of pages for counting errors, is totally
6 inadmissible. It contains transcribed witness statements
7 from third parties, again, those same parties that have
8 been deposed and will testify.
9 And the officers' conclusion, and another seven
10 to eight pages of that is officers' conclusions as to
11 causation based on those third party witness statements.
12 And then within those conclusions is information that even
13 the officer, Detective Salisbury conceded in his
14 deposition that he's not qualified to offer expert
15 testimony on things related to aerodynamics, biomechanics.
16 He conceded expressly in his deposition that he
17 is not an expert in those areas, and that he would defer
18 to other qualified experts as to those issues. And,
19 again, there's no dispute from the Defense that he's not
20 qualified to offer causation opinions, or opinions as to
21 fault.
22 We would want though the Court to expressly
23 admonish both Defense counsel and the officers outside the
24 presence of the jury that they are not to unwittingly
25 offer those types of opinions, because during the

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1 deposition Plaintiff had that concern because of the
2 voluminous amounts of causation opinions within the
3 report, and also those sort of gratuitously offered at the
4 time of the deposition.
5 So here to redact out the report is simply
6 unnecessary, because the information is already available.
7 Defendants concede that no causation opinions come in, and
8 that a great deal of the information is not admissible,
9 and particularly under Freias, the third party witness
10 statements reports, any opinions as to causation or fault.
11 And so there's really no dispute. The issue is,
12 well, do we go ahead to the task of redacting out 70 to 80
13 pages of the 90 pages when it's simply not necessary.
14 And what will that lead to, Your Honor? It's
15 going to lead to jury speculation as to: Well, why are
16 they giving us this 90-page report and leaving in three or
17 four pages of information at most. What were the
18 officer's opinions? What way did he find one way or the?
19 other.
20 And that's speculation that can prejudice either
21 party in this case. It's simply not necessary, because
22 the information is already readily available from other
23 witnesses, or it's not in dispute.
24 Nobody is saying, debating the date or time of
25 this accident, where it occurred, location, those sort of

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simple things that could be admissible, it's just not necessary.

So for those reasons, Your Honor, we would ask that the officers and Defense counsel be admonished not to offer causation opinions, and that the reports not be admissible in their entirety.

THE COURT: Thank you. Mr. Roberts?

MR. ROBERTS: Thank you, Your Honor. The argument presented in the motion is one page long. First, they rely on Frieas v. Valley for the proposition that accident reports and citations don't come in, and they quote some language from that case.

The Nevada Supreme Court stated that the conclusions of the officer based on statements of third parties and a cursory inspection of the scene did not qualify him to testify as to who was at fault.

The second thing that they rely upon, Your Honor, is the fact that the report is untrustworthy because the investigating officer did not interview the principle witness in the name to include a quote, "from a gardener at Red Rock."

And his deposition was taken, the Deposition of Luis Zacharius Pena. They say it's inexplicable why he did not interview the principle witness to the accident, and the report that they've attached, Las Vegas

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1 Metropolitan Police Department, Bates stamp 89, this is
2 his voluntary statement and it's in Spanish, and he listed
3 his name as Luis Perez.
4 And we searched for him. We couldn't him. He
5 gave a false name and false contact information when he
6 gave his statement, and that's why they never talked to
7 him.
8 His deposition was eventually taken because he
9 met a member of the family at the Ghost Bike Memorial, and
10 they talked to him and found out he had additional
11 information. He gave the family his contact information.
12 So there's a very good reason the police officer
13 did not talk to him, but it wouldn't have changed his
14 conclusions.
15 And I will say that I believe it's correct that
16 the police officer can't simply regurgitate third party
17 witness testimony. If that's all he's doing is repeating
18 third party witness testimony available to the jury, and
19 made only a cursory inspection of the scene, if that's an
20 expert under Hallmark, he gets excluded because that's not
21 a sufficient foundation.
22 So the question here isn't whether there's some
23 special rule that applies to an investigating police
24 officer and any factual findings and conclusions the
25 officer might make, but it's is he qualified to give those

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1 opinions under the regular rules that would apply to any
2 expert giving expert opinions.
3 So unlike the case in Freias, this officer did
4 have special training and experience in investigating
5 traffic collisions and reaching opinions about how the
6 accidents happened.
7 And the credentials he has are equal to or
8 greater to many of the traditional reconstructions that
9 testify in these courts. He took a Technical Accident
10 Investigation in Vehicle Dynamics, and this is starting on
11 Page 23 of his deposition, which was a course of over 110
12 hours.
13 And after that, May and June of 2012, he took an
14 80-hour class through Northwestern University for Traffic
15 Crash Reconstruction 1. And some people who testify as
16 reconstructionists are qualified simply by taking that
17 course.
18 But he went on and stated that he's also been
19 through Traffic Crash Reconstruction 2 and 3 through
20 Northwestern University. He has Advanced Crash Data
21 Retrieval Technique and Analysis training.
22 He had a course for Motorcycle Reconstruction
23 through Northwestern University, Momentum Applications
24 with Crash Data Retrieval. There are a number of things
25 he goes through. He's one of the most highly qualified

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accident investigators in Metro, which is why he's assigned to the fatal unit.

Now, they ask him questions and he'd never been qualified to testify in Court as to bus/bicycle accidents or aerodynamics and some of the rather unique theories that have come up in this case. But he's certainly qualifies to do regular accident reconstruction.

So while certain of his opinions might be excluded; for example, if he'd issued a citation, or even if he thought Dr. Khibani was negligent, that wouldn't come in for other reasons, but there are certain things which I believe clearly do come in under the cases and the rules.

And before I get to some of the facts here, Your Honor, I'd like to point out that the Freias case which they relied upon cites two cases for authority. And the conclusions of Officer Sauder based upon statements of third parties and a cursory inspection of the scene did not qualify him to testify as to who was at fault.

And then one of the cases they cite is Ingram v. Tucson Yellow Cab Company out of Arizona. And if you look at that case, what the Court there said is, it is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge when the opinion involves the very matter to be determined by the

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1 jury, and the facts on which the witness found his opinion
2 are capable of being presented to the jury.
3 So in this case he does -- he's not utilizing lay
4 knowledge as to what he thinks may have happened. He's
5 utilizing his extensive training in traffic accident
6 reconstruction in order to determine the most likely area
7 of impact between the bus and the bicycle, which is a
8 highly relevant and factual matter that he has formed an
9 opinion on using his investigating and accident
10 reconstruction skills.
11 The deposition states that, question: "So to
12 paraphrase, the physical evidence you found and relied
13 upon was strong enough that a witness statement to the
14 contrary is not going to cause you to change your
15 conclusion?"
16 "Answer: Correct. The scratches in the roadway
17 are where the bicycle was overturned and engaged the
18 asphalt. The absence of damage showing that it was
19 somehow underneath the bus and dragged into its area which
20 the roadway evidence doesn't exist, I have to, therefore,
21 rely on what the surface scratches there are, and that it
22 overturned somewhere near that area which, again, it was
23 feet east of the prolongation of the bicycle lane."
24 And he includes a scale diagram. This is not
25 based on a cursory examination of the scene, but it's a

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1 scale diagram made from a typical total station that the
2 fatality units do.
3 And it identifies the bicycle scratches in the
4 road, where the blood was, where the glasses were, where
5 the resting place of the bicycle was.
6 And the officer, based on his investigation and
7 specialized knowledge, should be able to testify what he
8 found at the scene, what he interpreted the scratches on
9 the pavement to be, and his conclusion as to where the
10 area of the impact was outside of the bicycle lane.
11 And that's the primary thing that we believe is
12 highly relevant from the investigation that Detective
13 Salisbury performed.
14 The traffic accident report to the extent that it
15 includes the diagram, to the extent it includes his
16 factual findings on that issue and other factual findings
17 is admissible.
18 And I'd like to point out Chapter 51, NRS 51.155,
19 Public Records and Reports: "Records, reports, statements
20 or data compilations in any form, public officials or
21 agencies are not inadmissible under the hearsay rule if
22 they set forth" -- and then I'm dropping down to No. 2 --
23 "matters observed pursuant to duty imposed by law," so he
24 can testify what he observed. There's a statute on point.
25 Actually, there's a case which they acknowledge

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that what he saw at the scene is admissible under authority that they've acknowledged in their briefs.

Going back to the statute, Subsection 3, "In civil cases and against the state and criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law."

So it's not hearsay if it's in the police report and its factual findings made pursuant to an investigation he was empowered to make as a matter of law, which he was as a member of the fatality unit assigned to investigate this accident.

The Freias case simply doesn't apply to require the wholesale exclusion of the entire police report and all of the opinions that he formed in the course of his investigation. Thank you, Your Honor.

MS. WORKS: Your Honor, the argument we just heard is exactly why we had to file this motion, because there seems to now, after MCI conceded in its opposition that Detective Salisbury was not qualified to offer opinions as to causation and/or who was at fault for the accident.

They're now coming forward and saying that he had all these traffic -- he had some traffic reconstruction classes and he took some other courses and he as on-the-job training.

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And that may all be well and true, and we certainly have no reason to doubt that the officer is qualified to investigate fatal accidents as he did in this case, and as he routinely does for part of his job.

He, himself, conceded during his deposition ad nauseum that he was not qualified to offer reconstruction opinions, not qualified to offer expert opinions on aerodynamics or human factors or medical causation.

He, himself, testified that he has never been qualified to testify as an expert in a case, in any case, let alone one that offers the specifics of this case with respect to a pedestrian and bicycle accident.

Again, he was asked, "On how many occasions have you been qualified to testify in court on a motor coach or commercial bus accident in your time in the fatality unit?"

"Not once."

"Do you have any training, background or experience in aerodynamics?"

"I do not."

"In meteorology?"

"No."

"Human factors?"

"No."

"Bicycle safety?"

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1 "No."
2 "Do you possess a Commercial Driver's License?"
3 "I do not."
4 "Have you ever possessed what we call a CDL?"
5 "No, I have not."
6 "Have you ever driven a bus?"
7 "I have not."
8 He does have some experience riding a bicycle.
9 He does that in his free time. He did not observe any of
10 the accidents. He arrived to the scene hours after the
11 subject accident. Even the first investigating officer on
12 the scene arrived about 30 pins after the accident took
13 place.
14 And so while they certainly can testify to what
15 they observed at the scene, they cannot offer causation
16 opinions or opinions as to who was at fault. They're not
17 qualified to offer expert opinions, and that's the concern
18 in this case, and that's what plaintiff is primarily
19 concerned with keeping out, Your Honor.
20 And with respect to the report itself, we don't
21 dispute that some of the information is admissible. Under
22 Freias though, the Court would be well advised to look
23 back at that case and see that they specifically said that
24 it was inadmissible because the officers' opinions were
25 based on third party witness statements, which is exactly

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1 what the officers' opinions in this case are based on.
2 And, further, it offered -- the report contained
3 officer opinions as to causation and who was at fault,
4 including the citation in that case.
5 And so that's a huge, huge chunk, and I
6 apologize, it's a 71-page total report, and at least 51
7 pages of it are summaries, narrative summaries or actual
8 transcribed statements from third party witnesses, with an
9 additional eight pages of causation opinions which, again,
10 the officer is not qualified to give.
11 So to try to redact out all of that information,
12 there's simply no useful purpose for it, Your Honor. Any
13 probative value is substantially outweighed by the risk of
14 unfair prejudice, because the jury is going to be
15 confused.
16 I think the Court knows, as does counsel from
17 many cases in the past, that when you give the jury
18 information that is redacted out, especially significant
19 volumes of which would have to be redacted here, they're
20 automatically going to speculate and say: Well, why isn't
21 the Court -- why are these attorneys hiding something from
22 me? What is in that report that is so special about this
23 case that I don't get to see it?
24 It's going to lead to confusion and speculation
25 that's unnecessary and prejudicial, and we ask that those

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issues be excluded, Your Honor.

THE COURT: Thank you.

MS. WORKS: Actually, I have the next one too.

THE COURT: Let's go on then to No. 10.

MS. WORKS: This is Plaintiff's Motion in Limine No. 10 to preadmit the funeral video. Defendants oppose admission of the video in its entirety, first arguing that it's not relevant.

In particular, they argue that it's not relevant because they go back to this theme again of so many of these issues being relevant only to Dr. Khibani's impact and presence on the community, and the loss of his life to the community, which Defendants argue is not a relevant damages aspect of this case.

But what is absolutely relevant is the impact of the loss of Dr. Khibani on his children and his wife, and that issue is not mutually exclusive, Your Honor, from his impact and his presence and reputation within the community.

Who Dr. Khibani was as a person within the community is also goes directly to who he was to his family. And so simply because the video may show aspects of both of those issues, doesn't mean that it's not also going directly to the value of the loss of his life to his

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family; to his wife and his two children, in particular, which is the ultimate issue in this case, Your Honor.

What is the value of that, and what compensation should be awarded to Plaintiffs as a result of their grief and sorrow and the loss of their father, Dr. Khibani?

Now, there are also a number of issues raised by the Defendants relevant to the hearsay. We have no issue pulling out specific clips and informing the other side that, first, we don't intend to play the full hour-and-a-half video. That wouldn't be a pleasant experience for anybody in the room, certainly not the jury or the Court.

But we do intend to use clips. I mean, we want to have those clips admitted beforehand so everybody knows what can be used and what's going to be seen. We have no issue with letting them know which clips and which portions and which clips we intend to use.

But their argument is that it should be inadmissible in its entirety because it's hearsay, it's not relevant. We already went over relevance, Your Honor. And as far as the hearsay goes, Aria and Khian Khibani spoke at their father's funeral.

Their statements, they're going to be here to testify and they can certainly talk about the grief, loss and sorrow that they felt.

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And also based on what's happening in the video, those statements aren't going to be offered for the truth of the matter asserted, although I don't know that there would be any dispute that these people were grieving and upset, and that what they were saying was, in fact, true.

Nevertheless, they're relevant and they go directly to the impact on Aria and Khian. And then I believe Dr. Barin also testified about the funeral proceedings and the process that her family went through with grieving. And so those issues are all going to be relevant, they're all going to come in. They're not inadmissible hearsay.

In addition to that, and this goes a little bit to the Ghost Bike Memorial argument that's been made, but we tried to make these statements, the statements of the funeral video akin to an anonymous post on the Internet.

This isn't just someone hiding behind a veil of their computer and anonymously posting about some guy who randomly died in some car accident. These are people who knew Dr. Khibani. These are his sons, his wife who are talking about their loss on video.

If you look at the hearsay rules in Nevada, inscriptions on an urn, inscriptions on a headstone at a funeral, those are admissible. Those are not inadmissible hearsay. And these items that are contained

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in the big area are much more like that than some anonymous Internet posting comment.

Now they say everything that's on the video is intend to inflame. I make reference to a Nevada case in which a doctor -- where the Defendant said, "I wouldn't let that defendant doctor treat my dog." That is a much different statement than someone talking about the grief or loss of a loved one.

Well, this is certainly going to be an emotional amount of testimony in portion of the trial, and we don't think that Plaintiff has to concede that, obviously.

These issues go directly to the grief and sorrow suffered by the family. They're not intended to inflame the jury. They're automatically going to evoke emotions in probably everyone present in the room.

But Defendants can't avoid the facts of this case and the loss that was suffered, because that's exactly what's compensable here, so it's not inadmissible hearsay. It's the lesser element to the issue that the jury is going to be deciding in this case.

And it brings context to the grief, sorrow and loss that the Plaintiffs have to prove. It's their burden of proof, and it's not unduly prejudicial to the Defense.

And so we would ask that the video be preadmitted with the caveat that we will exchange and (inaudible) the

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1 particular video clips that we intend to use.

2 MR. BARGER: May it please the Court. Your

3 Honor, to be candid with the Court, I've been around for a

4 long time and I have tried a lot of cases, and I have

5 never seen a case where someone wants to admit into

6 evidence, and have a jury hear and see a funeral. I've

7 just never in my life seen that. It's my understanding it

8 just doesn't happen here either.

9 But all that being said, Your Honor, with all due

10 respect, an hour-and-a-half document and video to be

11 admitted before you start trial, it's hearsay. It's total

12 hearsay.

13 On this video, and I personally tell the Judge I

14 have not watched it all, okay, but other people have. And

15 I think I can state with accuracy that those videos of

16 people gathering for the funeral, people speaking at the

17 funeral to include audio, members of the community

18 speaking at the funeral and the video after the funeral.

19 I agree that the Plaintiffs in this case, the two

20 boys and the video deposition of this parent, has some

21 relevance, obviously, as to what happened. But to show

22 the video is just totally improper.

23 I can't cross-examine. It's an out-of-court

24 statement made for the truth of the matter. I can't

25 cross-examine a funeral video. And to take the position,

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1 well, we'll just admit the whole thing, and then we'll
2 come along during the trial and show counsel what we're
3 going to show, that's not the way we do it.
4 I don't think the videos -- from what I have
5 seen, candidly in the past is, Plaintiffs are allowed to
6 show slides of family members, and they show what the
7 family did. I've never heard of you get to play a video
8 with audio on it when there's no opportunity to
9 cross-examine.
10 Now, I will also, let me just also -- the brief
11 speaks to community issue, and counsel spoke about it.
12 You know, if they want to call a character witness to say
13 what this loss has done to the family, they're entitled to
14 do that, and there may be people on their list to do that,
15 they have the aunts and uncles, that's admissible
16 testimony.
17 But to have members of the community stand up in
18 a funeral and state nice things about the Khibani family
19 is not an opportunity for me to cross-examine those people
20 at all.
21 Finally, I would say under the Nevada rule, and I
22 don't remember the exact rule, but the Court will know,
23 it's like the 403A under the federal rule, the prejudice
24 of this far outweighs any relevance.
25 They have every opportunity to put their clients

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and other people on the stand to testify what the loss of their father has done to the family and to the boys. And, obviously, they entitled to do that, they should do that and I'm sure they will do that.

But not through a video with audio attached for an hour-and-a-half. Thank you.

MS. WORKS: Again, Your Honor, Plaintiffs are not seeking to play the entire hour-and-a-half video, but I would direct the Court to a couple of different Nevada statutes that are directly on point, which indicate that, in fact, this is not inadmissible hearsay.

First of all, NRS 51.205, that goes to what I referenced earlier, family records.

THE COURT: Could you excuse me one moment.

COURT RECORDER: We are having feedback, but I can't figure out where it's coming from, so I apologize.

MR. BARGER: I don't know if we even need the microphone, to be honest with you here.

COURT RECORDER: It seems like it might be coming from Plaintiff's table.

THE MARSHAL: Does anybody have their cell phone on?

THE COURT: Okay. Go ahead.

MS. WORKS: NRS 51.205 I spoke about earlier goes to family records, inscriptions on portraits,

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1 engravings, on urns, crypts or tombstones. Those are not
2 inadmissible hearsay, Your Honor.
3 And via comments, whatever may be contained on
4 funeral video are much more akin to that than some sort of
5 anonymous comment on the Internet.
6 Additionally, NRS 51.265 specifically states that
7 reputation regarding personal family history, reputation
8 among the family, among associates or in the community is
9 not inadmissible. It concerns marriage or death or
10 similar fact.
11 Here this is exactly what this concerns. So in
12 addition to that, the video contains the slides which I
13 think counsel recognizes will be admissible. It contains
14 the slides which have been disclosed and, additionally,
15 statements from the boys.
16 Both of the boys were deposed in this case.
17 Defense counsel had opportunity to question them regarding
18 their statements. They chose not to ask many questions
19 but, of course, that's a strategic position that the
20 Defense counsel makes.
21 They had the opportunity to cross-examine the
22 boys with the deposition. They'll have the chance to
23 cross-examine them about their statements when they're on
24 the stand at the time of trial.
25 And they had the opportunity to depose Dr. Barin

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during her live video deposition testimony as well, and so there were opportunities to ask about all of these issues as we went along the way.

This information was disclosed. They've had the opportunity to review it. And they'll have the opportunity to make specific objections to particularized portions of the video should they wish to make it.

But in reality, Your Honor, they can't -- they say they've watched it, although not all of it, and yet they can't point to any specific portion of the video that they find to be objectionable, except to say that as a whole it's prejudicial because it's really sad.

Well, it is really sad, Your Honor, but that doesn't make it inadmissible.

THE COURT: Let's go to Plaintiff's Motion in Limine No. 11.

MR. KEMP: Your Honor, we had filed a lot of motions to preadmit in this case. We filed three; the one you just heard, this one, and one about a paper that I think we're going to withdraw, so we're pretty much down to two Motions to Preadmit.

In most cases I file a lot more motions to preadmit than that. I file anywhere from 8 to 12, so I kind of cut it back in this case to what we really need to get in for the jury on a liability case.

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As you notice, I'm not -- this pertains to the aerodynamic claim. I didn't file a motion to preadmit anything about the S-1 guard. I didn't file a motion to preadmit anything about the sensors.

The only thing I filed was the Motion to Preadmit this 1993 generic bus wind testing by the Defendant, and this is why I want this preadmitted.

Again, when we focus group this, we find that when we show the focus group that 25 years ago they actually developed a safer alternative car, we win the case, we're winning every time.

When we don't -- when we're not allowed to show them that they had a safer alternative car, it becomes a tougher case for us. And you know that aerodynamics is complicated, but when I can tell the jury right up front that in 1993, they, the Defendant in the case, had a safer alternative car, the case is over.

Of course, then the question is, why didn't they use it? So that's why we want to get it in, Your Honor. That's why we think this is very important.

Now, their response, their response -- and remember the way we found this. We took the PMK's deposition. They produced -- now they confuse me as to what his name was -- Hoogestraat, whatever his name was. Virgil, I'll call him Virgil too.

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1 So they produced Virgil, and one of the subjects
2 is PMK on wind tunnel tests done by MCI. That was the
3 subject, we attached it. So they produced, Virgil says, I
4 went back to the records and here's what I found.
5 Now, they argued: Judge, he's our PMK, but, ha,
6 ha, ha, he wasn't the custodian of records, it's not
7 admissible. And then they cite this Ham case, which is a
8 criminal case.
9 What happened in the Ham case is, they tried to
10 produce a bunch of receipts from the store because they
11 were trying to show that $100 worth of goods were stolen.
12 I guess $100 was the threshold where the guy went to
13 prison for five years instead of two or whatever. They
14 had to produce that or prove that as an element.
15 So they called the store manager onto the stand
16 and he said: Gee, I don't really know what happened, I've
17 only been the store manager for a while, I wasn't around
18 when those receipts were made.
19 And they say based on that case under Nevada law,
20 you have to have a Custodian of Records. Well, Your
21 Honor, the first key difference is that in the Ham case
22 the criminal didn't produce the receipts, okay.
23 In this case they produced the wind tunnel test.
24 And for them to say that: Oh, Judge, this is just not
25 reliable, this is our wind tunnel test?

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Well, number one, they produced it. Number two, their production number is on it, that's them, MCI 039853, dash, for the first page. You go through all the pages that has the production on Page 1. And what is it called? The Motor Coach Industry's Engineering Test Report.

This is the fourth page of this, a Wind Tunnel Investigation for Motor Coach Industries, that's the Defendant. So it's their report, it's got their name on it, they produced it.

And then their PMK said, quote: "I found a record of something that we have done in 1993 that our records shoed was 1993," unquote. That's Virgil again, okay. That's his testimony.

Now, true, he goes on and says that he wasn't personally involved with the wind tunnel test in 1993, but that's not surprising.

Today is 2018, it's been quite some time, but that's why the rule specifically says, and I'm referring to NRS 51.135, the rule says that we can authenticate it by testimony from, quote, "the custodian or other qualified witness."

This was the witness they produced as the 30(b)6 witness on the wind tunnel test. I didn't just start taking depositions of people. They went out, and under 30(b)6 they have an obligation to find someone who knows

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what he's talking about, or educate them, because his testimony is binding.

Okay. So now they're arguing to you that: Oh, okay, we produced the person most knowledgeable. He's really the person least knowledgeable. It shouldn't admitted because he wasn't the custodian at the time.

Your Honor, I think we squarely meet the criteria of the rule NRS 51.135. But if we don't, if we don't there's the catchall exception. And the catchall exception is if the Court finds it's reliable, or an indicia of reliability or a couple phrases like that.

And, again, I will emphasize, it's their PMK, they produced him. It's their test, it's got their Bates stamp on it. So for all those reasons, there's not a valid hearsay objection. Either it's a business record which, obviously, it is, or it falls under the catchall exception.

And that is the only argument they make as to the admissibility or in opposition to this motion. The only argument they make is that: Ha, ha, ha, you didn't do the Custodian of Records deposition, so you don't get to admit that.

And so for that reason, Your Honor, we'd ask that it be admitted. Again, the reason is showing the jury the alternative card is a lot more convincing than having me

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1 describe it to the jury
2 For that reason, we'd ask that this motion be
3 granted. Thank you.
4 MR. TERRY: If it please the Court, Michael
5 Terry, MCI.
6 THE COURT: Good afternoon.
7 MR. TERRY: Good afternoon. Your Honor,
8 we'd ask that the Motion in Limine be denied, and that the
9 Plaintiff be required to produce evidence to support the
10 admissibility of the document, both in terms of the
11 Custodian of Records and the relevance of the documents to
12 the lawsuit.
13 Now, the reason I say this is because this is, as
14 you can tell, a report that was submitted to MCI back in
15 1993. And you can tell when you read the document that
16 they did the work with MCI engineers to do it.
17 Unfortunately, Virgil Hoogestraat, who was the
18 designated representative in response to a Notice of
19 Deposition to MCI was noticed for wind tunnel tests
20 performed for buses from the time period 1997 to 2016,
21 including but not limited to tests for the MCI J4500, he
22 did not know anything about the 1993 test, and had not
23 prepared himself for knowledge about the 1993 test,
24 because he was outside the scope of the Notice of
25 Intention to Take Deposition.

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He was noticed for, or the company was noticed for, and Virgil was prepared to discuss wind tunnel tests between '96 and 2016. We produced the 1993 test, but Virgil knew nothing about it.

Now, it is highly technical for us to say they have not offered a Custodian of Records who has verified that this was a document created by someone who received information from persons with personal knowledge who recorded the information, and the document was kept in the ordinary course of business, when the document was clearly taken from our files.

On the other hand, no one has verified that this was a test that was performed with MCI and verified by MCI. All we have is that it was in our files. And the reason that I draw issue with it is because of its relevance.

In the motion they say that the reason they want this in, is the 1993 wind tunnel test is relevant to prove a general concept that rounded front edges improve drag coefficiency, and in parenthesis, (and reduce air blast.)

This is the actual test itself, Your Honor, the report. And I have dog-eared Page 5 of the report which I emphasize what this study was for. This study was not to determine, quote, "air blast."

This study was performed to determine the effects

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of aerodynamics on performance with respect to fuel consumption. And then if you go to Page 8, "with respect to cross-handling of the bus."

And there is nothing in this report that qualifies or quantifies air displacement to the side of the bus at the front in terms of foot pounds or disturbance to people who were nearby.

This was a test that was performed to determine fuel efficiency or fuel consumption and cross-wind handling. And if you want to know what cross-wind handling is, I dog-eared for Your Honor Figure No. 6.

And Figure No. 6 refers to the fact that cross-wind handling has to do with the effects of wind on the business itself, not the effect of the bus on other vehicles. They are concerned about --

THE COURT: Excuse me, what page are you on?

MR. TERRY: Well, this one is not very well numbered, Your Honor. I'll give you my copy.

THE COURT: That's good. Thank you.

MR. TERRY: So when you go to Figure 6, is that dog-eared?

THE COURT: Yes, it is.

MR. TERRY: Okay. So when you go to Figure 6 you see what they're talking about when they're talking about side forces, they're talking about side forces on

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the bus that create lift because of pitching moment that create lift, because a rolling moment that create side force because of yawing (phonetic) moment, because it's not a measure of side forces on people or objects that are in the vicinity of the bus.

There is nothing in this document that I can find that says what this information has to do with is air blast, or that rounding the front corners has anything to do with air blast.

And the Plaintiffs have offered no evidence, other than their own statements contained in their motion, that qualifies this document as something that has to do with air blast.

Now, it is not to say that some expert somewhere cannot take this information and issue opinions or other opinions that this information demonstrates that the different fronts produce different side forces.

I don't quarrel with that. The experts are amazingly facile creatures in terms of what they can do with limited evidence. But there is nothing in this document alone that sets out air blast or lateral forces because of the bus moving through the atmosphere.

And, accordingly, I do not think the document should be preadmitted. I think the document should be admitted when they have a qualified witness establish that

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1 this document has something to do with the relevant
2 issues.
3 THE COURT: Thank you.
4 MR. TERRY: (Inaudible.) Further, Motor
5 Coach Industries, Your Honor.
6 MR. KEMP: I'm glad Mr. Terry explained that
7 because I kind of knew what he meant, but I wasn't
8 positive.
9 Your Honor, the only objection they make in the
10 opposition is this, what he now calls a hypertechnical
11 objection.
12 I think they've withdrawn that, because he
13 admitted, as Virgil testified, this was clearly taken from
14 their files, and his statement that they didn't educate
15 the PMK about this because it was limited to 1997 and
16 beyond.
17 He is forgetting that there were three other wide
18 open PMK designations on Page 4, point 19, 20 and 21 about
19 the process for design for all buses provided by MCI, the
20 process of hazard identification for all buses provided by
21 MCI, the methods used to reduce, mitigate or eliminate
22 identified hazards for all buses provided by MCI.
23 So, you know, whether they misread this or not,
24 there was clearly a PMK request, and he was produced on
25 these three points.

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1 So I think what we're down to is relevance now.
2 Their argument is now relevance. First of all, they
3 didn't make that argument in the opposition. They didn't
4 argue in the opposition that it wasn't relevant.
5 But I think It's clearly relevant for the reasons
6 I've indicated, that I am showing the jury that they
7 designed a safer alternative part.
8 And he says, well, this doesn't have anything to
9 do with air blast. Your Honor, Page 2, the appendix run
10 log, if you take a look at Page 2, this is the standard
11 bus at the time, it's under Item 19. They've got a .584
12 coefficient, okay. When they use the part that I'm
13 showing, Proposal 1, they have a .36 drag coefficient.
14 They almost have the air blast.
15 And I don't want to go through drag coefficients
16 on the Bugatti again, but .36, that's better than a
17 Bugatti. They could have used a simple part that they
18 designed and have a better drag coefficient than a Bugatti
19 race car. It's stunning when you think about it.
20 But in any event, that's the relevance, Your
21 Honor. And I know they don't like my argument, but it is
22 relevant to my argument that this proves that they
23 designed an alternative part that reduced the drug
24 coefficiency.
25 Why they wanted the alternative part, they can

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tell the jury that. I'm just telling them what the impact would be on the air blast. Granted, it would help fuel economy, yes, that's a good reason. Granted, it would help the side disruption situation that Mr. Terry talks about.

But the third thing it would have done is, it would have reduced the air blast, halfed it. And that's why it's relevant, Your Honor.

THE COURT: Thank you. All right. Let's go to Plaintiff's Motion in Limine No. 12. This is to preclude Expert Rucoba.

MR. KEMP: Okay. Mr. Rucoba is their accident reconstruction expert, Your Honor.

THE COURT: Say that again?

MR. KEMP: Accident reconstruction expert.

THE COURT: Yes, yes.

MR. KEMP: Okay. He is not a meteorologist. He doesn't have a Doctorate in Meteorology, doesn't have a Masters in Meteorology. He doesn't have a Bachelors in Meteorology. He doesn't know anything about Meteorology.

I have an expert who is a Meteorologist, Dr. Rosenthal, who I saved his rebuttal expert just in case he went down this avenue which they're trying to go down.

And the avenue is, in his report Mr. Rucoba says,

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he says that based on the weather data at or hear the time of the accident at McCarran Airport, which is 13 miles away from the accident scene, based on that weather data he thinks it was 16 or 18 miles an hour of side wind, ambient wind, and that it could have been gusting up to 30 miles per hour. That's what he said in his expert report.

Okay. So then we filed the rebuttal report of the real Meteorologist, Dr. Rosenthal, who said: Gee, why are we using the McCarran Weather Station data which is 13 piles away, when we could use the Summerlin Weather Station data which is one mile away?

And under the Summerlin Weather Station data, it was four to six mile an hour ambient wind There's no gusting whatsoever. So why aren't we using the applicable weather station data?

So I took the deposition of Mr. Rucoba and I asked him that simple question, why aren't we using -- oh, gee, you know, you're right. We should be using the applicable data, and his opinion went away. His opinion went away, and in their opposition they say that they're not going to offer a Meteorologist opposition to Mr. Rucoba.

So you would think they would just say we agree with the motion, because he's not qualified to give a Meteorology opinion. He ran away from it when we showed

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him the real data, and he's clearly wrong. It would really embarrass me if he came up and said something like that.

But if Your Honor remembers, I showed you the video last week. Remember, I had the three different days before and after the accident?

THE COURT: I remember.

MR. KEMP: So what they're going to try to do is, they're going to try to show the video, or they're going to try to get Mr. Peers' testimony, who was on the bus for 40 minutes. So the bus is self-enclosed, he doesn't know how windy it was at the time of the accident, because he was in the bus.

And then he's sitting on the bus for 40 minutes, and then he comes off the bus and he says: Boy, it's really windy, okay. It might have been real windy 40 minutes later. My video shows it was real windy 40 minutes later. But what does that have to do with the time of the accident?

So by in any event, in this motion we're just asking that Mr. Rucoba's opinion be precluded on these grounds, and where now they say he doesn't really have the opinion, and he's clearly not qualified, and he ran away from -- you know, it's wildly unsupported claim I call it, wildly unsupported and completely discredited by the

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1 Summerlin data.
2 But in any event, for that reason the motion
3 should be granted.
4 THE COURT: Mr. Terry?
5 MR. TERRY: Yes, Your Honor. It comes down
6 to Motor Coach Industries prays that this particular
7 Motion in Limine be denied, because Mr. Kemp is asking you
8 to preclude Mr. Rucoba from giving an opinion he has never
9 given. He's asking you to order Mr. Rucoba not to offer
10 an opinion he has never offered. It was a pointless
11 gesture.
12 This is the source of the confusion, I believe.
13 This is Rucoba's report, and this is the paragraph I've
14 outlined it, where he talks about the wind conditions.
15 What Mr. Rucoba testifies or what he describes in
16 the report, is that when he went to check the wind
17 conditions, he went to McCarran, which he found to be 11
18 miles from the point of the accident, not 13 and not 15,
19 and he said they had weather data.
20 And then he said their weather data, the weather
21 information that he got from McCarran indicates the winds
22 at McCarran were coming from the south, southwest
23 direction at a speed of 16 to 17 miles per hour.
24 And the winds at McCarran were gusting to 30
25 miles per hour, and the data that he got is in the chart

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1 below his testimony.

2 He also goes on to say that as a result of the

3 fact that there is no way to know the specific wind

4 conditions that Dr. Khibani would have encountered, the

5 exact wind conditions he encountered at any particular

6 moment in time, or location in space is likely to have

7 been variable and difficult, if not impossible to

8 reconstruct with precision and, accordingly, he offers no

9 Meteorologic opinion.

10 And in the course of reconstructing the accident

11 he considers a certain number of factors, one of them is

12 environmental.

13 And when he considers the environmental factor,

14 he said in his report and he said in his deposition: I

15 cannot reach an opinion about the environmental factor. I

16 have no opinion about the environmental factor. And the

17 reason I have no opinion about the environmental factor

18 is, it's difficult, if not impossible to reconstruct the

19 actual wind conditions at the time of the occurrence.

20 Now, I don't know why Mr. Kemp persists in coming

21 forward with a motion that says he cannot offer a

22 meteorological opinion, when he goes to great pains to say

23 I do now a Meteorological opinion.

24 I do think there's an accident reconstruction.

25 He should be permitted to testify about the algorithm that

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he followed we reached his opinion. And in reaching his opinion, one of the things he considered was whether or not I can issue an opinion about weather at the time of the accident.

And he determined he could not. I see no reason to grant a Motion in Limine that says he cannot express an opinion that he has never expressed, has no intention of expressing, and only talks about it because he cannot reach the opinion.

That seems pointless, and I ask that you deny the Motion in Limine.

THE COURT: Mr. Kemp?

MR. KEMP: Judge, I found a Motion to Exclude his opinion on wind. They just said right now he doesn't have an opinion on wind, but they want the motion denied? They should be arguing the motion should be granted if they don't have an opinion.

Really what they're trying to do here is, they don't have an expert on the wind condition, so what they're trying to do is, they're trying to take his report and they're trying to offer to the jury -- and the reason I think, I thought that he was going to offer an opinion is he says, quote: "Thus he -- referring Dr. Khibani -- "thus he was likely in the turbulent, downwind area of the casino stretch."

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So they're trying to blame the wind on the wobble, or the wobble on the wind, rather. And that's why they're trying to get the evidence in.

So if he has no opinion on it, the motion should be granted. You know, and then they say: Well, Judge, we want him to testify regarding his algorithm. What the heck does that mean, algorithm?

What they really want to do is, they want throw this stuff out, the 16 to 17 miles per hour and the 30 miles per hour wind gusting, and hope that someone in the jury grasps onto it and says: Gee, it must have been windy there.

Then they're hoping that the jury sees the Red Rock video and say: It's windy in this part, it's windy in that part, maybe it should be windy.

So they're trying to get somewhere they can't get to with an opinion, because they don't have an opinion on that. And that's why it should be granted, Your Honor. That's exactly why.

THE COURT: Okay. Thank you. Let's move to Plaintiff's Motion in Limine 13, to Preclude Defendant from Arguing or Referencing Rigged Air Blast Testing that is Not Substantially Similar Because it Used a Stationary Bike.

MR. KEMP: Okay, Your Honor. What the

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1 Defendants did in this case to fight the aerodynamics case
2 is, they got a J4500 bus and they took it down to the X
3 Bonin Lab, that's the name of their consulting firm, down
4 in Phoenix.
5 And they did two things with the bus. One, they
6 had bicycle riders ride by jet engines, and they'd turn
7 the jet engines on. Since he made it through knowing that
8 he was going to get blasted by jet engines, that proves
9 that, you know, air blast can't disrupt a bicycle rider.
10 You know, I think that's kind of silly, because
11 they all knew that jet engines were coming, they had both
12 hands on, they expected the force. I'm not even asking
13 that that be excluded.
14 Okay. The second part of their testing is what
15 we're asking be excluded. The second part of their
16 testing is, they put a stationary bicycle out, and then
17 they ran the bus by it and they tried to measure the side
18 force.
19 And then they moved the bus in closer. The bus
20 was three feet, two feet, one feet because, like I said
21 last week, there's testimony that the doctor was one foot
22 away, there was testimony he was two foot away, there's
23 testimony he's three foot away. The closer you get, the
24 more wind blast you get. Our experts agree with him on
25 that.

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1 So they used as stationary bicycle. So the issue
2 here under Hallmark, this is the Hallmark versus Eldridge
3 case.
4 THE COURT: I know it.
5 MR. KEMP: Okay. The testing conditions
6 were similar at the time of the accident. This is the one
7 with Footnote 23 that I got confused in last time.
8 Footnote 23. So they cite two cases, and they
9 say substantially similar, substantially similar. So the
10 test that we apply in our jurisdiction for an out-of-court
11 experiment whether an expert can bring in an out-of-court
12 experiment, which is what we're talking about here,
13 they're running the test, the bus by a stationary bicycle,
14 is that substantially similar to the conditions that are
15 prevailing at the time of the accident.
16 So they have to prove that because they are the
17 proponent of the testing.
18 All right. Next one, please? This is
19 Dr. Briedenthal's (phonetic) report. He is our
20 Aerodynamic Engineer. He's got a Doctorate in Aerodynamic
21 Engineering. He's worked on other bus cases, so we have
22 an Aerodynamic Engineer. They do not have an Aerodynamic
23 Engineer, they have a mechanic.
24 So what he says is that the Aerodynamic forces on
25 a moving cyclist are different than those on a stationary

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1 cyclist. And he explained in detail in the first few
2 paragraphs, 1, 2 and 3, which I don't want to really get
3 into the detail in aerodynamics because it's not
4 necessary.
5 But he summarizes and says that the force
6 experiment, which is what Mr. Granite did, the
7 biomechanical engineer down in Phoenix, the force
8 experiment with the stationary dummy is not similar to
9 what occurred in the accident.
10 So that's his testimony and that was his
11 testimony at the time of his deposition. And then he goes
12 through and he uses a correction factor, and he can do
13 this because he's an aerodynamic engineer.
14 They didn't do this. When you have a bus and a
15 bike that are both moving, the side force is greater than
16 if you have a bus and a bike, which makes sense when you
17 really think about it.
18 By anyway, he estimated what kind of side force
19 there would be based just upon their experiments, so he
20 comes up with 10 pounds. They say 2.5 pounds if the bus
21 is one foot away. So they say 2.5, he says 10.
22 So what they're trying to do is use this test
23 they've done that's not substantially similar to justify
24 their opinion that there's only 2.5 pounds of force.
25 And I say only 2.5 pounds of force is a lot of force

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1 to be putting on that side wheel, because you've got to
2 remember the bicycle's stem goes out to the handlebar and
3 it functions as a lever, and the testimony is going to be
4 about three times multiplier of that.
5 If you're getting two-and-a-half pounds of force
6 on the tire, you're getting seven-and-a-half pounds in
7 Dr. Khibani's hand which was probably on the right-hand
8 side. But in any event, they want to say two-and-a-half
9 instead of ten based on this testing.
10 Next, please? This is Dr. Briedenthal's
11 testimony and they say: Well, Judge, our expert said that
12 it's not substantially similar. In fact, he says it's not
13 similar, and in the opposition they say it's not similar,
14 and I'll show you that in a minute.
15 And they say: Forget the fact that we don't have
16 any way to prove it, we can use Plaintiff's expert to
17 validate our test. So their question was using the wind
18 tunnel in a stationary bike, can you come up to something
19 substantially similar.
20 The answer is yes and no, and then he talks about
21 the corrections that have to be made. You have to make
22 corrections to account for the relative wind difference.
23 And what that means is, if the bike is moving X speed and
24 the bus is moving twice that speed, there's a relative
25 wind difference.

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1 So he doesn't say that it's substantially
2 similar, he says exactly the opposite, and I showed you
3 already from paragraph 4. So I don't know how they think
4 they're going to prove this with my expert, they can't.
5 Next, please? This is what they say in the
6 opposition. As Mr. Granite, and, again, he's the
7 biomechanical engineer in Phoenix who is the overseer of
8 this particular testing, as he explained in his
9 deposition, the aerodynamic force of a moving cyclist
10 would be different from the measured force on a stationary
11 bike.
12 This is their opposition to this motion. They
13 say it's different, and they have to prove it's
14 substantially similar, and they're saying it's different.
15 And they say -- they're having an argument as to why it's
16 substantially similar.
17 So for that reason, Your Honor, all this testing
18 with the stationary bike should not be referred to during
19 the trial. You know, and they're clever little people,
20 the reason they use the stationary bike as opposed to a
21 moving bike, you know, obviously, if they're buying jet
22 engines and shooting them at bicyclists, they could have
23 afforded a moving bike.
24 But the reason they used a stationary bike is,
25 they know that it's going to cause a different result

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that's stacked in their favor, and that's why the Court requires things should be substantially similar.

This is not substantially similar, even they say it's different. And for that reason, the report should be out, Your Honor, or not the report, but the testimony.

MR. TERRY: Would you be so kind to put the last slide up again, please?

Your Honor, the reason this is an issue is because, as we pointed out to them, that as Mr. Granite explained in his deposition, the aerodynamic force of a moving cyclist would be different from the measured force of a stationary bike when considering the longitudinal force and the duration of force.

The lateral force would be the same for both the stationary and the moving bike. So now we are here on a motion to eliminate the first phase of Kevin Granite's testing for a reason that because it doesn't do what his second phase of the testing did, which was recreating the accident.

The first phase of the testing was not to recreate the accident. The second phase was to recreate the accident, and there was no complaint lodged against the second phase.

The Plaintiff's position as set out in their moving papers is using a bike that is not moving, to

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simulate a bike that was traveling 13 to 14 miles per hour can never be substantially similar and must be excluded.

The simple truth of the matter is, that is not a valid statement. What do we do when we test things in wind tunnels? When we test things in wind tunnels, the thing in the wind tunnel is absolutely stationary and you blow wind at it. Because what is at issue is the relative winds effect on the object, not whether the object is moving.

That's the way Boeing tests its airplanes. That's the way NASA tests space vehicles. That's the way Briedenthal would test the aerodynamics of this bus. That's the way Briedenthal says he would test the incident itself, he would have them both stationary and he would blow things at them.

You cannot say simply because the bike is stationary it can never be substantially similar. The testing that Granite did that he identified is set out in his report. Again, I set out some pages for you and highlighted some things.

He said he was going to do the testing in two phases, and the first phase was going to be to measure the lateral force experienced by the bicyclist from a moving bus, not the longitudinal force, not the duration of force, just the quantity, the maximum quantity of the

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lateral force.

The test was not, quote, "rigged." The bike was stationary. And the reason it was stationary is because Kevin Granite pointed out in his deposition, in his report, and again I tell you that the lateral force is unchanged. It is the side force is unchanged whether or not the bike is moving or stationary.

In the other phase of his testing, the second phase of his testing, that is where Granite did conduct testing that was designed to evaluate the effect of the aerodynamic forces on a moving bicycle.

And while Mr. Kemp may want to poke fun at using a jet engine to subject a bike to a lateral force, sudden lateral force, the testing also included having a bicyclist ride a bike on a predetermined path at 13 or 14 miles per hour, and having a J4500 with the serial number of subject bus plus one drive past him at 25 miles per hour, and measure and evaluate the forces on the moving bicyclist.

This test was only designed to measure the lateral force. And in measuring the lateral force, they got a bike that was identical to the one Dr. Khibani rode. They got a dummy that weighed exactly what he weighed. They got clothes that were exactly what he was wearing, and they got a helmet that was exactly the same that he

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was wearing, and they drove the same bus, Aston, at 25 miles per hour at varying lateral differences and measured the force.

The incident was substantially similar for measuring the lateral force, which is not affected when the bike was stationary. And they do not complain about the tests that we performed when we recreated the accident to evaluate what that lateral force actually meant to a guy riding a bicycle.

There is no reason to exclude Mr. Granite's test because it did not satisfy Mr. Kemp's requirement that it somehow simulate or recreate the accident. That's not what he was doing in Phase 1.

What he was doing in Phase 1 was measuring or looking for value, the quantity of lateral force generated by an actual J4500.

I might point out that this aeronautical engineer that they are so proud of did no testing of any kind, and testified in his deposition that he cannot identify the quantity of the lateral force, whether or not there's separation from the side of the bus, how far out the separation from the side of the bus extends without making a measurement, and he made no measurement.

We, on the other hand, actually made a measurement of what kind of lateral force would be

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experienced by the bicyclist as the bus passes by.

So this incident, this accident, this test was substantially similar for that purpose. And the second phase of the test which they have not challenged was substantially similar for the purpose of evaluating what that side force actually means for a guy riding a bicycle because the bus passes by at 25 miles per hour.

There is no reason to eliminate Kevin Granite's test that was designed only to measure lateral force because the bike was stationary. It was similar enough for those purposes. Thank you, Your Honor.

MR. HENRIOD: Court's indulgence, if you don't mind?

THE COURT: We're veering off a little bit, but go ahead.

MR. HENRIOD: I would point this out because Mr. Terry was unable to be there on Friday, 72 hours ago I deposed their expert who did testing on the bike, and Mr. Kemp was there, and I asked him these very questions.

So if the criticism is that there's a stationary bike, your expert did a test with a stationary bike hanging out the side of the van that he drove down the road.

And I asked him the question, "So would the effect of the wind disturbance on the steering, in your

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opinion, is the same whether the bike is stationary or moving; is that correct?"

And he said that he did the testing on both and he found no difference. I asked him whether he had any criticism of Mr. Granite's test for using the stationary bike. He had criticisms of Mr. Granite's test on a variety of issues.

However, on the fact that he used a stationary bike he said, no, there's no problem with that. I don't like the way he did it, but the fact that the bike was stationary is not a problem. That's their expert. I got this deposition transcript a couple hours ago. This just happened on Friday.

So it's a little disingenuous to suggest that the stationary bike test is thrown out the window because our expert did it, even though their expert was using something similar.

So I wanted the Court to understand it's not quite as clean as stationary versus moving, even in their own expert's opinion.

THE COURT: Thank you.

MR. HENRIOD: Thank you, Your Honor.

THE COURT: Mr. Kemp, remember when we addressed the Defendant's Motions --

MR. KEMP: I'm going to address the new your

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point, Your Honor.

THE COURT: No. I'm just saying you may want to add a few things occasionally as well, so --

MR. KEMP: Okay. We get the right to have two, Your Honor. We have two separate Plaintiffs.

THE COURT: I'm trying to keep it balanced.

MR. KEMP: Right. In any event, let's start with where they ended, which was Alexander Larevere's testimony on Friday. He was a bicycle expert. And so what he did is, so Dr. Briedenthal testified -- remember when the bus is going 25 miles an hour.

That doesn't mean that the air blast is 25 miles an hour. It's 35 miles an hour is what Dr. Briedenthal says. That's in the Affidavit I just showed you.

So what Larevere did is, he took a bike and he put it in a van, and he drove the van at 35 miles an hour. And then he had a force meter on the tire so he measured how much force that the tire saw from that particular wind.

And the part where stationary and nonstationary, well, it's pretty hard to have a stationary or nonstationary bike in a moving van, all right. I mean, that would have just been an impossible experiment.

But what he did do is this. He took the tire and he set up something that made the tire rotate, I can't

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1 remember what he called it, and so he moved the tire as if
2 his bicycle was going 12-and-a-half, 13 miles an hour.
3 And so he tested whether or not it made any
4 difference to how much force he got, which was
5 approximately 5 pounds, to how much force he got if the
6 tire was moving 13 miles an hour, or if the tire was not
7 moving.
8 And he found it didn't make any difference, okay.
9 That's what his testimony was. First of all, you know, it
10 was not a review of the Granite testing, which is what
11 Dr. Briedenthal, the aerodynamics engineer did.
12 It was his experiment that found there was no
13 difference, that it was still 5 pounds, whether he had to
14 rotating tire, the nonstationary bike, or a stationary
15 bike.
16 And the reason it makes no difference is, because
17 assuming for the sake of argument you don't have flat
18 tires on the bike, there's only a small portion of the
19 tire that comes in contact with the ground, so it kind of
20 pivots like you would pivot on a pin.
21 So that's the reason that a moving tire and a
22 stationary tire doesn't make any difference in his
23 particular type of testing.
24 But that doesn't have anything to do with this
25 particular motion. I knew when he was asking the

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1 questions Friday he was going to jump up here today and
2 start yelling about it, but I'd be more than happy to
3 brief it more thoroughly.
4 But it didn't have anything to do with this
5 particular testing whatsoever. It wasn't questions about
6 Granite's testing. He's not an aerodynamics engineer,
7 he's a bicycle specialist.
8 So let's get back to the real object of the
9 motion. This is Dr. Briedenthal's opinion. He says the
10 aerodynamic force on a cyclist depends on the speed and
11 the relative wind.
12 Again, is the bicycle moving or is it not moving?
13 You know the relative wind, and it's different. It's
14 different when it's stationary than a nonstationary. And
15 they agree with that, Your Honor. They agree with that
16 point.
17 Now he comes in and says, well, it's not
18 substantially similar. And that's what Dr. Briedenthal
19 says, it's, quote, "Not similar to what occurred in 0the
20 accident." That's the evidence that's going to come in.
21 I don't know how they think they're going to get
22 it to be substantially similar. Let's go to what
23 Mr. Terry was referencing.
24 This is our opposition: "The aerodynamic force
25 on a moving cyclist would be different." That's what they

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1 say, it's different. That's their own statement.
2 And of course it's going to be different, because
3 under their test the bus is going 25, and on a stationary
4 bike it's not exposed to the bike as long. If you are
5 going 25 and 25, you can see it's constant exposure.
6 But in this case if it's 25 and 12, the exposure
7 is twice as long than if you had a nonmoving bicycle, and
8 the reason for that is because the bicycle is maintained.
9 Think, for example, if water was coming out of
10 the side of the bus, if you have a moving bike, you're
11 exposed to that condition for longer, depending on how
12 fast you're traveling. It's the same thing with the wind
13 blast, and that is why both Mr. Granite and
14 Dr. Briedenthal say that the aerodynamic force would be
15 different.
16 Now, that's the end of it, Your Honor. They say:
17 Oh, the lateral force will be the same. Well, that's also
18 wrong, and Dr. Briedenthal explained why it was wrong, and
19 that was the first three paragraphs of his rebuttal
20 report.
21 And, by the way, that rebuttal report there's
22 three paragraphs, it's real technical aerodynamic stuff,
23 they haven't said anything about that. They didn't
24 challenge anything in that.
25 So for them to jump up now and say: Gee, it's

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the same, it's not the same, Your Honor, and Dr. Briedenthal explains why.

So for this reason, especially their concession -- let's go back to their opposition again -- they say the aerodynamic force is different when measured on a stationary bike, they say it, okay. I mean, I didn't say this, they say it. This is from the opposition to the motion.

And based on that admission, Your Honor, there's no way they can prove substantial similarity, and that's what they have to prove. They don't have to prove kind of like it, which I think is what Mr. Terry finished with: Gee, Judge, it was kind of like what happened here. That's not it.

It's substantial similarity, that's what they have to prove, and they can't prove it.

THE COURT: Okay. Let's go on to Plaintiff's Motion in limine --

MR. HENRIOD: Judge, is this a good time to take a break?

THE COURT: I'm sorry, yes.

MR. HENRIOD: Thank you, Your Honor.

THE COURT: Thanks for the reminder. I kind of just keep going, so --

MR. HENRIOD: Take ten minutes, Your Honor?

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THE COURT: Good idea. Take a 15-minute recess.

(Whereupon, a 15-minute recess was taken.)

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THE COURT: All right. Now we're going to talk about Virgil?

MR. KEMP: That's correct, Your Honor.

THE COURT: No. 14.

MR. KEMP: I'm going to try to do 14 and 15 together.

THE COURT: Okay.

MR. KEMP: Because we did the opposition to both of them. Okay. Mr. Virgil, he's the paint can on all of these subjects. I have the subjects all listed of Pages 2, 3 and 4.

And then in the motion designated the page and line of testimony that we thought would be appropriate as PMK. And they didn't object to any of the specific designations.

I did the same thing for Mr. Couch or Cooch, Mr. Cooch. We know about Mr. Cooch, he is the head designer for the J4500 bus, and I think somewhere or another we have a chart of him being at the top of the design chain. He was the Vice President of design.

So we took his deposition. He said a couple of

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1 things -- well, quite a few things related to design, what
2 the goal was, or what the air blasts will do, and whether
3 or not he's moved about the proximity sensors, blah, blah,
4 blah.
5 So, again, we designated, specifically, like the
6 very first ones on Page 15, Lines 18 through 22, and Page
7 19. I designated specifically, and then on top of that, I
8 even paraphrased what the testimony was there, so I taught
9 I was pretty specific.
10 Now, in their opposition they say: Geez, we
11 can't even resolve these motions now until Mr. Kemp gives
12 us pages, lines of depositions, which I already did. Now
13 is the time, Your Honor. They should have come back and
14 said: Gee, we don't think he's qualified to testify and
15 this, that or the other thing.
16 But they can't just say: Oh, we need specific
17 page and lines when I've already given them to them. Then
18 they want to say: Well, how are you going to, Plaintiff,
19 tell us your trial strategy, tell us how you're going to
20 use this, assuming for the sake of argument he really
21 isn't (inaudible.)
22 Now here's Mr. Cooch found on Page 5. You see
23 he's right on the top there, Vice President of Design
24 Engineering and Production Planning. And then they've got
25 all the other design people underneath him, so he's the

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1 head guy on a design.

2 So the first point is, we didn't make this in a

3 vacuum, we gave them specific pages and lines. And the

4 second point they wanted: Well, what are we going to do

5 with this? Are we going to use it for cross-examination

6 or what?

7 And I go, you know, there's many things we could

8 do with it. We can play it during opening statements. We

9 can use it during our experts, and play it to have our

10 experts points reinforced during their testimony. We can

11 play it when we cross-examine their experts, which I see

12 done a lot. We could play it to the jury, which we will

13 probably do for sure.

14 And then we could use it during closing argument,

15 and I'm probably missing a couple things. There's all

16 kinds of things we could do. And the rule says, quote:

17 "For any purpose, unquote."

18 I don't have to tell them what to do. I'm just

19 seeking leave to be able to do it. And given that there's

20 no substantive opposition on any of these particular

21 areas, and given we did designate him as -- start with

22 Virgil -- Virgil as a PMK on pretty much everything.

23 And then Mr. Cooch was the head, overall head of

24 design. I don't see any particular piece of testimony

25 that wouldn't be appropriate for either one of these

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1 motions.

2 For those reasons, Your Honor, you should grant

3 both motions and we'll proceed from there.

4 THE COURT: Okay.

5 MR. SMITH: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. SMITH. Again, Abe Smith for Motor Coach

8 Industries. I do appreciate the reply brief, because

9 their motion does not make clear the scope which they

10 intend to designate these witnesses as, quote, unquote,

11 "managing speaking agents."

12 Because the motion just says for Hoogestraat that

13 he was produced by MCI as its PMK, i.e., its 30(b)6

14 witness, he should be designated as the managing speaking

15 agent at MCI without any caveats or qualifications.

16 Same for Mr. Cooch, he should be designated as a

17 managing speaking agent of Michelin which I assume is MCI.

18 So that's why our opposition was complaining about the

19 vagueness of the motion, because it appears that they just

20 wanted to label these individuals as managing speaking

21 agents as if that's some role that they carry for all

22 purposes.

23 One quick comment about the use of the term PMK,

24 obviously, the person most knowledgeable. It's a word

25 that we like to use in the Bar, but it's not part of the

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1 rule 30(b)6 allows a incorporate to designate anyone as
2 their witness for the designated topics.
3 What the rule just says is that that designee is
4 then bound, or the corporation is bound by the testimony
5 of the designee on those topics. So there isn't a
6 requirement that you produce the person most knowledgeable
7 about whatever subject. You just need to produce someone
8 who will bind the corporation for those topics.
9 Before I get into the specific testimony that
10 they think -- on which they say that Mr. Hoogestraat and
11 Mr. Cooch are managing speaking agents, I want to just
12 back of briefly to talking about what I think it is really
13 about.
14 They cite the Palmer versus Pioneer Inn
15 Associates case, which I understand because that case uses
16 the term "managing speaking agent test."
17 But that case doesn't really describe how you
18 figure out who is a managing speaking agent. It just says
19 that if someone is a managing speaking agent, meaning they
20 have authority to bind the company, then that's the kind
21 the person that you aren't allowed to talk to as opposing
22 counsel.
23 So it doesn't explain what who is the managing
24 speaking agent. For that you need to look to State agency
25 law and principles of evidence.

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1 But what I think this motion is about is really
2 this intent to designate them, and why at least initially
3 they said, yeah, we just want to call them managing
4 speaking agents is to confuse the jury on the topic of
5 punitive damages.
6 Because there's a similar test under NRS 42.007
7 for designating -- for imputing liability to a corporation
8 based on the acts of a managing agent at the time it was
9 defined in the statute.
10 And for that I think it's important to draw the
11 distinction. That description was explained in the
12 Nittinger versus Holman case, security guards beating up a
13 patron, the question was: Well, is that person really a
14 managing agent for the corporation.
15 To be a managing agent for purposes of punitive
16 damages liability, you need to have the authority to
17 ultimately determine the policy of the corporation. So
18 that's important and I think that informs our question
19 here, which is who can be a managing speaking agent.
20 And the other important thing is that it's
21 limited when you're talking about managing speaking agent.
22 It's not a person, it's for a particular conduct or for
23 particular testimony.
24 So you might be a managing speaking agent for
25 particular testimony, but not for other testimony. Or you

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1 might be a managing agent for some policies within the
2 corporation, but not for other policies.
3 And I think there's a risk if we just grant the
4 motions and say: Oh, yes, Mr. Hoogestraat is a managing
5 speaking agent, and Mr. Cooch is a managing speaking agent
6 wholesale, then it could be used to mislead the jury that
7 anything they say or do could be the basis for punitive
8 damages.
9 Turning briefly now to the actual testimony that
10 they highlight. Again, it wasn't clear in their motion.
11 It looked like this was just a saying point, but in their
12 reply brief I'll take them at their word that this is the
13 testimony that they intend to use, or that they say
14 Mr. Hoogestraat and Mr. Cooch are the managing speaking
15 agents for.
16 I just have some objections. Number one, they
17 seem to confuse with respect to Mr. Hoogestraat, the
18 distinction between his designation as a representative of
19 MCI, versus his kind of background knowledge on the
20 general subject matter that they're questioning him about.
21 And just to be clear, we're not afraid of their
22 testimony. We think that both Mr. Hoogestraat and
23 Mr. Cooch did an excellent job in their depositions. But
24 it is an important point to understand, and for the jury
25 to understand when they're speaking in their own capacity,

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in their individual capacity versus when they're speaking on behalf of MCI.

So taking, for example, their reference to -- and I'm looking at Page 5 of their motion from Mr. Hoogestraat's No. 14, talking about rounding corners, MCI knew that rounding the corners of buses as opposed to keeping them at right angles would improve the aerodynamic efficiency.

Number one, that wasn't general aerodynamic efficiency, it wasn't a topic listed in the 30(b)6 designation. And he admitted that he's not -- Mr. Kemp asked: "So round is better than tight angles, is that fair to say?

"Answer: In a broad reference that's true?"

"All right. Is this your area, aerodynamics?"

"Answer: No.

So he's not purporting to be an expert on aerodynamics in general, although he can discuss what MCI did in terms of their testing for the relevant time period.

We already discussed the 1993 wind tunnel tests. Again, the topics for which he was prepared only required him to represent MCI on the topics of testing between 1997 through 2016.

Now they come back and say: Well, there was a

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1 catchall at the end that said the design process for all
2 buses. But I think when you have a specific topic like
3 wind testing for a specific year period, it then isn't
4 fair to say that the witness must, therefore, be the
5 managing speaking agent for testing outside of that
6 period. If they designated a specific period, they should
7 be limited to that period.
8 Next, moving on to this issue of visibility and
9 proximity sensors, Mr. Hoogestraat actually does a good
10 job of explaining why that term, "proximity sensors," is
11 misleading.
12 But, again, his general pronouncements about
13 visibility and what he thinks are the -- would be -- I'm
14 sorry, let me look at the actual motion. So they say,
15 again, on Page 7, an A pillar in the J series creates,
16 quote, unquote "somewhat of a blind spot.".
17 His testimony is really about all vehicles, but
18 be that as it may, he's referring to Mr. Kemp's
19 hypothetical of a glass vehicle that even in that
20 situation, Mr. Hoogestraat is saying even then there would
21 be a blind spot, because if you place a mirror, that's
22 going to obstruct the place where you have the mirror.
23 But, again, that wasn't part of his preparation
24 as a 30(b)6 witness. That's just talking about his own
25 knowledge and his own understanding of how issues of

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1 visibility works. He wasn't designated as our visibility
2 expert or our proximity sensors expert. He was just
3 talking about how the design process worked at MCI.
4 Again, on the topic of a nonbraking sensors, they
5 asked about the parameters of design, and because the
6 design parameter was a collision mitigation system. So
7 what MCI was looking for in terms of these proximity
8 sensors was that a collision mitigation sensor that
9 actually would be integrated with the engine was
10 deceleration and the brakes.
11 So for him to then -- for Mr. Kemp then to ask
12 him about, okay, well, would it have been feasible to use
13 a nonbraking sensor, one that just tells you if there's
14 something in the area, that's not really part of his
15 designation as a 30(b)6 witness, because he had the design
16 parameter that they wanted something that was braking,
17 that was integrated with the brakes and the engine.
18 So he can talk from his own knowledge perhaps
19 about what might have been available, but that wouldn't be
20 a statement that he's making on behalf of the company for
21 which his deposition was noticed.
22 Same thing with his speculation about the
23 existence of after-market, nonbraking side detection
24 sensor, and then again with the barriers, the S-1 guard.
25 Mr. Kemp asked Mr. Hoogestraat a hypothetical

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about whether cyclists could get run over. And, again, I don't think we're afraid of his answer, because I think it's common sense that of course it's potentially possible for cyclists to get run over by a bus, just like they could get run over riding a vehicle.

But that wasn't strictly speaking the topic for which his deposition was noticed, to speculate about whether a cyclist could get run over in general.

There are a few inaccuracies in their paraphrases of his testimony. They transform dates that Mr. Hoogestraat approximated into these exact dates that talk about rounding corners generally, or in his deposition rather he talked about the aerodynamic efficiency of rounding corners generally, but then they discard the "generally" and say it's absolutely better.

They talk about no line of sight studies were done for the J series. That wasn't his testimony either. He talked about the difference between computer models for which there were studies done, and seated studies where you would actually sit in the seat and explore blind spots in that scenario.

Also, they talked about a customer who requested, customers have requested S-1 guards from MCI as recently as 2016. But, again, a customer there didn't actually request an S-1 guard from MCI. It was only in 2016, and

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1 it was only for a different coach, the D coach.
2 But the purchaser decided not to have MCI install
3 them, and Mr. Hoogestraat thinks that the purchaser may
4 have installed them themselves, but it wasn't something
5 that they insisted that MCI do.
6 Turning on to Mr. Cooch, he was not a 30(b)6
7 deponent. However, again, we're not saying that he
8 wouldn't necessarily be a managing speaking agent for any
9 purpose, but it's important to look at the specific
10 testimony that they apparently want to offer.
11 So he might be a managing speaking agent for
12 these purposes, but not for other purposes. And, again, I
13 think it is important to distinguish between the personal
14 experience, his personal understanding where he can talk
15 about what he thinks, what he knows, versus when he's
16 talking about a process that MCI put in place, or
17 something that MCI would have known. The latter he might
18 be managing speaking agent. The former, that's just his
19 own personal knowledge.
20 So, for example, again, Page 5 of their motion
21 No. 15 now for Mr. Cooch. This one, a bus moving at 25
22 miles per hour will displace air. Again, we're not afraid
23 of that statement, although it is not quite accurate to
24 state a moving bus. Any moving bus will displace air, not
25 just at 25 miles per hour.

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1 Down at the bottom of Page 5, the effect of
2 reducing air displacement would be to lessen what a
3 bystander or a bicyclist would see. That, again, sort of
4 mischaracterizes his testimony, because he can't reduce
5 air displacement if you're talking about a bus that is of
6 consistent volume, the amount of air being displaced is
7 going to be the same.
8 What he talked about is the effect of reducing
9 aerodynamic inefficiency or drag, just to make that point
10 clear. There again, that's his personal opinion. He's
11 not talking about that as a representative of MCI, he's
12 just talking about what he understands about aerodynamic
13 effects.
14 Same thing with respect to what he thinks would
15 happen, the effects of air displacement at higher speeds
16 at 55 miles per hour.
17 Now, here's I think an important one on Page 6 of
18 their motion, they talk about MCI does not have a
19 responsibility to inform its purchasers about air blast or
20 turbulence.
21 When he's talking about the duties of MCI, or
22 rather the lack of a duty of MCI to train drivers, because
23 drivers of motor coaches have to have specialized
24 licenses, he's not speaking about his expertise or his
25 area of policy making within MCI as the head of

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engineering.

He's just talking about what he thinks, you know, a driver who has a specialized license would be trained about. But it's not within his purview as a designer to say what would be or would not be something that MCI has to disclose to purchasers.

And for that matter, back on Mr. Hoogestraat talking about the price of the vehicle, that's not something that's within his purview as part of the design team.

Again, there are a few things that Mr. Cooch learned during the deposition talking about the Mercedes sensors, the Vendec sensors. He has very educated opinions about those items when they're brought to his attention, such as why sensors that were available from suppliers in Europe might not be available from suppliers in North America, but that wouldn't necessarily be an opinion rendered on behalf of MCI.

That's something he's learning for the first time during his deposition while he's still employed with MCI, and trying to figure out, okay, what do I do with this information.

There are a few inaccuracies, again, in Mr. Cooch's deposition talking transforming approximations into exact testimony. I don't want to get into all of

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1 those. One thing that did strike me though is, they did
2 talk about the availability of side sensors.
3 They characterize his testimony as side sensors
4 were supposedly not available in the 2005, 2006 time
5 frame. He did limit his testimony to the availability of
6 side sensors that wouldn't have the kind of false
7 positives that would make it infeasible for use on a motor
8 coach.
9 I think I'll leave it there since I've talked
10 quite a bit. If Your Honor has any questions?
11 THE COURT: No questions. Thank you.
12 MR. KEMP: Judge, I was watching the Grammys
13 last night, and a commercial came on and it had a glass
14 bus in it. And I went, wow, this would have been helpful
15 for questioning the witnesses. But it was interesting.
16 In any event, they start out by saying that I'm
17 mischaracterizing the testimony by these parentheticals.
18 Well, I'm not playing with parentheticals, I'm playing the
19 actual testimony. That's what we're asking to be done, to
20 play the actual testimony.
21 And they have the right under the Rule of
22 Completeness that if there's a question or answer
23 afterwards or before that makes it more complete, they can
24 ask that that be played too. They do have that right. So
25 there's really no argument that we are mischaracterizing

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1 it.

2 Now, let's take a look at their primary argument.

3 Their primary argument is that: Oh, he really wasn't a

4 PMK on those things. If you take a look at the PMK

5 designations 4, 5 and 6, just those, he's the PMK on the

6 general parameters of the design or engineering for right

7 side visibility for the time period 1997 to 2016,

8 including but not limited to this bus.

9 He's the PMK for visibility studies, testing or

10 modeling for right side visibility for that time period.

11 He's the PMK for No. 6, the general parameters of the

12 design or engineering of any and all proximity sensors

13 being designed or investigated.

14 You take a look at 11. He's the general -- he's

15 the PMK on whether it's feasible to place an S-1 guard.

16 14, he's the PMK on protective barriers designed or

17 engineered to protect human beings, including but not

18 limited to bicycles from contacting the J4500.

19 So these are very broad PMK depositions. And

20 they produced them, we took the deposition. There was no

21 opposition at that time that: Oh, he's really not the PMK

22 or 30(b)6 witness on these areas.

23 So, Your Honor, the argument that it was a narrow

24 30(b)6 designation as opposed to a broad one just doesn't

25 fly when you look at the actual 30(b)6 designations.

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Now going to Mr. Cooch, they say: Oh, Judge, we can't let the Vice President of Design, who admits knowing about the air blast danger, admits knowing that there could be interaction with bicyclists and that it might not go over the bicycle. He said that.

He is the head of engineering and designing. He said that one of their objectives was to try to make the bus more aerodynamic. They didn't do it, but that was at least an objective, so he's looking at aerodynamics.

And they don't want him to testify about air blasts. And what they cited to you was the testimony where he says MCI does not have the responsibility with regards to air blasts.

Well, they forget to tell you what he said in the follow-up because he said: Well, if MCI, the maker of the product that knows about danger doesn't have responsibility, who does.

He says, well, you know, I think Nevada DMV should be training all the bus drivers in Nevada about the air blasts. That's who has the responsibility. That's the testimony they don't want to come in under this particular designation.

But he's the head, the Vice President in charge of design knew about the air blasts, clearly knew about it. And when I asked him why they didn't warn about it,

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that's what he said. That's DMV's job, that's not our job as the manufacturer.

So in any event, stepping back a little bit, we provided the specific designations. Until today, until right now we have not had any objection to them. Certainly, the opposition doesn't make any objection to any specific designation.

So with regards to the limited number that we've got, we've got 22 on Virgil and 26 on Mr. Cooch, those should be -- the motion should be granted limited to those 22 and 26.

THE COURT: Okay. Thanks. Let's go to Plaintiff's Motion in Limine No. 16. This is a Motion to Preadmit the June 2001 Article as Notice of Potential Rear Tire Suction Hazard and Need for --

MR. CHRISTIANSEN: We'll withdraw that motion, Your Honor.

THE COURT: Withdraw?

MR. CHRISTIANSEN: We'll withdraw that motion.

THE COURT: Okay.

MR. CHRISTIANSEN: I told you I was going to be your favorite by the time this was over.

THE COURT: So Plaintiffs' Motion in Limine No. 16 is withdrawn, correct?

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MR. CHRISTIANSEN: That's accurate, Judge.

THE COURT: Okay. Very good. Shall we go to 17 then?

MR. CHRISTIANSEN: Yes, ma'am.

THE COURT: Go ahead.

MR. CHRISTIANSEN: Judge, this is my Motion to Admit Evidence of Facts and in a way couches constituting or establishing Defendant's consciousness of responsibility. And I'll go in sort of the easiest order.

Kayvan Khibani is killed April the 18th. From about three weeks of the Defendant's filing at (inaudible,) and within a couple of days of me -- Mr. Kemp starting depositions here, and me flying to Chicago to take some gentleman, Mr. Plants' deposition.

The evening before the depositions we get, we being the Plaintiffs, get an email supplementing with what appears to be handwritten statements written in the first person. They both start with: "I, Robert Peers", "I, Mr. Plants, I'm X years old, live at some place outside of Chicago, work here, was on the bus, signed by both of those persons.

As I'm looking at those, you know, in a hotel on the outskirts of Chicago, was apparent to me that they are in the same handwriting, and that they couldn't have been written by these persons individually.

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1 So we have -- I guess Mr. Roberts and I have a
2 series of emails back and forth, and it ended in a: Good
3 night, Pete, because we couldn't resolve it.
4 The following morning, Special Master Hale orders
5 the investigator and his file to be produced. And what we
6 established that day with Mr. Peers and Mr. Plants is that
7 MCI through its Texas counsel, who is present here today,
8 retained Sunny Hildreth, a Texas licensed investigator.
9 They sent him to do private investigation in
10 Illinois and in Nevada, both in violation of Illinois law
11 and Nevada law, where you have to have a license. In
12 Nevada it's a gross misdemeanor, in Illinois it's a
13 misdemeanor.
14 So both tasks illegal in nature. You can't go to
15 different states that you don't have a license in and
16 conduct investigations. Worse than that is the substance
17 of what Mr. Hildreth did as it pertains to -- and I'll
18 just keep it simple -- Mr. Peers.
19 And I laid this out in the motion and reply at
20 great length, and I won't go back and go through it all,
21 and shows Mr. Peers bits and pieces of the Plaintiff's
22 Complaint, gets Mr. Peers to agree that portions aren't
23 true, that things like the speed of the bus, which he
24 couldn't have observed from where he was looking, he gets
25 him to say, well, he was traveling at a safe speed.

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And the next day I take Mr. Peers' deposition, and when confronted with these false statements that are attributable to him, he says just that; that they're wrong, they're fabricated, he feels taken advantage of, he feels that this guy used his ex, quote, unquote "FBI," pulled out his fake badge and made Mr. Peers essentially adopt Mr. Hildreth's opinion, an agent of MCI, as true when it wasn't true.

And Mr. Peers doesn't a little bit do this, Your Honor, but by my count about 15 times he puts that Mr. Hildreth lied in the statement that he, Hildreth, wrote as if he were Peers. And that he fabricated that he felt spun, or the testimony had been spun, et cetera.

So I took that information, passed it on to former District Attorney David Roger, he was a Prosecutor for 25 years here in Clark County, the last eighth of which he was the elected District Attorney, tried probably as many murder cases as anybody in town.

He currently is general counsel for the Police Protective Association, so he represents all the --

THE COURT: So I'm going to disclose that I have been endorsed by that Police Protective Association in both of my campaigns; first my retention and then my re-election. And I can be fair and impartial, but you need to know that.

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MR. POLSENBERG: It would surprise me if you didn't.

MR. CHRISTIANSEN: Thank you, Your Honor. So he represents all the law enforcement officers in line, troop line, supervisors, et cetera for Metro.

And he takes a look at Mr. Peers' deposition, along with Mr. Peers' Sunny Hildreth statement as if it were written as Mr. Peers, and finds -- comes to a conclusion by clear and convincing evidence that --

THE COURT: Mr. Christiansen, why don't you review that again, because I wasn't following you?

MR. CHRISTIANSEN: Sure.

THE COURT: And, also, I'd like to disclose that I attended the same high school as Mr. Roger, but did not know him because he was a lot younger.

Now I want you to start fresh, because I want to pay attention.

MR. CHRISTIANSEN: You could have missed him, he's awful short. So what Mr. Roger concludes in his capacity as an expert with qualifications that have gone unchallenged, is that by clear and convincing evidence Mr. Hildreth, an agent of MCI illegally, because he doesn't have a license to be doing a private investigation in Chicago, is influencing falsely evidence, and causing a violation of NRS 199.150, which says, "Every

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1 person to offer false evidence shall be guilty of a gross
2 misdemeanor."
3 Mr. Roger concluded that Mr. Hildreth's statement
4 written as if he were Robert Peers constituted false
5 evidence in light of Mr. Peers' under oath sworn
6 deposition statement.
7 He also concluded that it was a violation of
8 NRS 199.200 that says, "every unqualified statement of
9 that which one does not know to be true is equivalent to a
10 statement known to be false."
11 So both of those are criminal violations
12 substantively from a procedure which is illegal
13 procedurally.
14 So what MCI does in the course of this case is
15 hire an investigator who, in violation of the law for
16 obtaining the statements, because he can't do it, it's
17 illegal, produces false statements as if they are true.
18 He does that during the litigation and what
19 happens is, Your Honor, as you recall, Katie Barin was
20 ill. We knew we were going to have to -- she passed
21 October the 12th. I think we took her deposition
22 September the 20th, it was a Friday afternoon. I think
23 the 21st was her last good day.
24 Preparing Katie for her deposition, she needed to
25 understand sort of what was going on in the case, and her

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1 son Aria was present. Katie couldn't last about an hour
2 in a session, so for a week or so I would go for an hour a
3 day and meet with her, and her sons would be there
4 sometimes.
5 Aria got to witness me having to tell his mom
6 that the Defence hired an investigator to try to blame her
7 dead husband and their dead father.
8 And Aria describes, and I put that in my papers,
9 the effects that had on his mom. I think he said it made
10 her sad, it made her angry, and at one point I think he
11 said it devastated her.
12 Similarly, you will recall that in August of
13 this year, so the following month, in an effort to have
14 Your Honor reconsider Judge Tiara Jones preferential trial
15 setting, she set the trial when your Honor had a personal
16 issue and was out.
17 THE COURT: Yes.
18 MR. CHRISTIANSEN: They came back in here,
19 they being MCI, and held up a report of an epidemiologist,
20 Dr. Day, and essentially said Dr. Barin and her physicians
21 were fabricating or magnifying the extent of her illness,
22 and gave you a statistic and said she was going to live
23 another 1.7 years.
24 That was in September. She was dead by October
25 the 12th. Similarly -- I'm sorry, it was in October, she

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was August -- in prepping Katie for her deposition, she had to learn that the Defense was accusing her of exaggerating her illness, and that they'd hired an expert to opine as such in an effort to continue the trial that she was desperately holding on to try to live until.

I moved and seek Your Honor's permission, Aria Khibani, the 16-year-old, witnessed that, and I quoted from his deposition what he saw, what personal, first-hand knowledge he observed, how that affected his mom.

That was done. I think Mr. Barger was at that deposition with me. They chose to not ask a single question of Aria or Khian or Cia McBarren, the guardian ad litem, or Marie Claude Barin, the guardian of the boys, not a single question.

So I moved to admit out of an abundance of caution, and asked you for a jury instruction that I had used in the past.

And we got an opposition, opposition of my friend, Mr. Henriod, I think he accused me of seeking permission to misbehave, which I knew tickled something in my memory, but it took me a bit to figure out, and longer to find it.

And that was back, I don't know, some years ago in a case called Eldridge versus Granite Construction, where I caught a lawyer hiding witnesses, and a Defendant

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threatening witnesses.

Judge Mariam Shearing, she had just retired from being the Chief of the Nevada Supreme Court. It was her first jury trial as a Senior Judge, gave me the identical jury instruction that I thereafter hired Mr. Polsenberg and Mr. Henriod to defend the verdict I got in a work comp case, the first work comp case to get to a jury since the Kennecot case in the 50's.

That was my supplement, where those accusing me of misbehaving defended the very instruction that I'm requesting, or one very similar.

And to which the response was: Well, hey, Judge Shearing, Justice Shearing acting as a Judge found that to be very improper, and they had found what I did to be improper and they attached her order.

But, Your Honor, if you go to Page 6 of 11 of Judge Shearing's order, and this is a posttrial order where before she was a Justice, Kris Pickering, who was hired after the verdict, argued that I shouldn't have been allowed to do those things, that consciousness of guilt and Defendant's conduct after the fact, much like a bank robber's flight from a bank robbery, a flight all the time gets introduced and we get instructions that say flight can be consciousness of guilt.

Whether somebody ran or didn't run doesn't prove

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that they robbed a bank, but it can prove that they knew they didn't want to get caught at the bank, so they took off. Justice Kris Pickering argued that it was improper.

Mr. Polsenberg and Henriod argued it was completely proper in that context. And Justice Shearing wrote, "There's no dispute that emotional distress is not actionable and, therefore, irrelevant. However, that testimony was intertwined with testimony regarding compensable suffering." That's a quote, "regarding compensable suffering."

Regarding compensable suffering, I would suggest she was exactly the same as the grief, sorrow and mourning recoverable by Katie Barin as the wife of Dr. Kayvan Khibani, who had died as a result of the defective product this Defendant placed on the market.

And I want to sort of walk the Court back to in the Eldridge case there were two specific instances of misconduct. And the one that I got the jury instruction for, the Defense sort of lumps them together.

The first was a lawyer misleading a Judge that he knew where our witness was. He told the Judge he didn't. I went and found him in Sparks, got a statement from him that he'd been in contact with the lawyer, promised his job back.

The Judge gave me a stipulation to remedy that.

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1 So the jury instruction didn't come from that, it came
2 from the second witness that the same Defendant, Granite
3 Construction, maintained they couldn't find. It was
4 another laborer who witnessed the events where my client
5 was hurt, who I located in Indio, California.
6 I know that I told the other side I had found him
7 and he was coming. The next day while he's at the Indio
8 airport, three Granite Construction trucks show up to his
9 trailer home, scare the living daylights out of his wife,
10 page him in Indio at the airport and tell him: If you go
11 to Vegas, you're going to have big trouble.
12 From that, Justice Shearing gave me the
13 instruction that said a Defendant's conduct before, during
14 and after is something a jury could consider when
15 determining what the Defendant's intent is. And I call it
16 consciousness of responsibility.
17 So that's what I'm asking to do here. I will
18 walk back from my request to talk about what I deemed as
19 frivolous removal. I just want to talk about the first
20 two, the Dr. Day and the investigator.
21 And I can give you by way of sort of common
22 sensical reasoning. Judge, imagine a situation where my
23 investigator, in violation of a different state's law,
24 goes out and takes the same type of statement and twists a
25 witness's words up, and the Defense learns about it?

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And I'm trying to make it good for my client, and it turns out it's good for them, not only would I be at the State Bar defending myself, I'd probably be conflicted off the case.

And then imagine further that I get a doctor to opine falsely that my client is sicker than she really is to get a preferential trial setting. Like, he knows she's not going to die, but he says she is going to die in a letter, so I can come argue to you and try to somehow pull the wool over your eyes that I'm entitled to a quick trial setting.

I can't imagine there's a lawyer on this side that says that that would be inadmissible, or either one of those would be irrelevant. It's only irrelevant and it only becomes a litigation tactic that they want to hide behind when it's done.

And you can't hide behind illegal things. You can hide behind accusing somebody who is still alive who is dying a slow, miserable death of magnifying her pain and her suffering.

And you can't hide behind it when she learns about it when she's alive, and it increases her pain and suffering, according to her 16-year-old son who was not privileged to have to witness it.

For those reasons, I ask that -- the Court may

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wish to reserve ruling on a jury instruction, I would understand that and see how the evidence comes in.

But this is all relevant evidence. It all goes to Katie Barin's grief, sorrow, pain, emotional loss of her husband, and how it's increased by the illegal tactics, procedurally and substantively, on Mr. Hildreth's behalf.

And telling -- what is somewhat telling, because I asked Mr. Hildreth. I took his deposition because he had to make himself available within a week. I took his deposition right before that big storm down in Texas.

And I asked: Will you make yourself available to come to Vegas for a deposition? He wouldn't agree. Could you imagine a guy that wouldn't agree to come to a jurisdiction where he had been shown he just broken the law?

So it is relevant. It goes to elements of damages that are compensable. Both of them should come before the jury, and Aria should be able to tell what his mom went through when he learned that the Defendant wanted to blame her husband, and then call her a malingerer.

Thank you, Your Honor.

MR. POLSENBERG: Your Honor, this is a motion -- Dan Polsenberg. This is a motion to bring in evidence of consciousness of responsibility.

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Now, my very good friend Pete Christiansen says at the beginning of the day you're going to love him the most, because he's going to be short and he's going to be right to the point.

Well, he was not quite as long as he was last week when he argued against my Motion to Dismiss. He was pretty long there, and he was pretty emotionally invested in it. He talked about himself more than anybody else.

And when he talked about somebody else, he said there's not a lawyer on this side who wouldn't think if he had done these things, or that wouldn't be admissible. Well, hi. I'm a lawyer on this side, and none of this is admissible at trial.

This is a motion to bring in consciousness of responsibility. There are two types -- no, three types, because they've added a third one. There's three types of issues we're talking about here.

Mr. Christiansen touched very briefly on the real issue that he's alluding to, and that's consciousness of guilt. Ismael Santillanes, and that's spelled S-a-n-t-i-l-l-a-n-e-s.

Ismael Santillanes was being charged with murder, and this is Santillanes versus State. One, he was charged with a murder. And the police said to him: You know, Ismael, we'd like you to come down and have a lie detector

1 test.

2 And the night before his lie detector test, he

3 took off, he left town. And he's right, Pete's right,

4 that doesn't prove that he did the crime, but it proves

5 his consciousness of guilt in a criminal case.

6 But that's not the issue that we're talking about

7 here. The other issue where you can bring in conduct

8 unrelated to the act is the one that he brings in the

9 Eldridge case for. And the Eldridge case, that was

10 somebody who was forced by his employer.

11 That's the one where he says that he hired me and

12 Joel. He was told by his employer to climb drown into a

13 pit that led to a trench that wound up caving in. And the

14 Defendants raised the workers comp defense.

15 You cannot recover, you're an employee. You

16 cannot recover, unless you show deliberate, intentional

17 harm. And, yes, he's right, it's the first case that went

18 to a jury since Kennecot. Kennecot was the case that said

19 under no circumstances can you go to a jury.

20 And then we had the Faye's Pub case, F-a-y-e's,

21 in which the Supreme Court said, no. An intentional act,

22 yeah, that's an exception to workers' comp. So they

23 changed the law in Kennecot.

24 So we had to come in and we had to prove, and I

25 say we but, honestly, I am completely after the fact. So

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1 Pete had to come in, he had to prove intentional act.
2 And as we point out in our supplemental brief,
3 rarely do you get a circumstance where an employer is
4 saying I'm intentionally injuring you by doing this.
5 And you have to prove it by circumstances. And
6 here's what the Instruction 22 in that case said: "A
7 state of mind existing at the time a person commits an
8 offense."
9 This isn't Santillanes, this isn't afterwards.
10 At the time the person commits an offense may be shown by
11 the act, it's surroundings and circumstances and
12 inferences deductible therefrom.
13 It goes on to say, "The Defendant's conduct
14 before, during and after the events may also be evidence
15 of the Defendant's mental state." That means before,
16 during and after. In that case, the circumstance had to
17 do with conduct that the supervisor did about other
18 employees an hour afterwards.
19 What they want to bring in is a completely
20 different thing. They want to bring in litigation
21 conduct, and that's not admissible, not at trial. That's
22 what juries are for.
23 Mr. Christiansen came if here and said that if he
24 had done this, he would have been subject to the State
25 Bar. Yes. He would have been subject to sanctions

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1 motions. Yes.

2 What you do in discovery and what you do before

3 trial is something the Judge takes care of. It is not

4 something you introduce to the jury, and we've cited the

5 cases that say that.

6 And here are the three things that they say that

7 we did. First, they say that Claude Sonny Hildreth,

8 H-i-l-d-r-e-t-h, fabricated what these people said.

9 That's the word they use repeatedly throughout the briefs,

10 that it was fabricated.

11 But here's what he did. He wrote out -- when he

12 talked to them he wrote out these statements. Here they

13 are, he wrote them out. I've actually done statements

14 like this as somebody in a motor vehicle accident, and

15 then just write out what it is that I was saying, and then

16 I sign it.

17 Look, sure, really, were we trying to hide this

18 from Pete? It's the same writing in both of these. It's

19 not like he typed it up so it would look like there was

20 something else.

21 And each one of these witnesses, Mr. Peers

22 himself wrote, "I have read this three-page statement and

23 it is true and correct." He wrote that and he signed

24 that.

25 Mr. Plants also signed his. And he wrote similar

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1 wording. He wrote, "I have read this two-page statement
2 and it is correct." And then he also talks about an email
3 to a detective, and it is correct.
4 You know, in business court people are always
5 saying: Oh, well, look at that Affidavit somebody wrote
6 that says it's from the client, but the lawyers actually
7 wrote it.
8 Well, yeah, a lot of times lawyers draft stuff
9 for clients or for witnesses because they're focusing it.
10 There's nothing improper about that.
11 Now, probably tomorrow we'll get to the motion
12 about Dave Roger and the issues that he raises. But what
13 he's saying right now is that these investigation -- what
14 Plaintiffs are saying in this motion is that these
15 investigations were improper because it was -- first of
16 all, because it wasn't licensed, that Mr. Hildreth wasn't
17 licensed in Nevada and wasn't licensed in Illinois.
18 Well, that's not an issue for an expert. That's
19 just facts and law. We don't need an expert to come here
20 and say it. But that doesn't mean, that doesn't rise to
21 the level of misconduct that would be a subsequent tort.
22 If they wanted these things to be elements of
23 their damages, and that's what they're arguing because
24 they say it goes to prove that we caused additional pain
25 and suffering, additional grief and sorrow, and I argued

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1 the other day those are two different things.
2 So what they're saying is, he suffered a
3 completely different injury from what we did because we
4 defended a case. We defended a case, that we questioned
5 the science behind the diagnosis that we investigated
6 whether or not the Plaintiff's decedent had a causative
7 role in his own death.
8 I mean, Mr. Christiansen says that he went --
9 he's always talking about himself -- he went to the client
10 and he told them that this is what the Defendants are
11 doing, and they were shocked and they were sad and they
12 were mad.
13 This is why we don't let juries decide those
14 things. It is an improper argument, even in closing
15 argument, to get up and say the Defendants won't accept
16 responsibility, that's causing even more damage. This is
17 improper to give it to a jury, it's improper to even argue
18 this sort of thing.
19 And if you look at Mr. Roger's opinion, he's not
20 even saying this violates the standard of care. He's just
21 saying it's not the best practice not to have recorded it.
22 But, of course, he's talking about criminal investigations
23 versus civil. He's talking about public employees, people
24 who are investigators for the DA's office versus what
25 happens in civil cases.

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And he's going so far as to say we're supported perjury. We're supporting perjury because there are inconsistencies between the statement and what Mr. Peers testified.

And, again, he's right, we're focusing mostly on Mr. Peers mostly here. And it's unnecessary to get into this. We can handle this. This is hearsay. These statements are hearsay. They don't come in on their own.

And if we used it in for impeachment of Mr. Peers if he testified to one thing, and we said: Look, your statement says something else, he can then say: Well, that's not what I said to the investigator.

And we can say: Well, look, you signed it.

And he can say: Well, yeah, I signed it but I didn't read it. That's just standard impeachment, not any of this: Let's blame the Defendant stuff.

They're dropping the removal issue. Thank God, because that removal issue is so incredibly complicated with the federal issues involved, the laws involved. Judge Bulware (phonetic) didn't say we were in bad faith, we presented it.

I think they tried to present it to you the time I offered you to continue this trial, and you made clear you weren't addressing the bad faith issue or the removal. Oh, good. Let's give it to the jury.

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We opposed 120-day expedited trial setting; yes, we did. I mean, we were out there, I said before on these issues about Dr. Barin's cancer, we're out there in the never regions. We're out there in the extremes of science and law combined.

And now they're actually raising as an issue that we should get in front of the jury that we opposed this motion. You know, even if any of this were even admissible under the consciousness of guilt issue, and it's not, we'd have to look at the 403 issue. Darrell mentioned 403 before, I use 403. In Nevada it's 48.035.

But you have to weigh the probative value. There Isn't any probative value. The impeachment can be done as in a normal case against the prejudicial effect, and this is so prejudicial I submit this would violate due process to even get into this stuff.

This is not something for a jury to decide, this is something, if it should be decided, it should be decided by the Court. If there's a sanction, it should be done by the Court or the State Bar, but not something just to get in front of a jury to inflame and prejudice them.

And this is even more extreme because it's a punitive damage case. Remember, the issue in Eldridge was simply whether there was intentional conduct that would take it outside of workers' compensation.

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This is a strict liability case which is decided without even defect exists outside the normal parameters of negligence cases. So it's not even relevant to that.

But is it relevant to punitive damages? Is it relevant to malice? No. I submit it is even more prejudicial. We have additional due process rights in a punitive damage case, because it's quasi criminal and this just blows up the whole thing.

Ismael Santillanes. The Supreme Court reversed Judge Mosley when he admitted the circumstances of his leaving town, because they found under those circumstances at that it was too prejudicial. So even in an area of law where it is an accepted thing, that wasn't admissible.

I love Mr. Christiansen, but he is not being your friend by leading you into this issue. Thank you, Your Honor.

MR. CHRISTIANSEN: If fairness to Mr. Polsenberg, I don't believe he was in the case when these decisions were made and the conduct occurred. But you always know he doesn't like the relevant evidence when we start talking about due process, and I'm not your friend because I'm trying to lead you somewhere.

And I didn't give any of this testimony. Quote, "Investigator Hildreth then added, quote, 'when the bus overtook the cyclist and the bus was safely clear of the

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1 cyclist more than three feet'," close quote.

2 Mr. Peers denied making that statement during his

3 interview. The witness acknowledged Investigator Hildreth

4 was, quote, "flat spinning or fabricating the substance of

5 the interview."

6 "Question: Fair to say -- this is me asking

7 Mr. Peers questions -- "fair to say the statement is

8 littered with fabrication?"

9 "Answer: Fair."

10 "Question: Not your fabrication, the fabrication

11 of an agent of the bus company who told you he was an

12 ex-FBI guy, and so he wanted to write a statement out for

13 you, fair?"

14 "Answer: Correct."

15 All a violation of the law, and by clear and

16 convincing evidence. And I'm reading the conclusion of

17 Mr. Roger: "Based on my review of the statement in the

18 deposition, it is my opinion that there is clear and

19 convincing evidence that the Investigator Hildreth

20 violated NRS 199.150 by falsely transcribing Mr. Peer's

21 statement and/or not transcribing incriminating evidence

22 provided to him by the rulings."

23 And, respectfully, that is not a statute for

24 public proceeds. That's a statute for everybody. You

25 can't tamper with witnesses, it's illegal. They got

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caught doing it, it's admissible. Thank you, Your Honor.

MR. POLSENBERG: Just a procedural note. I think we have a motion we'll probably get to tomorrow that goes to Dave Roger.

MR. CHRISTIANSEN: It does, I agree with Dan. There's another one of theirs, it's like 14 or something that deals with Mr. Roger.

THE COURT: Okay. Let's go to Plaintiff's Motion in Limine No. 2.

MR. PEPPERMAN: Actually, Your Honor, I think Mr. Christiansen can confirm, No.18 and the motion on Dr. Stahl, as well as our motion on Dr. Panigrahy, can all come off given the Court's ruling on the Motion to Dismiss.

Plaintiff is not going to call Dr. Panigrahy, therefore, we don't need to call Dr. Stahl in the issue about the stress should not be an issue. If it does, we will re-up the trial, but I think all three motions can come off calendar given the Court's ruling on the Motion to Dismiss.

THE COURT: Okay. So you're paring them with -- I had them with Defendant's 7 and Defendant's 6 and Plaintiff's 18.

MR. PEPPERMAN: No, no, no. It was Plaintiff's 18, Defendant's 16, and then the last

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1 Plaintiff motion on Dr. Stall didn't have a number. It
2 would be the last one on today.
3 THE COURT: Okay.
4 MR. CHRISTIANSEN: That's right. Judge, the
5 Plaintiff agrees that we're not calling Dr. Panigrahy. I
6 think that means Mr. Russell agrees Defense is not calling
7 Dr. Stahl. And both sides agree the unrelated disputes
8 thereafter become irrelevant.
9 MR. RUSSELL: Correct.
10 THE COURT: Okay, very good. Thank you.
11 MR. PEPPERMAN: Your Honor, for the
12 record --
13 THE COURT: We're on 20 now, right?
14 MR. PEPPERMAN: Yeah. And I think Stahl was
15 19.
16 THE COURT: It was. I show it as 19.
17 MR. PEPPERMAN: Okay.
18 THE COURT: You can go ahead.
19 MR. PEPPERMAN: So this is our Motion to
20 Exclude Untimely Supplemental Report Filed by Defense
21 Expert Carhart.
22 THE COURT: Right.
23 MR. PEPPERMAN: MCI disclosed brand new
24 expert opinions from Dr. Carhart nearly two months after
25 the deadline to disclose these opinions. That's not in

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1 dispute.

2 The question raised isn't were these brand new

3 expert opinions disclosed nearly two months later. The

4 question is whether or not these late disclosures are

5 going to be allowed to stand.

6 And I think to answer that question in this

7 particular case, we need to look at the circumstances

8 surrounding it. And I say in this particular case,

9 because there has been the suggestion, and I'm not going

10 to dispute it, that this was an expedited case. We did a

11 lot of work in a short period of time.

12 THE COURT: Understood.

13 MR. PEPPERMAN: Both parties disclosed late.

14 We were both very accommodating to each other in terms of

15 allowing different types of extensions past deadlines.

16 And I think for the most part we worked very well and

17 accommodated each other, and we did a lot of work in a

18 short period of time, and I think everyone is to be

19 commended for that.

20 But there are limitations. And I would suggest

21 that this instance exceeds any reasonable limitation on

22 what occurred in this expedited case. And I say that

23 because, one, these aren't supplemental opinions, they're

24 brand new opinions disclosed two months late for no

25 explanation whatsoever.

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1 The ostensible reason for the late disclosure was
2 they're based on -- the new opinions are based on helmet
3 data that wasn't available to them until November 9th.
4 Now -- and that may be true that they didn't do the scans
5 or whatever to the helmet until November 9th.
6 But that helmet has been available to them since
7 the day that we filed this case, and it's been at our
8 office and they could have inspected it or scanned it or
9 done whatever they needed to do with it at any time.
10 They just didn't do that. It wasn't lack of
11 opportunity that they didn't get this helmet data before
12 the expert disclosure deadline. It was -- there's no
13 explanation for why they didn't do it earlier.
14 But, really, Dr. Carhart explained his new
15 opinions had nothing to do with the new helmet data. That
16 was the excuse that the attorneys gave for the late
17 disclosure.
18 He said he decided to come up with the new
19 opinions because he read Dr. Stallnicker, our competing
20 expert's deposition, and drummed up some new things that
21 he could do to try to rebut our expert's opinions that he
22 didn't previously do when he timely disclosed his report.
23 So that's the real reason here. They disclose a
24 timely report from Dr. Carhart. That report rebuts the
25 report of our expert. Then our expert's deposed and

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1 testifies.

2 Then they come up with some new ideas of what

3 they can do to further rebut, and they come up with some

4 new things and they do some new testing and then they

5 disclose these new rebuttal opinions nearly two months

6 late without any opportunity to rebut them ourselves.

7 So I think the prejudice in that is plain as day.

8 You disclose new rebuttal opinions after you've already

9 disclosed earlier rebuttal opinions based on the

10 deposition of an expert two months late without any

11 opportunity for rebuttal in response.

12 That's not what the rules contemplate, and it

13 gets worse from there. Because based on the time line we

14 disclosed experts, they disclosed their experts in

15 rebuttal. They deposed our experts, then we start

16 deposing theirs.

17 We set Dr. Carhart's deposition on his timely

18 disclosed expert reports for November 17th. The night

19 before we get an email saying: Sorry, this expert

20 deposition tomorrow is cancelled. Dr. Carhart is no

21 longer available. We're going to have to reschedule it,

22 I'll get you a new date, no explanation whatsoever.

23 Then we get an email saying the next time

24 Dr. Carhart is available is December 12th for deposition.

25 So we respond and say: Well, December 12th, is there any

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1 way we can schedule him earlier than that? We're ready,
2 we want to take this guy's deposition.
3 No, sorry, December 12th is the soonest. Okay.
4 December 7th, which is a Friday, Saturday is the 8th, 9th,
5 his deposition is the next week. That's when we get these
6 new rebuttal opinions, and that's when it became clear
7 what had happened.
8 They knew on November 16th that they wanted to
9 disclose these new opinions. They knew that if
10 Dr. Carhart's deposition went forward as scheduled we
11 would depose him on his existing opinions, and they
12 foresaw this motion coming in the future.
13 They knew they would have a much tougher argument
14 to make if Dr. Carhart's deposition was in the bag, and
15 they had to come in and explain why he should be allowed
16 to disclose brand new opinions after his deposition, and
17 we weren't given the opportunity to ask about those
18 opinions.
19 They knew that, and that's true. And we call
20 them on it in the motion, and they respond capitalizing on
21 this exact thing. They say: Well, they got a chance to
22 depose him on the new opinion, so no harm, no foul.
23 So they knew what they were doing. They
24 unilaterally cancelled the deposition because they wanted
25 to disclose late opinions.

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They rescheduled the deposition unilaterally for a month so Dr. Carhart would have plenty of time to disclose these new opinions before his deposition, so that at this day at this hearing they could stand up here and say: No harm, no foul, Judge. They deposed him on those new opinions, what's the big deal.

Now, if I were Mr. Kemp, I'd probably call them clever little people or something, but I don't think can I get away with that personally, so I'll just let the Court decide.

THE COURT: Better than yourself, right?

MR. PEPPERMAN: I'll let the Court decide what that is, but that type of circumstance should not be rewarded, and that is the implication if you allow this late disclosure of brand new opinions under this gamesmanship with the deposition and continue it.

It would be essentially rewarding this type of gamesmanship, and that goes far beyond neutral accommodations, late disclosures; hey, this expert is busy, can we disclose a supplement here or there, which we've both done.

It's beyond that. It's intentional gamesmanship to disclose late opinions, and we submit that that should not stand. Thank you.

MR. BARGER: Your Honor, in this courtroom

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1 there seems to be a lot of emotion, a lot of rhetoric.
2 I'm not used to quite the rhetoric that I've heard, but I
3 want to talk about the facts, not rhetorical ideas.
4 First off, I would agree with Mr. Pepperman, this
5 case has been on an extremely expedited basis. I mean,
6 when I first came out here, I heard in court normal
7 products like -- if you remember, there were six
8 Defendants to begin with.
9 A normal product liability case would take three
10 years to get to trial, so we're going to trial in four
11 months, okay. We understood that.
12 So everybody is doing their best. In fact, we
13 were told by the first Judge, and I'm sorry, I could not
14 remember her name.
15 THE COURT: Judge Jones.
16 MR. BARGER: Yes, ma'am. Those schedules
17 didn't work, then we could try to address some of them,
18 and we have tried to work with each other. But here's
19 what happened with this issue.
20 So we produced a report of Dr. Carhart on October
21 19, timely. If you remember, Bell helmets was a party to
22 the case. It was their helmet. They had taken the
23 helmet, they had taken it, they had done CAT scans on it
24 and nothing was ever produced because they settled.
25 They settled, and I think the Court approved of

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1 that good faith settlement just recently.
2 THE COURT: I did.
3 MR. BARGER: And we tried to get the data,
4 our expert from the CAT scans, and it could not be
5 gathered appropriately. So we did produce a report on
6 October 19th.
7 On December the 6th, there was a supplemental
8 report that they're now complaining about, and that
9 supplemental report is the CAT scan that we finally got
10 the helmet. Now, let me go back and talk about that.
11 And I'm not here fussing at lawyers about delay,
12 this has all been very fast. But Mr. Roberts asked on
13 numerous occasions to let us get the helmet, send it off.
14 Yes, it was in the hands of the Plaintiffs at the
15 time, but we wanted to get the helmet, send it off and
16 have the CAT scan done because we don't have access to
17 everything that Bell did, because they were no longer a
18 party to the case.
19 Not intentionally, but there was a pretty good
20 delay. One of the reasons was, the helmet was in the
21 hands of the Plaintiff's expert and we couldn't get it.
22 And I was not privy to those conversations, but I've
23 talked to Mr. Roberts about it.
24 And the fact is, we tried to get the helmet, we
25 could not get the helmet. There's no act by the

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1 Plaintiffs to try to delay, I'm not accusing them of
2 malfeasance or anything. The fact is, it was in the hands
3 of somebody else.
4 We finally got it and they did the CAT scan up in
5 Boston, Dr. Carhart's group did, and they had to download
6 a lot of data and they were working on that. So the
7 helmet was obtained after October the 19th when the report
8 was done, but not because of our fault because we couldn't
9 get it.
10 Now, they are correct, there was a deposition
11 set, and I believe the date was November 17th. The
12 problem was, Dr. Carhart had not had time to get all the
13 data downloaded from the CAT scan, and using all these
14 programs that these biomechanical people use.
15 So the night of November the 16th it had not been
16 produced to the Plaintiffs. So we knew that if we
17 produced Dr. Carhart for depositions, he would have to
18 come back, and everybody would have to go back to wherever
19 they went to Alabama to do the depositions, so we said
20 we're going to cancel the deposition.
21 He got the stuff downloaded in the program and we
22 produced the report on December the 6th. Four days later
23 the deposition was taken of Dr. Carhart, and Mr. Kemp took
24 it and he asked questions about that supplemental report.
25 He had the opportunity to ask questions as much

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as he wanted. He did take that opportunity, and I'm going to presume knowing Mr. Kemp from this trial, he asked everything that he wanted to do.

And so they did get the information. We didn't have to go back and do a second deposition, and so I think the Nevada statute -- and I apologize, I have to deal with rules that I don't normally know, but there's a supplemental statute which is NRCP 26(e)1 does require supplemental disclosure.

So we did supplement it, and we did show this is the data on the helmet that we had no opportunity to get before because of the circumstances, not due to our fault, but just due to how fast the case went and then Bell settling out.

Now, may I get some water?

THE COURT: Certainly.

MR. BARGER: So kind of in conclusion, it wasn't an intended act, it was that we supplemented when we did finally get the helmet. They had every opportunity to depose him, and I guess if they wanted to name somebody, their own expert to say that he's wrong, then they already have Dr. Stallnicker to do that.

Now, I want to point out one thing that Mr. Russell reminded me of a while ago. They have an expert -- and there's not a motion on this, because this

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1 just happened on Friday -- they had disclosed an expert
2 named Larivere. He's a rebuttal expert.
3 But it turned out that when he was deposed on
4 Friday, he really wasn't a rebuttal expert, he had been
5 retained as an initial expert back in August.
6 He did some further testing, never named as an
7 expert. He did some further testing on January the 20th,
8 less than a month from the trial, and they disclosed it to
9 Mr. Russell Thursday night, the day before the deposition.
10 So good for the goose is good for the gander.
11 So we're stuck with that and we have to deal with
12 it. But the fact is, he shouldn't strike the opinions in
13 the December 6th or supplemental report of Dr. Carhart
14 because of the circumstances of the expediency of the
15 case, and the fact is that we could not get the helmet.
16 And they had every opportunity to depose him or
17 do whatever they needed to do. Thank you, Your Honor.
18 THE COURT: Thank you.
19 MR. ROBERTS: And, Your Honor, could I
20 clarify one thing?
21 THE COURT: Yes. I was just going to ask a
22 question, Mr. Roberts, about your attempts to get the
23 helmet?
24 MR. ROBERTS: Yes, Your Honor. This eye
25 witness testimony is so unreliable, it's hearsay testimony

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1 that Mr. Barger is offering.
2 I had made repeated attempts to get the helmet
3 data from the Bell lawyers. They had taken possession of
4 the helmet and it was our impression they had done a very
5 detailed and expensive CT scan of the helmet already.
6 They were trying to get that information to me,
7 and that's why we weren't doing our own scan for cost
8 efficiency and time savings. They had already done it,
9 let's just get this data and make our own scan.
10 And after they settled, I was told that we did
11 the scans, but we got raw data that has to be converted in
12 order to turn them into images, and it's proprietary so
13 there's nothing I can give you.
14 And it was at that point after the remand from
15 federal court we were -- I believe it was a Special Master
16 hearing after remand where I asked Mr. Pepperman if we
17 could get the helmet, because I was unable to get the scan
18 data from Bell.
19 He said we're planning to send it to the east
20 coast to one of our experts, but when it gets back I'll
21 give you the helmet. And then Mr. Russell followed up
22 with him after that to follow up on getting the helmet.
23 But we're not saying there was any inordinate
24 delay by Mr. Pepperman or Plaintiffs in getting us the
25 helmet once we realized we were going to have to do our

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1 own scans.

2 But, certainly, the compressed schedule that

3 Mr. Barger was talking about was all in effect here.

4 There was a lot going on, and it made sense to try to have

5 the Bell scans, rather than to repeat the exercise

6 ourselves. Thank you, Your Honor.

7 THE COURT: Okay. And then I would like you

8 to address the other expert, your most recent one?

9 MR. ROBERTS: Sure.

10 MR. KEMP: Your Honor, I actually had that

11 deposition. What he did on January 6th is, he repeated

12 part of the experiment he had previously done because he

13 had questions in his mind as to was whether or not there

14 was an additional variable.

15 So it wasn't a new experiment, it was the same

16 experiment that had previously been done.

17 MR. ROBERTS: And, Your Honor, if it helps,

18 I just found this. I couldn't pull it up here earlier.

19 It was on October 6th of 2017 where I wrote Mr. Pepperman

20 and said: Please let me know when the helmet is returned

21 from your expert, we still would like to do nondestructive

22 testing.

23 THE COURT: Thank you.

24 MR. PEPPERMAN: Now, everything you just

25 heard is well and good about the data and the helmet data

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1 and the scans and the supplemental information.
2 But we deposed Dr. Carhart, and Dr. Carhart in
3 his deposition revealed that his new opinions had nothing
4 to do with the data and the helmet.
5 He said clearly: I got the data on November 9th.
6 He had it on November 9th, prior to his November 17th
7 deposition. And he was producing that data. It didn't
8 change his opinions.
9 He wasn't offering new opinions based on that
10 data, he was disclosing it. He said he loaded it all up
11 to an FTP server. And when we asked him: You knew your
12 deposition was on the 17th, right?
13 And he said: Yeah. I was preparing for it the
14 night before.
15 And did you know that they suddenly cancelled
16 your deposition without giving us any explanation?
17 And he said: I don't know what they told you.
18 They told me that it wasn't going to go forward as well.
19 He was preparing, he was ready to go.
20 Then when we asked him what they told him, he
21 said they told me they were having problems downloading
22 the helmet-scanned data from the FTP server, and that we
23 needed to continue it for that reason.
24 Okay. If that is true and, like Mr. Barger
25 suggests, they cancelled that deposition for our benefit.

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1 Thank you very much. Then they download the data, they
2 produced it and they gave us a sooner date.
3 But when we asked for a sooner date they said,
4 no, sorry, December 12th, and here we are a month away.
5 Then we asked Dr. Carhart about his new opinions, and he
6 said: Well, I did it, I did new testing.
7 Well, when did you do this new testing? It had
8 nothing to do with the scanned data on November 9th.
9 I did testing on December 4th.
10 Well, that was after Dr. Stallnicker's
11 deposition?
12 Yeah. I saw his deposition, read it and I
13 thought: Oh, I could do some testing and disclose those
14 new opinions. And that's what they did, AND they
15 disclosed new opinions based on new testing that was weeks
16 after they had this helmet data.
17 So if we're going to look at the delay as this
18 helmet data, then you need to look at the whole picture.
19 Because they had the helmet well before November 9th.
20 They had the data November 9th.
21 Dr. Carhart had uploaded everything to an FTP
22 server for them to produce to us in advance of his
23 November 17th deposition. He was ready to go. He was not
24 anticipating rendering new opinions, those were his words,
25 exactly.

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1 Defense counsel decided to cancel his
2 deposition. He didn't even know why. And then they ask
3 him to do new opinions in rebuttal to Dr. Stallnicker. He
4 does new testing, discloses new opinions late, and we were
5 never given the clear story on that.
6 So, again, and I want to distinguish this from
7 certain situations, because we did. Mr. Larevere noticed
8 something in his testing and did a supplemental test and
9 disclosed that supplemental opinion.
10 And it's not a new opinion, it's based on
11 opinions that were already disclosed but, yeah, that was a
12 later disclosure. They have done the same thing.
13 This is not that situation. This isn't a
14 supplemental opinion based on previously disclosed things
15 that adds new data or new testing and an explanation on
16 how this new data supports a prior disclosed opinion.
17 This is a unilaterally cancelled deposition,
18 brand new testing, brand new opinions that deprive us of
19 the chance of having our own rebuttal opinions.
20 And under those circumstances and in this
21 instance, I would suggest that that is improper and
22 justifies striking the supplemental opinions only, not the
23 timely disclosed opinions, not the new helmet data that
24 may support some of his prior disclosed opinions, but the
25 new testing and the new opinions that were disclosed

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nearly two months late.

THE COURT: Okay. Thank you. I think we're done with Plaintiffs' Motions in Limine, correct? Okay. So I reserved a special setting for Wednesday, and is everyone on board with that?

MR. PEPPERMAN: Yes, Judge.

THE COURT: At 9:30. We'll start with Defendant's Motions in Limine.

MR. HENRIOD: Very good, Your Honor.

THE COURT: Thank you. Have a good evening.

MR. CHRISTIANSEN: Have a nice evening.

ATTEST: Full, true and accurate transcript of proceedings.

Maureen Schorn
MAUREEN SCHORN, CCR NO. 496, RPR

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Steven D. Grierson
CLERK OF THE COURT

CASE NO. A-17-755977-C

DEPT. NO. 14

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

*** * * * ***

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

Plaintiffs,

vs.

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

Defendants.

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE ADRIANA ESCOBAR
DEPARTMENT XIV
DATED WEDNESDAY, JANUARY 31, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 31, 2018;

P R O C E E D I N G S

* * * * * * *

THE MARSHAL: Please be seated. Come to order.

THE COURT: Okay. Today we are going to go through defendants' motions in limine. Why don't we get started.

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

THE COURT: Good morning.

MR. RUSSELL: We'll start with Defendants' Motion in Limine No. 1, and this relates to limiting one of the opinions by plaintiffs' expert, Robert Caldwell. There's a common theme through a lot of plaintiffs' oppositions to motions we filed related to their experts, and their mantra seems to be, well, this all goes to weight and not admissibility.

And while that's a common theme we hear and we see in the case law, that's not the end of the analysis, because if an expert's opinion is unreliable and is not the product of reliable methodology, it's inadmissible. It has nothing to do with weight.

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1 Hallmark makes very clear that to be admissible, expert
2 opinion has to assist the trier of fact and it has to
3 be the product of reliable methodology. And that's
4 what we're focused on here.
5 What we get in response to all of our motions
6 on the experts is a page and a half or two pages about
7 the experts' qualifications. And we're not always
8 challenging that. In Mr. Caldwell's case, I'm not
9 challenging his qualifications as an expert
10 reconstructionist. That's not what this motion is
11 about.
12 The plaintiffs also list some of the other
13 opinions he gives, and we're not challenging all of his
14 opinions. Some of his opinions are based on a reliable
15 methodology. But the one we're focused on in this case
16 is the S-1 Gard. And, again, to be admissible, his
17 opinions on the S-1 Gard have to be reliable. They
18 have to be the product of a reliable methodology.
19 And I -- I -- I use this as an example. If
20 Mr. Caldwell were to come into court and say, I think
21 the bus was going 65 miles an hour, I say, Well,
22 Mr. Caldwell, what is that based on? Well, one of the
23 witnesses who didn't see the bus at all, just heard
24 some noise behind him and I relied on that, and based
25 on what that person heard, I think 65 miles an hour,

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1 looks -- sounds reasonable. Did you look at the video?
2 No, I didn't look at the video. Did you talk to the
3 eyewitnesses? No, I didn't talk to them. Look at any
4 pictures? No. Look at the damage? No. That opinion
5 would be inherently unreliable, and it would be
6 inadmissible. You couldn't allow Mr. Caldwell to take
7 the stand and give that opinion hoping that the jury
8 won't give it any weight because it has absolutely no
9 basis in fact. His opinion becomes inadmissible
10 because it's unreliable. He didn't use any reliable
11 methodology and, therefore, he wouldn't assist the
12 trier of fact.
13 Well, that's what we're saying about the
14 S-1 Gard. Here, Mr. Caldwell admitted he's never held
15 one of these devices. He's never seen one up close.
16 He might have seen one out on a roadway on a transit
17 bus somewhere. He doesn't know how much it weighs.
18 He's not even sure what material it's made of. He
19 doesn't know what sort of injurious consequences it
20 would have if it hits someone. And he doesn't know
21 what kind of condition a guard would be in. Because we
22 went through some of the manufacturer's literature, and
23 it talks about varying conditions of the guard over
24 time, and what's a safe or unsafe condition and when
25 you need to replace it, that sort of thing. He doesn't

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1 know any of that.
2 But most importantly, he does not know what
3 the overlap between the tire and Dr. Khiabani's helmet
4 would have been. And why that's important is this:
5 Our experts have -- have laid this out, and they've
6 explained that when you install the S-1 Gard, if this
7 is the tire, the -- the guard gets installed a little
8 bit inside the tread, about an inch to an inch and a
9 half. That's what the manufacturer tells you. So
10 there's a part of the outside tire that is still
11 exposed. And our experts have looked at it and said,
12 well, based on our analysis, the way that
13 Dr. Khiabani's helmet impacted the tire, the S-1 Gard
14 would have just missed him. It wouldn't have actually
15 impacted him.
16 So I asked Mr. Caldwell, You would agree with
17 me to know whether the S-1 Gard would have made any
18 difference in this case, you'd have to know the overlap
19 between Dr. Khiabani's helmet and the -- and the tire.
20 And he said, Yes.
21 And I said, What's -- what is that overlap?
22 I don't know.
23 So he doesn't have a reliable methodology to
24 offer an opinion that the S-1 Gard would have made a
25 difference in this case. And that's what our motion is

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1 focused on. It doesn't go to weight. It does go to
2 admissibility because he doesn't have any reliable
3 methodology to offer that opinion.
4 Thank you.
5 THE COURT: Mr. Pepperman.
6 MR. PEPPERMAN: Good morning, Your Honor.
7 THE COURT: Good morning.
8 MR. PEPPERMAN: A few things. Number 1, I
9 want to be clear about what Mr. Caldwell's opinion is
10 on the S-1 Gard, because it's very narrow. It's based
11 on his accident reconstruction and his review of the
12 S-1 Gard product literature that he would have expected
13 the S-1 Gard to impact Dr. Khiabani's helmet.
14 Now, he doesn't say what the injurious
15 consequence of that was going to be. He doesn't say
16 this is what would have happened if it had hit him.
17 All he says is based on my accident reconstruction,
18 Dr. Khiabani's helmet and head was run over by the rear
19 wheels of the tire. If this S-1 Gard was installed
20 pursuant to the manufacturer's installation
21 instruction, I would have expected it to come into
22 contact with his helmet.
23 Now, when they argue that he doesn't know the
24 injurious consequences of what would happen, he's not
25 giving any opinion on that. When he -- he says he

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1 doesn't know the weight of the S-1 Gard, he's not
2 giving any opinion that's based on the weight of the
3 S-1 Gard. So we're not talking about what he doesn't
4 know related to opinions he's not going to give.
5 That's irrelevant. All we're talking about is what is
6 his narrow opinion on the S-1 Gard, that it would have
7 contacted his head, and is he allowed to -- to give
8 that opinion and does -- do the defendants' arguments
9 against it go to weight versus admissibility?
10 Now, what is his opinion based on? One, it's
11 based on his accident reconstruction. And his
12 qualifications and the fact that defendants aren't
13 disputing them do matter. Because he's a qualified
14 accident reconstruction expert. He's revered in the
15 field. He's done hundreds of these accident
16 reconstructions. It's certainly not an unreliable
17 methodology for him to say, I did an accident
18 reconstruction in the case. Dr. Khiabani's head was
19 run over by the bus. If this S-1 Gard was in front of
20 the rear wheel of the -- of the bus, I would have -- I
21 believe it would have impacted his helmet and head.
22 Now, they may not like that opinion because it -- it
23 disputes their expert's opinion that a sliver of the
24 tire was -- is what caused the damage to this helmet,
25 but that's his opinion. It's based on reconstruction

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that he completed which they don't dispute.

And the second basis for his opinion that they say is unreliable, his -- is what they call is a -- not a product of -- of reliable methodology, well, they asked him about what his opinion -- his opinion and what it was based on in his deposition. I'll read it to you.

"So is your opinion that an S-1 Gard would have interacted with Dr. Khiabani's helmet?

"ANSWER: Yes.

"QUESTION: And what is that opinion based on?

"ANSWER: The geometry. I'm aware of the guard and the fact that his head got partially run over by the tire."

It's -- it's geometry. It's -- that's not unreliable. It's this is the size of the helmet. It's underneath this bus. It's impacting this tire. If the S-1 Gard is installed pursuant to the manufacturer's instructions, I'd expect it to hit the -- the helmet to -- or the S-1 Gard to impact the helmet.

Now, what are they arguing? Well, you never -- you didn't actually see the S-1 Gard. You looked at the product literature. Yes, that's true. You didn't measure the -- whether it was a 1-inch or a

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1 2-inch overlap. You just looked at the product
2 literature and the installation instructions. Yes,
3 that's true. You don't know the exact height that it
4 would have been. Well, it says 4 to 6 inches. I don't
5 know the exact height, that's true. You never touched
6 the S-1 Gard. You didn't feel it in your hands.
7 Now, we're not asking them to preclude --
8 we're not asking the Court to preclude them from
9 asking -- cross-examining Mr. Caldwell on those
10 matters. They can go in and say, hey, his opinion, you
11 shouldn't listen to it because he never touched it, he
12 only looked at literature and pictures, he didn't rely
13 on the actual physical manipulation of it. He looked
14 at a picture. That all goes to weight of the opinion
15 not admissibility. It -- his opinion is based on
16 accident reconstruction. It's based on geometry. And
17 they can explain to the jury why they shouldn't listen
18 to that opinion, but it certainly is admissible.
19 THE COURT: Counsel?
20 MR. RUSSELL: All -- all I would suggest,
21 Your Honor, is to -- with respect to his reading and
22 our reading on pages 77 and 78 of Mr. Caldwell's
23 deposition where I asked:
24 "You would agree with me that to determine
25 if indeed the S-1 Gard would have" act --

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1 "interacted with Dr. Khiabani's helmet, you
2 would need to know, No. 1, the overlap between
3 the helmet and the tire.
4 "Would you need to know that?"
5 He says, "Yes." Then he tries to say:
6 "Well, I got that from Dr. Stalnaker's
7 opinion."
8 And I said:
9 "Well, what's his opinion on between the
10 overlap and the tire?"
11 "I don't believe he quantified it.
12 "And as we sit here today, you do not know
13 the overlap between the helmet and the tire;
14 correct?
15 "That's correct."
16 That's the heart of this motion. In order to
17 provide an opinion that the S-1 Gard would have
18 interacted with Dr. Khiabani, he needs a measurement --
19 by his own admission needs a measurement that he
20 doesn't have. And that makes his opinion on that
21 issue, on that issue, unreliable and inadmissible.
22 Thank you.
23 THE COURT: Okay. All right.
24 Let's go on to Defendant's Motion in Limine
25 No. 2. This is to exclude illustrations by plaintiffs'

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expert Joshua Cohen that have no basis in fact.

MR. RUSSELL: Yes, Your Honor. Thank you.

As a general matter, illustrations and demonstrative evidence is often helpful, if it has a basis in fact. If it has a basis in the evidence. And many of Mr. Cohen's illustrations do not.

Once again, if you look at plaintiffs' opposition, they start by saying how wonderful of an expert Josh Cohen is, and he's the foremost expert in 3D re-creations. I'm -- I'm not questioning. He's a very intelligent man. Unfortunately, he doesn't have anything to actually base his illustrations on, so they are completely theoretical illustrations that will confuse and mislead the jury.

And the reason we require demonstratives and illustrations to have a basis in fact is because if they don't, well, they're not relevant. If you put up an illustration that doesn't have anything to do with the actual facts of the accident or is not based on what actually occurred, it's not relevant because it's not helpful to the jury. And you can't use an -- a misleading or an inaccurate illustration to -- to reflect your expert's opinion. If your expert's going to give up -- get up on the stand and try to give an opinion that doesn't have any basis in fact, you can't

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1 salvage his opinion by using an illustration that also
2 has no basis in fact. And you can't salvage the
3 illustration by saying, well, so and so is going to
4 testify about this. Neither one of those things come
5 in. You can't -- you can't, you know, tie an
6 inadmissible, misleading illustration to an expert's
7 opinion and say, well, it's okay to use it then.
8 Now, the blind spot issue of Mr. Cohen's
9 illustrations, that's -- that's the particular -- one
10 of the more problematic ones. And it was on -- I
11 believe it is Exhibit 1 to our motion. I'm sorry.
12 It's Exhibit 2. And the one that's really, really a
13 problem that I -- I want to focus on because I think it
14 really highlights the purpose of our motion and the
15 analysis the Court should be adopting. And it's his
16 Illustration 18C. And it's on page -- his report
17 doesn't have page numbers. I apologize. But it's
18 essentially a picture from -- it's -- it's under the
19 page that says "Contributing Factors." And -- and that
20 page actually has all of the illustrations that I want
21 to focus on today.
22 Your Honor, you have that?
23 THE COURT: Okay.
24 MR. RUSSELL: All right. So if you look at
25 Exhibit 18C, and they would like to have Mr. Cohen put

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1 up this illustration, and they'd have -- like to have
2 Mr. Flanagan talk about this because, well, this is
3 going to -- I'm going to tell you about blind spots.
4 And this is the blind spot that existed in this coach.
5 He's not going to let the jury know, well, I'm not
6 really sure if this actually happened. He's going to
7 say, well, I'm going to show you a blind spot. No one,
8 no one is going to come into this courtroom and testify
9 in any way, shape, or form to support that picture.
10 Now, plaintiffs say in their motion that,
11 well, Mr. Cohen, he's not just putting in theoretical
12 measurements. He had video evidence. Well, if you
13 look at his deposition, 18C, he tells me is a
14 recreation or an illustration of something before the
15 bus and the bicycle get into the intersection. Before
16 the video starts. So he admits this is an illustration
17 not based on anything in the video.
18 And what Mr. Cohen is going to say is, well,
19 if I put a cyclist X number of feet away from the bus
20 and X number of feet in front of the bus, if I put him
21 at a certain lateral and longitudinal proportion with
22 the bus, this is what you see. And then Mr. Flanagan
23 is going to get up there and, see, that's what I told
24 you. Ladies and gentlemen of the jury, that -- that's
25 the blind spot I told you about.

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1 No one will ever come into this courtroom and
2 say that at any point in time Dr. Khiabani was X feet
3 away from the bus laterally or X feet in front of the
4 bus longitudinally such that would support Exhibit 18C.
5 Mr. Cohen himself said this is completely theoretical.
6 Now, they tried to salvage his testimony by
7 saying, well, it's a theoretical placement, but that's
8 actually what you would see. Well, that's fine. But
9 as the Court can surely appreciate, if the theoretical
10 bicycle is 6 inches that way or 6 inches to the left,
11 it's going to change this picture. If that theoretical
12 bicycle is 6 inches in front or 6 inches to the back,
13 it's going to change that picture. And Mr. Flanagan
14 himself admitted that. And Mr. Flanagan who's the one
15 apparently whose testimony this is going to illustrate
16 testified unequivocally, I don't know where he was. I
17 don't know the lateral and the longitudinal distances.
18 So how can he use an illustration to
19 illustrate an expert's testimony when the expert
20 himself says I can't tell you this actually ever
21 happened? I can't tell you this was actually ever the
22 situation. All of those factors, Mr. Flanagan
23 acknowledged in his deposition you need to know. You
24 need to know the lateral distance. You need to know
25 the longitudinal distance. You also need to know how

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the driver was situated. And you also have to know that the driver was looking in the lower right corner at that precise moment in time. He has none of that information. He doesn't know any of those facts. And all of those facts are the basis of Mr. Cohen's opinion. This is a completely, you know, made up theoretical, this might have been what happened out there when there's not going to be any testimony to support it.

If you show that to the jury, the jury's going to assume, oh, well, that must have happened at some point in the accident because why would they show me that picture? Why would the plaintiff show me that picture if that didn't really exist? That's, again, not about weight. It's about admissibility because it's irrelevant. Without facts to show that these things actually occurred, these are irrelevant illustrations, and they should not be admitted.

The one above that, Exhibit 17, that's the -- the proximity sensor illustration. And Mr. Cohen says, well, I got it off of -- of a Volvo ad, you know, and the Volvo was showing me how their proximity sensor worked. So I asked Mr. Flanagan about that, considering this is supposedly going to illustrate his opinion. I asked him about the Volvo proximity sensor.

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1 It's a rear- and side-facing proximity sensor that goes
2 on the mirror. This doesn't have anything to do with
3 the proximity sensor that Mr. Flanagan wants to talk
4 about. Mr. Flanagan wants to talk about proximity
5 sensors looking to the side of the bus and behind it.
6 Because Mr. Flanagan himself said this isn't -- in
7 Picture 17, that's not a blind spot. I can't tell you
8 about blind spots in front of the bus because I can't
9 understand how Mr. Hubbard wouldn't see him in front of
10 the bus. He's talking about a lower right-hand side
11 blind spot, like the one in Exhibit 18C.
12 Well, the picture in Exhibit 17 doesn't have
13 anything to do with 18C. And Mr. Flanagan said that
14 the Volvo sensor he thinks would be a good
15 recommendation or a good illustration of a proximity
16 sensor, that's a side- and rear-facing proximity
17 sensor. So Exhibit 17 doesn't illustrate his opinion
18 at all because he's not going to give that opinion.
19 And the final one is the -- Exhibit 19. By
20 the way, Your Honor, Exhibit 19 suffers from the exact
21 same flaws that Exhibit 18C does, which is this lateral
22 distance between the bus and the cyclist, we don't know
23 that at any point in time until the point of impact. I
24 agree that the experts have now been able to determine,
25 and Mr. Kemp showed you a video of this, because of the

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shading and the trees, they have an idea of where the point of impact was. And obviously at that point, we know the distance is zero between the cyclist and the bus. But that's not what Exhibit 19 is trying to show.

Exhibit 19, again, is trying to show this blind spot and how close they got. But we don't have actual data, information, or a witness to back that up. So it's -- it's theoretical. It's irrelevant. It's misleading.

The last one is Exhibit 20 regarding the S-1 Gard. And that's simply an issue of Mr. Cohen has put this figure there to try to re-create where Dr. Khiabani was or how he was positioned. He based that or was going to illustrate Dr. Stalnaker's testimony. Dr. Stalnaker said, well, I'm assuming he was on his back. He said, I don't -- I don't know. I couldn't tell you he was on his back.

So, again, not weight. It is admissibility. Irrelevant, misleading, and without basis in fact. Illustrations cannot be used to try to save their expert's opinion if they're not going to be helpful to the jury and if they're going to confuse things.

THE COURT: Okay. Thank you.

Mr. Pepperman.

MR. PEPPERMAN: Thank you, Judge.

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Since in this one we're talking about the -- the illustrations, I did a -- a PowerPoint so we can kind of go through some of -- some of them.

Now, you know, we're getting a lot of criticism for explaining what our experts did and the foundations for their opinions and with Mr. Cohen how he came up with his illustrations. But I think that is extremely crucial to the Court understanding that what he did in this case and -- and what his -- his illustrations are based on are a -- a 3D visualization model. And this is the new trend. This is what -- you know, what these guys are doing. They're -- they're using technology, and we've come a long way with technology and it's -- it has a great application in the courtroom. It's commonly used in the courtroom.

And so what we can see in the -- on the screen is he uses computer programming and basically makes an identical computer-generated image and model that you can actually manipulate of the scene of the accident. And this is based on the -- the laser scan data taken from the scene, the different measurements taken at the scene. And it's a -- an exact replica to the -- you know, I don't know how -- the exact ratio how close it gets. But it's essentially the exact same thing that you're -- you're seeing at the scene.

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Can we go to the next slide, Shane.

This is a -- an example of kind of the finished product and what you can do with it.

So on the left, we see -- that's a -- a screen shot from the actual Red Rock video. That's the surveillance video. The next -- the one next to it is the computer-generated model re-creating the Red Rock video.

Now, those buses are the exact same dimensions. The -- the street, the light posts, the -- everything that you see in those images, they're exactly the same measurements. One is the computer-generated model which you can manipulate, and one is the actual screen shot of the -- the scene of the accident, the accident occurring.

Now, why is that important? Why is it helpful? You can see -- in the video, you can barely see Dr. Khiabani behind -- after he was -- immediately following the accident. But he's blocked by the big palm tree in the middle. Can't really see him. So what can we do in the model? We can pull that palm tree back. And so we can -- you can get a better visualization, illustration of what you would see in the video if we could pull that palm tree back.

So this has a -- a number of applications,

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and -- and Mr. Cohen has created a number of applications for this, the vast majority of which are not contested. They're not -- you know, they're not saying this model was -- is no -- lacks foundation. They're not saying that this isn't the exact same thing. They're not saying that this is misleading or we're doing anything to mislead the jury. All they're saying -- they're -- they agree that this is as -- as Mr. Russell said, Mr. Cohen's a smart guy. He's good at this. He did a good job with this model.

Next slide, Shane.

Okay. So next important distinction I want to make with this is what are we talking about? Okay. Now, a computer-generated animation like what Mr. Cohen did, it can be used demonstratively or substantively. Substantively it's -- it's like it's creating its own expert opinion. You know, the -- the computer is the expert. You -- you -- I think what the -- the quote from this case says it's -- it's a simulation rather than mirroring a witness's testimony, forms a conclusion based on broad data and is substantive evidence in and of itself. That's not what we're talking about here.

Mr. Cohen did some measurements based on his model to -- to, you know, verify the speed of the bus

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1 and the location of the bus. But what we're talking
2 about here is purely demonstrative. Computer animation
3 is purely demonstrative when used to illustrate a
4 witness's testimony. And that's what Mr. Cohen is
5 doing here. He's illustrating the opinions, the
6 testimony of our experts. And those are the three kind
7 of areas that they're trying to exclude these
8 demonstrative exhibits.
9 One is the blind spot experts. He did some
10 illustrations for the blind spot experts. Two is the
11 aerodynamics expert -- I mean the biomechanical expert
12 to show the biomechanics of the injury. And three, the
13 proximity sensors. Of no -- I highlighted this
14 portion. That is the most commonly used method for
15 these demonstratives, these illustrations. The most
16 commonly used method to introduce a computer-generated
17 animation or simulation is to illustrate the testimony
18 of an expert witness. That's what we're doing. This
19 is extremely common.
20 Next slide, please.
21 So, you know, there's a lot of statements
22 about, well, it's not based on any facts whatsoever.
23 Okay. Well, to one extent, that's wrong, because we do
24 have some factual information that these -- that some
25 of the demonstratives are based on. And it wasn't

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clear whether they're seeking to exclude this one or not, but I wanted to show this example because we have the Red Rock video. And, again, you can capture -- you can see the -- the outline of Dr. Khiabani against the side of the bus where he's located. Again, because of the resolution, you can't make out him and because of the palm tree, it's even more difficult to see. But we do have some factual basis to say this is where Mr. -- or Dr. Khiabani was, and we have the scuff mark on the -- on the side of the bus behind the wheel. So to the extent they're saying something like this is not a -- a valid representation of where Dr. Khiabani was, that's simply not true.

But it -- it doesn't seem like they're -- they're saying that with respect to this one. It seems they're focusing on the prior two entering the video stuff.

So, Shane, please next slide.

Okay. So these are the visibility, two of the visibility slides that they seek to exclude. And they're -- the -- the reason that we are illustrating these two slides is because they show the height of the different obstructions on the bus. And that's going to be a -- a big issue at the trial, is what are the obstructions, what can the driver see, how could they

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1 have designed the bus better so there was less
2 obstructions, better visibility.
3 Now, remember, Your Honor, in this case, I
4 mean, the -- Dr. Khiabani went under the bus as the bus
5 is moving away from him. And the rear wheel of his
6 tire was -- was enough to get on -- get over his
7 helmet, and that's what caused his death in this case,
8 so -- and -- and it's their argument that it was a
9 fraction of a -- an inch that the tire ran over his
10 head. Now, we dispute that. I don't see how that's
11 possible. But in either case, we're talking about
12 milliseconds, a millisecond difference here, that if
13 that bus just a little bit sooner, saw him a little bit
14 sooner, started pulling away just a fraction of a
15 second quicker, then it's highly likely that that rear
16 tire misses -- misses Dr. Khiabani -- or misses
17 Dr. Khiabani's helmet altogether, and we're talking
18 about a much different case here.
19 But -- so that -- that timing, that
20 obstruction, that, you know, ease of visibility is a
21 big issue. And this illustration illustrates what our
22 experts, our visibility experts are going to testify
23 about the obstruction, where -- what the bus driver
24 could see, what he couldn't see in a -- in a given
25 situation. And, you know, yeah, to some extent if he's

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here, you might see something different. If he's over a little bit, you might see something a little bit different. But that's not the point. We're not re-creating what the bus driver saw exactly where Dr. Khiabani was.

What we're doing is we're illustrating the obstructions. We're illustrating the problems that the bus driver has with visibility and that doesn't matter where Dr. Khiabani is, because there's visibility obstructions no matter where he is on -- on the side of that bus.

Next slide, please, Shane.

Now, this is another illustration they're seeking to exclude. Now, this is -- Mr. Cohen did this illustration, but this is directly from Mr. Sherlock who's one of our visibility experts, it's exactly from his report. And what he's doing, he's not saying -- Mr. Sherlock's not saying this is what happened. This is what the bus driver saw. This is where Dr. Khiabani was. This is where the bus driver was. This is where the bus driver was looking. That's not what he's doing with this visual aid -- visual aid.

What he's doing is he's showing that this is the problem with the bus. This is the visibility obstruction. When someone is in that general area

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where Dr. Khiabani was, there's this problem called visual crowding, that there's the larger A-pillar, the block on the door, the high -- the high, you know, steering wheel, and the -- and all of the obstructions that are in his view, it causes someone to not notice that someone might be there. Because there's so many other visual things popping out in their way, it creates kind of like a blending effect. That's the problem here. That's what we're illustrating, this effect. Not re-creating exactly what happened. We're not attempting to do that.

So their argument that, well, it doesn't re-create exactly what happened is totally beside the point because we're not trying to re-create exactly what happened. We're trying to illustrate our expert's testimony on, for example, visual crowding or obstructions or the problems with the visibility in this bus.

Next slide, please.

Now, here we have Dr. Stalnaker's report. Dr. Stalnaker is our biomechanic. Again, these -- this is directly from his report. Okay? Dr. Stalnaker looked at the helmet. He looked at the injuries. Specifically, Dr. Khiabani had a -- a -- a -- a radial fracture on his -- the left side of his head that was,

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1 you know, in a -- in a circular shape. And so what
2 he -- what that tells him as a qualified expert
3 biomechanic is that the left side of his head was on
4 the ground when the bus impacted, went over his head.
5 It's that flat ground and the -- the crushing of the
6 head which causes the circular fracture on the left
7 side of his head.
8 Then he looks at the helmet, and he sees the
9 damage to the helmet and the tire -- what looks like
10 tire tread and says this is the angle that the bus went
11 over. And based on that information, he formulates an
12 opinion of the position of Dr. Khiabani's body when
13 he's run over by the rear tire of the bus. And based
14 on that, he says, yeah, based on this, it's my
15 assumption that he's lying on his back, his head's on
16 the ground, he's lying flat on left, and the bus went
17 over and at this angle.
18 Now, they say, oh, he's just assuming, he's
19 assuming. He's not saying, well, I assume based on
20 nothing. He's saying it's my assumption based on the
21 angle of -- based on the injuries, based on the exam of
22 the helmet. And that's what experts do. That's his
23 opinion. And Dr. -- and Mr. Cohen is illustrating that
24 opinion. He's just illustrating Dr. Stalnaker's
25 opinion that this is the position Dr. Khiabani was at

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the time of the accident.

And if you look at the -- the next slide, this is Mr. Cohen's illustration, and the first one is exactly from Dr. Stalnaker's report. And the second one is just kind of a drawn back view of it.

Next slide, please, Shane.

Now, this is the proximity sensor illustration. Now, a proximity sensor is -- as our proximity sensor expert, Mr. Flanagan, testified, it works by invisible -- you know, invisible -- invisible rays going out and hitting the objects and bouncing back and giving a signal.

So what do you do? How do you demonstrate that? How did you illustrate that testimony? Like this. This is what you do. You draw lines where the range is. And yes, the Volvo one that may have -- that specific Volvo one that was being discussed in his deposition may have been on the -- on the rear -- on the side mirror, but that's not what we're illustrating. We're not illustrating how that particular Volvo proximity sensor would have worked. We're illustrating how proximity sensors work in general. And this is an illustration of that. It's not misleading or we're not saying this Volvo one is what should have been on there. This is how the Volvo

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one works. We're just saying, generally speaking, this is how a -- a proximity sensor works. And that's an identical illustration of that.

So the argument to all these illustrations is, well, they're not -- they don't have a basis in the evidence. They're not what actually occurred. They're theoretical. They're not what actually occurred. But, again, we're not illustrating what actually occurred. We're illustrating what our expert's opinions are. And that is the critical distinction here.

And I think the best example of this distinction is in the ***Hinkle v. City of Clarksburg*** case from the Fourth Circuit, which is their case. This is their case that they cited. And I think they sum it up very, very succinctly by saying, "Obviously the requirement of similarity is moderated by the simple fact that the actual events are often the issue disputed by the parties. Although there is a fine line between a re-creation and an illustration, the practical distinction is the difference between a jury believing that they are seeing a repeat of the actual event and a jury understanding that they're seeing an illustration of someone else's opinion of what happened."

And that is what we're talking about here.

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1 We're not saying this is what actually occurred. This
2 is exactly where Dr. Khiabani was. This is a
3 re-creation of the event. That's not what we're doing.
4 We're saying this is our opinion. This is an
5 illustration of our expert's opinion of what occurred.
6 It's an expert -- an illustration of what
7 Dr. Stalnaker's opinion is about where Dr. Khiabani's
8 body was on the ground, where the bus impacted his
9 helmet. These are an illustration of what our
10 visibility experts will opine are the problems with the
11 visibility of the bus. It illustrates their testimony.
12 It's not anything more than an illustration of expert
13 testimony which is the most common way these
14 illustrations are used.
15 And it is -- the argument that if it's not an
16 actual -- if we can't show you that it's an actual
17 re-creation of what occurred, it has to be excluded
18 misstates the law, because we're not proposing a
19 re-creation of what occurred. We're illustrating our
20 expert's opinions.
21 And here's the critical problem with the --
22 with the motion. The argument -- their argument is,
23 well, you can't salvage an expert's baseless opinion
24 with these illustrations, but they're not challenging
25 any of the expert's opinions that underlie these

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1 illustrations. They haven't come in and said -- you
2 know, they say, oh, Dr. Stalnaker's opinion is an
3 assumption. You know, it's -- it's meritless. They're
4 illustrating a meritless opinion. Well, they haven't
5 sought to exclude Dr. Stalnaker's opinion about the
6 biomechanics of the fall and -- and the location of his
7 body and how he was run over. They're not challenging
8 that opinion. If they were and the Court ruled that
9 Dr. Stalnaker's opinion was inadmissible, then
10 Mr. Cohen's illustration of that opinion would also be
11 admissible -- inadmissible.
12 But that's not what they're arguing. They're
13 saying we want you to exclude the illustrations without
14 asking you to exclude the underlying expert opinions
15 that they illustrate. And that is a total disconnect
16 in the relief. If -- if they're not going to challenge
17 the expert's opinions as inadmissible, then there's no
18 basis to challenge the illustrations of those opinions
19 as inadmissible.
20 THE COURT: All right.
21 MR. PEPPERMAN: Thank you.
22 THE COURT: Well, actually, I have a couple
23 of questions for you. And I -- I didn't denote exactly
24 which illustration it was. But I -- I believe it was
25 the one where you had the actual photograph and then

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the re-creation or the illustration. If you can, I just want to know --

MR. PEPPERMAN: Do you mind pulling that up, Shane?

MR. GODFREY: Sure.

MR. PEPPERMAN: I think it's back a couple. The Red Rock surveillance one.

MR. GODFREY: Sure.

THE COURT: Actually -- actually, it may be a little bit later or it may be the -- the next one.

Generally, do you have information as to the -- how -- how close Dr. Khiabani was to the bus? Or the motor coach, excuse me, motor coach?

MR. PEPPERMAN: At -- at certain points, we do.

THE COURT: Okay.

MR. PEPPERMAN: You know, we -- there's the scuff mark on the bus -- side of the bus behind the rear wheel. And we know -- you know, I think both the experts agree that, you know, the angle of the bike is that -- we know the angle where it is to make that type of mark with the handlebar.

And then the other information we have is the -- the outline of Dr. Khiabani next to the bus which is in that similar location.

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THE COURT: All right. Thank you.

MR. PEPPERMAN: Thank you.

MR. RUSSELL: And, Your Honor, just to touch base on the question you just asked, that -- that last image is not really one of the problematic ones because Mr. Pepperman's right. I mean, there's some general agreement where -- you know, where on the bus the impact occurred.

THE COURT: Right.

MR. RUSSELL: But that's not -- that's not what we're talking about, and that's not the issues that were raised in our motion.

I -- I -- I heard some very interesting distinctions attempted to be made which actually I think highlight and made me realize even more why these are problematic and why plaintiffs are fighting so hard to keep them in. We heard this is the new trend. You can now manipulate, you know, photos to show what you want them to show. We're not challenging Mr. Cohen's 3D visualization. He's got high-end software to do that. That's fine. Okay? We're not talking about the new trend. Yeah, if you -- if you have a helpful diagram or an illustration for an expert that you can actually back up with evidence, by all means, I think it is helpful.

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But apparently, from what I'm hearing, the -- the new trend is to use these tools to -- to mislead and confuse the jury. Now, I find it interesting that Mr. Pepperman put up 18A and 18B, and these are the ones that show the height of the bus at various angles. And then we talk about 18C as well. And what he said is, Well, these illustrations go to show our expert's opinion about the visibility problems, to show you where there's -- there's obstructions. And Dr. Stotter -- excuse me, I'm forgetting the name now, but -- but -- Mr. Sherlock. Mr. Sherlock is going to talk about visual crowding.

Well, my question is this, then: Why do you need the bike, then? Why does the bike have to be there? You're showing measurements on the bus. You're talking about this solid door. You're talking about in 18C the dashboard and where the A-pillar is and where the door stash comes across. That's the problem that their experts want to talk about. And you know what, that probably is fair game because that would illustrate here's what the bus looks like. Ladies and gentlemen, here are the measurements we took. Because those are actual facts and that's actual evidence. But why do they have the bike there?

Well, Mr. Pepperman showed his hand a little

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bit on that. What he said is, Well, what we need is to show the jury what a driver would see if someone was where Dr. Khiabani was. That's exactly why they want to do this. They don't want to show you in general diagrams or pictures of visual crowding or obstructions. They want to tell the jury, you know what, when Dr. Khiabani got to that spot, that's what the driver would have seen, without one shred of evidence that Dr. Khiabani ever got to that spot.

I also find it interesting -- and it -- it just occurred to me. I look at 18A and 18B and 18C, and I see something common in all of them. And I asked Mr. Cohen about this and I -- I -- I realize now why I asked at the time. I asked him if he knew the position of Dr. Khiabani's head at the time he was driving down the road. And he said, No, we don't have any information on that.

Well, what's interesting is Mr. Pears, the witness who was sitting in the front passenger seat which, not surprisingly, they put in their illustration, they've got somebody sitting there in that front passenger seat, Mr. Pears said that right before the impact, he sees Dr. Khiabani look back to his left with a shocked look on his face. And I guarantee you're going to hear that from the plaintiffs

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1 during the case, that he was shocked. And we're going
2 to talk why he was shocked. We're going to speculate
3 why he was shocked. But they're going to talk about
4 Mr. Pears, and they're going to say Dr. Khiabani took
5 his hand off and looked over his left shoulder and had
6 a shocked look on his face. Why don't these bicyclists
7 have their head turned looking at the bus? Why does
8 this bike -- bicyclist have both his hands on the bus
9 with his head down? Because that's not what
10 Mr. Hubbard, the driver, would have seen if he had
11 looked in that direction according to Mr. Pears,
12 according to the evidence.
13 So they want to use these illustrations to
14 try to paint the picture that Dr. Khiabani was riding
15 in his bicycle lane, head down, both hands on the
16 handlebar when that's completely contrary to the
17 evidence. If they want to show the visual obstruction,
18 they don't need the bike there. They can show that
19 without the bike there. That's our concern with these
20 illustrations.
21 And, again, we focused only on a few. Some
22 of the illustrations that Mr. Pepperman showed I don't
23 have a problem with. Taking the palm tree out to be
24 able to show where Dr. Khiabani ended up, you know,
25 that's fair. That's helpful for the jury to get an

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1 idea of what happened in the accident. But you can't
2 then extend that to just plug in data that they don't
3 have to create a -- a picture for the jury to say,
4 well, there's our case. That's why we win, ladies and
5 gentlemen, because that's what Dr. Khiabani would have
6 looked like to the driver. They don't have the
7 evidence to support that, and it's misleading to allow
8 them to put that in.
9 Thank you.
10 THE COURT: I -- I would like to hear more
11 from Mr. Pepperman about -- give you some flexibility,
12 Defense, from yesterday. Can you respond to that,
13 please.
14 MR. PEPPERMAN: Well, it's -- it just is a
15 difference between a re-creation and an illustration.
16 They're arguing this should be excluded because it's
17 not an accurate re-creation. And we're not saying it's
18 a re-creation. It's an illustration. And there's a --
19 a legal distinction, exactly what the Hinkle case says,
20 and, you know, it's -- and the Fourth Circuit noted,
21 hey, we're talking about a fine line, but it's the
22 difference between the jury thinking this is what
23 happened. This is -- we're showing you in this -- in
24 these illustrations what happened, where Dr. Khiabani
25 was, where he was looking, where his hand was, you

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