

Case No. 78701

In the Supreme Court of Nevada

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

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

Respondents.

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APPEAL

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

**APPELLANT'S APPENDIX
VOLUME 14
PAGES 3251-3500**

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

Tab	Document	Date	Vol.	Pages
1	Complaint with Jury Demand	05/25/17	1	1–16
2	Amended Complaint and Demand for Jury Trial	06/06/17	1	17–33
3	Reporter’s Transcript of Motion for Temporary Restraining Order	06/15/17	1	34–76
4	Notice of Entry of Order Denying Without Prejudice Plaintiffs’ Ex Parte Motion for Order Requiring Bus Company and Bus Driver to Preserve an Immediately Turn Over Relevant Electronic Monitoring Information from Bus and Driver Cell Phone	06/22/17	1	77–80
5	Defendants Michelangelo Leasing Inc. dba Ryan’s Express and Edward Hubbard’s Answer to Plaintiffs’ Amended Complaint	06/28/17	1	81–97
6	Demand for Jury Trial	06/28/17	1	98–100
7	Defendant Motor Coach Industries, Inc.’s Answer to Plaintiffs’ Amended Complaint	06/30/17	1	101–116
8	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery’s Answer to Plaintiffs’ Amended Complaint	06/30/17	1	117–136
9	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery’s Demand for Jury Trial	06/30/17	1	137–139
10	Defendant Bell Sports, Inc.’s Answer to Plaintiff’s Amended Complaint	07/03/17	1	140–153
11	Defendant Bell Sports, Inc.’s Demand for Jury Trial	07/03/17	1	154–157
12	Notice of Entry of Order	07/11/17	1	158–165
13	Notice of Entry of Order Granting Plaintiffs’ Motion for Preferential Trial Setting	07/20/17	1	166–171

14	Reporter's Transcription of Motion for Preferential Trial Setting	07/20/17	1	172–213
15	Notice of Entry of Order (CMO)	08/18/17	1	214–222
16	Notice of Entry of Order	08/23/17	1	223–227
17	Stipulated Protective Order	08/24/17	1	228–236
18	Reporter's Transcription of Motion of Status Check and Motion for Reconsideration with Joinder	09/21/17	1 2	237–250 251–312
19	Defendant SevenPlus Bicycles, Inc. d/b/a Pro Cyclery's Motion for Determination of Good Faith Settlement	09/22/17	2	313–323
20	Defendant's Notice of Filing Notice of Removal	10/17/17	2 3	324–500 501–586
21	Civil Order to Statistically Close Case	10/24/17	3	587–588
22	Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)	10/27/17	3	589–597
23	Transcript of Proceedings	11/02/17	3	598–618
24	Second Amended Complaint and Demand for Jury Trial	11/17/17	3	619–637
25	Order Regarding "Plaintiffs' Motion to Amend Complaint to Substitute Parties" and "Countermotion to Set a Reasonable Trial Date Upon Changed Circumstance that Nullifies the Reason for Preferential Trial Setting"	11/17/17	3	638–641
26	Motion for Summary Judgment on Punitive Damages	12/01/17	3	642–664
27	Volume 1: Appendix of Exhibits to Motion for Summary Judgment on Punitive Damages	12/01/17	3 4	665–750 751–989
28	Volume 2: Appendix of Exhibits to Motion for Summary Judgment on Punitive Damages	12/01/17	4 5	990–1000 1001–1225

29	Volume 3: Appendix of Exhibits to Motion for Summary Judgment on Punitive Damages	12/01/17	5 6	1226–1250 1251–1490
30	Motor Coach Industries, Inc.’s Motion for Summary Judgment on All Claims Alleging a Product Defect	12/04/17	6 7	1491–1500 1501–1571
31	Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	12/07/17	7	1572–1583
32	Appendix of Exhibits to Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	12/07/17	7 8	1584–1750 1751–1801
33	Defendants’ Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.d., or in the Alternative, to Limit His Testimony	12/07/17	8	1802–1816
34	Appendix of Exhibits to Defendants’ Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.D., or in the Alternative, to Limit His Testimony	12/07/17	8 9	1817–2000 2001–2100
35	Motion for Determination of Good Faith Settlement Transcript	12/07/17	9	2101–2105
36	Defendants’ Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	12/08/17	9	2106–2128
37	Plaintiffs’ Joint Opposition to MCI Motion for Summary Judgment on All Claims Alleging a Product Defect and to MCI Motion for Summary Judgment on Punitive Damages	12/21/17	9	2129–2175
38	Appendix of Exhibits to Plaintiffs’ Joint Opposition to MCI Motion for Summary Judgment on All Claims	12/21/17	9 10 11	2176–2250 2251–2500 2501–2523

	Alleging a Product Defect and to MCI Motion for Summary Judgment on Punitive Damages			
39	Opposition to “Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians of Bicyclists (Including Sudden Bicycle Movement)”	12/27/17	11	2524–2580
40	Notice of Entry of Findings of Fact Conclusions of Law and Order on Motion for Determination of Good Faith Settlement	01/08/18	11	2581–2590
41	Plaintiffs’ Joint Opposition to Defendant’s Motion in Limine No. 3 to Preclude Plaintiffs from Making Reference to a “Bullet Train” and to Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	01/08/18	11	2591–2611
42	Plaintiffs’ Opposition to Defendant’s Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.D. or in the Alternative to Limit His Testimony	01/08/18	11	2612–2629
43	Plaintiffs’ Opposition to Defendant’s Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	01/08/18	11	2630–2637
44	Reply to Opposition to Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)”	01/16/18	11	2638–2653
45	Plaintiffs’ Addendum to Reply to Opposition to Motion for Summary Judgment on Foreseeability of Bus	01/17/18	11	2654–2663

	Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)”			
46	Reply to Plaintiffs’ Opposition to Motion for Summary Judgment on Punitive Damages	01/17/18	11	2664–2704
47	Motor Coach Industries, Inc.’s Reply in Support of Its Motion for Summary Judgment on All Claims Alleging a Product Defect	01/17/18	11	2705–2719
48	Defendant Bell Sports, Inc.’s Motion for Determination of Good Faith Settlement on Order Shortening Time	01/17/18	11	2720–2734
49	Plaintiffs’ Joinder to Defendant Bell Sports, Inc.’s Motion for Determination of Good Faith Settlement on Order Shortening Time	01/18/18	11	2735–2737
50	Plaintiffs’ Motion for Determination of Good Faith Settlement with Defendants Michelangelo Leasing Inc. d/b/a Ryan’s Express and Edward Hubbard Only on Order Shortening Time	01/18/18	11	2738–2747
51	Calendar Call Transcript	01/18/18	11 12	2748–2750 2751–2752
52	Motor Coach Industries, Inc.’s Pre-Trial Disclosure Pursuant to NRCP 16.1(a)(3)	01/19/18	12	2753–2777
53	Defendant’s Reply in Support of Motion in Limine No. 7 to Exclude Any Claims that the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	01/22/18	12	2778–2787
54	Defendants’ Reply in Support of Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.D., or in the Alternative to Limit His Testimony	01/22/18	12	2788–2793

55	Defendant's Reply in Support of Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	01/22/18	12	2794–2814
56	Defendants Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard's Joinder to Plaintiffs' Motion for Determination of Good Faith Settlement with Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard	01/22/18	12	2815–2817
57	Recorder's Transcript of Hearing on Defendant's Motion for Summary Judgment on All Claims Alleging a Product Defect	01/23/18	12	2818–2997
58	Motions in Limine Transcript	01/29/18	12 13	2998–3000 3001–3212
59	All Pending Motions Transcript	01/31/18	13 14	3213–3250 3251–3469
60	Supplemental Findings of Fact, Conclusions of Law, and Order	02/05/18	14	3470–3473
61	Motor Coach Industries, Inc.'s Answer to Second Amended Complaint	02/06/18	14	3474–3491
62	Status Check Transcript	02/09/18	14 15	3492–3500 3501–3510
63	Notice of Entry of Order	02/09/18	15	3511–3536
64	Jury Trial Transcript	02/12/18	15 16	3537–3750 3751–3817
65	Reporter's Transcription of Proceedings	02/13/18	16 17	3818–4000 4001–4037
66	Reporter's Transcription of Proceedings	02/14/18	17 18	4038–4250 4251–4308
67	Bench Brief on Contributory Negligence	02/15/18	18	4309–4314
68	Reporter's Transcription of Proceedings	02/15/18	18	4315–4500

69	Reporter's Transcription of Proceedings	02/16/18	19	4501–4727
70	Motor Coach Industries, Inc.'s Response to "Bench Brief on Contributory Negligence"	02/16/18	19	4728–4747
71	Defendant's Trial Brief in Support of Level Playing Field	02/20/18	19 20	4748–4750 4751–4808
72	Reporter's Transcription of Proceedings	02/20/18	20 21	4809–5000 5001–5039
73	Reporter's Transcription of Proceedings	02/21/18	21	5040–5159
74	Reporter's Transcription of Proceedings	02/22/18	21 22	5160–5250 5251–5314
75	Findings of Fact, Conclusions of Law, and Order	02/22/18	22	5315–5320
76	Bench Brief in Support of Preinstructing the Jury that Contributory Negligence is Not a Defense in a Product Liability Action	02/22/18	22	5321–5327
77	Reporter's Transcription of Proceedings	02/23/18	22 23	5328–5500 5501–5580
78	Reporter's Transcription of Proceedings	02/26/18	23 24	5581–5750 5751–5834
79	Reporter's Transcription of Proceedings	02/27/18	24 25	5835–6000 6001–6006
80	Reporter's Transcription of Proceedings	02/28/18	25	6007–6194
81	Reporter's Transcription of Proceedings	03/01/18	25 26	6195–6250 6251–6448
82	Reporter's Transcription of Proceedings	03/02/18	26 27	6449–6500 6501–6623
83	Reporter's Transcription of Proceedings	03/05/18	27 28	6624–6750 6751–6878
84	Addendum to Stipulated Protective Order	03/05/18	28	6879–6882
85	Jury Trial Transcript	03/06/18	28 29	6883–7000 7001–7044

86	Reporter's Transcription of Proceedings	03/07/18	29 30	7045–7250 7251–7265
87	Jury Trial Transcript	03/08/18	30	7266–7423
88	Reporter's Transcription of Proceedings	03/09/18	30 31	7424–7500 7501–7728
89	Reporter's Transcription of Proceedings	03/12/18	31 32	7729–7750 7751–7993
90	Motor Coach Industries, Inc.'s Brief in Support of Oral Motion for Judgment as a Matter of Law (NRCP 50(a))	03/12/18	32 33	7994–8000 8001–8017
91	Plaintiffs' Trial Brief Regarding Admissibility of Taxation Issues and Gross Versus Net Loss Income	03/12/18	33	8018–8025
92	Jury Trial Transcript	03/13/18	33	8026–8170
93	Jury Trial Transcript	03/14/18	33 34	8171–8250 8251–8427
94	Jury Trial Transcript	03/15/18	34 35	8428–8500 8501–8636
95	Jury Trial Transcript	03/16/18	35 36	8637–8750 8751–8822
96	Motor Coach Industries, Inc.'s Opposition to Plaintiff's Trial Brief Regarding Admissibility of Taxation Issues and Gross Versus Net Loss Income	03/18/18	36	8823–8838
97	Notice of Entry of Order	03/19/18	36	8839–8841
98	Jury Trial Transcript	03/19/18	36 37	8842–9000 9001–9075
99	Reporter's Transcription of Proceedings	03/20/18	37 38	9076–9250 9251–9297
100	Reporter's Transcription of Proceedings	03/21/18	38 39	9298–9500 9501–9716
101	Reporter's Transcription of Proceedings	03/21/18	39 40	9717–9750 9751–9799
102	Reporter's Transcription of Proceedings	03/21/18	40	9800–9880

103	Reporter's Transcription of Proceedings	03/22/18	40 41	9881–10000 10001–10195
104	Reporter's Transcription of Proceedings	03/23/18	41	10196–10206
105	Proposed Jury Instructions Not Given	03/23/18	41	10207–10235
106	Amended Jury List	03/23/18	41	10236
107	Special Jury Verdict	03/23/18	41	10237–10241
108	Jury Instructions	03/23/18	41 42	10242–10250 10251–10297
109	Proposed Jury Verdict Form Not Used at Trial	03/26/18	42	10298–10302
110	Jury Instructions Reviewed with the Court on March 21, 2018	03/30/18	42	10303–10364
111	Notice of Entry of Judgment	04/18/18	42	10365–10371
112	Special Master Order Staying Post-Trial Discovery Including May 2, 2018 Deposition of the Custodian of Records of the Board of Regents NSHE	04/24/18	42	10372–10374
113	Plaintiffs' Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	04/24/18	42	10375–10381
114	Appendix of Exhibits in Support of Plaintiffs' Verified Memorandum of Costs (Volume 1 of 2)	04/24/18	42 43 44 45 46	10382–10500 10501–10750 10751–11000 11001–11250 11251–11360
115	Appendix of Exhibits in Support of Plaintiffs' Verified Memorandum of Costs (Volume 2 of 2)	04/24/18	46 47	11361–11500 11501–11735
116	Amended Declaration of Peter S. Christiansen, Esq. in Support of Plaintiffs' 4/24/18 Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	04/25/18	47	11736–11742
117	Motion to Retax Costs	04/30/18	47 48	11743–11750 11751–11760

118	Opposition to Motion for Limited Post-Trial Discovery	05/03/18	48	11761–11769
119	Appendix of Exhibits to: Motor Coach Industries, Inc.’s Motion for New Trial	05/07/18	48	11770–11962
120	Motor Coach Industries, Inc.’s Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	05/07/18	48 49	11963–12000 12001–12012
121	Supplement to Motor Coach Industries, Inc.’s Motion for a Limited New Trial	05/08/18	49	12013–12018
122	Plaintiffs’ Supplemental Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	05/09/18	49	12019–12038
123	Opposition to Defendant’s Motion to Retax Costs	05/14/18	49	12039–12085
124	Notice of Appeal	05/18/18	49	12086–12097
125	Case Appeal Statement	05/18/18	49	12098–12103
126	Plaintiffs’ Opposition to MCI’s Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	06/06/18	49	12104–12112
127	Combined Opposition to Motion for a Limited New Trial and MCI’s Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	06/08/18	49 50	12113–12250 12251–12268
128	Reply on Motion to Retax Costs	06/29/18	50	12269–12281
129	Motor Coach Industries, Inc.’s Reply in Support of Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	06/29/18	50	12282–12309
130	Plaintiffs’ Supplemental Opposition to MCI’s Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	09/18/18	50	12310–12321

131	Motor Coach Industries, Inc.'s Response to "Plaintiffs' Supplemental Opposition to MCI's Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid to Other Defendants"	09/24/18	50	12322–12332
132	Transcript	09/25/18	50	12333–12360
133	Notice of Entry of Stipulation and Order Dismissing Plaintiffs' Claims Against Defendant SevenPlus Bicycles, Inc. Only	10/17/18	50	12361–12365
134	Notice of Entry of Stipulation and Order Dismissing Plaintiffs' Claims Against Bell Sports, Inc. Only	10/17/18	50	12366–12370
135	Order Granting Motion to Dismiss Wrongful Death Claim	01/31/19	50	12371–12372
136	Notice of Entry of Combined Order (1) Denying Motion for Judgment as a Matter of Law and (2) Denying Motion for Limited New Trial	02/01/19	50	12373–12384
137	Notice of Entry of Findings of Fact, Conclusions of Law and Order on Motion for Good Faith Settlement	02/01/19	50	12385–12395
138	Notice of Entry of "Findings of Fact and Conclusions of Law on Defendant's Motion to Retax"	04/24/19	50	12396–12411
139	Notice of Appeal	04/24/19	50	12412–12461
140	Case Appeal Statement	04/24/19	50	12462–12479
141	Notice of Entry of Court's Order Denying Defendant's Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants Filed Under Seal on March 26, 2019	05/03/19	50	12480–12489

Filed Under Seal

142	Findings of Fact and Conclusions of Law and Order on Motion for Determination of Good Faith Settlement	03/14/18	51	12490–12494
143	Objection to Special Master Order Staying Post-Trial Discovery Including May 2, 2018 Deposition of the Custodian of Records of the Board of Regents NSHE and, Alternatively, Motion for Limited Post-Trial Discovery on Order Shortening Time	05/03/18	51	12495–12602
144	Reporter’s Transcript of Proceedings	05/04/18	51	12603–12646
145	Motor Coach Industries, Inc.’s Motion to Alter or Amend Judgment to Offset Settlement Proceed Paid by Other Defendants	05/07/18	51	12647–12672
146	Motor Coach Industries, Inc.’s Motion for a Limited New Trial	05/07/18	51	12673–12704
147	Exhibits G–L and O to: Appendix of Exhibits to: Motor Coach Industries, Inc.’s Motion for a Limited New Trial	05/08/18	51 52	12705–12739 12740–12754
148	Reply in Support of Motion for a Limited New Trial	07/02/18	52	12755–12864
149	Motor Coach Industries, Inc.’s Reply in Support of Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	07/02/18	52	12865–12916
150	Plaintiffs’ Supplemental Opposition to MCI’s Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	09/18/18	52	12917–12930
151	Order	03/26/19	52	12931–12937

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

Tab	Document	Date	Vol.	Pages
84	Addendum to Stipulated Protective Order	03/05/18	28	6879–6882
59	All Pending Motions Transcript	01/31/18	13 14	3213–3250 3251–3469
2	Amended Complaint and Demand for Jury Trial	06/06/17	1	17–33
116	Amended Declaration of Peter S. Christiansen, Esq. in Support of Plaintiffs’ 4/24/18 Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	04/25/18	47	11736–11742
106	Amended Jury List	03/23/18	41	10236
114	Appendix of Exhibits in Support of Plaintiffs’ Verified Memorandum of Costs (Volume 1 of 2)	04/24/18	42 43 44 45 46	10382–10500 10501–10750 10751–11000 11001–11250 11251–11360
115	Appendix of Exhibits in Support of Plaintiffs’ Verified Memorandum of Costs (Volume 2 of 2)	04/24/18	46 47	11361–11500 11501–11735
32	Appendix of Exhibits to Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	12/07/17	7 8	1584–1750 1751–1801
34	Appendix of Exhibits to Defendants’ Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.D., or in the Alternative, to Limit His Testimony	12/07/17	8 9	1817–2000 2001–2100

38	Appendix of Exhibits to Plaintiffs' Joint Opposition to MCI Motion for Summary Judgment on All Claims Alleging a Product Defect and to MCI Motion for Summary Judgment on Punitive Damages	12/21/17	9 10 11	2176–2250 2251–2500 2501–2523
119	Appendix of Exhibits to: Motor Coach Industries, Inc.'s Motion for New Trial	05/07/18	48	11770–11962
76	Bench Brief in Support of Preinstructing the Jury that Contributory Negligence is Not a Defense in a Product Liability Action	02/22/18	22	5321–5327
67	Bench Brief on Contributory Negligence	02/15/18	18	4309–4314
51	Calendar Call Transcript	01/18/18	11 12	2748–2750 2751–2752
125	Case Appeal Statement	05/18/18	49	12098–12103
140	Case Appeal Statement	04/24/19	50	12462–12479
21	Civil Order to Statistically Close Case	10/24/17	3	587–588
127	Combined Opposition to Motion for a Limited New Trial and MCI's Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	06/08/18	49 50	12113–12250 12251–12268
1	Complaint with Jury Demand	05/25/17	1	1–16
10	Defendant Bell Sports, Inc.'s Answer to Plaintiff's Amended Complaint	07/03/17	1	140–153
11	Defendant Bell Sports, Inc.'s Demand for Jury Trial	07/03/17	1	154–157
48	Defendant Bell Sports, Inc.'s Motion for Determination of Good Faith Settlement on Order Shortening Time	01/17/18	11	2720–2734
7	Defendant Motor Coach Industries, Inc.'s Answer to Plaintiffs' Amended Complaint	06/30/17	1	101–116
8	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery's Answer to Plaintiffs' Amended Complaint	06/30/17	1	117–136

9	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery's Demand for Jury Trial	06/30/17	1	137–139
19	Defendant SevenPlus Bicycles, Inc. d/b/a Pro Cyclery's Motion for Determination of Good Faith Settlement	09/22/17	2	313–323
31	Defendant's Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous "Air Blasts"	12/07/17	7	1572–1583
20	Defendant's Notice of Filing Notice of Removal	10/17/17	2 3	324–500 501–586
55	Defendant's Reply in Support of Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	01/22/18	12	2794–2814
53	Defendant's Reply in Support of Motion in Limine No. 7 to Exclude Any Claims that the Subject Motor Coach was Defective Based on Alleged Dangerous "Air Blasts"	01/22/18	12	2778–2787
71	Defendant's Trial Brief in Support of Level Playing Field	02/20/18	19 20	4748–4750 4751–4808
5	Defendants Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard's Answer to Plaintiffs' Amended Complaint	06/28/17	1	81–97
56	Defendants Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard's Joinder to Plaintiffs' Motion for Determination of Good Faith Settlement with Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard	01/22/18	12	2815–2817
33	Defendants' Motion in Limine No. 13 to Exclude Plaintiffs' Expert Witness	12/07/17	8	1802–1816

	Robert Cunitz, Ph.d., or in the Alternative, to Limit His Testimony			
36	Defendants' Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	12/08/17	9	2106–2128
54	Defendants' Reply in Support of Motion in Limine No. 13 to Exclude Plaintiffs' Expert Witness Robert Cunitz, Ph.D., or in the Alternative to Limit His Testimony	01/22/18	12	2788–2793
6	Demand for Jury Trial	06/28/17	1	98–100
147	Exhibits G–L and O to: Appendix of Exhibits to: Motor Coach Industries, Inc.'s Motion for a Limited New Trial (FILED UNDER SEAL)	05/08/18	51 52	12705–12739 12740–12754
142	Findings of Fact and Conclusions of Law and Order on Motion for Determination of Good Faith Settlement (FILED UNDER SEAL)	03/14/18	51	12490–12494
75	Findings of Fact, Conclusions of Law, and Order	02/22/18	22	5315–5320
108	Jury Instructions	03/23/18	41 42	10242–10250 10251–10297
110	Jury Instructions Reviewed with the Court on March 21, 2018	03/30/18	42	10303–10364
64	Jury Trial Transcript	02/12/18	15 16	3537–3750 3751–3817
85	Jury Trial Transcript	03/06/18	28 29	6883–7000 7001–7044
87	Jury Trial Transcript	03/08/18	30	7266–7423
92	Jury Trial Transcript	03/13/18	33	8026–8170
93	Jury Trial Transcript	03/14/18	33 34	8171–8250 8251–8427
94	Jury Trial Transcript	03/15/18	34 35	8428–8500 8501–8636
95	Jury Trial Transcript	03/16/18	35	8637–8750

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

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

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

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

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

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

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

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

1 know. But that's not what we're doing.

2 We're illustrating the opinions of our
3 experts, that when our expert talks about visual
4 crowding, we're going to illustrate that and say this
5 is what he means by visual crowding. When you look and
6 there's the dashboard and a large A-pillar and the, you
7 know, portion -- a small portion of a bicyclist's head
8 coming out, you -- you can lose sight of the bicyclist,
9 the person there because it blends in with all the
10 other obstructions that are -- are -- your brain is
11 processing when you see. So that's why a bicyclist
12 needs to be there.

13 He says, Well, why do you need to have a
14 bicyclist there? Well, how do you illustrate how a
15 bicyclist blends in as a result of this concept of
16 visual crowding if the bicyclist isn't there? And it's
17 not saying this is exactly what happened, this is the
18 visual crowding that occurred, because, you know,
19 that's not what we're saying. We're not re-creating
20 the event. What we're saying is this is the problem
21 with the bus. This is why it is dangerous. This is
22 why there are visibility problems. This is why it
23 could have --

24 THE COURT: I understand the general
25 concepts. I -- I guess I -- it sounds like it's

1 minutia, but not to me. How do you -- what -- what is
2 your response to the position of the -- your -- of
3 your -- of the illustration with respect to the
4 bicyclist's position of his head, given some of the
5 testimony in and the information?

6 MR. PEPPERMAN: Well, we know -- we have a
7 certain amount of information based on the witness
8 testimony. Okay? Mr. -- people on the bus, where they
9 saw Dr. Khiabani in relation to the bus. Ms. Bradley
10 behind him, you know, and the -- the difference isn't
11 is he next to the bus or is he in the Red Rock parking
12 lot? It's is he 1 foot or 2 feet away? So that --
13 those are the distinctions.

14 THE COURT: Understood.

15 MR. PEPPERMAN: And -- and that's -- doesn't
16 make a difference. If he's 1 foot or 2 feet --

17 THE COURT: Right.

18 MR. PEPPERMAN: -- in that spot, he's still
19 going to --

20 THE COURT: And -- and I may not have asked
21 my question specifically enough. I -- I'm talking
22 about a different slide, and that's the one where the
23 bicyclist is riding next to the motor coach with the
24 head -- with his -- with the bicycle -- with the
25 illustration with the head down.

1 MR. PEPPERMAN: This one?

2 THE COURT: This one and perhaps the other.

3 MR. PEPPERMAN: The prior one?

4 THE COURT: Yes.

5 MR. PEPPERMAN: These two? Well, again, this
6 is what is -- we have from the witness testimony, that
7 as they approach the intersection, Dr. Khiabani is in
8 the bike lane next to the bus. Now, is it 1 foot away,
9 2 feet away, 3 feet away? The -- that's the range of
10 the witness testimony. But that is the general
11 vicinity of the witness testimony of where he is in.
12 And Mr. Cohen can illustrate that.

13 If Mr. Pears is going to say, well, he's --
14 he's 1 foot away from the side of the bus, Mr. Cohen
15 can manipulate the -- the model, the 3D model and put
16 him at 1 foot away. And then we can say, look, this is
17 the -- what the bus driver would see if Mr. Pears is --
18 if you accept Mr. Pear's testimony as true, and he's
19 1 foot away at this point in the -- in the -- in the
20 model.

21 And if you -- Ms. Bradley says, oh, he was,
22 yeah, 2 to 3 feet away, you know, if -- put him at 2 to
23 3 feet away. This is what they would see in that
24 circumstance. So those are things that we can
25 manipulate, but --

1 THE COURT: During trial?

2 MR. PEPPERMAN: During trial.

3 THE COURT: Okay.

4 MR. PEPPERMAN: If we want to illustrate
5 those different witnesses' testimony. But, again, it's
6 just an illustration.

7 THE COURT: Understood.

8 MR. PEPPERMAN: We're not going to say this
9 is what happened.

10 THE COURT: Right.

11 MR. PEPPERMAN: We're going to say this is
12 what Ms. Bradley is saying, and if this -- and if what
13 she's saying is true, to illustrate what she's saying,
14 what she says she saw, this is what it would look like
15 based on the model.

16 THE COURT: Thank you.

17 MR. PEPPERMAN: So, again, it just goes down
18 to the difference between re-creation versus
19 illustration, and we're illustrating not re-creating.

20 THE COURT: Thank you. Mr. Russell?

21 MR. RUSSELL: And -- and I -- I heard it
22 again in response to your question, Your Honor, we want
23 to show you visual crowding, but we want to put this
24 cyclist's head in there so that the jury knows what the
25 driver would have seen. Okay? If you ask Mr. Hubbard,

1 the driver's going to take the stand, he's not going to
2 be able to tell you that at that point in time, he's
3 looking in that direction. No one's going to be able
4 to tell you that in that visual crowding scenario that
5 Mr. Hubbard's looking in that direction.

6 And as far as Ms. Bradley and we can -- I
7 mean -- I mean, I'm a little disturbed by the notion
8 of, well, we can manipulate it during trial depending
9 on the testimony. I mean, we're a little past that. I
10 mean, we're getting close to trial. We're going to be
11 playing with the computer models during the course of
12 trial. That's a little concerning to me from the
13 standpoint of -- of disclosure and being able for us to
14 prepare.

15 But what Mr. Pepperman clearly said is, We
16 don't want to just show you visual crowding without a
17 bicyclist there. We got to show you his head there so
18 you know what the driver would have seen. Even if the
19 driver is never going to be able to say I looked in
20 that direction, even though no one's ever going to be
21 able to say how big or small Dr. Khiabani's head would
22 have appeared based on his distance, but we want -- we
23 want to show that to you. We're not trying to
24 re-create it. We're just trying to illustrate it.
25 Well, why do you need that bicyclist's head in the

1 picture, then? You don't need it.

2 Ms. Bradley, from behind the bus, I'm pretty
3 sure she's not going to be able to testify how close
4 the bicyclist was front to back, longitudinally along
5 the bus. All right? And Mr. Pears, he's going to give
6 his testimony, and that's fine. But you notice they
7 didn't say, well, our -- our illustrations are based on
8 Mr. Pear's testimony. They didn't say, you know what,
9 Mr. Cohen took Mr. Pear's testimony and he used that to
10 help put together his model. No. They said, well, if
11 Mr. Pears comes to trial, we can manipulate these
12 images then.

13 Now, these images should be out. Now, if
14 they want to take the bicycle out and just show the
15 height of the bus and that sort of thing, I don't think
16 that would be a problem. But having the bicycle in it
17 is a problem.

18 THE COURT: All right. Thank you.

19 MR. RUSSELL: Thank you.

20 THE COURT: All right. Let's go on to
21 Defendants' Motion in Limine No. 3 to preclude
22 plaintiffs from making reference to a bullet train.

23 MR. PEPPERMAN: Actually, Your Honor, if you
24 don't mind, I talked to opposing counsel. They've
25 agreed to accommodate. My last motion is No. 17.

1 THE COURT: Sure.

2 MR. PEPPERMAN: And if we could take that one
3 out of order. Thank you.

4 THE COURT: Give me one moment.

5 MR. ROBERTS: Good morning, Your Honor.

6 THE COURT: Good morning. Give me one moment
7 to be on the same page.

8 MR. ROBERTS: Okay. I had to do the same
9 thing.

10 THE COURT: Thank you. Okay. Very good.

11 MR. ROBERTS: Thank you, Your Honor.

12 Your Honor, we have moved to exclude argument
13 and evidence that the plaintiffs in this case are
14 entitled to recover Dr. Khiabani's lost income. That
15 is the substance of this motion. The parties are
16 fundamentally in agreement on both the statutory basis
17 of recovery and the pattern instruction that the jury
18 should receive. Under NRS 41.045, the heirs' damage
19 includes loss of probable support. And -- and as they
20 stated in their opposition brief, the legislature
21 carefully chose the words "probable support."

22 It's not the decedent's lost income, what he
23 would have earned had he lived to his life expectancy.
24 It's how much the decedent would have given to each of
25 the heirs. And the question as to how much each heir

1 would have received is individual to that heir and must
2 be presented and proved separately.

3 The instruction which they've cited, 10.13,
4 and that's substantially similar to the -- the new
5 instruction, states that the heirs' loss of probable
6 support, companionship, society, comfort, and
7 consortium is what may be awarded. It goes on to
8 state, You may consider the financial support, if any,
9 if any, which the heir would have received from the
10 deceased except for his death. So there's a jury
11 question here as to how much each heir would have
12 received in support from the decedent had the decedent
13 lived.

14 The instruction tells the jury that they can
15 consider the age of the deceased and the heir; the
16 health of the deceased and the heir; their respective
17 life expectancies; whether the deceased was kindly,
18 affectionate, or otherwise; the disposition of the
19 deceased to contribute financially to support the heir;
20 the earning capacity of the deceased. That's one of
21 the factors, earning capacity. The decedent's habits
22 in the industry and thrift and any other facts which
23 show what the heir might reasonably have expected to
24 receive from the deceased. So more likely than not how
25 much would each heir have received?

1 The plaintiffs in their opposition cite from
2 dicta in Allsims (phonetic). And essentially what they
3 indicate they would like to argue to the jury, and I
4 assume what they're going to ask the Court to instruct,
5 is that the lost support is measured by the lost
6 income. And there is some dicta in the case which was
7 talking about double damages.

8 But the problem with that is -- is there's
9 one measure of lost income of what Dr. Khiabani would
10 have earned and we've got two heirs. And we've also
11 got the estate of Dr. Katy Barin which has a claim to
12 the period of time where she lost support from the
13 death of Dr. Khiabani until her death.

14 So how do we divide that up? You can't
15 simply take the measure of lost income and say that's
16 the measure of damages when you've got three different
17 heirs, all with a different standard of proof. So
18 there has to be some other evidence from which the jury
19 can determine how much each heir would have received.
20 Even assuming that the -- the dicta in Allsims applies,
21 it -- it leaves a big open gap.

22 They state that probable support translates
23 into and is often measured by lost economic
24 opportunity. Well, if it's often measured by that,
25 sometimes it must be measured by something else. It's

1 not always measured. And if we look to the majority
2 rule around the country, we can see what "often" means
3 and what it doesn't mean.

4 It's the clear majority rule, and we've cited
5 cases from around the country and also some
6 authoritative treatises that a wife, a spouse, a modern
7 child, there's a presumption that they would have
8 received support in some amount had the decedent lived.
9 However, for an adult child of the decedent or for an
10 heir where the decedent is an adult child, there's no
11 presumption of any support. And that's probably
12 because it's a matter of common knowledge that more
13 than 50 percent of parents do not continue to
14 substantially support their adult children and vice
15 versa. And we've cited some statistics from the -- the
16 census bureau to that effect, and that's -- that's why
17 the majority rule makes sense, because if it's probable
18 support, more likely than not how much would they have
19 received after they reach adulthood, it -- the answer
20 is not all of his income. Parents don't give all of
21 their income left over after their personal
22 expenditures to their children. That's -- that's not
23 the way most people work.

24 Now, if there were evidence that he had
25 promised them that or some evidence that he had

1 provided them hundreds of thousands of dollars of his
2 income in the years preceding his death, then -- then
3 that could come in and -- and they could try to prove
4 that more likely than not they would have continued to
5 receive it. But at the point where the children reach
6 adulthood, there's no longer a presumption they're
7 going to get support in any amount. There has to be
8 proof.

9 Which leads to the problem with Dr. Stokes'
10 report. Dr. Stokes gives no opinion in his report as
11 to the amount of probable support any of the heirs
12 would have received. And he appears to fundamentally
13 misunderstand the legal basis of a claim in the event
14 of wrongful death in Nevada. The report is attached as
15 Exhibit 1 to our brief. And if I could draw attention
16 to page 1 of his report dated October 28th, 2017, where
17 he summarizes his report, he says, "To summarize,
18 the" --

19 THE COURT: If you just give me a moment.

20 MR. ROBERTS: Oh, okay. Sure.

21 THE COURT: Okay. Go on.

22 MR. ROBERTS: Second paragraph, page 1, "To
23 summarize, the present value of the loss of earnings
24 income and fringe benefits resulting from the death of
25 Dr. Khiabani totals 15,262,217." So his opinion is

1 what's the loss of earnings, income, and fringe
2 benefits? Fringe benefits, loss of earnings, income,
3 there's no opinion on loss of support.

4 He also states following that sentence, "The
5 present value of the loss of his household services
6 totals 53,673." And -- and if the Court has tried
7 wrongful death cases before, you're probably struck by
8 how small that number is for -- for a man who -- who is
9 relatively young. The answer to that question and why
10 we haven't moved to exclude that number, why it's so
11 low and why that's not part of our motion, however, is
12 illuminating to the improper nature of his opinion on
13 lost income.

14 On page 7 of the report, about halfway down,
15 Dr. Stokes indicates how he calculated the value of
16 household services. Third paragraph under that topic,
17 "Household services are calculated through 2021, the
18 year in which Keon Khiabani reaches age 18. Katy Barin
19 is included through the 2018 calendar year because he
20 anticipates that she will have passed away by the end
21 of 2018.

22 When I read you the -- the statutory quote
23 for what the heirs are entitled to recover, you saw the
24 words "probable support." Well, there's no mention of
25 household services. There's no mention of lost income.

1 It's probable support. But the courts have interpreted
2 that one of the ways that -- one of the losses of
3 support are the lost household services that the
4 decedent would have provided and which would have
5 benefited the heirs.

6 So here, Dr. Stokes acknowledges that lost
7 support in the form of lost household services will
8 terminate when the minor children reach adulthood. He
9 acknowledges that. That's why his number is so small.
10 But without any explanation and without any evidence in
11 the record, he assumes that the lost support in the
12 form of money will be all of Dr. Khiabani's income less
13 what he spends until his death. And that's not the
14 legal standard, and there's no evidentiary support for
15 it in the record.

16 Further, it's our contention that his
17 opinions are even more misleading through his reduction
18 for personal consumption. And if the Court has his
19 report, it's at page 10. It follows page 9. It's not
20 numbered, but it's a conclusion page. There it is.
21 It's got a sticker on it, page 10.

22 THE COURT: Okay.

23 MR. ROBERTS: Okay. So the number at the top
24 is present value of earnings, income, and fringe
25 benefits, 21,112,263. He then reduces that by present

1 value of personal consumption, 5.8 million, to come up
2 with his 15,262,000 loss of income. We -- we've
3 established that the heirs have no claim for loss of
4 income. It's loss of probable support. What is the
5 amount of earnings, lost earnings that he would have
6 received? It's 21 million.

7 The only reason you do a subtraction for
8 personal consumption is to figure how much he would
9 have left over after his personal consumption for the
10 purpose of arguing that the heirs are entitled to
11 recover the difference, 15,262,000. And there's no
12 basis in the law or the record for presenting the jury
13 with evidence in the form of expert opinion that opines
14 that the heirs who will soon be adult children are
15 entitled to recover 100 percent of lost income less
16 personal consumption.

17 And although the jury instruction does
18 generally talk about presenting evidence of
19 Dr. Khiabani's thrift, I assume for the purposes of
20 showing how much he spent on himself, how much did he
21 normally give to the heirs, that sort of thing, the
22 personal consumption is not based on any actual
23 evidence from this case. It's based on statistical
24 charts about what the average personal consumption is
25 for an individual with a wife and children in

1 Dr. Khiabani's income bracket. So -- so there's
2 actually no evidence in the record which would meet
3 Nevada's standard for measuring what his personal
4 consumption had been up to his death or what it would
5 have been had he not died. So the number we have here
6 is simply a means of giving an improper inflated number
7 to the jury for -- for which there's no basis in law
8 for them to claim that full amount.

9 Although they have cited Allsims and there's
10 very little case law we could find in Nevada on the
11 standard of what the presumptions are and what the law
12 requires where you have an adult child of this
13 decedent. But by digging around, we did find some
14 ancient authority which has never been overturned which
15 discussed the situation where parents lost an adult
16 son. And in that case, the Court overturned a trial
17 court decision where essentially the parents had been
18 awarded the lost income of the son. And the Court
19 found that that was error because when the action is by
20 a parent for the death of an adult son, substantial
21 damages are recoverable only by showing that the
22 deceased had been of actual pecuniary benefit to his
23 parent or that the -- such benefit might reasonably be
24 expected by the continuance of his life, the reasonable
25 character of such expectation to appear from the facts

1 in evidence. Otherwise only nominal damages may be
2 recovered.

3 So what the supreme court said is it may be
4 that it's often measured by lost income less personal
5 consumption, if you have a spouse and a community
6 property estate in a state like Nevada who could
7 reasonably expect to receive and have benefit of all of
8 the income of the decedent less what he spent on
9 himself, but it's not like that for adult children.
10 And in Nevada, you can only recover nominal damages
11 past the point where they become adults unless there is
12 reasonable evidence in the record from which a jury
13 could determine that more than nominal support would
14 have been provided once they reach majority.

15 And Dr. Stokes has no such evidence that he
16 relies on. He just says here's the amount of lost
17 income which is an improper and misleading standard
18 which is unduly prejudicial.

19 Thank you, Your Honor.

20 MR. PEPPERMAN: Your Honor, what they're
21 trying to do here is say that in a wrongful death case,
22 an heir's damages are the same if the decedent, the
23 dead father in our case, is a billionaire or a hobo.
24 And that is simply not the law, nor is it logical.

25 If you think about it, if this is Bill Gates

1 who was killed and it's Bill Gates' family suing for
2 loss of probable support, which is a recoverable
3 measure of damages, are we going to exclude any
4 evidence of Bill Gates' wealth? Is that not relevant?
5 Is that not a matter for the jury to consider when
6 deciding what is the loss of probable support here? Of
7 course not. And that's exactly what Nevada law says.

8 And just a couple of quick slides as you know
9 the Allsims case, and it says it exactly, "Loss of
10 probable support, this element of damages translates
11 into and is often measured by the decedent's lost
12 economic opportunity." It's their wealth. What were
13 they worth? If you're a hobo, there's not much there.
14 You know, you're -- you're not going to expect a lot of
15 probable support from a hobo. It's common sense. It's
16 reality. But that fact is admissible, the fact that
17 this person is -- you know, does not earn a lot of
18 money, there's not a lot there for probable support,
19 that factor is going to be considered. It's -- the
20 same is true if the person's a billionaire. Loss of
21 probable support, what is the economic opportunity?
22 What was there to be provided for support? It's
23 considered. It's -- it's generally how -- how this
24 works.

25 And if you think about it, this whole notion

1 of, well, they're adult children, you know, adult
2 children don't normally need support, or they're not
3 supported by their parents, well, that may be true to a
4 certain extent, and they can make that argument to the
5 jury. But if you think about it, this money if -- had
6 Dr. Khiabani lived, he would have earned his money that
7 he would have earned over his career, he would have
8 spent the money on personal consumption which
9 Dr. Stokes opines about, and then, in the normal
10 course, if he had not been wrongfully killed and he
11 dies of natural causes after a full life lived, where
12 does his money go when he dies? They go to the heirs.
13 It goes to the heirs -- it's -- that's support they
14 would receive.

15 Now, they may not be receiving a monthly
16 check from their father every single day, but they
17 could certainly expect to receive his lifetime earnings
18 after their father dies. I mean, that's not an
19 unreasonable expectation. But if they want to argue
20 otherwise, they can.

21 And that -- the reason they can is because of
22 the -- the jury instruction on this. This is exactly
23 what the jury instruction's for. You can consider
24 these things. The age of the deceased and the heir;
25 the health of the deceased and the heir; the respective

1 life expectancies of the deceased and the heir; whether
2 the deceased was kindly, affectionate, or otherwise.
3 If they want to come in and say, well, Dr. Khiabani,
4 had he lived, he would have not left his kids any of
5 his lifetime earnings, they can make that argument. I
6 don't imagine they will, but they could if they wanted
7 to.

8 What's their disposition? Is he not going to
9 give -- does he not support his children? Does he not
10 indicate a willingness to support his children? Does
11 he indicate a willingness to donate all of his money to
12 charity when he dies? Those are all considerations.
13 And equally to be considered, the earning capacity of
14 the deceased. That is the jury instruction. This is
15 the pattern jury instruction. That -- this is the
16 instruction we're going to ask the Court to give.

17 And what Dr. Stokes did, he gave an opinion
18 on the earning capacity of Dr. Khiabani. And it was a
19 big number, over \$15 million. Now, they don't like it.
20 But their dislike of the earning capacity of
21 Dr. Khiabani, who's the decedent in this case, does not
22 render Dr. Khiabani a hobo. It doesn't mean that the
23 children -- his children aren't entitled to ask for the
24 loss of probable support and argue what that probable
25 support would have been based on their father's earning

1 capacity. Nor does it preclude them from arguing that
2 they would give them something less than his -- his
3 income for the reasons that they've laid out to you.

4 But it is not appropriate to exclude the
5 evidence of his earning capacity altogether. It's
6 clearly appropriate under Nevada case law, Nevada
7 pattern jury instructions, and common sense, and we'd
8 ask that you deny this motion.

9 THE COURT: Thank you.

10 Mr. Roberts. Excuse me.

11 MR. ROBERTS: Thank you, Your Honor.

12 To make perfectly clear, we would have had no
13 objection to the heirs putting on evidence of the
14 earning capacity of the deceased. That's the pattern
15 instruction. The earning capacity of the deceased.
16 Dr. Stokes does not opine on the earning capacity of --
17 of the deceased. He opines on lost income. He
18 defines -- he opines upon a claim that doesn't exist
19 and is inconsistent with the statute. The 15 million
20 that Mr. Pepperman just gave to you is not his earning
21 capacity. Dr. Stokes says that's his lost income less
22 personal consumption.

23 And in his report, at page 6, he states,
24 "Personal consumption expenditures are subtracted from
25 the earnings, income, and fringe benefits of the

1 deceased to arrive at the economic loss." He opines on
2 an economic loss which is not equal to earning capacity
3 for the purposes of putting a number in front of the
4 jury that's inconsistent with Nevada law.

5 Of course they could have had an expert opine
6 on earning capacity and put that on, and the jury could
7 have considered that together with other evidence. But
8 they didn't do that. And the report that they have put
9 forward does not opine on earning capacity and is
10 prejudicial and misleading on Nevada law.

11 We -- we just heard a -- a new argument, Your
12 Honor. I don't recall seeing that in any of the
13 briefs, and that is that somehow whatever he doesn't
14 give to them and whatever he doesn't spend on himself,
15 oh, they'd just get when he died anyways as far as --
16 that -- that's a loss of inheritance claim. And the
17 majority rule is that under a wrongful death statute
18 where heirs have a right to probable support, a loss of
19 inheritance does not fall within that, and there is no
20 basis to recover a loss of inheritance because that's
21 just too speculative and it's not within the definition
22 of loss of support. We'd be happy to file a
23 supplemental brief on that subject, but they've never
24 made a claim in -- in their brief that they have a
25 claim for loss of inheritance. And it's just too

1 speculative.

2 One of the footnotes that -- that we cited
3 talked about the problematic nature of simply putting
4 forward a claim like this as a lost income claim. You
5 have to give meaning to the words carefully chosen by
6 the legislature, probable support.

7 So how much are they probably going to
8 receive? If Dr. Stokes is taken at face value and
9 they're allowed to argue that they probably would have
10 received the total measure of his income less what he
11 spent on himself in the form of personal consumption,
12 it doesn't pass the smell test. Stein on personal
13 injury damages said that in personal injury cases,
14 Courts adopt the gross earnings since the true measure
15 of the injured person's earning capacity, but gross
16 earnings are obviously not available for support of the
17 family. Gross earnings are reduced by the amount of
18 income taxes withheld at the source. So at a million
19 bucks a year, he's probably been in the 39.6 percent --
20 36 percent tax bracket.

21 So -- so the amount they've deducted -- and
22 the 15 million, if you reduce that by personal capacity
23 and the 30 percent taxes, that's going to cut it by
24 another third. And until taxes have been paid, Stein
25 says, nothing is available for the day-to-day living

1 expenses of the work or support of the family.

2 And then he goes -- then Stein goes on to
3 talk about and then you look at net pay. There's a
4 cost of earning money. There are things that aren't --
5 still aren't included in that. That's why you simply
6 can't take a lost income claim like you would have in a
7 personal injury claim and say that's what the heirs
8 get, because it's not an accurate measure of loss of
9 probable support, and there is no claim under a statute
10 like Nevada's for loss of inheritance. It's simply too
11 speculative.

12 The statute is strictly construed in
13 derogation of the common law. No claim for loss of
14 inheritance expressly allowed and, therefore, you can't
15 revert and say, well, even if he wouldn't have given it
16 to them while they -- year by year, they would have
17 gotten what was left when he died because that's not
18 loss of support. It's loss of inheritance.

19 Thank you, Your Honor.

20 THE COURT: Okay. Thank you. We're going to
21 take a 15-minute recess.

22 THE MARSHAL: All rise. Court is now in
23 recess, 15 minutes.

24 (Whereupon a short recess was taken.)

25 THE MARSHAL: Court is back in session. Come

1 to order.

2 THE COURT: Okay. Very good. Let's go back
3 to our chronological order, and I believe we are on
4 Defendants' Motion in Limine No. 3.

5 MR. ROBERTS: Yes, Your Honor. The Court may
6 have noted that plaintiffs presented a consolidated
7 opposition to the 3 and 7.

8 THE COURT: Yes.

9 MR. ROBERTS: And I'm happy to argue those
10 together given that consolidation, and we can do them
11 both now or do them when we get to 7 based on the
12 Court's convenience.

13 MR. KEMP: Judge, in looking at it, I did
14 file a consolidated opposition.

15 THE COURT: I'm sorry. Will you speak
16 louder, Mr. -- Mr. Kemp.

17 MR. KEMP: Your Honor, I did file a
18 consolidated opposition, but I think they are really
19 kind of separate issues. So I -- I'd rather argue them
20 separately. I think the first one is a pretty quick
21 one.

22 THE COURT: That's fine. Let's -- we -- we
23 can argue them separately.

24 So let's go with No. 3, Mr. Roberts.

25 MR. ROBERTS: Thank you, Your Honor.

1 So No. -- No. 3, Your Honor, is fairly
2 simple, and it's simply based on -- principally on
3 prejudice outweighing probative. And -- and it
4 probably would have helped to argue them together to
5 understand what's going on with their claims, but I can
6 very briefly summarize their burden of proof and how
7 the bullet train references are not probative to them
8 meeting that burden of proof and, therefore, confusing
9 and unduly prejudicial to the defense.

10 We talked about the -- the standard for
11 proving a product defect claim as set forth in Robinson
12 and Eades on Monday.

13 THE COURT: Yes.

14 MR. ROBERTS: And to meet their burden of
15 proof, they have to present evidence from which a jury
16 could find that there was a commercially feasible
17 design available when it was manufactured that probably
18 would have prevented the accident.

19 So what is -- what -- what does the bullet
20 train go to? It goes to their -- their theory of air
21 blast. And the -- the whole use of the term "air
22 blast," you got to give Mr. Kemp credit, as far as I
23 can tell, he made up this term. There -- there's not
24 even anything on Wikipedia talking about this air
25 moving around a vehicle as being an air blast. But

1 instead of the aerodynamic flow of air around the
2 vehicle as their expert refers to as airflow, an air
3 blast sounds much more dramatic.

4 The -- I think the -- the first thing that
5 comes up when you look for the term air blast is a
6 massive ordnance air blast, a MOAB, which is a type of
7 weapon that is the most powerful weapon we have short
8 of the nuclear bomb. So that's quite a visual image
9 that stirs up.

10 So what they have to do in order to show
11 causation and -- and prove this air blast theory as a
12 defect that could have been reasonably designed around
13 is they've got to show, first, that the air moving
14 around the bus is what caused the accident. And
15 they've got to show that's there's a commercially
16 feasible design that would have reduced the airflow
17 coming around the bus to the point where it would have
18 no longer caused the accident and been sufficient to
19 destabilize Dr. Khiabani, which is their theory that he
20 was destabilized by the air blast.

21 Of course, there's no evidence in the record
22 of any of this, that an air blast is what hit
23 Dr. Khiabani. There's not even any good evidence as to
24 how far away from the bus he was. And there's no
25 evidence that talks about the exact amount of air blast

1 reduction that would have to take place in order to
2 have prevented the destabilization under their theory.

3 So they want to talk about a bullet train.
4 And the Japanese have designed a bullet train that goes
5 200 miles an hour that has low coefficients of drag.
6 Okay? Great. That's true. But there's no evidence in
7 the record as to how much airflow comes around a bullet
8 train; what the airflow is; that if the bus in question
9 had been designed like a bullet train that was
10 commercially feasible, there's no evidence of that;
11 that if it had been designed like a bullet train
12 because it was commercially feasible, there's no
13 evidence of what that would have done to the airflow
14 coming around and what the impact would have been on a
15 bicycle.

16 So what they want to do is they want to talk
17 about bullet train, show pictures of some very
18 aerodynamic looking vehicle that is designed for a
19 completely different purpose than a bus that is
20 supposed to go at highway speeds maximum, not 200 miles
21 an hour, and ask the jury to speculate about all of the
22 implications of the fact that if you can design a
23 bullet train to have low drag, certainly you can design
24 a Bugatti to have low drag, then certainly they were
25 dis -- completely disregarded public safety by

1 designing a bus that had a higher drag coefficient,
2 wasn't as aerodynamic.

3 But there's no evidence in the record that
4 anybody has ever designed an airplane or a bullet train
5 or a bus for the purpose of reducing air displacement
6 so that you don't disturb vehicles to the -- or
7 pedestrians or bicycles to the side. That's never been
8 a goal.

9 And the evidence that they -- they cite in
10 their -- their own brief on this issue, they point to
11 testimony of -- of Mr. Couch where he talks about MCI
12 designing around the -- the wind tunnel testing, and
13 did MCI know that if you round the corners more like a
14 bullet train, and this is in their brief at page 8 from
15 the Lamothe deposition, 36, lines 4 to 23. So this is
16 where he uses it in his deposition. Questioning our
17 witness:

18 "Did you understand in general that the
19 more you round the corner like a bullet train,
20 for example, the better aerodynamics you have?
21 You understand that?

22 "Yes.

23 "And the higher the speed the more of a
24 factor that would be?

25 "Great."

1 He then asks:

2 "Whose job was it to make sure that the
3 aerodynamic design of the J4500 was reasonably
4 safe?"

5 The answer was:

6 "Well, I don't know that aerodynamics is a
7 safety factor. The shape of the front of the
8 coach, I'm not aware that would be a safety
9 factor.

10 "QUESTION: So as far as you know, when
11 the J4500 was designed, no one looked at
12 aerodynamics as a safety factor as far as you
13 know.

14 "ANSWER: Not to my knowledge."

15 So there's -- there's no evidence MCI looked
16 at this as a safety factor. There's no evidence any
17 designer of any type of vehicle looked at aerodynamics
18 as a safety factor.

19 They misconstrue the quote from our wind
20 tunnel testing, but they do provide -- we provide the
21 full quote at page 5 of our brief. What the document
22 actually says is that "The aerodynamic side force
23 rolling moment and yawing moment are important to
24 handling because they provide a disturbance that
25 deflects a bus from its path in the presence of side

1 winds or passing vehicles."

2 So other than fuel consumption and
3 acceleration, the only other thing they were doing with
4 wind tunnel testing for and looking at was its affect
5 on the handling of the bus because the -- the center --
6 there's an air displacement, that might affect the
7 handling of the bus. They didn't look at it as a
8 safety factor as to other vehicles, people, and
9 bicyclists next to the bus. And no one ever has.

10 So when he wants to talk about a bullet train
11 and ask our people -- witnesses questions, could you
12 have made it more aerodynamic as a bullet train, and
13 wouldn't that have reduced the drag coefficient, and
14 wouldn't the lower drag coefficient have prevented this
15 accident, there's too much speculation for -- to allow
16 them to connect those dots. There certainly is not
17 evidence in the record that if we even designed our bus
18 to look exactly like a bullet train, this accident
19 still would not have happened exactly the way it did.

20 And that's why we believe this is misleading,
21 and we would ask that the evidence of a bullet train be
22 excluded. And we also ask that all the arguments on
23 air blast be excluded, but that's going to come next in
24 Motion No. 7.

25 Thank you, Your Honor.

1 MR. KEMP: Judge, air blast is a term that's
2 actually used by at least five different witnesses,
3 Ms. Bradley, Mr. Huff -- I mean, I can go on forever.
4 That -- that's been used by a lot of witnesses in the
5 case.

6 And Mr. LaRivier, he's our bicycle expert,
7 he's going to testify that that's a common term in the
8 bicycle industry as well. So it's not something I made
9 up or looked up on Wikipedia.

10 THE COURT RECORDER: We need a little volume.

11 THE COURT: They tell us this is -- this
12 courtroom is equipped with great IT stuff and mics
13 but --

14 MR. KEMP: Okay. I'll try -- I'll try to
15 speak up.

16 THE COURT: If you bring it just a little bit
17 closer. Thank you.

18 MR. KEMP: Anyway, Your Honor, Motion No. 3
19 is what we call a muzzle motion. They want to muzzle
20 me from using certain terms because they think that
21 those terms will describe accurately the concepts we're
22 trying to present to the jury. And -- and it's not
23 unusual. There's usually a muzzle motion filed on
24 every case because they don't want, you know, colorful
25 terms. They don't want the jury to understand the

1 concept. They want us to have to explain aerodynamics.
2 So it's really a different philosophy here.

3 So I think of a trial lawyer as an artist,
4 okay, on the left. That's what I -- I try to think
5 that's what we're doing. And Mr. Roberts, too, you
6 know. They want it to be like the slide to the right.
7 They want to be, oh, (descriptive sound) (descriptive
8 sound) (descriptive sound), you know, very boring, the
9 jury's asleep, they don't understand anything. So it's
10 really a philosophical difference I have with
11 Mr. Roberts. And I think aero -- aerodynamic is a
12 tough issue to explain. It's not a simple concept.
13 And I think starting out with a bullet train is a good
14 analogy.

15 Can I have my next one?

16 This -- this is a picture of a bullet train.
17 Okay? The only reason the bullet train analogy is so
18 illustrative is, one, they were first. In 1964 at the
19 Tokyo Olympics, they unveiled the bullet train to a lot
20 of fanfare. And if you look at the bullet train,
21 you'll see that it's rounded. That's the general
22 principle we talked about with the Mr. Couch, and
23 Mr. Lamothe, and they're -- they're the two design
24 people that were deposed from MCI.

25 If you round the side of the bus, it's more

1 aerodynamically efficient. That's what they did with
2 the bullet train. I am not going to argue that the bus
3 should have had a front like the bullet train. I don't
4 have to do that. I have the alternative part that they
5 designed back in 1993 that we looked at before where
6 they rounded the sides and they rounded -- they already
7 made the alternative part for them. So I -- I don't
8 even think I want to show the jury this picture. I'm
9 not even sure it's an exhibit. I don't think it's an
10 exhibit, Your Honor. But I do want to use the term
11 "bullet train" because I think that is a good way to
12 convey things.

13 And I think it's important that not only the
14 jury understand things, but this is going to be a
15 closely watched trial, Your Honor.

16 My next one.

17 This is the advertisement from the Courtroom
18 View Network. Their -- their -- their media request
19 was granted next week. They've telephon -- I've had
20 seven different cases televised by them on the
21 Internet. I think Mr. Eglet's had five. So I've got
22 the record and he's No. 2. Mr. Roberts has three?

23 But in any event, this is usually watched by,
24 No. 1, the defendant; No. 2, by their competitors;
25 No. 3, by -- usually the big firms have eight

1 associates watching so they can all bill while they're
2 watching the trial in their home office. I'm just
3 being honest, Your Honor.

4 And then, my point is it's watched by a lot
5 of law professors that use the presentations,
6 particularly the opening statement, good
7 cross-examination, they use it in a lot of trial
8 practice classes. And I know this because I've gotten
9 a lot of requests because the other seven trials, they
10 call me up and they say, Well, will you send us this?
11 Will you send us that? What were you thinking? You
12 know, they want me to fly back to Syracuse to speak. I
13 don't do that. But I -- you know, I like to educate
14 people. And so we want to -- we want to be real trial
15 lawyers in here. We want to be artists. And -- and I
16 think there's a premium on that.

17 Do I have another slide here? Okay.

18 So -- so the -- the fundamental issue is they
19 agree that trial lawyers can give analogies. They
20 agree with that. Okay? But they disagree whether this
21 is an apt analogy or not an apt analogy. That's the
22 disagreement. That's the term they use. They say it's
23 not apt. Well, you know, aptness is in the eye of the
24 beholder, Your Honor. I think it's apt. I think it's
25 the best way to start this aerodynamic concept down the

1 road.

2 And -- and I -- and I -- and I really don't
3 think there's any justification for muzzling anybody.
4 We cited all the trial practice guidelines in the
5 opposition. You know, I think we got nine of them, and
6 they all say let the lawyers use colorful language, let
7 them give analogies to explain different cold concepts.
8 That's all we're trying to do.

9 So for that reason, we think the motion
10 should be denied.

11 MR. ROBERTS: Your Honor, sometimes the
12 Courtroom View Network gets inadvertently watched by
13 witnesses without knowledge of trial counsel which ends
14 up in motions to exclude. We're going to make sure
15 that doesn't happen this time.

16 I'm not going to belabor this one, Your
17 Honor. We agree that counsel can use analogies. But
18 the law is clear that you can't use misleading or
19 prejudicial analogies. And that's what we believe the
20 bullet train reference is, because if you want to talk
21 about analogous vehicles and similar vehicles, a bullet
22 train is not an analogous vehicle to a bus. And to
23 argue, imply, or put in the jury's head that a
24 responsible engineer would have designed a bus to look
25 more like a bullet train, which is what he asked our

1 witnesses, if you -- if the bus looked more like a
2 bullet train, it's going to make -- reduce your drag
3 coefficient. That's what he wants to put in the head.
4 And that's misleading and that simply shouldn't be
5 allowed.

6 Every motion in limine is, at its heart, a
7 muzzle motion to prevent counsel from saying and
8 presenting prejudicial and improper evidence. And --
9 and, Your Honor, that's what why we move to exclude
10 reference to bullet train.

11 Thank you.

12 THE COURT: All right. What -- let's take
13 Defendants' Motion in Limine No. 7 now.

14 MR. ROBERTS: So I -- I've already started
15 building in to -- to this motion somewhat, Your Honor.
16 If the idea that they've -- Mr. Kemp has tried to turn
17 a principle of engineering where you reduce a drag
18 coefficient for the purposes of improving fuel economy
19 into a safety issue. And there's simply no evidence
20 that anyone in the industry has ever considered the
21 rounding of corners on the motor coach to be a safety
22 industry -- safety industry concern or a safety issue.
23 Certainly no one at MCI did, and there's no evidence to
24 the contrary.

25 The articles talk about reducing drag

1 coefficients by coming up with a more aerodynamic
2 design. But none of the articles that he cites which
3 talk about doing that have this in the context of a
4 safety factor for reducing air blast to people or
5 bicyclists or on the side of the bus. It -- it's an
6 efficiency and a fuel conservation issue.

7 The expert who they have selected to present
8 this theory to the jury, that the air blast caused the
9 accident, his opinions should be excluded under
10 Hallmark. They're just too speculative, and he does
11 not have a sufficient foundation for an opinion.
12 Because without evidence from which a jury could find
13 that the air blast caused the accident and that the
14 more efficient design proposed by their expert would
15 not have caused the accident, it would just be too
16 speculative. And -- and I'd like to go through some of
17 their evidence on that issue so the Court can
18 understand the speculative nature of this theory and
19 exactly how far their expert goes, what he did and what
20 he did not do.

21 In order to describe the theory, I would like
22 to show you Exhibit 3 to Breidenthal's deposition,
23 which is a hand diagram he did to try to explain some
24 of his principles. Okay? And -- and I have a -- a
25 paper copy here too, Your Honor, if you -- if that

1 would help you follow along better.

2 So we've got a drawing of the front end of
3 two hypothetical buses shown on this drawing. The
4 figure to the left is a bus with 90-degree corners. So
5 this is a hypothetical shape where there's no edge
6 rounding at all. And then the figure to the right
7 shows a rounded corner of a theoretical bus which would
8 have a reduced drag coefficient and a reduced air
9 blast, as Mr. Kemp refers to it. So this is a nice
10 rectangular shape about what Dr. Breidenthal used.

11 And the theory is, is that the bus is
12 traveling at 25 miles an hour, it displaces air in
13 front of the bus, and the air has to flow around the
14 bus on each side. So as the bus moves through the air,
15 it can't go through the bus, so it goes along the bus
16 like that. But if this corner is at 90 degrees, once
17 you reach a certain speed, the air simply can't make a
18 turn that sharp. So if you have a 90-degree angle, and
19 the air hits the front and needs to go around the side,
20 it can't make that turn. So it moves away, separates
21 from the bus body. And if the vehicle is long enough,
22 at some point it reattaches. So the faster the speed
23 and the sharper this angle, the more separation or
24 detachment of the flow that you're going to have.

25 So when it detaches and then comes back to

1 the bus, it has to travel more than a straight line.
2 So if the bus is moving 25, he says as an example, 25-
3 to 30-mile-an-hour bus, as it comes back, it might be
4 40 miles an hour. So it's going to go there and then
5 come back, which is why he talks about the airflow
6 pushing out and then pulling in.

7 So his theory is that as the airflow
8 detached, it would have hit the bicycle, pushing the
9 bicycle to one side, and as it comes back in toward the
10 bus to reattach, it would have pushed the bicycle in
11 the other direction --

12 He then states that if you had a more
13 aerodynamic design, you would not have as much
14 detachment or any detachment if it was perfectly
15 aerodynamic and, therefore, you would have less air
16 pressure being felt by the bicyclist. But he agrees in
17 his deposition that it's impossible to eliminate all of
18 the airflow or all of this effect.

19 Under Hallmark, Your Honor, an expert's
20 opinions to be admissible has to be sufficiently based
21 on reliable evidence. And -- and they talk about an
22 accident reconstructionist who hasn't looked at the
23 vehicles or just tries to go on photographs, who hasn't
24 examined the scene. So we look at Breidenthal's
25 deposition. Let's look at what he saw and what he

1 didn't see. Beginning page 10, line 9:

2 "I reviewed materials concerning the
3 bus-bicycle case, including photographs of the
4 bus, brochures related to the Setra 417 and
5 500, two other buses, and pages from
6 Michelangelo training materials.

7 "Did you receive anything else before you
8 prepared the report?

9 "It's possible, but I didn't base my
10 opinions on anything else."

11 So his opinions are -- initial opinions are
12 based on photographs of the bus and brochures from two
13 other buses and training materials from Michelangelo.
14 That's it.

15 "To be more specific, did you have a
16 chance to inspect the bus?

17 "ANSWER: No.

18 "Have you ever inspected the bus?

19 "No.

20 "Did you have a chance to inspect the
21 bike?

22 "No.

23 "Have you ever inspected the bike?

24 "No.

25 "Have you had a chance to reconstruct the

1 event itself?

2 "ANSWER: I'm not quite sure what you mean
3 by that. I believe the answer is no. I
4 haven't been to the scene. I haven't looked at
5 any detailed measurements that were taken there
6 or anything like that."

7 Continue on page 13.

8 "Did you get any specifics about the
9 event? For example, were you told that the bus
10 overtook the bike?

11 "ANSWER: Yes, I was.

12 "What were you told?

13 "ANSWER: At the time of this first
14 opinion letter, I was told that the bus might
15 have been traveling at 25 miles an hour and
16 40 miles an hour. And I don't think I was told
17 any information about the speed of the cyclist,
18 but that the bus did overtake the -- take the
19 cyclist."

20 And this came from counsel for plaintiff:

21 "Were you told whether or not the cycle --
22 cyclist was in the bike lane?

23 "ANSWER: No.

24 "Were you told whether or not the cyclist
25 was out of the bike lane?

1 "ANSWER: No.

2 "Were you told where they came together on
3 the road surface?

4 "No.

5 "Were you told where they came together in
6 relation to any intercepting streets?

7 "I was told it was around an intersection.
8 That's all I knew at the time of the first
9 report.

10 "Were you told what the lateral separation
11 was between the bus and the cyclist when the
12 bus overtook the cyclist?

13 "I was told there was some issue in that
14 regard. It might have been 3 feet. It might
15 have been less."

16 And as Your Honor knows, the police report
17 and our expert have both said it's fair to say that the
18 impact occurred 6 feet outside the bicycle lane.

19 So under Hallmark, this expert simply doesn't
20 have enough facts to reasonably opine and calculate
21 what the air blast was and whether it would have been
22 sufficient to destabilize the cyclist.

23 Page 15:

24 "Where did you get the information for the
25 separation between the bus and the cyclist?

1 "ANSWER: Well, I didn't get any specific
2 information on exactly how far away the bus was
3 from the cyclist. Even if I had, you would
4 still need to figure out what they corresponded
5 to in terms of the velocity field to the flow
6 around it. I simply selected what I regarded
7 as a reasonable number to indicate the
8 magnitude of forces that might be expected as a
9 rough estimate.

10 "QUESTION: So if I understand correctly,
11 then, what you have done here in Exhibit No. 1
12 is come up with a rough estimate, not
13 necessarily what occurred.

14 "ANSWER: Correct."

15 Your Honor, under Hallmark, that's simply not
16 good enough.

17 At -- at the end of the deposition, after he
18 had admitted all these things, Mr. Kemp asked him
19 whether all of his opinions were based to a reasonable
20 degree of engineering certainty, and he said yes.
21 Well, simply reciting the appropriate standard can't
22 fix the admissions that he's already made throughout
23 his deposition, that he doesn't have any of the
24 necessary facts. The calculations were needed in order
25 to -- to come up with the right numbers, and he -- he

1 never did the calculations, and he doesn't have the
2 facts from which he -- he could have done the
3 calculations.

4 He admitted that he never had done any
5 testing of the aerodynamics of this actual bus involved
6 in the incident. And he didn't have any access to
7 anyone else who had done testing. So he doesn't
8 actually have any knowledge.

9 We know for a fact that the MCI bus is not a
10 rectangle with 90-degree corners. The MCI bus has
11 rounded corners, and it's somewhere in between the two
12 drawings that he did on Exhibit 3. Somewhere between
13 the hypothetical rectangle and the bus with a efficient
14 design that would have reduced the airflow. And he's
15 never done any testing in order to calculate how far
16 the actual airflow was on the MCI design. The
17 calculations that he did were the square corners
18 because those are easy to do. Once you start rounding,
19 he said you can't even calculate that. You have to
20 measure it in a wind tunnel, and he didn't do those
21 measurements.

22 And after he wrote this report, he gave a
23 supplemental report after he reviewed our wind tunnel
24 testing, and our wind tunnel testing was done for the
25 purposes of determining drag coefficient. There was no

1 measurement of the air displacement and the side force
2 and the air blast that he could confirm through
3 calculations what this vehicle displaced at 25 miles an
4 hour. It's all speculation. Calculations are needed.
5 He admits that he didn't do them.

6 Page 17, he talks about testing. More
7 testing is always good. And he talks about what he
8 would have done to test, things he didn't do.

9 If I could also read more, and I -- I request
10 the Court's indulgence for the extensive reading from
11 the depositions, but I think it -- it's very helpful to
12 understand the speculative nature of his testimony.

13 The -- the attorney questioning him gets to
14 the point:

15 "Okay. The front shoulder of the
16 right-hand side of the bus is the area I'm
17 interested in."

18 This is where there's some drawings right
19 around the -- the front passenger side of the
20 90-degree-angled bus. And he's asked:

21 "And what have you depicted? Is that the
22 flow coming from the stagnation point, goes
23 along the front of the bus, separates, and then
24 reattaches?

25 "ANSWER: Correct.

1 "QUESTION: Is there a formula that
2 determines when it reattaches or where it
3 reattaches?

4 "ANSWER: I would say in general, no.
5 This whole business of the turbulence at higher
6 Reynolds number, high speed, high velocity,
7 high large scale is not amenable to
8 mathematical calculation. That's why we still
9 use wind tunnels. We can't predict everything.
10 We have to go out and measure things."

11 Continuing on page 32, line 6:

12 "Now, the second thing I'm interested in
13 is not just the point of reattachment, it is
14 the lateral separation at a maximum between the
15 side of the bus and the detached boundary
16 layer."

17 So what we're talking about here is as the
18 air detaches, that's allegedly what hit Dr. Khiabani.
19 So he's asking him, okay, at its maximum, what's the
20 maximum point that it detaches away from the -- from
21 the bus where -- where it would have impacted a
22 bicyclist? So we can tell, you know, was Dr. Khiabani
23 within that area where it could have theoretically
24 impacted it? And he's asked the question:

25 "That dimension, can you calculate that

1 dimension?

2 "ANSWER: From first principles, no.

3 "QUESTION: Is it something that has to be
4 measured?

5 "ANSWER: Yes. So in terms of the area
6 where the boundary layer separates and comes
7 around the corner of the bus and the distance
8 that it reaches from the side of the bus is
9 something that has to be measured and the point
10 where it reattaches is something that has to be
11 measured to know where those things occur or
12 how far out the boundary layer gets.

13 "ANSWER: Correct."

14 So their expert has admitted that you can't
15 calculate these actual numbers. He's admitted that you
16 can't calculate how far out it goes, when it comes back
17 and the force would be in the opposite direction on
18 this particular coach.

19 Now, what about the speed of the air? He
20 wants to opine about the speed of the air:

21 "Can you calculate the speed of the air,"
22 at page 34, line 9?

23 "ANSWER: No, because it critically
24 depends on whether or not the flow stays
25 attached or not. And that's one of the things,

1 when you have a rounded corner that's smooth,
2 there's no obvious separation point. And so
3 our ability to calculate separation when
4 there's not a sharp edge, like there is in this
5 sketch, means we don't know exactly where the
6 separation point is and, therefore, we don't
7 know the speed just outside the boundary layer
8 at that separation point."

9 He goes on to talk about that's the nice
10 thing about studying bluff bodies. With 90-degree
11 edges, you can do calculations. Once you start
12 rounding, you have to measure it. Page 36:

13 "You have to measure it?

14 "ANSWER: I would say in general, you're
15 obliged to measure it because you don't know
16 for sure where it separates."

17 He wants to see it measured throughout that
18 entire point of his deposition.

19 So after discussing all of these problems
20 with his calculations, that it requires measurements to
21 know what they actually are, that he hasn't had an
22 opportunity to -- he hasn't had this bus in a wind
23 tunnel, what did he actually provide? The -- the
24 answer is on page 80. What he says:

25 "According to the witness accounts, if he

1 was within 3 feet or less of the bus, I would
2 expect my estimate to be a plausible indication
3 of the magnitude of the side forces he" -- "he
4 would encounter."

5 That's what his opinion is, Your Honor, a
6 plausible indication of what they might have been.
7 Plausible is not probable. Plausible is not to a
8 sufficient degree of engineering probability. He's
9 guessing. And it's -- it's plausibly within the range
10 of what he might experience. So we've got a plausible
11 guess as to what he might have encountered with this
12 bus for which there's no calculations, no wind tunnel,
13 no measurement.

14 And then his ipse dixit that a more efficient
15 design would have somehow lowered the velocity of the
16 airflow around the bus to the point it wouldn't have
17 destabilized the bike. And, Your Honor, that's simply
18 not enough in order to get this evidence to the jury
19 and cause them to speculate that the air -- theoretical
20 air blast is what caused the cyclist to destabilize,
21 and that the more efficient design which they want to
22 opine on would not have caused the same
23 destabilization.

24 In their opposition, they mentioned that they
25 asked for drawings of the bus and that's why he had not

1 in his initial report looked at the actual rounding of
2 the MCI bus in question. And it is true that we've
3 searched exhaustively for the original drawings from
4 well over ten years ago of the front of the bus, and
5 have been unable to locate them.

6 But what did he use eventually? Well, we had
7 an exemplar bus that was the same model, and a
8 three-dimensional scale was made of the bus. And
9 that's what he ended up using. And of course, the
10 actual bus was produced months -- months ago, and they
11 did their own three-dimensional scans. On the 23rd,
12 when Mr. Kemp did his oral argument on the punitive
13 damages and brought up the replica of the street, you
14 notice he had a bus? That was an exact scale model of
15 the very bus that's in question, which he's had since
16 he took the first deposition, I believe, in this
17 matter. An exact scale model.

18 So they got three-dimensional scans and the
19 actual bus, a scale model of the bus that they could
20 have provided or used for testing. And what's the best
21 evidence of the profile of the bus involved in this
22 accident, a 3D scan of the actual bus or a design
23 drawing from before the bus was manufactured? So they
24 had the information.

25 But even after Dr. Breidenthal got the

1 dimensions of the bus and was provided the 3D scan
2 showing the actual dimensions, he still doesn't come up
3 with any type of analysis from which you -- you can
4 satisfy Hallmark or give this to the jury. He does get
5 more accurate. He starts to plug in -- originally he
6 was 8 miles an hour, and now he's using 13.5 because
7 he's provided additional evidence of what actually
8 happened.

9 Audra, do you have his new report, the last
10 few paragraphs?

11 So what we've got here are his supplemental
12 opinions, and you can see that he's using 13.5 instead
13 of 8 which more accurately represents the evidence in
14 the case.

15 Here's the interesting thing: Even though
16 he's changed the cyclist's speed to 13.5 and we now
17 have a different speed for the bus, his local flow
18 speed is still 40 miles an hour. It's the exact same
19 thing as his original report. He was using different
20 speeds for the bicycle and the bus. How can it be the
21 same if it was a calculation? Well, the answer is not
22 the same. It's a rough order of magnitude which he
23 can't even figure out how the changes in speeds would
24 affect it, so he just uses the same rough plausible
25 estimate.

1 We then look at paragraph 6 which talks about
2 the MCI wind tunnel where the -- by modifying the shape
3 of the front of the bus, the drag coefficient is
4 reduced from .558 to .357. This decrease in drag
5 coefficient corresponds to a reduction in the separated
6 flow so that the effective aerodynamic width of the bus
7 is reduced. Okay. Great.

8 He says that reducing the drag coefficient
9 will reduce the separation and it won't go as far out
10 from the bus. Maybe it -- maybe it will reduce the
11 speed if you still got the speed at 40 miles an hour.

12 So how does this meet the Hallmark standard,
13 Judge? He doesn't say what the width on the MCI design
14 is. He doesn't say what the width would be had they
15 used the design they used in the wind tunnel. He
16 doesn't tell you any factor from which a jury could
17 determine that the width was wide enough to knock him
18 off the bike under the MCI design that was used, and
19 under the modified design, it would have been enough.
20 The jury would have to speculate to get here because he
21 doesn't give you any numbers. All he says is it's
22 reduced, and he doesn't even opine that it would be
23 reduced proportionately, that the more round corners,
24 that it's a proportionate reduction.

25 It -- it's all speculation. They're trying

1 to take a design study that was done for the purposes
2 of saving fuel economy and somehow turn it into a
3 safety issue where even if you could shove that package
4 into the Nevada standard for defective product, they
5 have absolutely no credible, nonspeculative evidence
6 that the plausible design they want to put forward
7 would have prevented this accident. And that's why
8 they shouldn't be allowed to put this theory forward.

9 Thank you, Your Honor.

10 MR. KEMP: Your Honor, the simple response to
11 Mr. Robert's entire argument is they did not file a
12 motion to exclude Dr. Breidenthal. Didn't do it. He
13 just got done arguing a motion that was not filed.
14 They filed a 7 1/2-page motion that they entitled
15 "Motion to Exclude Any Claims That the Subject Motor
16 Coach was Defective Based on Alleged Dangerous Air
17 Blast." That's what they said. The word "Hallmark" --
18 the Hallmark case is not even cited in that motion.
19 All these deposition excerpts that they read to you
20 from Dr. Breidenthal that they think are -- are so
21 terrible, those aren't even quoted in the particular
22 motion.

23 What they did in the motion is they argued in
24 general that there's no evidence to support the air
25 blast theory. Well, they lost that last week when they

1 lost the summary judgment opposition. So they --
2 they're trying to flip it and -- and salvage something
3 out of this motion which, frankly, they should have
4 withdrawn it. But they did not file a Hallmark motion
5 challenging Dr. Breidenthal's opinion. So that is the
6 short end of it. There is no possible basis for them
7 to exclude the opinion at this point.

8 Now, let's talk -- and I -- and I do want to
9 talk about his opinion. His deposition, that
10 deposition that he read to you was taken on
11 November 3rd. Three months prior to that deposition,
12 in August, we served requests for production on them
13 asking them for the drawings of the front right corners
14 of the bus, because -- I think the Court can appreciate
15 now, the radii which is the -- the calculation of the
16 radius, the radii is a key fact on the side of the bus
17 and the front of the bus to determine the aerodynamics.
18 And I -- I -- well, I -- I probably will go through
19 this with some of the other evidence because I do have
20 to support this -- I do have to oppose the substantive
21 motion.

22 But they did not give us the radii for the --
23 they did not give us the drawing. Today is the first
24 time they've admitted that they've lost this key piece
25 of evidence. I've been pounding them for it. I filed

1 a motion to compel with Special Master Hale. He
2 granted it. He ordered them to produce it. Today is
3 the first time this admission in open court that they
4 do not have this key drawing.

5 So Mr. Roberts says, Well, we -- we don't
6 have the drawing. You know, no explanation as to how
7 they lost a design drawing from a 2008 bus. This isn't
8 an 1880 bus. This is a 2008 bus. Where is this
9 particular design drawing?

10 In any event, what was developed is Granat,
11 who's one of their experts, did a laser rendering of
12 the front of the bus, and he came up with a substitute
13 drawing for the radii. That was produced on
14 November 14th, 2017. That is 11 days after
15 Dr. Breidenthal's deposition. And I'm sure Your
16 Honor -- Your Honor was wondering why Dr. Breidenthal,
17 a world-class aerodynamics engineer would be forced to
18 having to draw a picture of the front of the bus.
19 Okay? That is why. Because they did not produce the
20 drawing, and the radii that they developed was not
21 produced until November 14th, 11 days later. And he
22 has done a supplemental report based upon that
23 late-produced radii.

24 So what they're really arguing to you is
25 because Dr. Breidenthal didn't have the measurement at

1 his deposition -- which he didn't. I'll admit that,
2 Your Honor. He did not have the bus measurement at the
3 deposition -- that his whole opinion should be thrown
4 out because we committed a discovery abuse by, one, not
5 producing the drawing that was requested back in
6 August; by two, not telling counsel that that
7 apparently was destroyed; by three, not honoring a
8 order from the special master that it be produced. So
9 they're saying that because of their serial discovery
10 abuses, our expert's opinion should be thrown out? I
11 don't -- and they didn't even file a motion to throw it
12 out? I don't think so, Your Honor.

13 So for that reason, we would strongly oppose
14 any, any type of restriction or limitation on
15 Dr. Breidenthal's testimony. In particular, a -- a --
16 an exclusion of him when they filed a motion, in
17 7 1/2 pages they don't even mention Hallmark and they
18 don't cite everything that they've just told the Court.

19 Now, opposing the substantive motion, this is
20 really the same motion for summary judgment that they
21 already lost. Because the motion was to exclude any
22 claims that the subject motor coach was defective based
23 on alleged dangerous aerodynamics. That was the
24 motion. Any claim, any evidence. And just to make
25 crystal clear what the motion was, they repeat again in

1 their reply that that's exactly what they want to do.
2 They want to exclude any evidence that -- and then
3 they -- in the reply, they do talk about
4 Dr. Breidenthal, but they go through all the evidence
5 types that we had gone through last week.
6 Dr. Cato's --

7 Can we have some of these?

8 This is the same slide I showed you last
9 week, Your Honor. The three design defects
10 aerodynamics.

11 Next one.

12 This is the video. I don't know if -- well,
13 maybe we shouldn't play it again. It's such a great
14 video, you know.

15 And remember, Erica Bradley testified that
16 this was substantially similar to what she saw. She
17 was in the car right behind the bus, and this is
18 substantially similar to what she saw.

19 Next one.

20 This is Dr. Cato's article. In the reply, it
21 doesn't talk about Hallmark and cite Breidenthal's
22 deposition. In the reply -- reply page 4, line 2, they
23 talk about Dr. Cato's article and say, well, this
24 article is irrelevant. You know, I -- I kind of think
25 an article that establishes a scientific principle that

1 when the bus comes up on a bicycle, first it does an
2 air blast out and then it sucks back in, I think that's
3 relevant. But let's let the jury decide that. That's
4 going to be admissible because that comes in as a
5 learned treatise.

6 Next, we showed you Dr. Cooper's paper.
7 Cooper, he was the one that they hired to be their
8 aerodynamics engineer. He found that rounding the
9 buses was an effective way of reducing the drag
10 coefficient, the air blast. He even has the optimum
11 match radius. I -- I haven't compared his value with
12 what they -- well, I guess I have compared it. But in
13 any event, he tells them exactly what they have to do.
14 So what do they do? They hire this guy.

15 Next one, please. Go ahead. Next one.

16 This is their -- this is Dr. Cooper. They
17 hired the guy who just did the previous article, they
18 hired him to do these aerodynamics testing that we
19 talked about in 1993.

20 Now, Mr. Roberts says, Oh, well, there's no
21 evidence that comes out of this. Not only is there
22 evidence that come out of this --

23 Next one, please.

24 There -- this is their wind tunnel.

25 Next one. Back. Yeah.

1 This is the alternative product, Your Honor.
2 They designed it. They built it. They had it. And so
3 Mr. Roberts says, Oh, there's no evidence as to what
4 the aerodynamics measurement would be on that product.
5 Yes, there is. It's in the test report.

6 Next one, please.

7 They've got the exact drag coefficient right
8 there. New MCI, .349. They -- they're telling the
9 world what they could have done. You know, they're
10 proud of it.

11 Now, Mr. Robert says, Oh, well, we weren't
12 trying to save lives of bicyclists or pedestrians by
13 reducing the air blast. We were just trying to save
14 fuel. Well, who cares what they were trying to do.
15 This is what they did. This is what they came up with.
16 And no one denies that if they had halved the -- the
17 drag coefficient of this bus, that it would halved the
18 air blast. No one denies that. And if anyone did,
19 Dr. Cooper -- we skipped over it, but Dr. Cooper said
20 that. And that's the Bugatti thing.

21 Let's go forward.

22 But this is the evidence that they talk about
23 in the reply, the reply at page 4. The first thing
24 Dr. Cato. The second thing Cooper. The third thing
25 the wind tunnel tests. Then they go to the testimony

1 of their engineers that they tried to --

2 Next.

3 -- you know, the Couch Testimony. They're
4 rebutting the summary judgment ruling. That's what
5 they're doing here.

6 And so what they've done is really they've
7 recast this as a last-ditch effort to get something out
8 of this motion in limine when the Court's already made
9 the ruling.

10 This is Couch's testimony. Couch, excuse me.
11 Couch, he's one of the design engineers. You know,
12 Mr. Roberts says, Oh, well, we were just trying to save
13 fuel. You know, that's why we were doing it. One of
14 the reasons was to reduce the air displacement that a
15 bystander and bicycle would see. Well, that would be
16 the effect. Maybe that wasn't their effort, but they
17 knew there was a safety component to it, Your Honor.
18 They knew it. This is their design engineer, and --
19 and he's the same person that we talked about Monday as
20 being a managing speaking agent.

21 Okay. Now they go -- now they go forward and
22 on page 7, lines 5 through 10 -- 10, that is the only
23 place where they talk about Mr. Breidenthal not
24 being -- it's Dr. Breidenthal, by the way -- not being
25 able to salvage their theory. That is in the reply.

1 Okay. So what Mr. Roberts has done is he's
2 taken four sentences out of re -- and this doesn't even
3 cite Hallmark. He's taken four sentences out of a
4 reply of a -- a motion that he knows is going to lose
5 because of the Court's previous ruling, and he's trying
6 to recraft it as -- to some sort of motion to exclude
7 Dr. Breidenthal.

8 Well, Your Honor, that shouldn't be done.
9 Number 1, the motion is improper. Number 2, there's
10 not grounds. He showed you some of Dr. Breidenthal's
11 report.

12 Do we have that coming up next?

13 I mean, this -- this -- this is pretty deep
14 stuff, Your Honor, the -- the leading edge and the
15 radii, the difference in the flow calculations. It's
16 pretty deep stuff, which is why I want to use a bullet
17 train analogy for the jury to make it a little simpler
18 for them.

19 But in any event, Dr. Breidenthal, he has the
20 measurement now because he got it on November 14th,
21 2017. They didn't ask to retake his deposition after
22 the supplemental report. They don't know what change
23 having an actual measurement will have to his opinion.
24 But he did tell them in the deposition what he would do
25 if he had the actual measurement.

1 And where their -- their whole criticism of
2 Dr. Breidenthal flows from their discovery violation, I
3 mean, I think it's really outrageous that they ask that
4 his opinion be excluded.

5 And then Mr. Roberts, his final suggestion
6 really, really gets me going. He says, Well, Mr. Kemp
7 should have anticipated that we would have lost a key
8 engineering drawing and that he should have known that
9 we would have violated Special Master Hale's order and
10 he should have gone out and done the laser study of the
11 test that we did and given that to Dr. Breidenthal.

12 Well, okay, Your Honor, retrospect, maybe I
13 should have done that and I could have done that, but I
14 mean, when you ask for a simple drawing, an engineering
15 drawing from the defendant and they don't tell you
16 until January 31st when it's asked for in August that
17 all of a sudden, it's been lost or destroyed and they
18 can't produce -- I don't even know how they keep making
19 these buses if they don't have the engineering drawing.
20 But in any event, Your Honor, I mean, to -- to suggest
21 that our expert should be stricken because of their
22 misconduct, I think is really outrageous.

23 MR. ROBERTS: Addressing first, Your Honor,
24 the -- the short argument that we had never moved to
25 exclude these opinions of -- of Breidenthal and

1 therefore, that's not the motion before the Court.
2 It's not a long motion. Page 8, "plaintiffs could not
3 salvage this theory through their expert."

4 During his deposition, Mr. Breidenthal
5 candidly admitted that to accurately determine the
6 magnitude of the vehicular displacement in the area
7 that is affected, one must measure a number of factors,
8 and then we give examples. And he admitted that he
9 assumed all of the factor -- values corresponding to
10 those factors. Consequently, Mr. Breidenthal's
11 opinions associated with air displaced by the moving
12 coach are speculative and inadmissible. Mr.
13 Breidenthal cannot base his opinions on speculation
14 and, as such, cannot offer opinions on any purported
15 air blasts.

16 It's the exact same argument I made this
17 morning. We clearly moved in the original motion to
18 exclude all evidence regarding their air blast theory,
19 including the inadmissible speculation of their expert,
20 Mr. Breidenthal.

21 Moreover, he was provided by Mr. Kemp the 3D
22 scans. He did issue a supplemental report after his
23 deposition, and that supplemental report is what I put
24 up on the screen and the monitor for you, Judge. Even
25 in the supplemental report, he still provides no values

1 for the width of the displacement. He provides no
2 values for where it reattaches. He provides no values
3 as far as what implementing the design that was tested
4 by MCI would have done to those values and that -- from
5 which a jury could conclude that if those changes in
6 design had been made, it would have reduced airflow to
7 the point where the air blast would not have caused the
8 destabilization of Dr. Khiabani. It's all built on
9 gossamer threads of speculation and whimsy. It's a
10 very sexy argument. It has jury appeal, but there's no
11 scientific basis in the record for it.

12 The wind tunnel results which Mr. Kemp says,
13 oh, it's right there in their report, the reduction in
14 drag is right there in the report, we agree to that.
15 Absolutely it is. And the numbers were cited in -- in
16 the supplemental report from Breidenthal.

17 What's not in the report are any measurements
18 of the displacement of airflow around the design that
19 was used and the displacement of airflow around the
20 theoretical coach design which had the lowest drag
21 coefficient. It's nowhere in that report.
22 Dr. Breidenthal doesn't measure it. He says it can't
23 be measured -- can't be calculated. It would have to
24 be measured and I didn't do any measurements.

25 Addressing this issue that it was somehow our

1 misconduct that required -- that -- that caused his
2 report to be speculative and inaccurate, first, the
3 supplemental report he issued after they get the data
4 that Mr. Kemp is referring to is still speculative and
5 still doesn't provide value. So it didn't cause him to
6 speculate. He is still speculating now that they have
7 the dimensions they claimed he needed.

8 And I -- and I also need to -- to actually
9 show the Court some things because Mr. Kemp just said
10 it was the radii that he needed, the radii of the
11 front. That's what he didn't have and that Dr. -- or
12 sorry, I don't know if he's Dr. or Mr. I've seen it
13 both ways -- but that Breidenthal didn't have that he
14 needed. Even after he got it, he's still speculating.

15 But, Your Honor, if I could show you first,
16 at the special master hearing, we -- we had provided a
17 bunch of design drawings, hundreds of design drawings
18 on September 6th. And they said, What we're looking
19 for still isn't there, and they moved to compel.
20 And -- and I said, What exactly do you want?

21 And so at the hearing with Special
22 Master Hale, they said, What we want is your expert,
23 Granat, has four pages of drawings of the bus. And
24 this is -- this is one that's up on your screen. And
25 this is from Granat Technical Consulting, and you see

1 you got a full bus here with measurements.

2 And -- and, Audra, can you show a couple
3 other pages from -- from that same Granat exhibit so
4 the Court can get an idea.

5 So what -- what they were saying is that
6 Granat has these things that he's produced. And it's
7 obvious he's lifted them off of drawings. We want the
8 drawings that match up with these drawings. That's
9 what they asked for. We want the design drawings that
10 match up with these four sheets from Granat's
11 materials.

12 So I called up Granat and I said, I can't
13 find any drawings that look exactly like these four
14 sheets. And he said, Well, that's -- I didn't lift
15 them off of drawings. I took these dimensions from the
16 three-dimensional scan of the J45 bus that Exponent
17 did. And -- and they did their own three-dimensional
18 scan.

19 So I wrote back and I told Mr. Pepperman,
20 There are no drawings that these were lifted from.
21 They were from a 3D scan. And he did say, I -- I'd
22 still like to see drawings that match up. And I didn't
23 say anything was lost. I didn't say anything were
24 destroyed. I said, I personally looked through 4 1/2
25 boxes of drawings that were sent to me from MCI and I

1 couldn't find anything that matched these four
2 drawings.

3 But if what Mr. Kemp says he was missing was
4 the radii of the front corners --

5 Audra, could we have Bates No. 38-71.

6 This is what was produced to them on
7 September 6th of 2017. And if all he needed were the
8 radii of the front corners, this drawing has the radii
9 of the front corners. And there are four more drawings
10 that are similar to this that show radii of the front
11 corners that were produced 38-71, -72, -73, -74. These
12 don't look like Granat's drawings and they don't match
13 up with Granat's drawings, but they clearly show the
14 radii that they claim they were missing. They had it
15 September 6th.

16 So what it comes down to is this wasn't based
17 on any discovery abuse. Breidenthal wasn't lacking the
18 radii of the front corners because of some discovery
19 abuse that we performed. They've got this drawing.
20 They've got their own 3D scans. They got a scale
21 model. They got all sorts of things that Breidenthal
22 could have gotten that information.

23 But as you saw, they hardly sent him
24 anything. They -- they sent him some photographs of
25 the bus and a couple brochures and told him the rest of

1 what he should assume. It's completely speculative.
2 It's completely inadmissible as argument in our motion,
3 and it should be excluded. And -- because with the
4 exclusion of this evidence, the whole theory is
5 speculative, all argument on wind blast should also be
6 excluded pursuant to our motion in limine.

7 Thank you, Your Honor.

8 THE COURT: Mr. Kemp, do you have anything
9 else to add since yesterday --

10 MR. KEMP: Yes, Your Honor. They did not
11 produce those Bates stamps on September 6th. What they
12 did is they invited Mr. Pepperman to come over to their
13 office, and they had boxes and boxes of drawings. And
14 then we filed a motion to compel. They didn't tell the
15 special master, Oh, we have Bates 38-71, -72, -73, -74.
16 They said, We'll go look and we'll make a supplemental
17 production. That's what they told the special master.
18 To this day, they have not made a supplemental
19 production, Your Honor.

20 So to suggest that it is somehow our fault
21 that they did not produce the evidence that was
22 requested after a motion to compel, after numerous
23 letters, after dozens of emails, and after a special
24 master hearing, you know, to suggest that that's our
25 fault I think is totally inappropriate.

1 MR. RUSSELL: Your Honor, may I address that?
2 The -- the documents that were made available to
3 Mr. Pepperman were not -- were not Bates stamped. We
4 had boxes. We invited them over. They had access to
5 them. Those documents were part of a Dropbox as a part
6 of our first and second -- responses to the first and
7 second requests for production which were served on
8 September 6th. They were included in that. The
9 Bates -- the boxes that are at our office that
10 Mr. Pepperman had the opportunity to look at, and --
11 and they were produced for view, they were not Bates
12 stamped. These were different. And these were
13 provided on September 6th.

14 MR. KEMP: Judge, we filed a motion to compel
15 for the engineering drawings of the front of the bus.
16 We had a special master hearing. They said that they
17 would get them. Today, they said they don't have them.
18 They can't find them. And I don't know what these
19 Bates stamps are, but these obviously are not the
20 engineering drawings or they would have showed -- they
21 would have told Special Master Hale that. You know,
22 they would have -- or at least they would have produced
23 it to us as being responsive to our requests.

24 So what Mr. -- Mr. Roberts is doing is
25 he's -- he finds some Bates stamp document that has the

1 word "radii" on it, and he's like, Oh, Judge, he could
2 have looked at this radii. Those were not the drawings
3 that were initially requested that were subject to the
4 motion to compel and that were ordered to be produced
5 and that he said this morning were lost.

6 MR. ROBERTS: Judge, I didn't say they were
7 lost. I said I couldn't find any drawings that matched
8 up with Granat's drawings. The motion to compel was
9 filed later, long after this. They weren't looking for
10 it when they gave them these documents originally. It
11 was filed long after his report.

12 They -- in response to their motion, I asked,
13 What exactly are you looking for? We're looking for
14 the drawings that match up with these four sheets from
15 Granat. In response, I said, Granat says those
16 drawings came from 3D scans he got from Exponent. Do
17 you need a copy of it? I think you've already got it,
18 and they said, We've already got those. At that point,
19 we had satisfied the motion to compel by providing the
20 source of Granat's drawings.

21 And that -- that's the way we viewed it, and
22 Your Honor --

23 MR. KEMP: Judge, he admitted to you --

24 THE COURT: Okay. We're -- I'll hear from
25 you once more, and then we'll wrap up with Mr. Roberts.

1 MR. KEMP: He admitted to you that we weren't
2 satisfied. He admitted to you that Mr. Pepperman has
3 an outstanding request to him for the drawings that has
4 not been satisfied. And today is the first day they
5 say they can't find them.

6 THE COURT: Thank you.

7 Mr. Roberts.

8 MR. ROBERTS: Thank you. I -- I think I'd
9 just be repeating myself at this point, Your Honor.

10 THE COURT: Right. Okay. Very good. All
11 right.

12 Give me just a moment. Okay.

13 Does anyone here need to take a break yet?

14 Or --

15 UNIDENTIFIED SPEAKER: Are we going to take
16 lunch today?

17 THE COURT: Yes. But I'm ready to move
18 forward and break later, but ...

19 MR. KEMP: Whatever you want to do, Your
20 Honor.

21 THE COURT: I'll let -- I'll leave that up to
22 you because --

23 MR. ROBERTS: If it wouldn't be inconvenient
24 for the Court, Your Honor, I skipped breakfast this
25 morning, and I am arguing the next two, so I might

1 appreciate some --

2 THE COURT: Okay.

3 MR. KEMP: Might make it faster, Your Honor.

4 Maybe we should do the next one.

5 MR. ROBERTS: It probably would speed it up.

6 THE COURT: Let's take one hour. It's 12:32.

7 Come back at 1:32.

8 THE MARSHAL: All rise. The court is in
9 recess for an hour. The time is 12:31.

10 (Whereupon a lunch recess was taken.)

11 THE MARSHAL: Court is back in session.

12 Please be seated. Come to order.

13 THE COURT: Apologize for being late. I was
14 on a conference call. So okay. Let's continue.

15 I believe we are now on No. 4; correct?

16 MR. ROBERTS: That is correct, Your Honor.

17 THE COURT: Okay. Very good.

18 MR. ROBERTS: And, Your Honor, No. 4 is the
19 defense motion to preclude evidence that proximity
20 sensors were a safer alternative design.

21 THE COURT: Correct.

22 MR. ROBERTS: And as -- as we discussed a
23 number of times, there's no obligation to put forward
24 alternative safer designs. But if the plaintiff
25 proposes to put forward a safer alternative design, it

1 must be -- there must be sufficient evidence and
2 support of that design which, if accepted by the jury,
3 the jury could find that the alternative design
4 proposed is feasible, commercially feasible, and would
5 have prevented the accident. And if that prima facie
6 case cannot be presented, then it's our position that
7 you just need to preclude the argument as it becomes
8 confusing and prejudicial because the sufficient basis
9 for the jury to find the necessary elements has never
10 been presented to them and, therefore, if the argument
11 is accepted, it would only be made for inadmissible
12 speculation.

13 I already discussed the proximity sensor
14 evidence to some extent in opposing their motion in
15 limine --

16 THE COURT: Yes.

17 MR. ROBERTS: -- to preclude us from
18 presenting evidence that the forward-looking sensor
19 would not -- available at the time would not have
20 worked with the electrical system on our bus.

21 If you remember, they accused us of us
22 setting up a strawman to knock down, and they weren't
23 claiming that a forward proximity sensor is what was
24 needed. It was a side proximity sensor that was
25 needed.

1 THE COURT: Just to be clear, is that
2 Plaintiffs' 18?

3 MR. ROBERTS: It doesn't sound like, Your
4 Honor.

5 Howard, do you have that?

6 MR. RUSSELL: It is 7.

7 THE COURT: Seven. Seven? Plaintiffs' 7.
8 Thank you. Correct. Okay.

9 MR. ROBERTS: So I -- I won't repeat all the
10 arguments that -- that I made, or at least I'll try not
11 to repeat most of them. But there are a couple of
12 things that I wanted to emphasize.

13 And for the purposes of our motion, the main
14 point is their expert, Flanagan, who opines on
15 proximity sensors is not a real expert in proximity
16 sensors. He worked, and his background was in the
17 automotive industry, working in indirect visibility,
18 meaning the size and location of mirrors. He wasn't a
19 proximity expert when he was actually working. And it
20 appears that most of the research he did was simply
21 derived from Internet searches. So he -- he doesn't
22 have sufficient expertise, and he doesn't have
23 sufficient data to reach opinions that the side
24 proximity sensor, which they're now saying should have
25 been on the coach, was commercially feasible at the

1 time this coach was manufactured.

2 And, in fact, that's really not what his
3 report says. Because we were able to effectively rebut
4 the compatibility of the forward-looking sensor
5 available at the time of manufacture, they're now
6 trying to pivot to the side sensor. But I think it's
7 important for the Court to understand that the front
8 sensor was the focus of their expert report on what was
9 feasible and what should have been on the motor coach.

10 Audra, could you pull up the Flanagan report
11 at page 7, Section D, proximity sensors. And look --
12 let's look at Bullet 1 first.

13 So what did their expert actually say in his
14 disclosed report about proximity sensors and collision
15 warning systems being available to detect pedestrians
16 and bicyclists before 2008? First, he says, "Between
17 1992 and 2008, numerous front proximity sensor systems
18 and forward collision warning systems and active cruise
19 control systems were available to all types of
20 vehicles, including buses and tour buses, as original
21 equipment or aftermarket."

22 That opinion is limited to front proximity
23 sensors and the type of automatic warning systems which
24 would brake the vehicle. The very evidence that we
25 have that they're trying to exclude, that this system

1 wasn't compatible and would have required a rebuild of
2 the electrical system of the whole bus -- coach to use
3 it, they're trying to exclude that. But that evidence
4 rebuts this opinion.

5 Let's look at Opinion No. 2. "Well, before
6 the subject 2008 MCI J4500 tour bus was manufactured
7 and sold, numerous auto manufacturers, commercial
8 vehicle manufacturers, coach manufacturers, tour bus
9 manufacturers, and commercial vehicle fleets were
10 utilizing OEM proximity sensors or aftermarket
11 proximity sensors for providing forward collision
12 warnings."

13 So, again, he's saying, state of the art,
14 what was feasible at the time, lots of people were
15 using forward warning systems.

16 Number 3, "The subject 2008 MCI tour bus was
17 designed and manufactured by MCI without forward
18 proximity sensors and without front corner proximity
19 sensors."

20 So he criticizes the fact that the coach
21 didn't have front corner proximity sensors, or he notes
22 that fact, but as far as feasibility and state of the
23 art, he only talks about forward-sensing proximity
24 sensors. Nothing in here about side sensors in use
25 before 2008.

1 Mr. Kemp has argued and included in his
2 briefs the BCI bus and brought in some brochures, art
3 magazine advertisements or articles talking about how
4 something will be introduced. But the Court needs to
5 be clear that their expert that's going to talk about
6 commercial availability and commercial feasibility of
7 systems says nothing about the side sensors in his
8 report.

9 And he would -- as Mr. Kemp said, he sort of
10 overdid it. He included an appendix where he has about
11 21 pages of automobile manufacturers who had various
12 sensors on their vehicles and when those systems were
13 available, anywhere from '92 to 2016. He only had two
14 pages of bus collision avoidance systems.

15 And, Audra, could you put up Exhibit 5 to the
16 opposition.

17 So if we could take a look at this. Here is
18 where their expert lists and surveys the collision
19 avoidance safety features that were available on motor
20 coaches and when those systems were first offered. And
21 if you -- if you can see up at the top, side sensor,
22 the code for side sensor is S, active cruise control is
23 ACC, front sensor is F, and -- and he puts notes on
24 here. And the Court -- the Court can hopefully see
25 this, but there's only one coach manufactured before

1 2008 on this list. And it's a 2002 Volvo with an
2 audible warning and distance alert, and it doesn't say
3 anything about there being a side sensor or proximity
4 sensors on that Volvo. The BCI coach is not listed
5 here. There's simply no coach with a side sensor
6 listed in the expert report, and there's been no
7 supplement by the expert of his opinions to talk about
8 those.

9 So the coaches that Mr. Kemp wants to talk
10 about in opposition to this motion and the sensors, as
11 we mentioned before, are hearsay evidence that he's
12 researched and come up with after his experts are done.
13 And the fact that a manufacturer says we're soon going
14 to offer a side protection system is not proof that the
15 detection system was ever actually offered. It's not
16 proof of how long it was in use. It's not proof that
17 it was effective and would have avoided this accident.
18 It's not proof that it would have worked on one of our
19 coaches. And they don't have any evidence of that.
20 They just want the jury to speculate about all of those
21 things because he's come up with a couple of magazine
22 articles or -- or press releases.

23 The fact is there's not any type of evidence
24 in the record of an aftermarket proximity sensor or a
25 OEM proximity sensor that would have worked on an MCI

1 bus where there's evidence that that sensor worked and
2 was effective and would have operated in such a manner
3 as to present -- prevented this evidence. And
4 therefore, the jury is simply at -- going to have to
5 speculate that such a proximity sensor would have been
6 fitted and would have worked, would have shown
7 Dr. Khiabani's location even if he was inside 5 meters
8 of the bus, that would have shown him even if he was
9 more than 3 feet away from the bus, and that it was
10 commercially feasible for MCI to put that on their
11 vehicle.

12 There's no evidence that MCI had the ability
13 to develop and manufacture their own proximity sensors.
14 They relied upon suppliers for that type of device.
15 And if that device wasn't commercially available, it
16 was not commercially feasible as to MCI.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 Mr. Kemp.

20 MR. KEMP: Your Honor, I think we've gone
21 through a lot of this, but --

22 THE COURT: We have. But that's okay.

23 MR. KEMP: Let me just show you the --

24 THE COURT: Sure.

25 MR. KEMP: -- two printed ones.

1 Shane.

2 Mr. Roberts, Mr. Flanagan, there was some
3 overkill there. He listed every proximity sensors ever
4 used by man, pretty much.

5 This is in their reply. They say, "Plaintiff
6 cites no evidence that a commercially feasible
7 proximity sensor system existed," and then they have in
8 italics "for the motor coach at the time of its
9 manufacture." Then they criticize all the car sensors
10 and they say, well, no motor coach is using this. And
11 then, again, on the reply, right before the conclusion,
12 they say there's no motor coach in the world that uses
13 this proximity sensor.

14 So here's the motor coach. Okay? We have
15 the motor coach. October 15, 2007. Again, this is the
16 trade magazine and Mr. Roberts alluded to this. This
17 is the BCI. That's the Australian company. So they're
18 going to zero in on safety and offer as standard
19 equipment, it's not even optional, it's standard
20 equipment, the Eaton VORAD anticollision radar warning
21 system. And we'll go back and show you that Eaton was
22 advertising this back in 2005 for buses.

23 Back -- back, Shane.

24 In any event, this -- this is the analysis.
25 Number 1, I do not have to offer any evidence of an

1 alternative design. Don't have to do that. I can just
2 say that the bus is unreasonably dangerous and they
3 should have done something about it. I don't --
4 because of the blind spots. So under Trejo, I do not
5 have to offer evidence of alternative design.

6 I am offering evidence of alternative design,
7 i.e., the thousands and thousands of proximity sensors
8 that Mr. Flanagan has brought up, and this Eaton one.
9 So clearly they could have done something because this
10 company did it. And this is October 2007, the exact
11 same time frame that they built this particular bus.

12 Now, Mr. Roberts says, oh, the Eaton system
13 doesn't work with the electrical system. First time
14 we've heard that. It's not in any of the briefing.
15 They don't have an expert opinion on that. I don't
16 know what he bases that on. I don't know whether he's
17 going to claim that this is a 120 and their buses are
18 220 or vice versa or, you know, they're not using
19 alternating current. They're on direct current or
20 whatever. But I've never heard anything like that.

21 The argument from Mr. Virgil was that they
22 didn't look at proximity sensors earlier because they
23 couldn't coordinate it with the brake system. They
24 wanted automatic braking and it had to work with the
25 Bendix system. Haven't heard anybody say, and

1 certainly they have no expert that's going to say that
2 it doesn't work with the electrical system. But I
3 think that would be an easy fix. You know, if they --
4 if they bring out what the contention is, I -- we can
5 address it. It's a pretty -- you know, for -- for
6 Eaton to put it on there. You know --

7 Let's see the next one.

8 And this is Eaton. This is the installation
9 guide from July 2005. Two years before the bus in this
10 case, July 2005, they're trying to put on this blind
11 spot system.

12 Next one, Shane.

13 Judge, you've seen this before. There's the
14 bus. They want to put it on buses. And so -- so
15 Mr. Roberts says, Well, we -- we were too stupid to
16 design one ourselves, which I really think that's
17 probably not true, the biggest bus manufacturer in the
18 world.

19 But in any event, accepting that as the
20 truth, they could have just bought this one from Eaton,
21 like this guy did.

22 Next one, Slane -- Shane.

23 Your Honor, this is -- this is not a hard
24 thing to do. Like I said the other day, you know, we
25 can go down to Audio Express. I could zip my car down

1 there, be out in half an hour, and I'd have a proximity
2 sensor, you know. I don't know why they can't do it
3 with a bus. But for -- for these reasons, the claim
4 that there was no alternative product clearly is wrong.

5 So we come to Mr. Robert's fallback position
6 which is, oh, it's not in Mr. Flanagan's expert report.
7 You know, just because it's not in Mr. Flanagan's
8 expert report, Your Honor, doesn't mean I can't offer
9 evidence of this through an alternative means, even
10 through Mr. Flanagan. So -- so to suggest that -- he
11 used the term it's not in the record. Nothing's in the
12 record. The trial hasn't started yet. Okay? If we're
13 at the end of the trial and there's been no evidence of
14 the Eaton VORAD system, which I really doubt is going
15 to be the case because Mr. Flanagan probably referenced
16 at least 200 times in -- in some vehicle or another,
17 but if that's the case, they can file a motion for
18 directed verdict. You know, can't just say it's not
19 going to be in the record and ask for a limine motion.

20 The last thing he said, I really didn't
21 understand, but he repeated a point he made previously,
22 which was that the proximity sensor is only good --

23 Do I have another one, Shane?

24 MR. GODFREY: You want the one?

25 MR. KEMP: Okay. The proximity sensor is

1 only good for 5 meters. Well, 5 meters is 12 feet.
2 Dr. -- no one's testified that Dr. Khiabani was past
3 12 feet away from -- you know, the witnesses go 1 foot,
4 2 foot, 3 foot. You know the gardener says he was in
5 the bike lane the entire time. There's basically four
6 witnesses, Your Honor. There's the gardener. There's
7 Mrs. Bradley, because Mr. Bradley was in the car, but
8 he was looking at his laptop, so he -- he didn't see
9 anything. There's Mr. Pear, Mr. Plantz. I guess five,
10 because there was a woman across the street named
11 Coach, and she can at least say that the -- the bus and
12 the bike were in the crosswalk. So there's five
13 witnesses, and 1, 2, 3 feet. That's where they're at.
14 You know, it's one or the other. Nobody says that they
15 were over 3 feet, much less 5 meters away. So I don't
16 know where he thinks he can -- he can create some kind
17 of situation where there's no proximity sensors.

18 And then, finally, in order for the proximity
19 sensor to have been effective --

20 Do we have a slide on this?

21 And I've showed you this before, Your Honor.

22 This is -- oops.

23

24 MR. GODFREY: You want testimony?

25 MR. KEMP: Let's go back to that one. This

1 is the one I was looking for earlier.

2 In 2005, they were advertising their
3 proximity sensor, the side one, to be used for buses.
4 They were out there advertising it for buses. And
5 that's again the Eaton.

6 Now, the final point, Your Honor, would it
7 have worked? Do we have heeding testimony in the
8 record? This is Mr. Hubbard again.

9 "So if you'd have been given some sort of
10 warning at the 50 or the 100" -- and, again,
11 that's 50 feet from the crosswalk and 100 feet
12 from the crosswalk -- "you would have taken
13 evasive action earlier?"

14 He did take evasive action. As I think
15 Mr. Pepperman and Mr. Russell alluded to, the experts
16 agree that if -- if the bus just -- just hit him by
17 inches. If he'd have taken evasive action earlier, I
18 think it's -- no one's disputing that this accident
19 wouldn't have occurred.

20 So that's the -- that's the heeding element.
21 That -- that shows that a proximity sensor would have
22 prevented the accident. And for those reasons, we
23 submit that this motion should be denied. And really,
24 this motion's kind of a -- as -- as you can tell from
25 the repeat of the slides and the arguments, Your Honor,

1 this is -- this was really included in the summary
2 judgment that we already argued last week.

3 THE COURT: Thank you.

4 MR. ROBERTS: Thank you, Your Honor.

5 First, I just want to clarify in case I did
6 misspeak. The testimony in the record is that the
7 front looking-forward proximity system with automatic
8 braking, the one that is discussed in the first two
9 bullet points of the Flanagan report I showed you,
10 that's the one that was incompatible with the
11 electrical system.

12 Our witnesses didn't talk about the Eaton
13 VORAD system because that wasn't one of the systems
14 being proposed by Flanagan in his report and they
15 weren't asked about it as far as I know. So -- so
16 that -- that was not the defense to the side system.

17 The two systems which you were just shown,
18 again, were not two of the systems listed in their
19 expert's report. And they -- they say, well, that
20 doesn't mean they can't talk about it just because
21 their expert didn't list it in his report or rely on
22 them. But, Your Honor, here's the problem: Internet
23 searches, press releases, magazine articles are
24 hearsay.

25 Now, maybe they could make an argument that

1 it -- it's the type of hearsay an expert could
2 reasonably rely on if there's sufficient indicia of
3 reliability that those systems were actually
4 implemented and actually worked. But their expert is
5 their potential conduit for getting hearsay into the
6 record at trial. Without an expert to rely upon and
7 timely disclose those articles as the bases of his
8 opinion, they can't use the expert to get the hearsay
9 in. And without the expert, they've got no one to
10 authenticate those articles. They've got no disclosed
11 witnesses to testify those systems were actually
12 implemented. They've got no one to testify that those
13 systems actually worked.

14 And if you look closely at the BCI article
15 that he showed you, it doesn't say we've successfully
16 implemented a system that's saving lives and working
17 great. It says the company plans to do something. The
18 company will introduce at some point in the future.
19 Well, it doesn't say they did introduce it, and it
20 doesn't discuss the technical capabilities of that
21 system so that the jury could have a reasonable basis
22 for determining it could have prevented this accident.

23 The -- and I know we've thrown a lot of
24 information around. But if the Court would go back and
25 look at the record, when we argued Plaintiffs' Motion

1 in Limine 7 on Monday, and I'd be happy to send this
2 over to the Court or make a supplemental filing today,
3 because the record is so big on this issue. It was in
4 their motion -- in support of their motion, they cited
5 an article that was either Foo or Fang or Boo, it was
6 something like that, and -- and I apologize, I don't
7 have my papers for that motion with me, and that was
8 the article that in 2005, when you saw an ad for the
9 VORAD system from 2005, well, that expert tested that
10 very system in 2005 and talked about the limitations of
11 that system.

12 And remember, some of the limitations were
13 the object would disappear. If two vehicles were going
14 the same speed, it would disappear. But the other
15 limitation he listed is that it didn't work if the
16 object was closer than 5 meters. Five meters is
17 actually 16 feet. And so their evidence and their
18 article that they're putting forth in support of this,
19 their hearsay article that they want the Court to
20 consider actually says this system would not have
21 detected him if he was closer to the bus than 16 feet.
22 There is no evidence of a credible commercially
23 feasible system which would have prevented the evidence
24 and would be misleading for them to argue so to the
25 jury.

1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 All right. Let's go on to Defendants' Motion
4 in Limine No. 4, Exclude any Claims of Defect Based --
5 of Defect Based on the S-1 Gard.

6 MR. ROBERTS: Thank you, Your Honor. Two
7 more and then you won't have to listen to me for a
8 while.

9 THE COURT: Go on.

10 MR. ROBERTS: So we're asking the Court to
11 exclude evidence of any claimed defect based on the
12 S-1 Gard as an alternative safer design. We're not
13 asking to preclude all protective barrier, any -- some
14 other theoretical design they may have come up with.
15 We're asking about the S-1 Gard, because that's what
16 they talk about, that's what their experts talk about.
17 And it's a little confusing.

18 On -- in -- in their response to the motion,
19 page 18 of 20 of their opposition brief beginning at
20 line 12, they argue, "As for whether an S-1 Gard would
21 have prevented this accident, plaintiffs do not even
22 have to prove that there was an alternative product,
23 much less prove that a specific alternative product
24 would have prevented the accident in question. Proof
25 of an alternative design is not required."

1 But they don't have to do it. We agree.
2 They can argue the product's defective without
3 presenting an alternative design. But this coach did
4 not have an S-1 Gard. If they want to put on evidence
5 that it should have had an S-1 Gard and it would have
6 prevented the accident, then they have to be able to
7 come forward with evidence from which a jury could find
8 that this alternative design, a coach with an S-1 Gard,
9 was commercially feasible and would have prevented the
10 accident. So we -- we -- we've discussed, laid out in
11 our brief, and they've gone extensively through the
12 evidence that they have that an S-1 Gard would have
13 prevented the injuries and death to Dr. Khiabani.

14 But what -- what they admit was that their
15 expert didn't actually do any testing of an S-1 Gard,
16 and what it would -- what would happen if it struck a
17 helmeted head at 25 miles an hour. Now, you know,
18 they -- I think their expert says, and they include all
19 the briefing. He talks about the fact that, well, it
20 would be unethical to -- to do this to a real person at
21 25 miles an hour. And they didn't do it either.
22 But -- but there are other things you can do. You can
23 do test dummies. You can measure force. You can --
24 there are -- there are other ways to do these
25 experiments. But they didn't do any of that. They

1 didn't do any detailed calculations.

2 He just says, Look, you know, I was -- just
3 thought about it. I thought about what would happen if
4 a helmeted head hit an S-1 Gard. And I thought about
5 what would happen and how long it might stay -- the
6 contact might stay and be pushed out of the way. It --
7 it's not helpful and it doesn't have a sufficient
8 engineering background.

9 This is where it gets very prejudicial, Your
10 Honor, and this is really what it comes down to as a
11 jury question. They've got a video that the S-1
12 manufacturer released at some point, it's available on
13 their website, which shows a stuntman falling under a
14 bus in various positions, simulating events that might
15 commonly occur if a transit bus is -- is pulling away
16 from a curb. And they want to show that to the jury to
17 prove that an S-1 Gard would have prevented the
18 injuries to Dr. Khiabani. And they've showed it to a
19 number of lay witnesses. Said, What about this? Watch
20 this video. Do you think that would have -- have
21 prevented injuries to Dr. Khiabani? When laypeople
22 have no basis for doing it. And the --

23 Audra, could you show the video?

24 I think the Court needs to view this so that
25 the Court can see. The -- the S-1 Gard is primarily

1 sold for transit buses that are constantly stopping at
2 the curbside to pick up passengers, are usually
3 traveling at low rates of speed when they get into
4 incidents with passengers and -- and bicyclists. And
5 all of these reenactments they show, the bus is going
6 extremely slow.

7 In this case, the question is: What would
8 happen if a bus going 25 miles an hour hit
9 Dr. Khiabani's helmeted head? Well, the S-1 Gard
10 wouldn't have prevented an impact to Dr. Khiabani's
11 head. So it would not have prevented the accident.
12 The only argument they have left is that it would have
13 mitigated the injuries. Not that it would have
14 prevented the accident, but it would have mitigated
15 injuries from the accident, that he wouldn't have died.
16 But they have no credible scientific evidence that
17 he -- he would not -- he could not have possibly
18 sustained a skull fracture, even if the S-1 Gard had
19 been on the bus.

20 We're not disputing the fact that an S-1 Gard
21 was commercially available at the time of the
22 manufacture of the bus. We're not disputing that it
23 could be installed without destroying the functional
24 integrity of the frame.

25 What we are disputing is that there were

1 sufficient collisions between a bicyclist and an MCI
2 bus to cause MCI to say, hey, maybe we should put on an
3 S-1 Gard. Because the undisputed evidence in the
4 record is that there's never been a documented
5 rear-wheel accident between a bicyclist and an MCI tour
6 bus. There's no record of that ever occurring.
7 There's no problem to be solved as far as MCI's
8 concerned. And even though, there are a few fleets of
9 motor coaches that have put these on, most of the
10 evidence is that they've gone on transit buses. And
11 keep in mind that their own evidence, 30,000 and 50,000
12 guards installed, has to be looked at in the context of
13 a million registered buses in the country, so we're
14 talking only a very small number of buses have these.

15 But the jury is going to be left -- even if
16 they believe that this was commercially feasible to put
17 an S-1 Gard, they're going to be left to speculate on
18 whether this commercially feasible device would have
19 prevented Dr. Khiabani's injuries, whether or not he
20 would be hurt anyway. Because they've got testing at 3
21 to 5 miles an hour, that can't be authenticated. No
22 one knows where the stuntman is or who he is, and none
23 of it's documented. Came off their website, but no one
24 has done testing at what would happen if an S-1 Gard
25 had struck Dr. Khiabani's head at 25 miles an hour.

1 And it's a big, heavy device. Mr. Kemp had
2 that device in the courtroom, and -- and the device he
3 had was actually the device that goes on a transit bus.
4 The manufacturer of the S-1 recommends a different
5 guard for a motor coach, and it's about twice that big
6 and twice as heavy. So their expert didn't even have a
7 picture of the correct device.

8 What did he have, and does it satisfy
9 Hallmark? He had pictures of the device. He didn't
10 actually have an S-1 Gard when he gave his opinions.
11 He couldn't do any testing because he didn't have the
12 guard. Doesn't meet Hallmark. It's pure speculation
13 as to whether it would have prevented the injuries, and
14 that's why we're asking to have it excluded.

15 THE COURT: Thank you.

16 MR. KEMP: Your Honor, first, just a little
17 side point. They keep saying there's undisputed
18 evidence that there's been no accidents with regards to
19 bicyclists. The only evidence they're relying upon is
20 Virgil's testimony. Virgil was an engineer that they
21 produced as the PMK. He's not in the claims
22 department. He didn't review the accident records in
23 either the claims department or the legal department.
24 And he said based on his anecdotal discussions with
25 people, he had found three prior accidents. That is

1 not undisputed evidence that there's only been three
2 accidents involving MCI buses in the last whatever, 20,
3 30 years. In fact, if Mr. Roberts is honest to you,
4 he'll tell you that he's actually an attorney for
5 another MCI case in this very jurisdiction at this
6 time. Granted, didn't involve a bicycle, but there are
7 plenty of accident cases with MCI buses if you want to
8 point them out.

9 So I don't know what that has to do with the
10 point he's trying to make, but there -- there really
11 are -- you know, we've cited -- in the -- the
12 opposition, we cited the true number of accidents
13 involving buses and bicyclists. Okay.

14 He admitted that the issue is really not
15 whether the S-1 Gard works or doesn't work. It's
16 whether protective barriers in general could have been
17 installed. The S-1 Gard is one example, and the reason
18 we like the S-1 Gard theory is because we have the
19 letter from Mr. Ellis. And, again, it's the -- I think
20 it's 2008, Mr. Ellis. He's the engineer from New Flyer
21 who said in the letter that S-1 Gards are functional
22 and that put on the bus, it doesn't hurt anything. And
23 then in his deposition which I played to you, he
24 expressed the opinion that these S-1 Gards should be
25 put on all buses. That's an engineer from New Flyer.

1 So that's one of the reasons we like the S-1 Gard.

2 The other reason is that there's 50,000 of
3 them out there now, and the S-1 Gard inventor and the
4 president of the company, Dr. Barron -- I think we have
5 that coming up -- testified that he was going to give
6 it to them at cost or at no cost just to try to build
7 the market. So that's why we like the S-1 Gard. But
8 the general theory is that they should have had some
9 type of protective barrier.

10 Okay. Let's -- let's start on the key point.
11 He's admitted -- there's two points here, commercial
12 feasibility and whether it would have prevented the
13 accident. They concede commercial feasibility, and the
14 reason they concede it, of course, is because it's on
15 50,000 buses, it's endorsed by the New Flyer engineer,
16 and it was offered to them for free. So they -- they
17 concede commercial feasibility.

18 So their second point is whether it would
19 have prevented Dr. Khiabani's death due to the skull
20 fracture, which I'll show the Court in a minute.

21 Let's have the first slide, please.

22 This response to the point they made that,
23 oh, gee, these S-1 Gards are just used for transit
24 coaches. No, they're not just used for transit
25 coaches. This is Dr. Barron's -- excuse me, Mr.

1 Barron's testimony. He's the inventor and president of
2 the S-1 Gard company, and he gives us one example of
3 where someone called Santa Monica Big Blue. I haven't
4 been to Santa Monica for a while. But apparently these
5 Big Blues are everywhere. They're using them in
6 Los Angeles, 500 buses, and some of these buses are
7 Motor Coach Industry buses. But these are the motor
8 coaches he's talking about. I didn't print -- print
9 the whole deposition. So we have at least 500 motor
10 coaches down in Santa Monica running back and forth
11 with these S-1 Gards on them.

12 Now, to the -- the true part of the motion.
13 They are asking that Dr. Stalnaker's opinion be
14 excluded. And, you know, they -- unlike the last
15 motion, I will concede that they did ask for this
16 expert's opinions to be excluded. So who's
17 Dr. Stalnaker?

18 This is a picture of Dr. Stalnaker. He's --
19 those are his degrees, applied mechanics and
20 theoretical mechanics, PhDs. He has over 40 years of
21 experience in appeal, and he coauthored the seminal
22 work, which I'm going to get to in a minute. So he has
23 studied the -- what happens when you have an impact by
24 an accident on the brain and the skull bone and the
25 skull. And in 1975, he did studies to do this. And so

1 what they did is they used primates, chimpanzees. You
2 couldn't do this now, Your Honor, because of PETA. You
3 know, can you imagine crushing -- you know, the outcry
4 you would hear.

5 Anyway, so they -- they looked both at
6 cadaver X rays and they did their own animal testing.
7 They did not follow Mr. Robert's suggestion and test on
8 people, which I think is probably a good idea, but --

9 THE COURT: Very good idea.

10 MR. KEMP: -- he -- he developed the criteria
11 that's used in helmet design.

12 Since that time he's been a helmet expert as
13 well. None of their experts are helmet experts, and
14 that's important. So he developed a method for scaling
15 them, and he worked on the design.

16 So let's go to the next slide.

17 You know, it's a little -- I -- you say --
18 you hear a lot of time that my expert wrote the book.
19 Well, this expert did write the book. This is the book
20 that is the seminal book on the biomechanical aspects
21 of head injury including skull fractures which is what
22 we're dealing with in this case. He wrote this with
23 Dr. Mattinay (phonetic), and it came out in 1973. So
24 he wrote the book.

25 And so I asked -- you know, we took

1 Dr. Carhart. That's their opposite of Dr. Stalnaker,
2 and I'll show you his picture in a minute. He cited,
3 he cited Dr. Stalnaker's not once, but twice. He cited
4 his -- his skull fracture study using the primate
5 skulls and the human data. So their expert relies on
6 our expert's work, and they have the temerity to file a
7 motion to exclude our expert?

8 So then I asked Dr. Carhart, Well, have you
9 done any studies on primate or skulls or anything? He
10 hasn't done anything. So Mr. Roberts goes, oh, man,
11 they should have done studies. Their expert hasn't
12 done studies. All he did was read Dr. Stalnaker's
13 paper. And I asked him point blank, I said, Do you
14 think Dr. Stalnaker has more experience in looking at
15 actual skull fractures in primates? And he agrees that
16 Dr. Stalnaker has experimental experience. In other
17 words, he actually did the work. But that's his
18 background, and he's reviewed the research, and he's
19 applying to the case.

20 So in effect, what they want to -- they're
21 telling the Court is my expert that wrote the book,
22 whose work that their expert relies on is not qualified
23 to testify on this area of whether the S-1 Gard would
24 make a difference, but their expert whose only
25 experience is he read my expert's book is qualified? I

1 don't think so.

2 All right. Let's move to the actual helmet.

3 Doctor --

4 Let's -- let's keep that one.

5 Your Honor, this is the actual helmet that's
6 exactly the same as the one Dr. Khiabani used. I know
7 it's the same because I ordered it on Amazon, and I had
8 to order them 25 times before I could find these
9 because I wanted the exact year. Really doesn't make
10 any difference, but I didn't want to hear Mr. Roberts
11 arguing about, oh, you don't have the right year. So
12 anyway, we have 25 of these. This is the front of the
13 helmet. This is the back.

14 The point that we're going to be discussing
15 in a minute is the thickness of the back of the helmet.
16 You see back here, the back of the helmet. It -- it
17 just doesn't stop. There's -- there's about an inch of
18 thickness there. Okay?

19 All right. Can we have the actual helmet?

20 So what Dr. Stalnaker did, he looked at the
21 actual helmet, and, again, he's a helmet expert. He's
22 testified hundreds of cases. It's always him against
23 the Bell company guy or him against whoever the other
24 helmet manufacturer is. Helmet cases are his
25 specialty. So he looked at the actual helmet, and he

1 looked at the damage that was done on the actual
2 helmet. By the way, I should point out that I don't
3 ride bicycles myself. And so it's agreed that
4 Dr. Khiabani's head was lying on the side at the time
5 that the bus impacted it. That's agreed. And so --
6 and you'll see the -- I'll show you the skull fracture
7 that's on the left side. So -- so it's agreed.

8 The thing that's not agreed is our expert has
9 the tire going over, let's say half the helmet. It's
10 probably a little less than half. Their expert has the
11 tire just hitting the -- the end of the helmet. And
12 they -- they say -- and I'll show you their exact
13 theory in a minute. They say that by pinching it, it
14 can cause the circular skull fracture on the bottom.
15 Our expert and the coroner says you have to come over
16 the top. So that's the issue here in the case.

17 Okay. So our expert looked at the helmet.
18 True, he didn't look at the bus. He didn't need to
19 look at the bus. But he looked at the -- the -- the
20 helmet and the MRI that was taken down at UMC, which
21 I'll show you in a second. And he was -- that's
22 sufficient basis for his opinion. And he examined the
23 actual helmet.

24 Okay. Next.

25 This is the circular skull fracture that

1 Dr. Khiabani suffered. I've digitally enhanced the
2 skull fracture a little bit there with some lines to
3 make it more prominent. But you see that it's a
4 circular skull fracture. And what that means is that
5 something -- and this is the big debate -- something
6 caused enough force to cause this circular skull
7 fracture right here on the head. Okay. So that is the
8 skull fracture that caused Dr. Khiabani's death.

9 Next.

10 Okay. So it's what I call the crush theory
11 which is our theory versus the pinch theory which is
12 their theory. And that's the word they use. They use
13 "pinch." Okay? So on the one side, I have
14 Dr. Skull -- Dr. Stalnaker, you know, the wily old
15 veteran that's actually done the studies, against their
16 expert, Dr. Carhart, who's a little bit younger. And
17 then on our side, we have the coroner's office who
18 agrees with us.

19 But let's have the next one.

20 This is Dr. Stalnaker's testimony, and this
21 is where he explains why their argument that -- and
22 this argument -- you know, to hear their argument as to
23 how you can pinch the side of the helmet and that
24 causes enough force to fracture someone's skull, you
25 know, because the -- their argument is that it grabs on

1 the street and then that these straps transmit force
2 and -- I mean, Dr. Stalnaker even calls it unsupported
3 and ridiculous. I'm not going to go that far. I'm
4 just going to call it, for now, the pinch theory. But
5 I think it does defy the laws of physics.

6 But anyway, he's explaining how their claim
7 that they just barely missed it -- and the reason they
8 want it to barely miss him, is they -- the tire extends
9 about an inch, inch and a half beyond the S-1 Gard. So
10 they want it to barely hit the helmet so they can argue
11 that the S-1 Gard wouldn't have worked. That's the --
12 the whole reason for this. It's a litigation theory.

13 But he tries -- Dr. Stalnaker is addressing
14 their theory, and he explains that, you know, the edge
15 of the wheel, if you're going to -- if it just hits the
16 side, if the tires run over the side, it's going to
17 push it away like this. You're not going to trap the
18 head underneath. It's just going to push it out and
19 rotate it away. That's his explanation. Again, he's a
20 helmet expert, and he's done all the research on the
21 area.

22 Can I have my next one.

23 Okay. This is their theory. This is the
24 pinch theory. And I'll just read it into the record.
25 This comes straight from their motion in this case,

1 this particular motion. "The outer edge of the
2 outboard dual tire crushed and pinched one side of the
3 helmet, trapped the head of plaintiff decedent by
4 pinching of the bicycle helmet between the tire and the
5 ground and produced forces around the circumference of
6 decedent's head through the helmet structure which
7 caused the skull fracture and resulted" in some big
8 word which means circular skull fracture.

9 So, Your Honor, us and the coroner, we say
10 that it went over there. They say pinch. All right.

11 Let me show you the testimony, unequivocal
12 testimony. This is the coroner's testimony. Okay?

13 "First, would you be able to say to a
14 reasonable degree of medical probability what
15 caused the skull fracture here for Dr. Khiabani
16 is the impact of the tires running over his
17 skull; correct?

18 "ANSWER:" --

19 Go ahead, Shane. See it again. Let me see
20 the second one, Shane.

21 This is -- the answer is yes, but this is
22 Mr. Roberts follow-up question. And, again, this is
23 Lisa Gavin. I showed you the picture. She's the
24 coroner.

25 "Can you state to a reasonable degree of

1 medical probability that the head was rolled
2 over by the tire or versus impacting the
3 sidewalk?"

4 Crushed versus pinched. That's Mr. Roberts'
5 question to her. And she clearly answers that it's
6 crushed. And the amount of force that is necessary to
7 do a circular skull fracture, Dr. Stalnaker's going to
8 explain, Your Honor. His studies are right on point.

9 But let me have my next one, Shane.

10 Shane?

11 MR. GODFREY: That's all.

12 MR. KEMP: Oh, that's all?

13 So what they're suggesting to you is that we
14 throw out his opinion because he didn't look at the
15 bus, but what do you need to look at the bus for when
16 you looked at the actual helmet? The helmet went back
17 to him. He inspected the helmet.

18 There's also going to be testimony that --

19 Can I have the helmet picture again. This
20 is -- the next one.

21 There's going to be testimony that would --
22 yeah, this is the actual helmet, Your Honor. There's
23 going to be testimony that when people inspected the
24 actual helmet, which was preserved, we have the actual
25 helmet, (microphone interference) their expert and

1 bell's expert, that when they looked at the actual
2 helmet, they found tire tread inside the helmet.

3 Now, if you didn't run over the helmet and
4 you just pinched it, how did the tire tread get there?
5 You know, like angels came and sprinkled it? I don't
6 know. I'm -- I'm sure Mr. Roberts will come up with
7 some explanation in trial for that event.

8 But in any event, Your Honor, Dr. Stalnaker
9 was issued the helmet, looks at the medical records
10 from MCI which were all caused -- from UMC which were
11 all sent to them. And after -- this is just one of the
12 series of medical records. I just gave you the best
13 one. But they have a lot of records of the skull
14 fracture of the head. He examines all this, and based
15 on his primate testing and his examination of cadaver
16 skull fractures, he renders his opinion that to produce
17 this much force, the -- the tire must have come over
18 this part of the helmet. And if it had come over this
19 part of the helmet, there's no disagreement that the
20 S-1 Gard would have pushed it out of the way. And he
21 could further testify that it wouldn't have caused this
22 type of accident. Whether Dr. Khiabani would have had
23 a neck strain or some other incident, that's -- that's
24 part of his opinion too.

25 I would point out, that we do have the actual

1 person who went under the bus in Los Angeles. I think
2 I showed you a little bit of his testimony.

3 THE COURT: Yes.

4 MR. KEMP: Mr. Russell jumped up and said, he
5 said this and he said that. Well, this was a very
6 tentative witness at the beginning of his deposition.
7 He didn't remember anything. At the end of his
8 deposition when Mr. Pepperman had dragged him through
9 everything, he said exactly -- exactly what
10 Mr. Pepperman said the other day that he -- it had
11 saved his life, that the S-1 Gard was effective. And,
12 you know, it's -- it's not disputed, Your Honor. He
13 went under the -- the -- this is him right here. He
14 went under the bus with a bicycle. And look at him.
15 Look, he's not even scraped. He doesn't have a
16 circular skull fracture like Dr. Khiabani had. So that
17 will also be evidence for the jury as to the
18 effectiveness of the S-1 Gard.

19 And they have no expert, no expert that says
20 that the fact that this bus was going 25 miles per
21 hour, that's pretty slow, really. When you think in
22 the grand scheme of things, 25 miles per hour. Some
23 transit buses go a lot faster than that. Some of them
24 go a lot slower, particularly when they're stopping and
25 starting. But 25 miles per hour is not a very high

1 rate of speed. And that's the speed that both experts,
2 accident reconstruction on their side which is the
3 accident reconstruction person on our side, they both
4 agree it's 25 miles per hour and they get that from the
5 Red Rock video. So that's not really a hot point of
6 dispute. I think everyone's going to concede to that.

7 So -- so they have no expert that's going to
8 say, oh, gee, 25 miles per hour, it would have caused a
9 circular skull fracture. Clearly it wouldn't have,
10 Your Honor. All they're trying to do is trying
11 to -- to sidestep the issue by saying it would have
12 just missed, would have just missed, so the S-1 Gard
13 is -- wouldn't be effective.

14 And so for those reasons, Your Honor -- I
15 mean, I never had a case where my expert wrote the book
16 and the other side's expert relies on my expert and
17 then they try to throw my expert out.

18 THE COURT: Okay. Thank you.

19 Mr. Roberts.

20 MR. ROBERTS: Thank you, Your Honor.

21 First, addressing the issue of notice that
22 this was a problem that needed to be solved, Mr. Kemp
23 correctly cited that Virgil testified to three
24 accidents. But the testimony is all three of those
25 accidents involved pedestrians. At his deposition,

1 page 137, the witness states, beginning at line 15:

2 "In my research on the E and J model" --
3 the E was the predecessor model -- "that's been
4 in production for 20 years with thousands out
5 there, I did not find one with contact with a
6 bicyclist."

7 And they've got no evidence to dispute that.

8 Mr. Kemp then said:

9 "How about pedestrians?"

10 And he said he found three. And then
11 Mr. Kemp asked about each one of those three incidents
12 with pedestrians, and they all occurred with contact
13 with the front of the coach. So there were no
14 rear-wheel injuries to pedestrians or cyclists in the
15 prior 20 years with an MCI coach. That's the state of
16 the record. The S-1 Gard only protects against the
17 passenger side rear wheels running over a pedestrian or
18 cyclist.

19 So now let's talk about their expert, stall
20 necker, Dr. Stalnaker. I don't think I ever criticized
21 his qualifications. He's done lots of work with
22 helmets. He's done lots of work with brain injuries.
23 But the fact that he's qualified as an expert doesn't
24 give him the foundation under Hallmark to testify about
25 something if it's not the result of reliable

1 methodology and if he doesn't have sufficient data.
2 I -- I think even in the Hallmark case, and in fact
3 Hallmark or Hicks, the accident reconstructionist, the
4 biomechanic, no one was questioning his credentials as
5 a biomechanic. They were questioning whether he had
6 sufficient foundation to render his opinions when he
7 hadn't looked at certain things.

8 And -- and think about this in connection
9 with Hallmark. He hadn't looked at the vehicles. He
10 only looked at pictures. And our supreme court said
11 it's not enough to look at the pictures. You can't
12 give an opinion about an accident if you've -- haven't
13 seen the vehicles.

14 So what did Dr. Stalnaker say? And this is
15 attached to the -- to the briefing, Your Honor. His
16 deposition, page 10:

17 "Before being contacted about this case,
18 had you ever done any previous work with regard
19 to an S-1 Gard?

20 "ANSWER: No, sir.

21 "Had you ever even heard of such a thing?

22 "ANSWER: No, sir.

23 "QUESTION: Okay. Did you have any
24 opportunity to inspect an S-1 Gard installed on
25 any kind of bus?

1 "ANSWER: No, sir, I did not. I was
2 offered an opportunity to come to Las Vegas and
3 look at the bus that was in the accident and I
4 wasn't available to make that."

5 Continuing on page 44, with regard to the
6 S-1 Gard at lines 2 and 3:

7 "S-1 Gard on a bus?

8 "I have only seen the pictures that have
9 been available online."

10 So he is -- he is one of the world's foremost
11 experts in helmets and brain injury. Fine. But he's
12 never worked on an S-1 Gard before. At the time he
13 rendered his opinions, he had never seen an S-1 Gard,
14 never had one in his possession. He had only looked at
15 pictures, just like in Hallmark someone had looked at
16 pictures of the vehicle. And he'd never seen one
17 installed on a bus.

18 So how does he have a foundation to give
19 these opinions? And what he says is, well, running
20 into the S-1 Gard would not be like running into a
21 brick wall because I've done testing on what happens
22 when helmets hit various thicknesses of urethane, which
23 is what the S-1 Gard is made out of. But all he's got
24 is pictures. He doesn't say he knew how thick the
25 urethane was. And he testifies that the amount of

1 shock absorption which the urethane causes would be
2 based on the softness of the urethane and its
3 thickness, but he doesn't know how soft this urethane
4 was. He doesn't even know how thick it was. He
5 doesn't say he did. He -- he's simply speculating
6 that, well, you know, I've done some urethane testing,
7 and I think it would have bounced off, and it certainly
8 wouldn't have been as bad as a brick wall.

9 What does he actually say, and does it meet
10 the standard of admissibility in Nevada? Page 103:

11 "Did you do any assessment of the
12 potential of this S-1 Gard to produce diffuse
13 axonal injury?

14 "ANSWER: No, I did not do any analysis.
15 Nobody could, not with what we're talking here.
16 Takes a relatively large amount. It takes
17 time-consuming research to do that. Also,
18 again, like I said, I think the chances of that
19 in the S-1 is not as important or not as bad as
20 getting your head run over by a tire. So I
21 think the chances that are -- like in helmets,
22 like in air bags, they can happen and probably
23 would, but it would certainly be much, much
24 more useful to be able to say he didn't get run
25 over by the bus."

1 So he doesn't opine that -- that there would
2 have been no injury. He doesn't opine on the probable
3 kind of injury. He says something that probably any
4 layperson on the jury could come up with is that, well,
5 I don't know what injury an S-1 Gard would cause at
6 25 miles an hour if it hits your head. It's got to be
7 better than getting run over. That's nothing but a lay
8 opinion. You don't need all his degrees and all his
9 experience in order to give that basic lay opinion that
10 it's got to be better than getting hit, run over by the
11 tires.

12 Page 114:

13 "Did you see any evidence of any
14 significant testing of the effectiveness or
15 injury potential arising from the use of the
16 S-1 Gard in your research?

17 "ANSWER: No. Again, everything I've
18 read, I did not analyze anything like that.
19 But I was aware there is a potential for that
20 obviously. And I considered it to be much
21 better to take a chance with those than it
22 would be to be run over by a bus."

23 That's not the standard for product defect in
24 a safer alternative design, that I just think it would
25 be better to take my chances by getting my head knocked

1 by an S-1 than run over by a tire.

2 Your Honor, there's no sufficient foundation
3 for his opinion. He hasn't inspected an S-1. He
4 hasn't inspected the tire. He hasn't performed any
5 tests. He just wants to offer a commonsense opinion
6 that you get knocked with a piece of rubber, it's
7 better than getting run over by a tire. And any juror
8 can come up with that conclusion for themselves.

9 Thank you, Your Honor.

10 THE COURT: Okay. Thank you.

11 Let's move on to Defendants' Motion in Limine
12 No. 6, to exclude reference to New Flyer Industry, the
13 nonparty.

14 MR. ROBERTS: Your Honor, I'm going to
15 accommodate Mr. Christiansen, and I will submit this
16 motion on the briefing. The -- this is the question of
17 whether New Flyer's wealth is relevant and whether they
18 should be able to continually reference statements by
19 New Flyer employees and the wealth of New Flyer. I
20 think we argued this in connection with the motion to
21 compel the deposition on the 23rd. I think the Court
22 ruled in a minute order that the -- they're not going
23 to be able to get into evidence of the wealth of the
24 parent corporation of the entire subsidiary in the
25 deposition. So I think the Court understands these

1 issues, and we're happy to submit on the briefing.

2 THE COURT: Thank you.

3 MR. KEMP: Your Honor, this goes back to the
4 Terrible Herbst case, and I did some investigation --
5 Where is Mr. Polsenberg? Oh, there he is.
6 Okay.

7 So I did some investigation, and here's what
8 happened. It was pretty much what I said. The timing
9 Mr. Polsenberg had right. What happened is in the
10 Terrible Herbst case, which was tried in front of
11 Judge Gonzalez, Mr. Parker was the plaintiff's attorney
12 against Terrible Herbst, which I can't remember what
13 their ETR or something like that for Eddie, Troy,
14 and -- ETT? In any event --

15 MR. POLSENBERG: ETT.

16 MR. KEMP: -- the only evidence they had was
17 the consolidated financial statement that included both
18 the division that was at issue, I don't know which
19 division that was, and the whole company. That is the
20 only evidence. So the jury came back with a verdict
21 late at night, and the jury said, we want to decide the
22 punitives tonight. And so they did the punitive phase
23 at 1:30 at night or something like that, according to
24 Mr. Parker. Mr. Polsenberg's memory may be better.

25 So what happened --

1 MR. POLSENBERG: And in the hallway.

2 THE COURT: Understood.

3 MR. KEMP: Yeah. So what happened is
4 Terrible Herbst at the last minute said, Oh, those are
5 our consolidated financials. Let's gin up some
6 separate financials for the subsidiary and give them to
7 you, and we'll use those for the punitive phase.

8 So at least in that case, they at least
9 offered separate financials. And Judge Gonzalez says,
10 Look, if this is consolidated financials and it's not
11 broken down, I'm just going to give the jury the
12 consolidated and away we go.

13 So now what they're arguing is that somehow
14 somewhere I am able to show the jury the separate
15 financials for MCI that are current. Cannot be done,
16 Your Honor, unless they want to give me something and
17 violate SEC law.

18 Let's have the first slide.

19 MR. POLSENBERG: Excuse me, Your Honor. I
20 thought we were submitting this on the briefs.

21 MR. KEMP: Just because you submit on the
22 briefs doesn't mean we have to submit on the briefs.

23 MR. ROBERTS: I think they've declined our
24 offer to submit on the brief, Mr. Polsenberg.

25 MR. KEMP: I suspect --

1 THE COURT: Mr. Kemp, I'd like you to speak
2 slowly, please.

3 MR. KEMP: Okay.

4 THE COURT: Okay.

5 MR. KEMP: So, Your Honor, this first slide,
6 shows you their 2015 financial. That is at or near the
7 time that they acquired MCI, and they being New Flyer.
8 So see, they break it down separate for us here. We
9 have MCI's pro forma revenue separate as of the fiscal
10 year that began on January 15th and ended -- or excuse
11 me. I guess it began on December 14th and ended in
12 January 15th. So that is separate of course. We have
13 that. Okay?

14 Now, let me -- let's go to the next one.

15 This is the following year. They don't break
16 it down anymore. The only financials they give are
17 consolidated financials, just like the Terrible Herbst
18 case. So -- and -- and I agree with Mr. Roberts that
19 this is only going to be relevant if we get to the
20 punitive phase. But if we get to the punitive phase,
21 this is the only evidence that's publicly available
22 that could be offered to the jury. All right? This --
23 this is it. This is the only thing that's on the
24 exhibit list. Just like Judge Gonzalez's case, they
25 have not prepared a separate exhibit that shows the --

1 the MCI financials. It's just consolidated.

2 Can I have the next one.

3 Here is the most recent one.

4 Do we have another one?

5 THE COURT: Wait. What -- what period was
6 the one you just --

7 MR. KEMP: The -- the -- the -- this was the
8 following year.

9 THE COURT: 2016?

10 MR. KEMP: Right. Yeah. So -- so if we had
11 the 10-Q -- or, excuse me, 10-K, K means annual -- if
12 we have the 10-K now, it would be for 2017. But what I
13 showed you is the one for 2015 which broke it down
14 separately and 2017 which doesn't break it down.

15 Also, on the exhibit list is the most recent
16 quarterly financials which, again, is consolidated
17 financials. So what they're really saying is when we
18 get to the punitive phase, it's ha, ha, ha, you can't
19 use the New Flyer financials because the judge ruled
20 that. And since we don't have separate financials that
21 we gave you, you can't offer any evidence of financial
22 condition. So I mean, that's -- that's where we're
23 heading here, Your Honor.

24 And that's why I vehemently object to us not
25 being allowed to refer to the New Flyer financials in

1 the punitive phase. And we will submit it on the other
2 New Flyer points. But, you know, just like
3 Judge Gonzalez, if they -- if -- and -- and when we get
4 to the deposition of Mr. Asham, he's the treasurer for
5 New Flyer, I would be shocked if he -- if he rolls out
6 a separate set of financial statements for MCI and
7 says, Well, here's what MCI's been doing. He can't do
8 that, Your Honor, because that -- I'd violate the
9 insider trading rule. He'd be giving me something that
10 he didn't give the SEC first. Can't do that.

11 So -- so we're going to go to the deposition,
12 and they're going to object to every question I ask
13 about financial statement. There are no separate
14 financials. And so for that reason, I think we should
15 be allowed to get into, at the punitive phase again,
16 the New Flyer financials. That's only the evidence.

17 THE COURT: Okay.

18 MR. POLSENBERG: (Inaudible.)

19 MR. ROBERTS: I'm going to turn it over to
20 you next.

21 So, Your Honor, we'll submit on the points
22 that -- other than the one Mr. Kemp addressed. But to
23 respond, I -- the reason the only evidence that he's
24 got in his possession is of New Flyer consolidated
25 financials is because that's what he pulled off the

1 Internet. I mean, he's never propounded discovery
2 asking for MCI separate financials. He's never
3 propounded interrogatories. He hasn't done anything to
4 try to get separate MCI financials. Because his
5 expert, Dr. Stokes, would rather opine as to the
6 ability of the entire company to borrow because that's
7 a big, big number.

8 So it's very premature for him to talk about
9 what we won't produce and what our deponent is going to
10 refuse to give him when he hasn't even tried yet. But
11 as of right now, we've talked about the Dillard case.
12 We've talked about the fact that New Flyer is not a
13 party to the parent corporation. Dillard's was a
14 party. And I know now he's talking about the Terrible
15 Herbst case. Since Mr. Polsenberg was in that case, I
16 would like him to address that, with the permission of
17 the Court --

18 THE COURT: Certainly.

19 MR. ROBERTS: -- and distinguish that from
20 the situation here.

21 MR. POLSENBERG: You know, it's fascinating
22 because Mr. Kemp just said that the last time we -- we
23 were here, he was wrong and I was right. And the
24 really fascinating part of it is that I didn't say
25 anything during the hearing. I had actually told him

1 out in the hallway that he was wrong on the facts, and
2 he said he would check.

3 So here -- here's what happened in that case.
4 That was the -- that was a big red truck case. There's
5 no published opinion on it. We actually argued it in
6 the supreme court twice, which I think I've only done
7 in two or three cases. But in -- in that case, we did
8 go through trial. We -- the jury came back very late
9 at night and said, We find malice, and we want to award
10 punitive damages. Because they have to answer both.
11 And -- and Judge Gonzalez said, Okay, Mr. Parker, what
12 do you want to do? Do you have the financial
13 information? And he had never asked for any.

14 And so Judge Gonzalez -- I'm there saying,
15 you know, Judge, I'm half asleep. Let's -- you know,
16 let's do this Monday. And she said, No, I told this
17 jury they would be out of here on Friday. Although
18 technically I think at that point it was Saturday. In
19 fact, the question we got from the jury was if it's
20 after midnight, what date do we put on the verdict
21 form?

22 So the -- so Sean Higgins was there, the
23 general counsel of Terrible Herbst, and he had to call
24 his sister who was the treasurer of Terrible Herbst and
25 wake her up in the middle of the night. And we didn't

1 have a lot of time to come up with something, but we --
2 we all agreed on some number. And that's what we gave
3 the jury.

4 So I don't think that case is like this case.
5 Terrible Herbst was a party in that case. We weren't
6 just dealing with ETT, a subsidiary. So I -- I think
7 on all the points that we talked about even last week,
8 this case -- that case is radically different from this
9 case. And I don't think that Terrible Herbst was a
10 publicly traded corporation. So we weren't dealing
11 with any of the issues we have here.

12 Thank you, Your Honor.

13 THE COURT: All right. Let's move -- and we
14 need to get going. All right. Defendants' Motion in
15 Limine No. 8, Exclude Any Reference to Seat Belts.

16 MR. BARGER: Good afternoon, Your Honor.
17 We've been sued -- MCI's been sued alleging essentially
18 three defects. The Court's heard ad nauseam for two
19 days now what those three defects are, S-1 Gard,
20 proximity, et cetera. They -- Mr. Kemp in several
21 witness questionings has referred to the issue that
22 motor coaches do not have seat belts on them. Seat
23 belts inside this Motor Coach had nothing to do with
24 this case, has no probative value whatsoever. And I
25 will suggest to the Court as opposed to not knowing a

1 whole lot about Nevada law with all these esteemed
2 lawyers on both sides here, I know a lot about seat
3 belts, and I've probably tried seat belt cases, and,
4 Judge, they take a month.

5 And -- and believe it or not, there's some
6 legitimate reasons and have been for many years, even
7 for the National Highway Transportation Safety
8 Administration back in the '70s all the way up until
9 last year that they didn't think they needed and wanted
10 it was more dangerous to have seat belts on a bus or
11 not. Now, I can sit here for literally a month, but
12 I'll tell you it's a very controversial issue. And
13 since 1970 when that's been the study, they've never
14 had a requirement to have seat belts on buses because
15 there's other reasons not to. As of 2016, there is now
16 a rule -- a rule that you will have seat belts on buses
17 going forward.

18 All that being said, and if you look at their
19 response, the only reason they want to put it in is,
20 quote/unquote, for punitive damages. And -- and -- and
21 that has nothing to do with this lawsuit. The
22 prejudice of that and having to then extend the length
23 of this trial with witnesses talking about seat belts
24 and NHTSA information back in the '70s, '80s, and '90s
25 is just absolutely ludicrous and it has nothing to do

1 with this case. And they only want to do it for one
2 purpose, just, quote/unquote, to prejudice the jury
3 because a lot of people think seat belts save lives.
4 It doesn't necessarily meet that test in motor coaches.
5 In fact, it shouldn't even be mentioned. It has
6 nothing to do with this lawsuit and the alleged
7 defects.

8 Thank you.

9 THE COURT: Thank you.

10 MR. CHRISTIANSEN: Good morning, Judge --
11 afternoon. Peter Christiansen.

12 THE COURT: Good afternoon, Mr. Christiansen.

13 MR. CHRISTIANSEN: Just so the Court recalls,
14 Mr. Kemp and I have not done it up to now, but I
15 represent Aria Khiabani and the estate of Katy Barin.
16 Mr. Kemp's firm represents Keon Khiabani and the estate
17 of Dr. Khiabani. We have separate clients. So
18 technically, we both could talk every single time.
19 We've not done that --

20 THE COURT: Right.

21 MR. CHRISTIANSEN: -- thus far, but I just
22 wanted to remind the Court of that sort of for
23 procedurally.

24 We do think seat belts are admissible, and
25 they're admissible because guys like Mr. -- is it coach

1 or couch? I get it wrong every time.

2 THE COURT: It's Couch.

3 MR. CHRISTIANSEN: I'll defer -- all right.

4 Mr. -- Mr. Couch --

5 MR. POLSENBERG: Oh, couch.

6 MR. CHRISTIANSEN: -- and the second engineer
7 they brought whose names escapes me came to the
8 depositions and -- and said there are no such things as
9 blind spots on our buses. In other words, they out and
10 out say these buses are perfectly safe, there's no such
11 thing as blind spots, only to be followed by Mr. -- by
12 Virgil --

13 THE COURT: Virgil. Okay.

14 MR. CHRISTIANSEN: -- I'll do the same thing
15 as everybody else who says, of course there's blind
16 spots. He's the 30(b)(6) person most knowledgeable on
17 this. But we just design the safest bus we -- we can
18 design. So they're absolutely going to put at issue
19 the safety of these buss. And the safety of the buses,
20 the fact that they are or are not safe is belied by the
21 fact that since 1960 something, every car in the -- the
22 United States has had to have a seat belt, but not
23 until the year 2016 do buses need seat belts or any of
24 these other -- you know, are they legislated in as seat
25 belts. And it comes in under our statute as 48.045

1 subsection 2, which is the equivalent of 404(b) in the
2 federal jurisdiction.

3 And so you have to find one of the mimic
4 exceptions, motive, opportunity, intent, preparation,
5 plan, knowledge, identity, absent of the state or -- or
6 accident. And our theory why it becomes relevant is
7 this is the way they operate. They put profit over
8 safety all the time. They were offered the S-1 Gard
9 for free and didn't take -- avail themselves of that
10 opportunity.

11 And it costs money to put seat belts on them,
12 when they put at issue this bus is safe and we make it
13 super safe, we shouldn't have done any of these things
14 because it was safe, I certainly have the ability to
15 say to them, what about seat belts? All of you have
16 seat belts in your cars; right? But you don't want to
17 put them on your buses because it costs money? And
18 putting profit before safety is conscious disregard
19 under 42.001.

20 And that gives rise to punitive damages which
21 is a box we need to get checked to go -- by clear and
22 convincing evidence to go into the punitive damages
23 section, and it's relevant.

24 Thank you, Your Honor.

25 MR. BARGER: With all due respect, and -- and

1 I normally don't use a lot of rhetoric, but that's
2 nonsense. It's being done for one purpose only. The
3 fact is seat belts have nothing to do with -- we can
4 extend this trial two weeks and have these experts talk
5 about what the federal government, the National Highway
6 Transportation Safety Administration has told motor
7 coaches for 30 years, don't put them in.

8 And so to get into that sidebar issue which
9 has nothing do with whether there should have been
10 S-1 Gard or proximity sensors on this vehicle is just
11 totally a waste of time and it's -- and you know -- the
12 Court knows it's being done for one purpose. And --
13 and I don't even need to say what that purpose is. It
14 would totally prejudice the jury.

15 And so, again, I won't use the word 403
16 because that's a federal statute, but -- but -- but
17 your state has a statute, too, about any -- any
18 relevance, which there is no relevance. It is
19 certainly outweighed by -- by bias or prejudice. And
20 at end of the day, I don't want to try a seat belt
21 case. It -- it literally takes a month to do so with
22 all the -- the people that have to testify.

23 Thank you, Your Honor.

24 THE COURT: Thank you. All right.

25 Let's move on. This is Defendants' Motion in

1 Limine No. 9 to Exclude Reference to the Ghost Bike
2 Memorial.

3 MR. SMITH: Good afternoon, Your Honor.

4 THE COURT: Good afternoon.

5 MR. SMITH: Abe Smith for MCI.

6 We -- we had a similar motion we talked about
7 on Monday with the funeral video, that -- that case the
8 plaintiffs were wanting to introduce or at least
9 preadmit an hour and a half of the funeral video, only
10 later to pick out whatever clips they might want to do.

11 Here we have -- here we're talking about the
12 Ghost Bike Memorial, which was after -- which was a
13 memorial set up by a community organization to raise
14 awareness about bicycle safety in Las Vegas. I think
15 the -- in the motion in the opposition, we're sort of
16 talking past each other. Our -- our principal intent
17 in the motion was really addressing the -- the memorial
18 itself, this -- this white bicycle without tires.

19 THE COURT: I'm sorry. Repeat that last
20 sentence.

21 MR. SMITH: The -- we were addressing
22 principally the memorial itself --

23 THE COURT: Right.

24 MR. SMITH: -- which was a replica of a
25 bicycle that had various inscriptions on it and

1 mementos from members of the community.

2 In the opposition, they're focusing on
3 certain oral speeches that members of Dr. Khiabani's
4 family gave during that memorial service. So I --
5 hopefully, I'd like to clarify what -- what we're
6 talking about here.

7 And then we also have sort of talking past
8 each other with respect to issues of relevance versus
9 issues of hearsay. Our primary objection is really on
10 the relevance issue, but there are hearsay issues that
11 come up when we're talking about assertions that might
12 have been made during that ceremony or -- or inscribed
13 on the bike itself.

14 So first, let's talk about the public
15 comments. So not -- setting aside for -- for right now
16 the members of Dr. Khiabani's own family, but others
17 who participated in that memorial or -- or made
18 inscriptions on the bicycle. The -- the basic issue
19 there is that it's irrelevant under NRS 41.0853.
20 Dr. Khiabani's heirs are coming in on a wrongful death
21 action. The statute provides certain elements of
22 damages that they can recover, including for grief and
23 sorrow, for loss of probable support, loss of
24 companionship, et cetera.

25 The statute does not provide a cause of

1 action for the loss of Dr. Khiabani's life in general
2 or for the loss -- or -- or to value his life, his
3 reputation within the community. That's why the cases
4 are clear. We set these out in our motion. The -- the
5 value of -- of a person's life is not a compensable
6 item of damages in a wrongful death action. Sometimes,
7 you know, you hear people talk about, well, how can you
8 compare the value of a human life to something even
9 like a valuable painting. If you were to -- to run
10 inside a burning building and there was a Picasso, but
11 then there was a -- a child inside the building, would
12 anyone even have to hesitate to think that they would
13 save the child before they would save the Picasso? But
14 that's really getting into issues of the value of a
15 person's life as a whole. That's not what the -- the
16 wrongful death -- death statute is intended to -- to
17 compensate. It's a specific item of damage relating to
18 the actual grief and sorrow that the heirs experience.

19 So we get to this Ghost Bike Memorial, we
20 have a series of comments by members of the public,
21 mostly anonymous, that are talking about what
22 Dr. Khiabani meant to them (inaudible) sentiments,
23 expressing support, and -- and sympathy. Those kind of
24 statements are not relevant to what the heirs
25 experienced in terms of their grief or sorrow. And

1 so -- so to the extent they're just talking about that
2 in a general sense, what -- what Dr. Khiabani meant to
3 them, it doesn't come in under relevance.

4 Now, if they go on, if those -- if those
5 statements actually have an assertive component to
6 them, in other words, stating some sort of fact,
7 then -- then in addition, they're also hearsay because
8 they're an out-of-court statement brought in for the
9 truth of the matter.

10 We don't have any -- as far as I know, we
11 don't have anyone from the memorial coming in to
12 testify, to actually say, Oh, here's what I wrote and
13 here's what I meant. In that case, you wouldn't need
14 what they wrote. They would just be giving their own
15 testimony. But again, as I said, that sort of
16 testimony would be irrelevant because what Dr. Khiabani
17 meant to others in the community is not something that
18 the heirs have a right to recover for under the
19 wrongful death statute.

20 In addition, those -- to -- to the extent
21 that they aren't completely irrelevant, we also have
22 the balancing test that any -- any relevance would be
23 far outweighed by the prejudicial nature of the
24 comments. Understand that the grief and sorrow --
25 evidence of the heirs' grief and sorrow is by its

1 nature very emotional evidence. And -- and Dr. -- and
2 Keon and Aria will certainly have a chance to testify,
3 and I -- I fully expect that -- that it will be very
4 emotional testimony.

5 But that makes it all the more important to
6 be careful in policing the line when we are dealing
7 with a very emotional item of damages or -- or an item
8 of damages that is a tie -- tied in some ways to a
9 person's emotional state, that we don't drift over into
10 somebody else's emotional state. And allowing that
11 very -- by its nature prejudicial and -- and emotional
12 evidence that tends to appeal to the passions and
13 sympathies of the jury, that we limit how that evidence
14 comes in.

15 Here, if we have -- if we allow in statements
16 of other members of the public, how they felt, what
17 they experienced, that would be incredibly emotional
18 evidence tending to provoke the passions and sympathies
19 of the jury for no probative purpose, but certainly
20 outweighed by the prejudicial effect of it.

21 In addition, we have foundation authenticity
22 issues. Any of these statements that would be coming
23 in are for -- are not only un -- in some cases
24 unsigned, but we don't have the authorship. We -- we
25 don't have the actual authors here to testify.

1 Now, turning to Aria and Keon, they were
2 certainly at the -- at the Ghost Bike Memorial
3 themselves. And I think it would be a separate
4 question not within the purview of this motion whether
5 they can come in and testify about their grieving
6 process. You know, I don't see any objection to them
7 describing their feelings after their father's death,
8 and -- and it -- you know, there may be a point to
9 describe what it was that they did after their father's
10 death, what was part of the grieving process.

11 But beyond that, it -- it would be
12 inappropriate for them to come in and say, Okay, well,
13 here's what I said at this Ghost Bike Memorial service,
14 because then that would stray into -- into issues of
15 hearsay. Aria, for example, said that he gave a speech
16 about bicycle safety at this Ghost Bike Memorial.
17 Well, any assertions within that speech would be
18 hearsay. They kind -- plaintiffs say that, oh, well,
19 you know, it's a statement by a party. It's therefore
20 not hearsay. But the rule is that it has to be an
21 admission by a party opponent. In other words, we
22 could bring in statements by the plaintiffs for
23 non-hearsay purposes. But a party can't bring in its
24 own prior statements, out-of-court statements as
25 non-hearsay. That still falls within the -- the

1 traditional definition of hearsay.

2 Finally, on the issue of voir dire and jury
3 selection, this is a sensitive issue, and plaintiffs
4 are saying that this is part of their grieving process
5 that they attended this -- this bicycle memorial. I
6 apologize, Your Honor. Just one second.

7 In NRS 16.050, subsection 1(e), it discusses
8 the -- the biases that would warrant exclusion of
9 jurors on the jury panel. And most of those
10 subsections within -- within that statute talk about
11 implied bias. One of the examples of implied bias --
12 meaning you don't have to show that somebody is
13 actually -- you know, actual bias against the plaintiff
14 or defendant, but certain circumstances, such as, you
15 know, blood relationship or a working relationship, we
16 imply that that -- we -- we assume that that person is
17 biased. Bias is imputed to them regardless of whether
18 they could or could not be fair to the parties. The --
19 the legislature just makes a categorical exclusion of
20 those people from serving on -- on the jury in that
21 action.

22 So in subsection, or rather paragraph (e), it
23 says, "Interest on the part of the juror in the event
24 of the action," is an example of implied bias. We cite
25 the -- the criminal case, *United States versus Carick*

1 (phonetic), U.S. Supreme Court case, where Justice
2 O'Connor concurring explains that someone who's
3 actually a witness to the transaction that forms the
4 basis of the case is one of the "extreme situations
5 that would justify a finding of implied bias."

6 In other words, if there's somebody who's in
7 the jury pool who has actually participated in the
8 events for which the parties are claiming injury or
9 claiming damage, then that is a circumstance that
10 automatically excludes them from serving on the jury
11 pool. So here if we have people who actually
12 participated in this Ghost Bike Memorial service with
13 members of Dr. Khiabani's family, that would be -- that
14 would be a juror -- that juror would be -- would have
15 participated in an event giving rise to the action, and
16 they would have to be excluded under NRS 16.050 1(e).

17 If Your Honor doesn't have any questions, I
18 will sit down.

19 THE COURT: No questions. Thank you.

20 Okay, Mrs. Works -- Ms. Works.

21 MS. WORKS: Good afternoon, Your Honor.

22 Again -- and -- and I agree with counsel.

23 This motion by the defense is somewhat similar to the
24 motion with respect to the --

25 THE COURT: Yes, it is.

1 MS. WORKS: I would say there are some
2 distinctions here. First and foremost, much like the
3 funeral was a ceremony memorializing their father, the
4 Ghost Bike ceremony was also another memorial for
5 Kayvan Khiabani which Aria and Keon and Dr. Katy Barin
6 attended to honor their father. Aria did testify that
7 he spoke at the time of the memorial about bicycle
8 safety. There are photos from the event. There are
9 photos of the bicycle. A ghost bike memorial is --
10 ceremony is held by Ghost Bikes of Las Vegas, which is
11 dedicated to raising bicycle safety awareness. That
12 group hosts a bike ceremony in memory of all cyclists
13 struck and killed by motor vehicles in the Las Vegas
14 community. That information is available from the
15 website. That's where I obtained it. It's not
16 something that's specific to Dr. Khiabani.

17 There could have been attendees -- you know,
18 there were numerous attendees present. Aria and Keon
19 witnessed the ceremony. It's not necessarily the case
20 that each of the attendees knew or had any personal
21 relationship with the Khiabani family or with
22 Dr. Khiabani at all. Could simply be that they're a
23 member of this organization and attend every single one
24 of these ceremonies. So there's not necessarily a bias
25 on the part of every single one of those people.

1 Nevertheless, the memorial ceremony itself is
2 not just relevant to Dr. Khiabani's presence and his --
3 the -- the impact of his loss on the community. It's
4 relevant, again, just like the funeral ceremony, to the
5 grieving process that Aria and Keon and Dr. Barin went
6 through in honoring their father's death and speaking
7 to the community and, you know, the impact that the
8 ceremony had on them when others were reaching out to
9 them in order to honor their father.

10 And so that's absolutely an event, that is
11 something that Aria and Keon can speak to and testify
12 about. And pictures of the memorial are relevant. The
13 bike itself is relevant because it's, again, part of
14 that grieving process. If we look back at -- at, you
15 know, the memorial itself is much like a tombstone, an
16 urn, or crypt which pursuant to NRS 51.205, any
17 inscriptions on that would be not considered
18 inadmissible hearsay under the Nevada statute. The
19 bike is a memorial, much like a tombstone is a memorial
20 piece at a cemetery. The inscriptions, again, on the
21 memorial itself are not being offered -- or would not
22 be offered for the truth of the matter asserted, but
23 rather for the impact that they had on Aria and Keon in
24 grieving the loss of their father.

25 And so it's relevant not just to his

1 reputation in the community, but to the grief and
2 sorrow that his family experienced during their
3 grieving process which is relevant and will come in.
4 It must, because the plaintiffs have to have an
5 opportunity to present their damages to the jury, which
6 their grief and sorrow is explicitly recoverable under
7 the statute.

8 Now, with -- with respect to whether or not
9 you exclude a juror simply because they've been to the
10 memorial or they may have gone to the ceremony or
11 driven by it, I think that -- I'm not certain if the --
12 if the reply indicated that even if they had been
13 there, they should automatically be excluded. I mean,
14 I think the placement was next to the Red Rock. There
15 could be any number of citizens from this community
16 that drove by that memorial that saw it, that maybe
17 stopped and took a look at it. Those jurors are not
18 excluded simply because they have seen the memorial or
19 they may have been in attendance at the ceremony.

20 What defendants need to do in this case, if
21 they want to exclude a potential juror, is to show
22 cause, to show that that juror cannot be fair and
23 impartial because they saw the memorial or they may
24 have attended the ceremony. They may have attended ten
25 different memorial ceremonies in the last year. It

1 doesn't necessarily mean that they're biased or that
2 they need to automatically be excluded.

3 Now, they well -- they may well need to be
4 excluded. They may well say to the Court, Yes, I -- I
5 can't be fair and impartial. I have -- you know,
6 there's a special place in my heart for this family.
7 Those aren't things that we're saying would not
8 preclude them from serving. But it's something that
9 needs to be explored on voir dire on a case-by-case
10 basis, not as a blanket proposition, anybody who saw
11 the memorial can't be a juror. Anybody who attended
12 the ceremony can't be a juror. Because what they need
13 to do is show cause that those jurors -- potential
14 jurors can't be fair and impartial. So a blanket
15 ruling by this Court would be inappropriate.

16 Again, the memorial is highly relevant to
17 their grief and sorrow, and so it's -- it gets -- any
18 prejudicial impact is -- the prejudicial impact is not
19 any different than any other element of grief and
20 sorrow that Aria and Keon are going to testify to.
21 Their father's funeral was a terribly difficult
22 experience. The memorial service was likely a
23 difficult experience. But the fact is defendants can't
24 avoid that those are elements of damages in this case
25 and the jury is going to hear presentation of that

1 evidence. And the ghost bike in particular is no more
2 prejudicial than any other piece of evidence that's
3 going to come in as to the loss and the grieving
4 process that these children incurred as a result of the
5 loss of their father. And so if you -- on balance that
6 there's no substantial prejudice to the defense,
7 certainly not any more than any other piece of evidence
8 that they're going to have to face.

9 And so, in short, the evidence is relevant
10 and it's not hearsay. Any hearsay objection can be
11 ruled on on a case-by-case basis, and same thing with
12 potential jurors. The Court needs to decide whether
13 those jurors can be fair and impartial on a
14 case-by-case individualized basis.

15 THE COURT: Thank you. All right.

16 MR. SMITH: If Dan Polsenberg gets put on
17 trial for stealing somebody's jokes, I think I can be a
18 fair and impartial juror. But the --

19 MR. POLSENBERG: I only borrowed them.

20 MR. SMITH: But -- but the -- the thing is
21 the law does make it a blanket exclusion. It implies,
22 it imputes bias to members that have certain
23 relationships with the people on trial regardless of
24 whether those people actually could be fair or unfair.

25 And one of those circumstances is where

1 the -- the witness or whether the juror has an interest
2 in the event giving rise to the litigation. Here, if
3 somebody actually participated in the -- in the Ghost
4 Bike Memorial -- I don't have anything to say about
5 somebody who saw the bicycle as they drove down
6 Pavilion Center Drive. That -- that's not what we're
7 talking about. We're talking about people who actually
8 participated in that ceremony. If somebody actually
9 participated in that ceremony, which plaintiffs are
10 adamant was -- was kind of a continuation of the
11 funeral, part of their grieving process, then they are
12 absolutely within the purview of that statute, which is
13 a blanket exclusion.

14 I'm not saying that there aren't jurors or
15 prospective jurors who attended the Ghost Bike Memorial
16 who might still be fair jurors. But it is -- it is --
17 it is a -- a bias that's imputed to them, whether or
18 not they're actually biased.

19 Turning briefly to the family records
20 exception to hearsay, which by the way, they do not
21 cite in their opposition, yeah, this is talking about
22 urns, crypts, tombstones, engravings, inscriptions, and
23 family bibles, engravings on rings and the like. First
24 of all, the -- the -- to be a hearsay exception, we're
25 only talking about statements of facts in -- in these

1 circumstances. If there is a statement of fact in --
2 in something like that that is so permanent, then the
3 expectation -- we're talking about the hearsay rule as
4 a -- a way of ensuring the reliability of the testimony
5 that's being offered.

6 THE COURT: Understood.

7 MR. SMITH: And the law makes an exception
8 for certain family records, something that the
9 family --

10 THE COURT: Right.

11 MR. SMITH: -- has gone to the trouble to --
12 you know, to -- to chisel into stone, on -- on a
13 gravestone, something like the date of birth or death.
14 That would be something that would be -- that would be
15 admissible despite the hearsay rule about it being a
16 factual assertion.

17 It sounds like plaintiffs are talking about
18 the photographs, speeches at a -- at the funeral.
19 That -- that isn't the same kind of family record that
20 we'd be talking about. In fact, plaintiffs concede
21 that this isn't something that is organized by the
22 family. It's something that's put on by a community
23 organization that does this all over the country. So I
24 don't think that -- that any factual assertions to the
25 extent there are factual assertions on -- on the Ghost

1 Bike Memorial that those would fall within the family
2 records exception to the hearsay.

3 They also talk about the prejudicial impact,
4 that -- the fact that, well, of course this evidence is
5 going to be prejudicial; they can't run away from it.
6 I think that this is a very easy line to draw. In
7 fact, you can -- you know, you have the evidence, the
8 testimony, the live testimony of Keon and Aria talking
9 about their grieving. It's very easy at that point to
10 shut off the testimony when it starts to be somebody
11 else's grieving process, somebody else talking about
12 what they -- what they felt or experienced at this
13 Ghost Bike Memorial. Just because there may be a
14 similar emotional impact that is given by both
15 statements doesn't mean that both are admissible. In
16 the case of Keon and Aria's testimony, they get to talk
17 about their own grief and sorrow. But when it's a
18 member of the community, no, that's absolutely -- it's
19 emotional, but not emotional in an appropriate way.

20 It's -- it's only offered for the prejudicial
21 impact that it would have of suggesting to the jury
22 that it can decide this case not only for what -- for
23 what loss Keon and Aria experienced but also for the
24 loss that the community as a whole experienced. And
25 that's just an issue to inflate the damages and appeal

1 to the jury's passions and prejudices.

2 Finally, I -- I heard reference to the Ghost
3 Bike Memorial website. I -- I'm not quite sure what
4 plaintiffs intend to do with that, but we would
5 certainly object to the introduction of unauthenticated
6 pictures just from a public website that -- that aren't
7 even the plaintiffs' own testimony in court.

8 Does Your Honor have any additional
9 questions?

10 THE COURT: No, I don't.

11 MR. SMITH: All right. Thank you, Your
12 Honor.

13 THE COURT: All right. Let's go on now to
14 Defendants' Motion in Limine No. 10, excluding
15 speculation as to defendants' thoughts about the motor
16 coach. Okay.

17 MR. HENRIOD: That is correct.

18 THE COURT: How are you today?

19 MR. HENRIOD: Joel Henriod. Good afternoon.

20 This one is simple. Witnesses, percipient or
21 expert, should not be allowed to testify as to what
22 Dr. Khiabani was thinking. There is testimony about an
23 expression of surprise. I think that comes in. That
24 is an objective observation. It -- it comes in, I
25 think, with -- it comes in subject to cross-examination

1 about differences between surprise and terror, any of
2 the emotions that somebody might feel under that
3 circumstance and understandably, where the line is.
4 But the expression on the face, I think they can
5 testify to that. It's a percipient issue.

6 What it means, why he was surprised, they
7 can't go there. We don't have any psychiatrist or a
8 psychologist called as experts. None of our percipient
9 witnesses have any expertise or particular background
10 in that. So whether he was -- had that expression of
11 surprise because he saw the bus coming up on his left
12 hand as opposed to his right hand, which is one of the
13 things plaintiff liked to exercise -- or emphasize in
14 their -- in the depositions or whether or not he felt
15 some unusual air pressure, what -- what Mr. Kemp wants
16 to artistically call an air bomb or an air blast, or
17 whether the doctor was surprised that this driver just
18 had not moved over yet when it's obvious that he should
19 have or I think, most likely, surprised that the bus
20 was there at all after he had decided to start turning
21 left and -- and saw that the bus was there, as -- as is
22 our sole proximate cause argument. So they can't go
23 into why. They can't guess.

24 We also can't guess as to what Dr. Khiabani
25 thought about this motor coach, what he thought about

1 buses or motor coaches in general, what his
2 expectations are, assuming he had any and assuming that
3 his perspective as a bystander is relevant for the
4 ordinary and prudent person and ordinary consumer,
5 that -- that test for determining whether or not
6 there's a defect. We have no idea what he thought
7 about these vehicles, even assuming that his
8 perspective is relevant. They saw an expression that
9 they took to be an expression of surprise. That's
10 fine. Why he was surprised, nobody can guess at that.

11 THE COURT: Thank you.

12 MS. WORKS: Your Honor, the argument seems to
13 me -- good afternoon -- to have changed a bit. If --
14 if the argument had been in the motion that the
15 percipient witnesses could testify as to the fact that
16 they observed what they perceived to be surprise on the
17 look of Dr. Khiabani, then we wouldn't have had an
18 opposition. But the -- the motion, and even the reply,
19 as we understood it, was that the defense didn't want
20 the percipient witnesses to be able to even say he
21 appeared surprised to me. And as the Court is well
22 aware, a percipient witness can testify to what they
23 observed and any rational inferences that flow from
24 that observation.

25 And, in fact, in one of the cases that MCI

1 cites with respect to Motion in Limine No. 15, it
2 specifically -- they specifically cite a case that says
3 a lay witness can testify regarding emotions that are
4 manifested by acts that they observe. So if they
5 observe what they perceive to be a look of surprise on
6 his face, that's certainly within the ken of lay
7 witness and everyday person's observations of other
8 people and life experiences.

9 So we certainly don't have an issue with
10 that, and we agree, although I'm still not entirely
11 clear that -- that -- that they are in agreement that
12 they can testify as to observing a look of surprise.
13 But we would agree with that if that is, indeed, what
14 Mr. Henriod is saying.

15 We agree, however, that they can't speculate
16 to why. I don't think anybody on either side of the
17 fence wants him -- them speculating one way or another,
18 whether it was terror or whether -- you know, we -- we
19 contend, of course, pursuant to our Motion in Limine 3
20 that issues of comparative and contributory fault
21 should not come in. We expect that we shouldn't be
22 able to get to these issues, but if, in fact, these
23 witnesses are permitted to testify in this regard, they
24 should be able to testify. And it is well within their
25 ability to observe the look of surprise. And that's

1 our only opposition, Judge.

2 THE COURT: Very good. Thank you.

3 Are we on the same page?

4 MR. HENRIOD: I think we are. Our --

5 THE COURT: I mean not literally on the same
6 page. Okay. I just --

7 MR. HENRIOD: Our motion could have been more
8 clear. I apologize to the Court and opposing counsel.
9 I -- I do think we're all on the same page. The
10 objective observation comes in, but not as to any
11 guessing as -- as to the why.

12 THE COURT: Okay. I just wanted to be sure.
13 Okay.

14 MS. WORKS: That's correct, Your Honor.

15 THE COURT: All right. All right. Then
16 let's go on to Defendants' Motion in Limine No. 11.
17 This is to exclude plaintiffs' expert witness Dave
18 Roger.

19 MR. POLSENBERG: That's right. Thank you.

20 THE COURT: We've already had some discussion
21 in general.

22 MR. POLSENBERG: Dan Polsenberg, and I'll try
23 to be less passionate than I was on Monday.

24 THE COURT: Okay.

25 MR. POLSENBERG: Plaintiffs propose Dave

1 Roger --

2 THE COURT: Mr. Polsenberg, I'd like you to
3 speak a little bit slower, please.

4 MR. POLSENBERG: You bet.

5 THE COURT: Thank you.

6 MR. POLSENBERG: Plaintiffs propose Dave
7 Roger -- and I actually spell more words than everybody
8 else does too -- and -- and for three basic principles
9 and to testify on three groups of things. And he
10 really can't testify on any of them. Let's take the
11 first one.

12 The first one has to do with whether
13 Mr. Hildreth -- can't call him Virgil, but I can call
14 him Sonny -- whether he violated some law by conducting
15 the investigations without a license. First of all --
16 and we've heard all about Hallmark all day today.
17 We -- and we've heard about how you have to meet three
18 requirements, the qualification requirement, the
19 assistance standard, and the limited scope standard.
20 Let's look at qualifications here. Their argument is
21 that he's a lawyer. He's got a law degree. So he can
22 read the law and tell people what the law is and
23 whether somebody violated it. Well, that's -- that's
24 wrong on a number of levels.

25 First of all, while he may have a law degree,

1 his experience is in criminal law, and he's actually
2 quite focusing on criminal law in this context. And
3 he's also testifying on foreign law. He's testifying
4 on what the law in Illinois is where he has no
5 background, no training, no experience. But they come
6 in here -- and so I would say that even if he were
7 qualified, and he's not, this would fall under the
8 limited scope standard. But they come in and they say
9 *Jain versus McFarland* -- now, that's J-a-i-n. And it's
10 McFarland, although they have a typo of the name of the
11 brief in their case. And Ms. Recorder, I've got a
12 whole thing of words to give you that I'm going to say
13 that are hard to -- hard to spell.

14 *Jain versus McFarland* doesn't say once you're
15 a doctor, you can testify about any kind of doctor
16 stuff. And that's what they're trying to say, that any
17 lawyer can talk about any law, can go to the Illinois
18 law books and pull them down and -- and say, well,
19 here's what the law is. Or with an experience in
20 criminal law, can go into civil background, not even
21 civil law, just civil practice. You know, Wright and
22 Miller wrote the book *Federal Practice and Procedure*,
23 and in their very title, they notice there's a
24 difference between actual practice and procedural law
25 set out.

1 But anyway, in -- in the *Jain versus*
2 *McFarland* case, Dr. Silver was a noted -- a famous
3 gynecologist here in Las Vegas. In fact, he's the
4 father of Chief Judge Abbi Silver.

5 THE COURT: Yes.

6 MR. POLSENBERG: And he -- he did a certain
7 surgery on a vesicovaginal fistula. You bet I'm going
8 to hand you that card. Now, that's a hole between the
9 bladder and the vaginal wall. And this is a -- this
10 fistula is operated on by both gynecologists and
11 urologists. Now, the plaintiff brought in
12 Dr. Rosenstein who was a urologist, and he said, Here's
13 how urologists do it. This is the standard of care.
14 This is the proper approach. I don't know what
15 gynecologists do, but they should do it this way too.
16 And the supreme court said, yes, that's appropriate,
17 because even though he was a urologist testifying
18 against a gynecologist, he had experience with this
19 actual surgery.

20 But Mr. Roger doesn't have experience on
21 Illinois law, and Mr. Roger doesn't have experience on
22 how statements are taken in civil cases. So he doesn't
23 have the qualifications even to handle this. And when
24 it comes to the need for a licensure, I -- I don't even
25 understand why this is an issue we would have an expert

1 witness on. Legal issues are not the subject of expert
2 opinion.

3 Who -- if we're talking about Nevada law,
4 who's the judge of Nevada law in this case? The judge
5 is. So the judge decides what the law is. Who's
6 the -- who's the expert on foreign law if Illinois law
7 applies. Well, it's not Mr. Roger because he doesn't
8 have any experience on that.

9 And look at his methodology. We've -- I've
10 heard -- you know, Howard did a great job at the very
11 beginning of the day talking about that under the
12 assistance standard, you have to have a reliable
13 methodology. Repeatedly throughout his opinion, all
14 Mr. Roger is saying is here's the law, here's the facts
15 as I see them, and so that violates the law. But
16 that's the jury's job. And I don't understand why
17 we're even claiming that Nevada law would apply here.
18 These acts took place in Illinois.

19 There was a case that came down just a little
20 over four months ago, *Ditech Financial versus Bugles*.
21 And in that case -- and -- and part of the issue that
22 we're dealing here in Mr. Roger's opinion is whether we
23 violated Chapter 199 and suborning perjury, but also
24 has to do with licensure. But in that case, the Nevada
25 Supreme Court said where there -- the -- when dealing

1 with the wiretapping statute in Chapter 200, where the
2 phone conversation takes place at two ends, one in
3 Nevada and one outside Nevada, if the recording takes
4 place outside Nevada, that's extraterritorial. The
5 Nevada statutes don't apply to that.

6 So as a matter of law, we're not even talking
7 about Nevada licensure. We're not even talking about
8 the Nevada suborn and perjury statute. And when it
9 comes to the licensure statutes, and that's
10 Chapter 648, what's his opinion as a result of not
11 having a license? Well, he goes on to say, well, you
12 know, if -- if -- if he is -- if Sonny is
13 investigating, conducting investigations in Nevada,
14 then they -- the State can issue a cease-and-desist
15 order or an injunction. But none of that goes to the
16 validity of the statement being made. So that first
17 opinion having to do with licensure is simply
18 irrelevant. It's irrelevant because the -- the
19 statement still exists, and the jury can consider that.

20 How about the interviewing techniques? This
21 is very interesting. Mr. Roger says even in the
22 heading, it -- he says "Best practices for obtaining
23 witness statements." Now, I do a little -- a lot of
24 malpractice. Let me clarify that. I mean, I litigate
25 a lot of malpractice. I'm not expressing an opinion on

1 whether I commit. But the standard is not whether you
2 have -- have met the absolute best practices. In -- in
3 a malpractice case, you would come in and say here's
4 the standard of care. Here's what the ordinary
5 reasonable person in that situation, even a
6 professional, would do. I mean, there's a lot of law
7 saying you can't go into best practices.

8 And the best practices that Mr. Roger is
9 talking about here, if I -- if I distill this page and
10 a half, maybe two pages down, is, oh, my gosh,
11 Mr. Hildreth -- Hildreth didn't record these
12 statements. He -- he wrote them down. He wrote down,
13 took notes about what the people were saying. And he
14 then wrote out a statement for them, and they read it
15 and they signed it. And repeatedly Mr. Roger says that
16 that's not the best practice in law enforcement. Well,
17 this isn't law enforcement. There's a big difference
18 between criminal and civil.

19 Let me dig a little deeper on that. As we
20 all know, Mr. Hildreth is a former FBI agent. Here's
21 how FBI agents work. They interview, usually in a
22 team, but they interview a person and they write down
23 what that person says and then they leave. And they
24 write out a 302 statement. It's a form that's called
25 FD-302. And -- and they write out what that person

1 says. The person doesn't read it. The person doesn't
2 sign it, and that's what happens in federal criminal
3 prosecutions. And that memorialization of what the
4 person said in the interview is often used against that
5 person.

6 Now, in some states, there are statutes that
7 say, well, we prefer to give different protections to
8 criminal defendants. We prefer to have recordings,
9 especially of custodial interviews. Now, back in 2003,
10 there were only two states that had such statutes.
11 There are more now, but there's now a majority of
12 states. And Mr. Roger does not express the opinion
13 that it is the law in Nevada, even in a criminal case,
14 that you have to record the statements. So he really
15 can't even testify about this. He doesn't have the
16 qualif -- qualifications to talk about what happens in
17 a civil scope -- in -- in a -- Freudian, in a civil
18 case. It goes beyond the scope of his practical
19 expertise and it fails the limited scope, Your Honor.
20 And it is very common in civil cases for statements to
21 be written down and for people to sign them.

22 Now, I'm not talking about a 302 statement
23 where the person doesn't even get to see it. I mean,
24 look what happened in this case. In this case,
25 Mr. Hildreth met with both these people. Mr. Pears,

1 whom I will probably called Peers a couple of times,
2 but it's P-e-a-r-s, and Mr. Plantz, who Lord knows,
3 I'll probably call him Roger Plants -- I mean Robert
4 Plants. But here's what he did: He met with them. He
5 talked about them. He wrote down notes. He wrote out
6 a statement. He had them read it. He actually read
7 each sentence to them. And if they wanted to make a
8 change, they could make a change.

9 Mr. Pears says that on page 143 of his
10 deposition that he made changes. Mr. Christiansen
11 asked him did he make them, meaning changes based on
12 his information? The answer was:

13 "They were -- I pointed out that -- that
14 they were incorrect, and he corrected it."

15 On page 222, when Darrell got to talk to
16 Mr. Pears, he said:

17 "All right." This is the question. "now,
18 it's not a lie if he was writing it. the
19 statement written and it was going to be your
20 statement, and you read it and signed it, and
21 it's not a lie that your name is Robert Anthony
22 Pears, is it?

23 "No."

24 And I'm not going to go through all of these
25 things Mr. Barger says.

1 "But you have the document in front of
2 you.

3 "Yes.

4 "And did you -- did he read the document
5 as you -- as you -- as he wrote each sentence
6 to you?

7 "ANSWER: Yes.

8 "QUESTION: And did you agree with what
9 the sentence said at the time?

10 "ANSWER: Yes.

11 "QUESTION: And if you didn't agree, did
12 you make changes?

13 "ANSWER: Yes. I made -- I suggested some
14 changes.

15 "QUESTION: There were a couple of
16 changes. And any suggested changes, were they
17 made?

18 "ANSWER: Yes.

19 "All right. So when you were there, the
20 statement was there, each sentence was read to
21 you, and then you read the whole thing and you
22 signed it because it was accurate.

23 "Is that a fair statement?

24 "ANSWER: Yes."

25 A little further down on page 223:

1 "QUESTION: All right. In fact, you look
2 like a man who would never say anything in a
3 statement that was inaccurate intentionally,
4 would you?"

5 Honestly, Darrell, that sounds like a Pete
6 Christiansen question.

7 "ANSWER: No.

8 "QUESTION: And nobody could make you sign
9 such a statement, could they?

10 "ANSWER: No.

11 "So you stand by your statement?

12 "ANSWER: Yes."

13 So even then, at the time of this deposition,
14 he was standing by the answers that he gave.

15 Mr. Plantz, the same thing. On page 122 of
16 his deposition, he says -- and I'm going to edit
17 through so that I don't take four hours arguing this.
18 This is part of his answer.

19 "He had us read it -- had me read it. I
20 assume he did the same thing for Robert."

21 Little further down on line 10:

22 "He wrote this out after taking bulleted
23 notes and then wrote this out and had me read
24 it several times and said, Is this accurate?
25 And I said yes. And that's when I signed it."

1 Mr. Plantz says at page 172 going to 173:

2 "Did he" -- question from Mr. Barger.

3 "Did he intimidate you in any form or
4 fashion?

5 "ANSWER: No, no intimidation whatsoever.
6 Very comfortable.

7 "QUESTION: Did he in any form or fashion
8 attempt to get you" -- sorry. I'll slow
9 down -- "attempt to get you to write something
10 or say something that wasn't true?

11 "ANSWER: No. It was very clear that he
12 wanted to -- me to run through the events. He
13 took notes, he transcribed those into this
14 document, and then he had me read it several
15 times --

16 "QUESTION: Okay.

17 "ANSWER: -- to make sure I was
18 comfortable with agreeing to the statement so
19 there was some written record as to my
20 statement.

21 "QUESTION: And I assume that you read it
22 several times and you were comfortable with it?
23 You had no problems saying it was true and
24 correct?

25 "ANSWER: Correct.

1 "And that stands true today; right?

2 That was the question.

3 "ANSWER: Yes."

4 So this procedure wasn't unorthodox. It
5 wasn't improper. The procedure itself was routine in a
6 civil case. We cite all these cases that talk about
7 how it is very common, how it is the practice, how it
8 is not misconduct for even lawyers to be able to
9 prepare statements.

10 You know, when I do an affidavit to you, Abe
11 writes it, Adam back at work types it up, but I read
12 it, and I sign it. And when I do an affidavit of
13 somebody -- and I mentioned the other day even in
14 business court where we deal with very sophisticated
15 clients, I'm not going to let them write up an
16 affidavit or statement because, you know, they'll --
17 they'll think something's important that has nothing to
18 do with the case. So we -- we write it out. That's
19 not uncommon. It's not improper.

20 Now, repeatedly throughout the questioning,
21 and -- and it's in Mr. -- Mr. Roger's statement where
22 he talks about this being a transcription. And I know
23 Mr. Plantz used the word too, but, you know, I'm from
24 Philadelphia and I misused words for 30 years. But --
25 but Mr. Roger is purposefully use -- misusing words

1 when he says that this is a transcription. This is his
2 statement. But there isn't anything wrong with what --
3 with -- with the practice.

4 The third one is the most troublesome.
5 Mr. Roger sets out seven paragraphs where he thinks we
6 suborn perjury. First of all, again, he's relying on a
7 Nevada statute. And under Ditech, that Nevada statute
8 wouldn't even apply here. And he -- but the Nevada
9 statute also for perjury requires that it be a sworn
10 statement, and that doesn't apply -- apply here either
11 for perjury. We can't suborn perjury that isn't
12 perjury.

13 But all we're looking at is inconsistencies
14 really. Ordinary inconsistencies. Like I said the
15 other day, inconsistencies in what witnesses say are
16 not unusual and not something that's beyond the
17 handling on an ordinary trial. Let's go through --
18 before I do that, let me -- let me point out that under
19 the assistance standard, I don't think he -- again,
20 what's his methodology? His methodology is to say
21 here's this one statement in the statement, and here's
22 something else said in the deposition. There must be
23 something wrong here, and it must be my client's fault.
24 And that methodology is just not appropriate. The
25 inconsistency doesn't prove perjury and doesn't prove

1 suborning perjury.

2 So let's look at the seven paragraphs on
3 pages 5 and 6 of Mr. Roger's report where he sets out
4 what he thinks are things that constitute suborn and
5 perjury. The first paragraph, which is the third from
6 the bottom on page 5, he says that Mr. Pears testified
7 that he joked with the bus driver having to do with
8 increasing the decedent's heart rate, but that was not
9 included in Mr. Hildreath's, he says, transcription. I
10 am not going to justify that by saying transcription.
11 I'm going to say statement.

12 Well, the fact that something is left out, a
13 statement like that, I mean, how does that prove that
14 we're -- I'm not even sure that's an inconsistency.
15 And how does it prove that we're trying to hide that?
16 In the motion before -- I mean, that seems to be
17 something that -- that wouldn't be something if I were
18 doing a report very early on in the litigation, I
19 wouldn't consider it to be important to this case.
20 Now, they keep -- Mr. Roger keeps referring to, no,
21 that's not true. Mr. Christiansen in the deposition
22 keeps referring to us as the bus company.

23 Well, my grandfather was a trolley driver for
24 Philadelphia Transportation Company. That's a bus
25 company. All right. We're a manufacturing firm. So

1 why would -- this is rather distasteful, though, that
2 the bus driver would joke about such a thing. But why
3 would we leave that out? To protect the bus driver?
4 We're not liable because of what the bus driver does.

5 In -- in fact, I think the other day we were
6 arguing we should get in the fact that that -- last
7 week we were arguing that what the bus driver did was
8 foreseeable misuse of the product. There's no
9 motivation here to leave this out. This is an ordinary
10 thing that was not included.

11 And the same thing for two paragraphs later.
12 The bottom paragraph on page 5, "Mr. Pears testified he
13 told the police that he looked over his shoulder and
14 the decedent seemed to be startled and this was not
15 included." Well, I just heard Joel get up here and
16 say, We agree that he was startled. This is not
17 something we're trying to leave out of the case.

18 And now Mr. Roger cites their -- page 140 of
19 the transcript. It's actually page 146. Same lines,
20 wrong page number. Let's go up a paragraph. On
21 pages 1 and 2 of Mr. Hildreath's statement, he wrote
22 that Mr. Pears stated, "At the intersection, I saw the
23 cyclist had moved to the left through the bicycle lane
24 and fully into the lane with the bus." In stark
25 contrast, Mr. Pears testified -- there you go, I said

1 it wrong -- Mr. Pears testified that the cyclist
2 remained within the bike lane the entire time.

3 Well, no. He cites page 138. It's actually
4 page 144 but is -- is lines 10 through 20. That's not
5 what he said, that he stayed in the bus lane the entire
6 time. What Mr. Pears said was that -- what he was
7 asked by Mr. Christiansen in the deposition:

8 "When you looked back up, he was where he
9 was supposed to be?"

10 The conflict there isn't even the conflict
11 that Mr. Roger points out. He's not talking about the
12 entire time. He's talking about that one instance.

13 The first paragraph on page 6, Hildreath
14 wrote in the statement, "Specifically I can say that
15 the bus overtook the cyclist at a slow, safe speed."
16 But during his deposition, Mr. Pears testified that
17 they didn't know how fast the bus was traveling. Okay.
18 There's an ordinary inconsistency. At one time he said
19 it was a safe speed. At another time -- should we take
20 a break?

21 THE COURT: All right. Go.

22 MR. POLSENBERG: Very good. I -- I actually
23 thought -- I -- I apologize. I should have recommended
24 it before I got up.

25 Here it is, just an ordinary inconsistency.

1 He said at one point -- he agreed to. He read it. He
2 saw that it said slow, safe speed and he signed it.
3 Now, in the deposition, he's saying, okay, I don't know
4 what the speed was. That's an ordinary thing that you
5 can handle through cross-examination. That doesn't
6 mean that they were suborning perjury.

7 The next paragraph and the last paragraph.
8 First, Hildreath said when the -- in -- in the
9 statement that Mr. Roger accredits to Hildreath, he
10 said, "When the bus overtook the cyclist, the bus was
11 safely clear of the cyclist." And then later in the
12 deposition, he -- he denied that.

13 You know, the same thing happened, all of
14 this -- remember the other day when Mr. Christiansen
15 said I'm going to focus on Mr. Pears. All of this is
16 focused on Mr. Pears, because the same thing happened
17 the same day and the same place with Mr. Plantz. And
18 they asked him the same questions in the deposition.
19 And Mr. Christiansen said:

20 "Okay. So you said one thing in the
21 statement about overtaking and now you're
22 testifying to something else."

23 And on page 130 of Mr. Plantz' deposition, at
24 line 20, Mr. Christiansen asked:

25 "Okay. So that sentence is false;

1 correct? The one that Sonny wrote for you and
2 had you adopt is not accurate."

3 And Mr. Plantz answered:

4 "The interpretation of overtake has -- it
5 can be different."

6 The next page:

7 "QUESTION: You're not changing your
8 testimony today?

9 "ANSWER: I'm not changing my testimony."

10 So it's the way things are worded. They
11 interpreted overtake and -- and gosh, Joel, didn't we
12 do this over the weekend? Joel and I are talking about
13 the bus overtaking the bicycle or the bicycle
14 overtaking the bus. And we're saying two different
15 things. I'm saying they meet up at the same point, and
16 he's saying one passes the other. So this is just Mr.
17 Plantz says, no, we're talking about two different
18 things. Mr. Pears in the exact same situation's going,
19 um, okay, that's not the same thing. And Mr. Roger
20 interprets that as perjury and suborning perjury.

21 The last paragraph. Same thing, the bus
22 never drove into the bicycle lane. Mr. Pears denied
23 saying that it never drove into the bicycle lane. But
24 the same thing happened with Mr. Plantz. Page 131:

25 "QUESTION:" -- during his deposition.

1 "All right. Go down to -- I'm pointing it out
2 to you so it's easier. It says the bus never
3 veered into the bicycle lane. As you've
4 testified here today, the bus at some point on
5 Pavilion Center was in the bicycle lane; fair?"

6 And he answers:

7 "My statement was relative to the
8 intersection."

9 In other words, yeah, you could get Mr. Pears
10 to say, well, no, he wasn't in the bicycle lane all of
11 the time, because he wasn't in the bicycle lane all the
12 time perhaps. But what Mr. Plantz says, when I said he
13 never moved from the -- the lane, I was dealing with
14 that -- that area around the accident. I wasn't going
15 all the way back to Charleston.

16 It was Mr. Kemp, wasn't it, who got up here
17 and talked about the stuntman's deposition and talked
18 about how, you know, when he started, he wasn't giving
19 us the answers we wanted. And Mr. Pepperman finally
20 got him to the point where he was like, yes, he's
21 giving us -- finally he's giving us what I wanted.
22 That's the difference between Mr. Pears and Mr. Plantz,
23 and that's why they're dealing with Mr. Pears. They
24 were able with Mr. Pears to say on page 141 of his
25 deposition:

1 "QUESTION: Hildreath writes in the first
2 line" -- talking about the statement -- "and
3 says, my name is Robert Anthony Pears. That's
4 a lie; correct? I mean, you didn't write this.

5 "ANSWER: No.

6 "His name isn't Robert Anthony Pears; your
7 name is.

8 "ANSWER: Right.

9 "QUESTION: And then it says, I am 49
10 years old and I reside at"-- where that
11 sentence ends.

12 "I bet that's your address.

13 "ANSWER: Correct.

14 "QUESTION: Then this sentence is a lie
15 too; right? He's not 49, I would guess. And
16 he doesn't live at your address; fair?

17 "ANSWER: Fair.

18 "QUESTION: All right. He says, 'I was in
19 Las Vegas.'

20 "To your knowledge, he -- was he in
21 Las Vegas when this occurred?

22 "ANSWER: No.

23 "So that third sentence -- we're three
24 sentences in, and we've got three lies."

25 So from the beginning, they were able to turn

1 him into everything's a lie.

2 They couldn't do that with Mr. Plantz,
3 though. Mr. Plantz said, well, no, when he wrote that,
4 he was writing it for me. He wrote out this statement
5 for me to attest to. But they just got Mr. Pears going
6 and going and going to the point where he would agree
7 that anything is a fabrication.

8 And that's where Mr. Roger, as this block
9 quoted at the bottom of page 6, he says, "The following
10 excerpt from Mr. Pears' deposition is very concerning."

11 "QUESTION: Fair to say that this
12 statement is littered with fabrication?

13 "ANSWER: Fair.

14 "QUESTION: Not your fabrication, the
15 fabrication of an agent of the bus company who
16 told you that he was an ex-FBI guy and so he
17 wanted to write a statement out for you; fair?

18 "ANSWER: Correct."

19 But this -- most of this -- they got him --
20 they got Mr. Pears into this idea that there were
21 fabrications because his name was Pears and not the guy
22 who wrote this stuff.

23 THE COURT: I understand.

24 MR. POLSENBERG: All right. At page 127 of
25 Michael Plantz' deposition:

1 "ANSWER: Sonny wrote that.

2 "QUESTION: Okay.

3 "ANSWER: Because I said that."

4 So Mr. Plantz understands the distinction.
5 Mr. Pears didn't.

6 But that shouldn't be what we have this trial
7 about. We shouldn't bring in an ex so-called expert
8 who's going to testify beyond his qualifications about
9 issues that aren't really involved.

10 And if Mr. Roger does come in here what he's
11 basically doing is attacking the credibility of
12 Mr. Hildreath and vouching for the new version of the
13 story by Mr. Pears. And that's inappropriate.

14 And it's funny, the heading that they have at
15 the end of their opposition says "Mr. Roger's attack of
16 Mr. Hildreath's credibility is a result of
17 Mr. Hildreath's own doing." In other words, it's okay
18 to attack the credibility of this ex-FBI agent who
19 wrote down the statements. But it's not okay.

20 So what's the purpose? What are they doing
21 with all this? Again, they raise consciousness of
22 guilt. I handled that the other day. That's not
23 involved here. We are again stuck with the 403
24 analysis. And I say 403 at every trial I'm in,
25 although yes, it is 48.035. And 48.035 not only talks

1 about weighing the prejudicial effect and the probative
2 value, but the waste of time that would be involved.
3 So we're supposed to have a trial within a trial about
4 the guy who wrote down the statement when these people
5 read the statement repeatedly, attested that it was
6 true, and both of them under oath in their depositions
7 again said that they were accurate.

8 They again argue that, well, these statements
9 caused additional emotional distress to the heirs. If
10 they're going to bring in a new claim -- I said this
11 briefly the other day. If they're going to bring in a
12 new claim, they legally cannot do it as part of a
13 wrongful death claim. They would have to file
14 supplemental pleadings under 15(d). Now, they already
15 know when they make that motion to amend that what my
16 argument is going to be because I did it the other day,
17 you cannot get emotional distress -- distress for
18 litigation conduct.

19 You know, there's this thing going around in
20 Vegas for the last decade. And I and Justice Pickering
21 call it litigation by sanctions, where people try to
22 make these -- raise these issues and -- and try to get
23 sanctions and either compensatory or striking parts of
24 people's cases. This is worse. They want to bring
25 these issues up in front of a jury, and it's not the

1 realm of the jury to have to decide these things.

2 This would cause a misconduct -- or cause a
3 mistrial. This is misconduct. They can handle all
4 this in cross. They shouldn't be allowed to, as one of
5 the cases we cite says, hijack the trial.

6 Now, the other day they brought up the
7 Eldrich case, which of course they love bringing up
8 district court cases that never got to the supreme
9 court opinions. And that, honestly, Your Honor, is
10 what tripped my trigger the other day. And I
11 distinguish the jury instruction in Eldrich and said
12 how it doesn't apply here.

13 But what counsel said was that he hired me
14 and my very good friend Joel to go in and argue that
15 the same kind of conduct was appropriate in another
16 case. We never argued that. That was the case where
17 Justice Pickering argued that his bringing up
18 post-accident litigation conduct involving a witness
19 was improper. And Justice Shearing, as the trial
20 judge, agreed it was improper.

21 What we argued was it wasn't prejudicial and
22 it doesn't -- didn't require a new trial. And what
23 Justice Shearing said was she handled it at the trial
24 when it was objected to and she struck it. You
25 shouldn't have to be in the position where this comes

1 out at trial, and you have to strike it and admonish
2 the jury because we're raising it now.

3 And yes, counsel said the other day, you know
4 you got Dan if he brings up due process. Ask
5 Judge Gonzalez what I mean when I bring up due process.
6 Because that's an important issue here, and their use
7 of Dave Roger is not only improper, but
8 unconstitutional.

9 Thank you, Your Honor.

10 THE COURT: Okay. Thank you.

11 MR. CHRISTIANSEN: Want to take a break,
12 Judge, for your staff?

13 THE COURT: Yes. We'll take a ten-minute
14 recess. Fifteen minute recess then we have --

15 THE MARSHAL: All rise. Court's in recess
16 15 minutes.

17 (Whereupon a short recess was taken.)

18 THE MARSHAL: Please be seated. Come to
19 order.

20 THE COURT: Okay. Let's see. So we've -- so
21 we've dealt with this quite a bit the other day, and
22 it's about -- we have less than an hour. I don't know
23 if you want to go later. We have about six left.

24 MR. CHRISTIANSEN: I'm going to move fast,
25 Judge.

1 THE COURT: Okay. Very good. Thank you.

2 MR. CHRISTIANSEN: Qualifications.

3 Unfortunately, somebody just forgot to read the report.
4 Sgro Rogers, a civil firm. David Roger is a partner at
5 civil firm practicing civil law. Dave Roger represents
6 2800 line officers in civil law. You think the PPA
7 pays Mr. Roger to defend cops criminally? That's
8 absurd. He's got a law practice -- a law license that
9 includes the license to practice civil law.

10 To argue that a criminal lawyer doesn't know
11 the rules of evidence because they're civil rules of
12 evidence is absurd. There's one set of rules of
13 evidence. There's one set of ways to take statements.
14 None of the cases they cite you, none of them -- and,
15 Judge, they could have hired somebody that says, hey,
16 the FBI does stuff this way, it's okay, which is what
17 Hildreth said. They couldn't find anybody in the
18 country to say that because it's not true. They --
19 they could have hired somebody to say the practice
20 performed by Hildreth writing something in the first
21 person as if it was himself when being sent to a state
22 which requires a license that he does not possess, and
23 he did it both in Illinois and in Nevada, is
24 procedurally okay. They couldn't find anybody. You
25 can find an expert for anything, and they couldn't find

1 somebody to support that position.

2 So under *Higgs v. State* which is a case I
3 think after Hallmark, the Nevada Supreme Court said --
4 Higgs is a case where Chaz Higgs was convicted of
5 killing Kathy Augustine, an elected official, goes up,
6 gets reversed on issues of the district court keeping
7 out experts on sort of a rigid standard, and says we
8 don't have a rigid standard. If they qualify him, and
9 we don't have a rigid standard and it will assist the
10 jury, you got to let somebody do it.

11 Dave Roger will assist the jury. He's a
12 lawyer for 30 years with a vast background on
13 interviewing witnesses, maybe as big a background as
14 exists. And the scope of his opinion is, frankly, the
15 methodology performed by Mr. Hildreth -- and it got
16 suggested to you, Your Honor, that this is how the FBI
17 does things because they use a thing called an FD-302.
18 That's absurd. I've cross-examined a hundred FBI
19 agents in federal court. An FD-302 is authored by an
20 FBI agent to reflect the statement of Mr. Polsenberg
21 who they happen to interview, such that I as a defense
22 lawyer -- it's done this way intentionally. I can't
23 show it to the FBI agent and say this is your statement
24 and impeach him with it because it's Mr. Polsenberg's
25 statement, and I can't show it to Mr. Polsenberg

1 because he didn't write it. The FBI agent typed it up
2 some days after the initial interview. That's why
3 they're done that way.

4 They're never -- an FBI agent never types up
5 my name is Dan Polsenberg. I live at such and such
6 Illinois. I'm 59 years old. I was on the bus with
7 Mr. Plantz and I saw this accident. They -- they --
8 they'd lose their job faster -- it's absurd to suggest
9 to you that that's the case.

10 The criminal case where the suggestion is now
11 you should apply Illinois law, the criminal case that
12 dealt with the out-of-state or over-state-line
13 telephone conversation --

14 THE COURT: Yes.

15 MR. CHRISTIANSEN: -- that said you can't
16 apply Nevada law, that's because in Nevada, we have
17 two-party consent to phone calls. Both people on the
18 phone line have to consent for it to be recorded. If
19 the person on the other end is over state lines, that
20 law doesn't apply. So that explains and -- away that
21 silly argument.

22 Mr. Roger is qualified. The scope is narrow.
23 It's not going to extend anything a lengthy period of
24 time. They tampered with witnesses. They got
25 witnesses to change substantively their testimony. And

1 to suggest somehow that I'm -- or to disparage my
2 character because somehow I caught them when they sent
3 an unlicensed investigator with -- and here's what they
4 did, Your Honor: They gave him portions of the
5 complaint, told him to read them to the witnesses, not
6 the whole complaint just portions. Didn't send him off
7 with Nevada law about the 3-foot rule or requiring to
8 get over to the far left lane. He didn't even know
9 that law existed when I deposed him a week later. And
10 he went down and got statements that were, not my
11 words, according to Mr. Pears, fabrication over and
12 over and over.

13 And it's not -- and I wrote it down,
14 litigation -- litigation by sanction. This was
15 litigation by violation of the law. It wasn't my
16 conduct. I never met Mr. Pears or Mr. Plantz in my
17 life. I show up at the out search -- skirts of Chicago
18 in some dumpy Marriott and -- and get an email from --
19 I think it was Lee, Mr. Roberts supplementing some --
20 these statements and figure out that somebody has
21 written in the first person as if they took -- they
22 themselves are these witnesses. And those statements
23 are new to me. I -- these people are cold to me, Your
24 Honor. I've never seen them, talked to them my entire
25 life.

1 The next day I think there's some implication
2 that I did something nefarious in this deposition. I
3 just asked the guy questions, and he gave me his
4 answers. His answers were what the defense doesn't
5 like, and that is, that MCI's counsel who he's worked
6 for in the past, sent him with tasks to a state in
7 which he didn't have a license. He also came here and
8 did it in Nevada, attempted to do it five different
9 times in Nevada and nobody would talk to him.

10 And this is the result, these statements that
11 were fabrications, that he felt like had been spun,
12 that he felt like weren't reflective, and that he'd
13 been tricked. Tricked is my word. That's not in
14 there. So stick with his words, fabrication, spun by
15 MCI's agent, Mr. Hildreth, who didn't have a license to
16 even take the statements that he was taking.

17 The evidence under the wrongful death statute
18 entitles me to get into Katy Barin's grief, sorrow, the
19 loss of her husband. Aria Khiabani has testified to
20 his and his mom's grief and sorrow for learning that
21 MCI was attempting to blame her husband and their --
22 his dad by altering witnesses' statements.

23 If I were to have tried to alter a witness's
24 statement to do just the opposite, can you imagine the
25 fervor with which the defense would be arguing that

1 comes into evidence. Rules should apply evenly. It is
2 relevant to the grief and sorrow of -- of those
3 persons, those heirs who learned of it which, as we
4 know today, are Aria and Mrs. Khiabani, Dr. Katy Barin
5 before she passed.

6 Thank you, Your Honor.

7 MR. POLSENBERG: Just briefly, Your Honor.
8 Counsel is saying, well, we could have got an expert
9 too. Well, that's the 403 argument I made earlier.
10 This is immaterial. We shouldn't have a trial within a
11 trial about this. Counsel suggested that it's in your
12 discretion. You know, there are an awful lot of --
13 since Hallmark, there are an awful lot of opinions
14 having to do with how a Court has to exercise its
15 discretion when it comes to experts.

16 Hallmark was a reversal. *Williams versus*
17 *District Court* was a reversal. And that was a big
18 case. Ditech is the case that the -- criminal case
19 that he's talking about, the extraterritorial case.
20 That wasn't a criminal case. That was a civil case.
21 That was a case where one of the -- the -- Ditech, the
22 financial institution, was calling up people and
23 calling people in Nevada. And they were sued in a
24 class action for violating the statute. And the
25 supreme court said, no, the recording of -- took place

1 outside Nevada, so it doesn't violate the Nevada
2 statute.

3 Counsel says he didn't use the word
4 "fabrication." He -- he implies he didn't use the word
5 "spun." I could debate that. But the whole idea of
6 this is that we shouldn't have these endless litigation
7 about this wholly collateral issue. But "lie" was his
8 word. And that's why I think it's prejudicial.

9 Thank you, Your Honor.

10 THE COURT: Very good. Thank you.

11 All right. Let's go on to Defendants' Motion
12 in Limine No. 12 to exclude reference to the cost of
13 the S-1 Gard or proximity sensors.

14 MR. ROBERTS: Yes, Your Honor. I believe
15 Mr. Kemp and I have agreed to submit this one on the
16 briefs.

17 THE COURT: Okay.

18 MR. KEMP: Yes, Your Honor.

19 THE COURT: Let me just make a note on that.

20 MR. ROBERTS: Thank you, Your Honor.

21 THE COURT: Then we'll go on to No. 13,
22 Defendants' Motion in Limine No. 13 to exclude
23 plaintiffs' expert witness, Robert Cunitz, PhD, or in
24 the alternative, to limit his testimony.

25 MR. BARGER: Judge, also just for -- I think

1 there's one right after that that we can tell you I
2 don't think will be argued. It's to allow the jury
3 view of the bus. I think at one time, there was some
4 agreement to that. I don't know if --

5 UNIDENTIFIED MALE SPEAKER: That's next.

6 MR. BARGER: I don't have that on the list.

7 UNIDENTIFIED MALE SPEAKER: I don't have it
8 either.

9 MR. RUSSELL: Hang on. Darrell. Stop using
10 your internal spreadsheet. No, we did -- we did have a
11 discussion with plaintiffs' counsel. We're going to
12 stipulate to allow the jury view of the bus. I reached
13 out --

14 THE COURT: Let's -- let's get there in a
15 moment.

16 MR. RUSSELL: Yeah, that's fine.

17 THE COURT: All right. Let -- let's go with
18 No. 13. Mr. Barger.

19 MR. BARGER: Judge, I understand there's more
20 and we're running out of time, so I'm going to be kind
21 of brief.

22 THE COURT: If we need to stay longer, we
23 can. I -- I -- I am happy to, but I'm inclined to --
24 are you able to stay longer? Okay. Very good.

25 MR. BARGER: I'll -- I'll be somewhat brief,

1 but not totally brief.

2 It's our motion to exclude their expert
3 witness Robert Cunitz who is the -- and Dr. Cunitz who
4 is their warnings expert. And, look, I haven't
5 attacked his credentials. That's a -- a large portion
6 of the opposition was saying he's qualified. We're not
7 challenging that. We're talking about his opinions.

8 And his opinions -- what he basically says is
9 the following: That the motor coach was unreasonably
10 dangerous because it -- MCI did not warn the owner of
11 the coach, Ryan's Express, that at a certain
12 unidentified speed, the coach would present a hazard
13 because of an air being displaced while moving -- we're
14 back to this air displacement issue -- and because MCI
15 did not tell the owner of the coach to train its coach
16 drivers at keeping a certain unidentified distance
17 while passing bicyclists mitigating the risk of the
18 accidents. Those -- that opinion. And then he wants
19 to say that substantially caused this accident.

20 First off, it's not supported. Those --
21 those are assumptions that he made that are not
22 supported by the evidence. He incorrectly assumed,
23 Dr. Cunitz did, that Ryan's Express and the driver did
24 not know a moving motor coach can displace air. And we
25 can look at the actual testimony of the driver.

1 Secondly, he incorrectly assumed that MCI had
2 given any information to Ryan's Express about air
3 displacement, that had -- had they given any
4 information, that Ryan's Express would have changed its
5 training.

6 And third, he incorrectly assumes that Ryan
7 Express training included additional information about
8 air displacement, he would have -- Mr. Hubbard would
9 have driven differently that day. That's pure
10 speculation, Your Honor.

11 And finally, his opinion is based on the
12 incorrect assumption that Mr. Hubbard testified had
13 adequate warnings and training materials been provided
14 by MCI, he would have given bicycles greater clearance
15 during passing moves. That testimony never occurred
16 either.

17 So basically, what -- what Mr. Cunitz -- what
18 Dr. Cunitz did was take incorrect assumption and come
19 to a conclusion that if MCI had warned the bus company
20 or the driver about what hazards they would be at an
21 unidentified speed, then the accident wouldn't have
22 happened.

23 Now, what did Mr. Hubbard -- and the Court
24 will recall he's the driver. What Mr. Hubbard said, he
25 was asked a question:

1 "Do you have any understanding that a bus
2 if it's moving at 30 to 35 miles an hour will
3 cause air blast or air disturbances at the
4 front of the bus? Have you ever heard of
5 that?"

6 And his answer was "Yes."

7 Then Mr. Kemp asked another question:

8 "Is a J4500 if it's moving forward at 30
9 to 35 miles an hour, is it your understanding
10 that there are no air blast, some air blast,
11 air blast on -- on some occasions?"

12 His answer was:

13 "I don't know. I don't know, sir."

14 Now, I think you'll -- the Court will see,
15 and I think Mr. Kemp is the one who's brought the word
16 "air blast" into this case by asking questions of
17 witnesses about air blast. This witness, Mr. Hubbard,
18 knew that there would be some disturbance at the front
19 of the bus, and that's what Dr. Cunitz wants to
20 complain he didn't know. Well, the evidence says he
21 did know. He didn't know how much or at what speeds,
22 but he knew there would be some disturbance.

23 And finally, the hypothetical that the --
24 that Mr. Hubbard was given that plaintiffs want to rely
25 upon says the following:

1 "Assuming today you got a bulletin from
2 the manufacturer of the bus that said our bus
3 creates a 10-foot air blast on the front, would
4 you take that into account when you were
5 driving the bus tomorrow or the next day?"

6 And he said:

7 "Yes, sir. Take it into account."

8 Dr. Cunitz takes the words "take it into
9 account" and says that this driver would have followed
10 any warning that he had been given about an unknown
11 speed and an unknown air blast and he would have driven
12 differently. You can't do that. That's -- that's way
13 too far for what the question takes into account.

14 Mr. Hubbard was familiar with the air being
15 displaced by moving vehicles, and the Ryan's Express
16 person representative testified as follows. The
17 question to her was:

18 "Have you seen air blasts from buses or
19 trucks cause bicyclists or pedestrians to
20 wobble?"

21 Her answer was:

22 "I personally have not seen it.

23 "QUESTION: Have you heard of that?"

24 The answer was "Yes."

25 "And is that something you train the

1 drivers that is a potential hazard, that the
2 air blast from the front of the bus could cause
3 a bicyclist you are overtaking to wobble?"

4 "Yes, sir, we train them.

5 "I mean, you recognize that as a potential
6 hazard; right?

7 "Yes, sir, because you have a large
8 vehicle going down the road, you know, that's
9 why you allow as much space as you can, and,
10 you know, slow down and take all the
11 precautions necessary."

12 The training that Ryan's Express gives its
13 drivers -- and they're going to argue, well, this --
14 this trainer was from Reno not Las Vegas. That's not
15 the issue. The training that they gave them was you
16 have to stay away from bicyclists. And -- and
17 Mr. Hubbard knew that, the driver.

18 So to kind of cut it short, Your Honor, I'm
19 not going to talk about the standards for admissible
20 testimony by an expert, but this -- this witness,
21 however qualified, does not meet any standard by making
22 improper assumptions that are incorrect, and then
23 reaching some conclusion that a warning -- and -- and
24 by the way, Dr. Cunitz, I asked him:

25 "What warning would you give to a driver

1 or to a bus company that's buying a bus?

2 "Well, I don't know what warning I would
3 give them.

4 "At what speeds would you talk about?

5 "I don't know. I haven't designed a
6 warning. I don't know anything about it. I'm
7 just assuming that if -- if he would have given
8 you some unknown warning at identified speed
9 that Mr. Hubbard would have driven differently
10 that way."

11 Your Honor, that's pure speculation, and it's
12 based upon improper assumptions. And I think that the
13 testimony of Dr. Cunitz, he should be excluded, and at
14 the minimum, he needs to be not allowed to say it's a
15 substantial factor in causing an accident, because
16 that's just pure speculation and that would be for the
17 jury to decide, even if they even got to hear the
18 testimony.

19 So our -- our request for relief is to strike
20 his testimony. In the alternative, if the Court
21 doesn't strike it, that he cannot testify it was a
22 substantial factor just based on (inaudible).

23 Thank you.

24 THE COURT: Thank you.

25 MR. KEMP: Your Honor, let me take up two

1 minor issues that they brought up at the very end.

2 First of all, they refer to Ms. Witherell's
3 testimony, and they -- they use that testimony to
4 argue, oh, the bus company knew all about air blast and
5 they were training people about it. Well,
6 Ms. Witherell, her name is Mary Witherell, she -- and
7 we -- we go through this in a lot of detail in the
8 opposition, she was employed in Reno, not in Las Vegas.
9 She left the company in 2014, I can't remember exactly
10 how many months, but it's in the brief, before
11 Mr. Hubbard even got there.

12 The -- the trainer here in Las Vegas was a
13 man named Mr. Bartlett. And the company had went
14 through another -- and gone in bankruptcy, come out of
15 bankruptcy, or something like that. So it's not even
16 in the -- it's not even the same company. It's Ryan's
17 Express and then it turns out Michelangelo was the name
18 of the company at the time of the incident.

19 So what they are really arguing is the safety
20 analysis from another city that didn't she -- didn't
21 even know what the training was that the -- the new
22 company was giving, Michelangelo, Mrs. Witherell. So
23 they're trying to impute her knowledge to Hubbard? I
24 mean, that's just out as a matter of course.

25 But in any event, that is the sole basis of

1 their argument that -- that they -- they call it Ryan's
2 Express because that's what -- where she worked at the
3 time. It turned into Michelangelo. But that is the
4 sole basis of their argument that the bus company knew
5 about this. And I'll get into what they really knew
6 and didn't know.

7 Last -- second point he raised at the very
8 end is that Dr. Cunitz didn't design the warning.
9 Well, he didn't design a warning because we don't have
10 to design a warning. If you look at the Sea Ray
11 factor -- factors, it is not our obligation to have an
12 alternative warning like it is, if we want to, to offer
13 alternative design. We never offer alternative
14 warnings because what -- what happens invariably is
15 defendants start nitpicking them. So case law is
16 pretty clear on that. But if you look at Sea Ray,
17 you'll see.

18 All right. Let's go to my slides, and I'll
19 be quick, Your Honor.

20 This is Dr. Cunitz. This is an actual
21 picture from the 2010 case of *Chanin versus Teva*, the
22 \$505 million verdict. He's using a microscope to -- or
23 a -- a magnifying glass to look at those warning in
24 this case, which was relatively small. It -- we don't
25 need a magnifying glass in this case because there's no

1 warning whatsoever, and they admit it. There's no
2 warning whatsoever by an air blast risk.

3 Next.

4 And these are his qualifications. And
5 actually, that's me cross-examining her, doing the
6 direct examination in the same case.

7 MR. POLSENBERG: Does that look like your
8 hair?

9 MR. KEMP: But he was head -- yeah, the hair
10 looked better back then.

11 He's head of human factors sections at the
12 National Bureau of Standards. 1972, he helped come up
13 with those -- you know, flip back of a refrigerator or
14 washer, any appliance, you know, those big yellow
15 stickers? That -- that's from Dr. Cunitz. Okay.
16 That's how long back he goes. From '83 to present,
17 he's been on the ANSI -- and this is why they don't
18 question qualifications. He's been qualified five
19 times in Nevada alone since 2010. And we listed the
20 judges.

21 MR. BARGER: Your Honor, not to -- not to
22 interject, but I'm not challenging the man's
23 qualifications.

24 THE COURT: Understood.

25 MR. KEMP: Okay. Let's -- Your Honor, we --

1 we cite this. This is -- this -- this is the standard
2 for qualifications; right?

3 Next one.

4 Yamaha. Clearly Dr. Cunitz meets these
5 qualifications.

6 Now focusing on his argument, and I'm going
7 to give you at the very end what they say are
8 Dr. Cunitz's false assumptions. One of them that they
9 say is false is that the bus company would have
10 incorporated this in their training. Well, Your Honor,
11 that is not the only way that they could have provided
12 a warning, by having the bus company change its
13 training.

14 So let's start out with the -- the standard
15 in Nevada. This is the *Sims versus General Telephone*
16 case. Some guy went into some kind of tank or
17 something, and the argument was that there should have
18 been a warning on the tank. And the only evidence as
19 to whether the actor would have complied with the
20 warning in that case is that the actor, in this case
21 someone named Robert, historically complied with the
22 warning -- warnings. Consistent attitude of compliance
23 with instructions. So historically.

24 He didn't testify -- I can't remember if he
25 died or if he was unavailable, but there was no

1 testimony from the actor in that case that, hey, if
2 they had given me a warning, I would have changed my
3 behavior. None whatsoever. So the -- the supreme
4 court said all you have to do is show something for the
5 jury to meet the but-for test, but-for not providing a
6 proper warning, the action would have changed.

7 Now, let's focus on the -- the methods of
8 warnings. I went back and I read the -- all the Nevada
9 case law on warnings, and these are the different
10 methods that have been used in our cases. They say
11 training is the only method. We've got to be part of
12 the training program in the best company. That is not
13 the only method.

14 The Yamaha case, there's an owner's manual.
15 The owner's manual -- there's is an owner's manual for
16 a J4500. Not one word about air blasts. Not one word
17 about any warning whatsoever in that owner's manual.

18 The Jacobson case, they adopted bulletins or
19 circulars, which kind of relevant in this case because
20 the questioning to Mr. Hubbard focused on circulars.
21 That is a warning method.

22 The Robinson case, that was the crushing
23 machine case. Stickers on the machines, stickers about
24 dangers.

25 Riviera, that's the tobacco case, packaging

1 on the outside of cigarettes.

2 Jeep, that was a sticker on a car and it was
3 a post accident -- or post-purchase sticker. So
4 they -- they approved warning through stickers put on
5 vehicles after they were purchased.

6 *GE versus Bush.* In that case they said one
7 of the things they could have done is warn the sales
8 staff. And I'm going to show you the sales staff's
9 testimony in a minute.

10 And then *Lewis versus Sea Ray*, they said put
11 it in the sales documents.

12 So here's one, two, three, four, five, six,
13 seven different types of warnings, different ways that
14 the manufacturers, all of them available to the
15 manufacturer in this case, they could have warned. So
16 their -- their primary argument that the only way to
17 transmit a warning in this case was through a training
18 regimen by the bus company is not accurate.

19 Okay. Let's go to David Dorr's testimony.
20 This is the person who actually sold this bus. He sold
21 the bus in this case, and he didn't know anything about
22 air blast. So this is the guy that sold the bus. So I
23 ask him:

24 "Well, since you didn't know anything
25 about it, you never told customers?"

1 Next one.

2 "Never -- never told customers about it.

3 Never told customers about it."

4 And this is the evidence that Mr. or
5 Dr. Cunitz relies on. That's why I'm going through it.

6 Next, this is the actual person --

7 Next one, please.

8 This is the person, Mr. Bartlett, who was the
9 actual trainer of Mr. Hubbard and he worked for the
10 company in question, Michelangelo. And, again, they
11 try to drag in Ms. Witherell. But this is the real
12 person. We ask him whether he knew about air blasts.
13 Didn't know anything about them. Never heard of it.

14 Then we asked Mr. Hubbard if he knew about
15 it. Counsel went through this. I'll go through it
16 real quick. Doesn't know one way or another about air
17 blasts, anything.

18 Let's take a look at the sales agreement.
19 As -- as you remember, one of the ways they could have
20 done in the Sea Ray case, the boat case, they said they
21 could have put it in this -- this is the only warning
22 in -- in the agreement in this case. This -- this is
23 the actual sales agreement in the case where they sold
24 the bus in this case to then Ryan's Express, the one
25 that went into bankruptcy. This is the only warning

1 they have in the whole thing, that -- that the vehicle
2 may have something that destroys the ozone layer.
3 That's it. That's the only warning in the whole case.
4 So clearly they didn't do it in the sales agreement.

5 So let's take a look at Mr. Hubbard's
6 testimony. And, again, we're going back to the
7 bulletins or circulars that were an approved method of
8 warning in the Jacobson case. All right.

9 "Assuming you got a bulletin from the
10 manufacturer that said our bus creates a
11 10-foot air blast, would you take that into
12 account when you were driving the bus tomorrow,
13 the next day on?

14 "Yes, sir."

15 He would take it into account.

16 Okay. Now, they say, oh, well, take it into
17 account, it's vague and ambiguous or doesn't mean
18 bicyclists. Let's contrast that back with the -- the
19 approved language from the supreme court case that he
20 would -- historically heeded a warning. Historically
21 heeding a warning is enough to launch a failure to warn
22 case.

23 In this case, I have the actor giving
24 testimony that he would take into account the warning
25 and goes on. And the reason he would take it into

1 account is because the manufacturer's telling him about
2 a potential hazard. And if that's part of his
3 training, yeah, they would take it into account. I
4 expect there will be a lot of cross-examination of him
5 as to what taking into account means, but this clearly
6 meets the standard.

7 Now, here's the four mistakes that they say
8 that Dr. Cunitz made, so he can't testify. One, that
9 Ryan's Express and Mr. Hubbard did not know moving
10 coaches displaced air. Well, I showed you
11 Mr. Hubbard's testimony. He denied it. I showed you
12 Mr. Bartlett's testimony. He was the trainer. He
13 denied it. I showed you the salesperson's testimony.
14 He didn't know anything about the warnings -- the air
15 displacement. The only person that knew anything about
16 it was Mary Witherell, and she worked for the previous
17 company. So I think Dr. Cunitz is spot on in his --
18 his assumption there.

19 Two, that if they had given any warning, it
20 would have changed the training it provided to
21 Mr. Hubbard. Your Honor, we're not arguing it would
22 have changed the training. We're arguing all these
23 other different techniques they could have provided a
24 warning. So whether it would have training -- changed
25 the training or not, I don't think's important. But in

1 that regard, Mr. Bartlett did say that he didn't know
2 about the air blast. If it was a hazard, he would pass
3 on that warning. So I think we're going to be even
4 able to meet that.

5 The next one, that Mr. Hubbard would have
6 driven differently the day of the accident. Well, he
7 said he would have taken it into account. I already
8 showed you I think Dr. Cunitz saying -- you know, the
9 testimony of Mr. Hubbard is going to be before the
10 jury, Your Honor. Whatever it is, it is.

11 And then the -- the fourth thing is that if
12 he -- he had adequate warning, he would have given the
13 bicycles greater clearance. Okay. He said take it
14 into account. You know, I think that's going to be
15 fleshed out, but I don't think that's an unreasonable
16 statement for Dr. Cunitz to make.

17 So all four of those alleged Cunitz mistakes
18 is really nitpicking trying to characterize his
19 testimony their way instead of our way or -- or what I
20 would subject to be a reasonable way.

21 So for those reasons -- leave that up.

22 These are the four things that they say a
23 qualified warnings expert -- I mean, the guy's been
24 around for 45 years, Your Honor -- cannot testify about
25 warnings in this case because these are four such

1 critical factual mistakes that his whole opinion has no
2 foundation?

3 I think the motion should be denied for the
4 reasons I've expressed, Your Honor.

5 MR. BARGER: Your Honor, through the process
6 of elimination with Mr. Hubbard, it will be an
7 interesting day. He testified that he turned right on
8 the green, 400 feet before the accident, he never saw
9 the bicyclist again.

10 Let me -- let me go back to what he did say,
11 and -- and I've got about one minute to respond here.
12 That's all I'm going to take. He was asked a question
13 by Mr. Kemp:

14 "Do you have any sort of understanding
15 that a bus if it's moving at 30 to 35 miles an
16 hour will cause air blasts or air disturbances
17 at the front of the bus? Have you ever heard
18 that?"

19 And his answer was, "Yes." He was a bus
20 driver for almost 30-something years out of -- out of
21 New York. He -- he was not a first-day bus driver. He
22 knew -- he had heard that going down the road displaced
23 air. His experience told him that.

24 Secondly, to make the quantum leap from would
25 you take something into account, to say that you would

1 have taken a hypothetical warning unrelated to the
2 facts of this case into account is not the same to say
3 he would have altered and done something different that
4 day. Very clear. Absolutely. That's just pure
5 speculation. And for this witness to be able to say
6 that was a substantial factor of causing this accident
7 is just total speculation and improper.

8 Thank you, Your Honor.

9 THE COURT: Thank you. Okay. Let's go to --
10 did I miss Motion in Limine No. 14? This is to exclude
11 articles regarding or references to transit buses.

12 MR. HENRIOD: I think, Your Honor, based on
13 my understanding that these won't be coming in opening
14 argument -- or I'm sorry, in opening statement, and the
15 foundation will be laid, we'll submit.

16 MR. CHRISTIANSEN: That's accurate, Your
17 Honor.

18 THE COURT: Is that correct?

19 MR. CHRISTIANSEN: Yes, ma'am.

20 THE COURT: Okay. Thank you. All right.

21 All right. Let's go to Defense Motion in
22 Limine No. 15 -- sorry, 15, to exclude opinion
23 testimony from lay witnesses on causation and
24 engineering principles.

25 MR. RUSSELL: Your Honor, I'm happy to say,

1 since we've got -- we've withdrawn 16 and 17's already
2 been argued, this is the last one for the day here.

3 And -- and what Mr. Barger made reference to
4 earlier, I said I would tell the Court. It will be a
5 housekeeping matter later. We've agreed with the
6 plaintiffs' counsel to -- with the Court's blessing --
7 arrange a jury view of the actual bus. I've spoken to
8 the attorney for Ryan's Express, and they're going to
9 make arrangements for the -- the actual bus that was
10 involved in the incident to be here. We'll have it
11 parked somewhere outside the courthouse, so at least
12 the jury can have a few minutes to give a look at the
13 bus. And we'll talk about other housekeeping matters.

14 I'm -- I'm somewhat glad that -- that Motion
15 in Limine No. 15 is the last motion you're going to
16 hear, Your Honor, because you've heard a lot over the
17 last three sessions, between last week's motions
18 hearing and today and Monday, about air blasts and
19 S-1 Gards. And what we're talking about now is who's
20 going to be able to provide the causal link that
21 plaintiffs need to show that any of these alleged
22 defects were actually a cause of the accident?

23 What they have relied on heavily are the
24 witnesses -- are -- are lay witnesses. Erica Bradley
25 who was driving behind the bus, interesting enough

1 she's in the -- in the driver's seat and, therefore,
2 have to kind of look around the bus to see the
3 right-hand side of the bus. And her husband was not
4 looking. He looked up later. Mr. Pears and Mr. Plantz
5 who were sitting on the bus. And also, Mr. Sacarias,
6 the gardener, the landscape person that was outside the
7 Red Rock.

8 And as you saw, the examples we gave in our
9 motion, plaintiffs had -- plaintiffs' counsel had a
10 tendency to ask these witnesses questions which really
11 go into engineering and causation principles. And
12 before I go into some of those examples, the important
13 thing to remember when you're talking about lay
14 witnesses, their opinions are very strictly limited.
15 They are limited to what they have observed and what
16 they rationally perceive. What did they rationally
17 perceive? And that's why they're called percipient
18 witnesses. What do they perceive? And they cannot
19 speculate. They cannot go beyond what the -- their
20 rational perception allows.

21 Good example is if I'm standing 50 feet from
22 someone and I see them walking towards me and they're
23 sort of disoriented, they're wobbling a little bit,
24 they don't seem like they have their footing, I can
25 rationally perceive that that person is either

1 physically or mentally impaired somehow. I don't know
2 if they've hit their head. Maybe they had something to
3 drink. Maybe they have a physical impairment. But I
4 can tell from 50 feet away that that person probably
5 has a -- an issue because they can't walk straight.
6 All right.

7 I can't tell you why they walk that way. I
8 can't tell you how long they've been walking that way
9 because those are not rational perceptions. I can't
10 tell you what caused that person to be in that
11 condition. All I can tell you is, yeah, I've seen them
12 down there and, rationally, I can perceive that perhaps
13 that person is impaired in some way, shape, or form.

14 And let's say he gets to be 3 feet away from
15 me. Now I can smell -- I can smell alcohol on his
16 breath. And so now I can rationally perceive, you know
17 what, maybe this guy had a few too many to drink and
18 that's why he's wobbling all around. That's why he
19 can't keep his footing. But I can't tell you -- I
20 can't --

21 And that was a Freudian slip, Will. I did
22 not --

23 MR. KEMP: I wasn't even listening, so...

24 MR. RUSSELL: I can't tell you what he had to
25 drink, when he drank it, how much he drank. Those are

1 not rational perceptions. And so what we've had with
2 the lay witnesses in this case is that next step, to
3 take a rational perception and then extend it beyond
4 what they perceived to speculate about things.

5 The first set are these questions about the
6 S-1 Gard. They asked Mr. Pears and Mr. Plantz, well,
7 if this device had been on there -- they showed them
8 the video that you saw earlier today. If this device
9 had been on there, it would have helped the doctor,
10 wouldn't it? It would have saved him, wouldn't it?

11 Well, Mr. Pears and Mr. Plantz didn't see
12 Dr. Khiabani impact the rear tire. They don't know how
13 he was oriented. They don't know what an S-1 Gard is.
14 They don't know how it works. It's a -- it's
15 completely speculative to ask them, well, would this
16 have made a difference?

17 Obviously Ms. Bradley can't see it because
18 she's behind. She can't see where Dr. Khiabani's body
19 is in relation to the tires. She just knows he -- he
20 falls down. She doesn't know how an S-1 Gard works.

21 And Mr. Roberts talked earlier about the
22 injurious consequences of what a guard would be. These
23 lay witnesses don't have any basis to talk about those
24 things. So you can't ask them because they haven't
25 rationally perceived what an S-1 Gard could do or would

1 do. That's complete speculation on their part. They
2 can't use that to substitute their causation arguments.

3 And the second major issue is -- is the --
4 the wobble and the air blast. What we have learned in
5 this case from the investigating officer and the
6 accident reconstructionists and what is undisputed is
7 that the -- this collision happens when Dr. Khiabani
8 leaves his bicycle lane and ends up in the bus's travel
9 lane. We all know that. That is not in question at
10 this point.

11 From the moment that fact became undeniable,
12 the plaintiffs needed an explanation why. Why would
13 this man leave the bicycle lane and end up in the bus's
14 lane? We need to be able to explain that to the jury,
15 because it -- it doesn't make any sense to us. And we
16 don't want to come up with crazy theories. We need --
17 we need something. We need something that the jury can
18 sink their teeth into.

19 Oh, wait a second. Ms. Bradley said that she
20 saw him wobble. Well, if he wobbled and he was losing
21 control of his bicycle, that makes sense as to why he
22 was not able to stay in the bike lane. But now I need
23 an explanation, Why does he wobble? Well, I don't want
24 it to be that he just wasn't paying attention because
25 that doesn't make my case very good as -- as the

1 plaintiffs in the case. And I don't want it to be he
2 had been drinking that morning even though obviously
3 there's no evidence of that because that would be
4 really bad for me. And I don't want it to be that he
5 hit a rock in the road because that would be really bad
6 for me, too, because that means nothing was wrong with
7 the bus. It just means Dr. Khiabani hit a rock in the
8 road and lost control of his bike. So I need an
9 explanation. I'll use the air blast.

10 So let's ask Ms. Bradley, you see
11 Dr. Khiabani wobble. You know why he wobbled? No, I
12 have no idea why he wobbled. Why -- how could she have
13 any idea why he wobbled. Again, that's the plaintiffs'
14 term for wobbly. I don't know why he wobbled.

15 Let me show you a video that you've seen now,
16 Your Honor. Let me show you a video of an 18-wheeler
17 going down a highway with a bike on the left-hand side,
18 and the 18-wheeler is probably going 50 miles an hour,
19 and say, well, jeez, doesn't that look like what maybe
20 happened? And Ms. Bradley's response is, well, that's
21 possible. I don't have -- I don't know the reason, but
22 it's possible.

23 That is rank speculation by Ms. Bradley. You
24 cannot use her testimony to substitute for proof of
25 causation, and that's exactly what they're trying to

1 do. It was not based on rational perception of what
2 Ms. Bradley saw. All she can say is, I'm driving
3 behind the bus, I see the bike start to lose control.
4 You want to call it a wobble, or you want to call it
5 lose control, whatever you want to call it. But she
6 has no idea, and she did not rationally perceive why
7 that happened.

8 Mr. Pears and Mr. Plantz, and we talked a
9 little bit earlier, Mr. Henriod and -- and Ms. Works
10 discussed that issue. They can say he looked
11 surprised. He looked -- we -- we saw his face, he --
12 he -- he looked surprised in his face. They can't
13 testify as to why he was surprised. We've already
14 agreed on that. So if you can't testify as to why
15 Dr. Khiabani was surprised, how in the world can you
16 testify to why he lost control of his bike? You can't
17 show a lay witness your theory, ask if it's possible,
18 then they say, well, sure, it's possible. And now it
19 becomes that's -- that's how the accident happened.

20 It's speculation on the lay witness's part.
21 It doesn't fall within the rational perception and,
22 therefore, it -- any questions about why did
23 Dr. Khiabani do this, why did he wobble, would an
24 S-1 Gard have made any difference, you can't ask the
25 lay witnesses that.

1 Thank you.

2 THE COURT: Ms. Works.

3 MS. WORKS: Your Honor. Your Honor, this one
4 is really pretty simple. A lay witness, as the Court
5 knows, can testify to any observation, any opinions
6 that are rationally based on their perception, and that
7 which will be helpful to a clearer understanding for
8 the jury. And in this case, you don't have rank
9 speculation because you have witnesses, Ms. Bradley,
10 Mr. Pears, Mr. Plantz, and Mr. Sacarias, who all four
11 actually witnessed the collision from some vantage
12 point.

13 Now, Mr. Pears and Mr. Plantz, I would
14 submit, can't testify, obviously, to Dr. Khiabani's
15 position on impact with the tire. That's correct.
16 They didn't -- they didn't witness that.

17 But Ms. Bradley testified unequivocally that
18 she's behind the vehicle the entire time. She
19 witnesses the impact. Mr. Kemp shows her a video, the
20 one that you saw, Your Honor, in addition to a few
21 others, after he had already established the foundation
22 of what she observed at the accident scene on the date
23 of the collision, and asks her comparison questions
24 between the two. She observed both of those incidents.
25 She observes what's on the video and she observes the

1 collision that day.

2 She testified not only that it's possible,
3 that -- that was in some of the verbiage, but that the
4 two were substantially similar. And so to -- because
5 Mr. Kemp, because the plaintiffs can lay a foundation,
6 as we did in the deposition, for the comparison of the
7 two, she can testify as to what is in her rational
8 perception and what she can infer from her
9 observations. She observed both videos. She could
10 well have said, No, they don't look the same at all to
11 me.

12 And just because she observes it, just
13 because she's making an inference doesn't transform her
14 testimony somehow into inadmissible, unreliable expert
15 opinion. She is one of four people who actually
16 witnessed this collision. And her testimony is going
17 to be exceedingly helpful to the trier of fact in
18 understanding what happened and utilizing a comparison
19 of the two videos. And she can certainly testify to
20 the differences and the similarities.

21 And the defense will be free to cross-examine
22 her on, well, you know, one of the vehicles may have
23 been going faster. That -- that isn't exactly what you
24 saw. But that's all fodder for cross-examination, not
25 the admissibility of her testimony itself.

1 And the same goes for Mr. Sacarias who
2 probably out of anyone has the best vantage point
3 because he's standing off to the side. He's the
4 landscaper at the Red Rock who witnesses the accident
5 and he's sees the entire thing. Again, the defense is
6 free to cross-examine him about his observations. But
7 he, likewise, has witnessed the accident, and he also
8 watched the videos during his deposition and testified
9 to the comparisons between the two.

10 The defense has argued over and over again
11 that it's pure speculation, but the law is clear that a
12 lay witness can testify to any inference that's
13 rationally based on what they've observed. So here,
14 this isn't speculation. They're simply being asked to
15 compare what they saw on the date of the accident with
16 what they see in the videos and with -- whether, in
17 their opinion, would those devices have made a
18 difference, would they have assisted. That's not
19 expert testimony. Defense can cross out or, you know,
20 point out on cross-examination that they're not an
21 expert in the area.

22 But in this line of questioning, in this line
23 of testimony, in some ways they have -- they're more
24 able to assist the trier of fact because they actually
25 witnessed what happened that day. And so their

1 testimony is not purely speculative because it's based
2 on their observations and it's absolutely permissible.

3 THE COURT: Thank you.

4 MR. RUSSELL: Ms. Works brought up the video
5 again, and I think the video actually helps illustrate
6 the point and the concern here. We're now operating
7 under the presumption that this video of the bike on
8 the left-hand side of the 18-wheeler is the result of
9 an air blast. That is speculation. That bike rider in
10 that video, unless he's now been -- unless he's being
11 disclosed now, he's not going to be here and testify.
12 The guy driving the 18-wheeler, he's not coming here
13 and testifying. What basis would Ms. Bradley or anyone
14 in this room have to say that the cyclist with the
15 18-wheeler going by him at 55 miles an hour lost
16 control because of an air blast? That's speculation.

17 So what the plaintiffs want to say is, well,
18 here's a speculative theory, and why don't you watch a
19 video of another speculative theory, and do they look
20 the same? Well, there you go. Then they must be
21 the same. Well, that's -- that is so far afield, it's
22 incredible.

23 Ms. Bradley doesn't know anything about that
24 video. She -- she was shown it for the first time at
25 her deposition, and they're asking her, well, does it

1 look like the same thing happened? All she can say,
2 all her rational perception allows her to say is both
3 bicyclists, the one I saw next to the bus on the day of
4 the accident and the one you showed me in the video,
5 they both lost control of their bicycles. She could
6 say that. Okay. Fine.

7 Why did the bicyclist in the video lose
8 control? She doesn't know. None of us know. And so
9 you can't use that to now create some comparison, give
10 her a speculative theory, and then ask her to compare
11 it to another one.

12 If you look closely at some of the cases that
13 plaintiffs provided in their opposition, it's actually
14 very helpful, and they -- they illustrate this point.
15 The Randolph case that they cite, in that case, the
16 Court actually denied the request to have the lay
17 witness opine on design issues. Essentially, it was --
18 I think it was a pressure cooker or slow cooker that --
19 that malfunctioned. And the -- the lay witness said,
20 well, I've worked on these for years. I know how to
21 repair them. I'm familiar with them. And they asked
22 him design issues, even though he'd never designed one.
23 And the Court denied the lay witness the opportunity to
24 do that.

25 And the quote from the -- from the judge

1 in -- in Randolph at 590 F.2d 847 was, "There is
2 uniformity among the courts that the testimony of
3 witnesses both in" seminal -- "civil and criminal cases
4 is admissible if predicated upon concrete facts within
5 their own observation and recollection, that is facts
6 perceived from their own senses, as distinguished from
7 their opinions or conclusions drawn from such facts."

8 You can talk about what you perceive. You
9 can't speculate an opinion or a conclusion about it.

10 In the -- in the *State versus Ellis* case out
11 of Utah, and this actually segues nicely into what
12 Ms. Works just said, there you had a lay witness that
13 was a security guard, and he saw a set of footprints
14 both outside the apartment that was broken into and
15 inside the apartment that was broken into. And during
16 trial, they showed him those two footprints that he had
17 seen himself, and said, Well, do these look similar?
18 He said, Yes. Well, that's fine. That was based on
19 his actual perception of the footprints, not maybe
20 speculating about what happened on a video. She wants
21 you to allow witnesses to compare things that they know
22 nothing about. Lay witnesses are not allowed to do
23 that.

24 And finally, in the Trenton Potteries case,
25 the U.S. supreme court case the plaintiffs cited, that

1 was another case where the lay witness testimony was
2 excluded. And it was an unfair competition case, and
3 they wanted the lay witness to speculate on whether
4 they had -- there had been unfair competition. And
5 what the U.S. Supreme Court case -- what the U.S.
6 Supreme Court said was, "Whether or not such
7 competition existed at any given time is a conclusion
8 which could be reached only after consideration of
9 relevant data known to the witness." In other words,
10 something he perceived. "Here, the effort was made to
11 show the personal conclusion of the witness without the
12 data and without, indeed, showing that the conclusion
13 was based upon knowledge of relevant facts."

14 All of these cases say the same thing. Lay
15 witnesses can talk about what they rationally perceive.
16 They can't speculate about conclusions or opinions, and
17 that's exactly what they want the lay witnesses to do
18 in this case.

19 Thank you, Your Honor.

20 THE COURT: All right.

21 MR. KEMP: Judge, we had a housekeeping
22 matter. Mr. Roberts.

23 MR. ROBERTS: Yes, Your Honor, under the
24 exhibit guidelines of Department 14, the Court requires
25 binders be submitted by the Wednesday before trial, as

1 far as exhibits. The Wednesday before trial is
2 February 7th. We're going to be in mediation that day
3 with Joe Bongiovi. I think we've scheduled the 267 for
4 February 4th, and we --

5 THE COURT: I'm sorry. What dates are you in
6 mediation?

7 MR. ROBERTS: We are.

8 THE COURT: What -- what dates?

9 MR. ROBERTS: February 7th, and that's the
10 Wednesday before trial, the same day your guidelines
11 would ordinarily --

12 THE COURT: Right.

13 MR. ROBERTS: -- require exhibit binders. So
14 we were hoping that we might be able to put that
15 deadline off by a day to --

16 THE COURT: Sure.

17 MR. KEMP: Yes, Your Honor. And -- and then
18 the other housekeeping matter, and I don't know if I
19 need to file a motion on this. Maybe I do. The
20 caption -- I tried a case one time, and we settled with
21 a defendant. We had another defendant in the case.
22 You know, we were the second week into trial, and I
23 walked by, and that was back in the old courtroom where
24 they -- they tape the caption up. So I looked at the
25 caption and I thought, Oh, jeez, we left the other --

1 the settled defendant's name on the caption and now the
2 jury knows we all sued the settled defendant, you know.
3 So it caused a problem in that case. I think it would
4 cause a problem in this case.

5 So I suggested to opposing counsel that we
6 just stipulate that the case caption be amended to drop
7 the settled parties. Otherwise, the jury's going to
8 wonder where are they since they're on the caption.
9 Their position, I think, is they don't want to do that.
10 I don't know if that's -- they don't want to do that
11 pending the Court's rulings on Motion in Limine 1 or
12 Motion in Limine -- or they just don't want to do it
13 period.

14 But I think, clearly, you have to do it at
15 some point because if you order that they can't blame
16 the bus driver's negligence, we can't have the bus
17 driver of the bus company still on the caption because,
18 in effect, you know, it would circumventing the order.
19 So ...

20 MR. ROBERTS: And, Your Honor -- Your Honor,
21 we agree not to talk about settling defendants, which
22 to us means there's a settlement. We would agree to
23 remove them from the caption after they're dismissed
24 from the case. The problem is they aren't dismissed.
25 The Court has approved the good-faith settlement, but

1 as far as I know, a compromise has never been approved.
2 You may recall.

3 MR. KEMP: It has not been approved.

4 MR. ROBERTS: It has not been approved --

5 MR. KEMP: Correct.

6 MR. ROBERTS: You may recall we removed the
7 case to federal court. They went before federal
8 Judge Boulware, and they said, Your Honor, there is not
9 complete diversity because even though we've agreed to
10 settle with these defendants, there can be no
11 settlement until a good-faith approval is made and a
12 minor's compromise is approved. The Court may not
13 approve the minor's compromise. We can't say they're
14 gone. They're still in the case. So we get remanded.

15 Well, we're now on the eve of trial. Even if
16 they're dismissed or they're not dismissed, if they are
17 in the case on the day the trial starts, they're on the
18 caption. They are parties to the case.

19 And in -- and, in fact, maybe the case needs
20 to be continued at that point because they're either
21 defendants or they're not defendants. Either they're
22 settled or they're not. If they're settled, let's
23 dismiss them out, and then they're no longer parties
24 for all purposes, including diversity. If they are
25 parties, then let's leave them on the caption. It's

1 time to make your choice. They're the ones who said
2 they are parties, Judge, until good-faith compromise is
3 approved and the dismissal is granted. So they're
4 still parties. They could lie in the bed they made,
5 Judge.

6 MR. KEMP: Your Honor, we didn't make this
7 bed. There's -- there's no rule that says that the
8 caption has to reflect settled defendants. There's no
9 rule that says that. There's no rule that says you
10 have to keep them on the caption until the case is
11 formally dismissed after the minor's compromise.

12 What they're trying to do is they're --
13 they're assuming they're going to lose the Motion in
14 Limine No. 1, and they're trying to backdoor it by
15 having it on the caption and just hope that someone on
16 the jury sees it, and I think that's totally
17 inappropriate.

18 MR. ROBERTS: Maybe they can move to
19 bifurcate and separate out the trial, Judge. I -- I
20 just think that it would probably be improper to go to
21 trial with the defendants who are still parties to the
22 case. How do you do that? Dismiss them before trial
23 starts or they're parties. I -- I don't know how the
24 law would require anything differently. They got to be
25 dismissed or they got to be formally bifurcated or they

1 are parties to the trial.

2 And the jury has to be qualified through
3 their names, and under the rules, we're allowed to read
4 the complaint to the jury. We can publish the
5 complaint.

6 MR. KEMP: Maybe we should just file a motion
7 to amend the complaint and drop them from there, or at
8 least drop them from the caption. The caption's what
9 I'm really worried about because the caption is what
10 the clerk's office uses when they do those electronic
11 things. So, you know, maybe we could just amend the
12 caption. Let us -- let me think about it and file a
13 motion or motion or something.

14 THE COURT: Okay. Very good.

15 MR. ROBERTS: Thank -- thank you, Your Honor.

16 MR. POLSENBERG: Your Honor, thank you very
17 much.

18 MR. ROBERTS: We appreciate your patience,
19 Your Honor.

20 THE COURT: Have a good evening, everyone.

21 THE MARSHAL: Court is now adjourned.

22

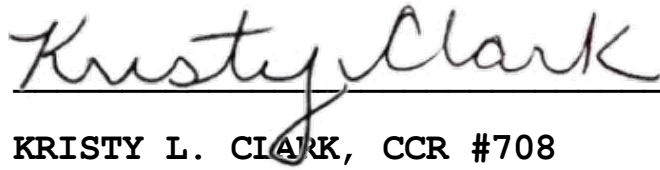
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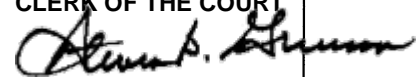
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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF
PROCEEDINGS.


KRISTY L. CLARK, CCR #708

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1 **FFCL**

2
3 **EIGHTH JUDICIAL DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 KEON KHIABANI and ARIA KHIABANI,)
6 minors, by and through their Guardian,)
7 MARIE-CLAUDE RIGAUD; SIAMAK)
8 BARIN, as Executor of the Estate of Kayvan)
9 Khiabani, M.D. (Decedent), the Estate of)
10 Kayvan Khiabani, M.D. (Decedent);)
11 SIAMAK BARIN, as Executor of the Estate)
12 of Katayoun Barin, DDS (Decedent); and)
13 the Estate of Katayoun Barin, DDS)
14 (Decedent);)

15 Plaintiffs,)

16 vs.)

17 MOTOR COACH INDUSTRIES, INC.,)
18 MICHELANGELO EXPRESS; EDWARD)
19 HUBBARD; BELL SPORTS, INC. d/b/a)
20 GIRO SPORT DESIGN; and SEVENPLUS)
21 BICYCLES, INC. d/b/a PRO CYCLERY)

22 Defendant(s).)

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

23 **SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

24 Plaintiffs' and Defendant's motions in limine came on for a hearing before
25 Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar
26 presiding, on January 29, 2018 and January 31, 2018. The Court issued findings of fact,
27 conclusions of law, and orders on the majority of the motions in limine on February 2, 2018.
After considering the pleadings and argument of counsel, the Court issues the following
rulings on the remaining motions.

///

///

///

Plaintiffs' Motion in Limine #1 (Preclude Reference or Argument regarding alleged negligence of third parties):

GRANTED. Under *Young's Mach. Co. v. Long*, 100 Nev. 692 (1984), "the only defenses available in a strict products liability action [are] assumption of the risk and misuse of the product; ordinary contributory negligence [is] not to be considered." The only possible instance of "misuse" in this case would be by the driver, Mr. Hubbard. While negligence of Mr. Hubbard may constitute "misuse," this Court has already ruled that any negligence by the driver is foreseeable as a matter of law, and thus cannot insulate Defendant from liability. *Andrews v. Harley Davidson, Inc.*, 106 Nev. 533, 537 (1990). See also *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 520 (1995) (A defect need only be a substantial factor in producing the injury to establish causation, and an intervening act by a third party must be "both unforeseeable and the proximate cause of the injury" to be an intervening superseding cause) (emphasis in original).

Therefore, Defendant is precluded from referring or arguing to the jury in regard to alleged negligence of any third party.

Plaintiffs' Motion in Limine #3 (Preclude Defendant from Arguing Decedent was Contributorily Negligent):

GRANTED. First, the Court notes that its previous ruling granting Plaintiffs' "motion for summary judgment on foreseeability of bus interactions with pedestrians or bicyclists (including sudden bicycle movement)" establishes that a collision between a bus and a bicycle is foreseeable as a matter of law.

As stated above, under *Young's Mach. Co. v. Long*, 100 Nev. 692 (1984), comparative negligence does not apply to a strict liability-based claim, and "the only defenses available in a strict products liability action [are] assumption of the risk and misuse of the product; ordinary contributory negligence [is] not to be considered." Defendant has not established any grounds for asserting an "assumption of risk" defense, as there is no evidence that Dr.

1 Khiabani was, or even should have been, aware of the claimed defects in the coach. *General*
 2 *Electric Co. v. Bush*, 88 Nev. 360 (1972). Further, because Dr. Khiabani was not a “user” of
 3 the coach, the only potential “misuse” of the product based on the evidence presented would
 4 be by the driver, Mr. Hubbard. This Court has already ruled that any negligence by the driver
 5 is foreseeable as a matter of law, and thus cannot insulate Defendant from liability. *See supra*.

6 Therefore, Defendant is precluded from arguing to the jury that Dr. Khiabani’s
 7 negligence can absolve Defendant of liability even if the product is found to be defective.

8
 9 **Plaintiffs’ Motion in Limine #14 (Designate Virgil Hoogestraat as Managing Speaking**

10 **Agent of Defendant Motor Coach):**

11 DEFERRED UNTIL TRIAL. Plaintiffs have not provided enough information for the
 12 Court to make the fact-intensive finding that Mr. Hoogestraat can be considered a managing
 13 speaking agent for Defendant for all purposes. *See Palmer v. Pioneer Inn Associates, Ltd.*,
 14 118 Nev. 943 (2002). Plaintiffs may request the Court reconsider this issue during trial if the
 15 issue becomes pertinent.

16
 17 **Plaintiffs’ Motion in Limine #15 (Designate Bryan Couch as Managing Speaking Agent**
 18 **of Defendant Motor Coach):**

19 DEFERRED UNTIL TRIAL. Plaintiffs have not provided enough information for the
 20 Court to make the fact-intensive finding that Mr. Couch can be considered a managing
 21 speaking agent for Defendant for all purposes. *See Palmer v. Pioneer Inn Associates, Ltd.*,
 22 118 Nev. 943 (2002). Plaintiffs may request the Court reconsider this issue during trial if the
 23 issue becomes pertinent.

24 DATED this 5th day of February, 2018.

25
 26 
 27 ADRIANA ESCOBAR
 DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

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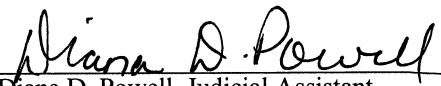
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Case No.: A-17-755977-C

Dept. No.: XIV

**MOTOR COACH INDUSTRIES, INC.'S
ANSWER TO SECOND
AMENDED COMPLAINT**

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

Defendants.

Defendant **MOTOR COACH INDUSTRIES, INC.** (hereinafter “Defendant” or “MCI”), by and through its attorneys, hereby files its Answer to Plaintiffs’ Second Amended Complaint.

ANSWER

Defendant denies generally the allegations of Plaintiffs’ Second Amended Complaint and further denies that it was responsible for, or liable for, any of the happenings or events mentioned in Plaintiffs’ Second Amended Complaint.

THE PARTIES

Responding to the individual allegations of Plaintiffs’ Second Amended Complaint, Defendant answers:

1. Answering paragraph 1 of Plaintiffs’ Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

2. Answering paragraph 2 of Plaintiffs’ Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

3. Answering paragraph 3 of Plaintiffs’ Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

4. Answering paragraph 4 of Plaintiffs’ Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

///

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Boulevard, Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

1 5. Answering paragraph 5 of Plaintiffs' Second Amended Complaint, Defendant is
2 without knowledge or information sufficient to form a belief as to the truth of the allegations
3 contained in this paragraph and, therefore, cannot admit or deny these allegations.

4 6. Answering paragraph 6 of Plaintiffs' Second Amended Complaint, Defendant is
5 without knowledge or information sufficient to form a belief as to the truth of the allegations
6 contained in this paragraph and, therefore, cannot admit or deny these allegations.

7 7. Answering paragraph 7 of Plaintiffs' Second Amended Complaint, Defendant
8 admits that it was and is a Delaware corporation, and that it sells new motor coaches in the United
9 States. Defendant did not design or manufacture the motor coach referenced in the Second
10 Amended Complaint, and denies such allegations. It is admitted that Defendant sold a 2008 motor
11 coach bearing Vehicle Identification No. 2M93JMHA28W064555, which based on the report of
12 the Las Vegas Metropolitan Police Department was involved in the accident at issue.

13 8. Answering paragraph 8 of Plaintiffs' Second Amended Complaint, Defendant is
14 without knowledge or information sufficient to form a belief as to the truth of the allegations
15 contained in this paragraph and, therefore, cannot admit or deny these allegations.

16 9. Answering paragraph 9 of Plaintiffs' Second Amended Complaint, Defendant is
17 without knowledge or information sufficient to form a belief as to the truth of the allegations
18 contained in this paragraph and, therefore, cannot admit or deny these allegations.

19 10. Answering paragraph 10 of Plaintiffs' Second Amended Complaint, Defendant is
20 without knowledge or information sufficient to form a belief as to the truth of the allegations
21 contained in this paragraph and, therefore, cannot admit or deny these allegations.

22 11. Answering paragraph 11 of Plaintiffs' Second Amended Complaint, Defendant is
23 without knowledge or information sufficient to form a belief as to the truth of the allegations
24 contained in this paragraph and, therefore, cannot admit or deny these allegations.

25 12. Answering paragraph 12 of Plaintiffs' Second Amended Complaint, Defendant is
26 without knowledge or information sufficient to form a belief as to the truth of the allegations
27 contained in this paragraph and, therefore, cannot admit or deny these allegations.

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1 13. Answering paragraph 13 of Plaintiffs' Second Amended Complaint, Defendant
2 denies the allegations contained in this paragraph as they pertain to MCI. MCI is without
3 knowledge or information sufficient to form a belief as to the truth of the allegations contained in
4 this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

5 14. Answering paragraph 14 of Plaintiffs' Second Amended Complaint, Defendant
6 denies the allegations contained in this paragraph as they pertain to MCI. MCI is without
7 knowledge or information sufficient to form a belief as to the truth of the allegations contained in
8 this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

9 15. Answering paragraph 15 of Plaintiffs' Second Amended Complaint, Defendant
10 denies the allegations contained in this paragraph as they pertain to MCI. MCI is without
11 knowledge or information sufficient to form a belief as to the truth of the allegations contained in
12 this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

13 **JURISDICTION AND VENUE**

14 16. Answering paragraph 16 of Plaintiffs' Second Amended Complaint, Defendant is
15 without knowledge or information sufficient to form a belief as to the truth of the allegations
16 contained in this paragraph and, therefore, cannot admit or deny these allegations.

17 17. Answering paragraph 17 of Plaintiffs' Second Amended Complaint, Defendant is
18 without knowledge or information sufficient to form a belief as to the truth of the allegations
19 contained in this paragraph and, therefore, cannot admit or deny these allegations.

20 **GENERAL ALLEGATIONS**

21 18. Answering paragraph 18 of Plaintiffs' Second Amended Complaint, Defendant is
22 without knowledge or information sufficient to form a belief as to the truth of the allegations
23 contained in this paragraph and, therefore, cannot admit or deny these allegations.

24 19. Answering paragraph 19 of Plaintiffs' Second Amended Complaint, Defendant is
25 without knowledge or information sufficient to form a belief as to the truth of the allegations
26 contained in this paragraph and, therefore, cannot admit or deny these allegations.

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20. Answering the first sentence of paragraph 20 of Plaintiffs' Second Amended Complaint, Defendant admits that it sold a 2008 motor coach bearing Vehicle Identification No. 2M93JMHA28W064555, which based on the report of the Las Vegas Metropolitan Police Department was involved in the accident at issue. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the license plate number of the motor coach in question. As to the remainder of the allegations contained in the first sentence of paragraph 20 of Plaintiffs' Second Amended Complaint, Defendant, except as expressly admitted herein, denies the remainder of such allegations. Answering the second sentence of paragraph 20 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations, because of the lack of clarity with regard to the "proximity sensors" referenced therein, and, therefore, cannot admit or deny these allegations.

21. Answering paragraph 21 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

22. Answering paragraph 22 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

23. Answering paragraph 23 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

24. Answering paragraph 24 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

FIRST CLAIM FOR RELIEF
(STRICT LIABILITY: DEFECTIVE CONDITION OR
FAILURE TO WARN AGAINST DEFENDANT MCI)

25. Defendant incorporates by reference its responses and defenses to paragraphs 1 through 24 of Plaintiffs' Second Amended Complaint as if fully set forth herein.

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1 26. Answering paragraph 26 of Plaintiffs' Second Amended Complaint, Defendant
2 admits that it sells new motor coaches in the United States and was responsible for the sale of a
3 2008 motor coach bearing Vehicle Identification No. 2M93JMHA28W064555. The motor coach
4 bearing that Vehicle Identification No. was designed and manufactured by Motor Coach Industries
5 Limited, a Canadian company. Except as expressly admitted herein, Defendant denies the
6 remaining allegations of paragraph 26.

7 27. Answering paragraph 27 of Plaintiffs' Second Amended Complaint, Defendant is
8 without knowledge or information sufficient to form a belief as to the truth of the allegations
9 contained in this paragraph and, therefore, cannot admit or deny these allegations.

10 28. Answering paragraph 28 of Plaintiffs' Second Amended Complaint, Defendant
11 denies the allegations contained in this paragraph.

12 29. Answering paragraph 29 of Plaintiffs' Second Amended Complaint, Defendant
13 denies the allegations contained in this paragraph.

14 30. Answering paragraph 30 of Plaintiffs' Second Amended Complaint, Defendant
15 denies the allegations contained in this paragraph.

16 31. Answering paragraph 31 of Plaintiffs' Second Amended Complaint, Defendant
17 denies the allegations contained in this paragraph.

18 32. Answering paragraph 32 of Plaintiffs' Second Amended Complaint, Defendant
19 denies the allegations contained in this paragraph.

20 33. Answering paragraph 33 of Plaintiffs' Second Amended Complaint, Defendant
21 denies the allegations contained in this paragraph.

22 34. Answering paragraph 34 of Plaintiffs' Second Amended Complaint, Defendant
23 denies the allegations contained in this paragraph.

24 35. Answering paragraph 35 of Plaintiffs' Second Amended Complaint, Defendant
25 denies the allegations contained in this paragraph.

26 ///

27 ///

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36. Answering paragraph 36 of Plaintiffs' Second Amended Complaint, the Court has dismissed any claims for relief related to alleged physical injuries, illness or death of Katayoun Barin, and as such this paragraph should be stricken and no response is required. To the extent a response is required, Defendant denies the allegations contained in this paragraph.

37. Answering paragraph 37 of Plaintiffs' Second Amended Complaint, Defendant denies the allegations contained in this paragraph.

38. Answering paragraph 38 of Plaintiffs' Second Amended Complaint, Defendant denies the allegations contained in this paragraph.

39. Answering paragraph 39 of Plaintiffs' Second Amended Complaint, Defendant denies the allegations contained in this paragraph.

SECOND CLAIM FOR RELIEF
(NEGLIGENCE AGAINST DEFENDANTS RYAN'S EXPRESS
AND EDWARD HUBBARD)

40. Defendant incorporates by reference its responses and defenses to paragraphs 1 through 39 of Plaintiffs' Second Amended Complaint as if fully set forth herein.

41. Answering paragraph 41 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

42. Answering paragraph 42 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

43. Answering paragraph 43 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations. To the extent "Defendants" is meant to apply to MCI, MCI denies any such allegations.

44. Answering paragraph 44 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

///

45. Answering paragraph 45 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

46. Answering paragraph 46 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

47. Answering paragraph 47 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

48. Answering paragraph 48 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

49. Answering paragraph 49 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

50. Answering paragraph 50 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

THIRD CLAIM FOR RELIEF
(NEGLIGENCE PER SE AGAINST DEFENDANTS
RYAN'S EXPRESS AND EDWARD HUBBARD)

51. Defendant incorporates by reference its responses and defenses to paragraphs 1 through 50 of Plaintiffs' Second Amended Complaint as if fully set forth herein.

52. Answering paragraph 52 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

53. Answering paragraph 53 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

54. Answering paragraph 54 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

55. Answering paragraph 55 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations. To the extent "Defendants" is meant to apply to MCI, MCI denies any such allegations.

56. Answering paragraph 56 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

FOURTH CLAIM FOR RELIEF
(NEGLIGENT TRAINING AGAINST DEFENDANT RYAN'S EXPRESS)

57. Defendant incorporates by reference its responses and defenses to paragraphs 1 through 57 of Plaintiffs' Second Amended Complaint as if fully set forth herein.

58. Answering paragraph 58 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

59. Answering paragraph 59 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

60. Answering paragraph 60 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

61. Answering paragraph 61 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, cannot admit or deny these allegations.

62. Answering paragraph 62 of Plaintiffs' Second Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

1 contained in this paragraph and, therefore, cannot admit or deny these allegations.

2 63. Answering paragraph 63 of Plaintiffs' Second Amended Complaint, Defendant is
3 without knowledge or information sufficient to form a belief as to the truth of the allegations
4 contained in this paragraph and, therefore, cannot admit or deny these allegations.

5 **FIFTH CLAIM FOR RELIEF**
6 **(STRICT LIABILITY: DEFECTIVE CONDITION OR**
7 **FAILURE TO WARN AGAINST DEFENDANTS GIRO AND PRO CYCLERY)**

8 64. Defendant incorporates by reference its responses and defenses to paragraphs 1
9 through 63 of Plaintiffs' Second Amended Complaint as if fully set forth herein.

10 65. Answering paragraph 65 of Plaintiffs' Second Amended Complaint, Defendant is
11 without knowledge or information sufficient to form a belief as to the truth of the allegations
12 contained in this paragraph and, therefore, cannot admit or deny these allegations.

13 66. Answering paragraph 66 of Plaintiffs' Second Amended Complaint, Defendant is
14 without knowledge or information sufficient to form a belief as to the truth of the allegations
15 contained in this paragraph and, therefore, cannot admit or deny these allegations.

16 67. Answering paragraph 67 of Plaintiffs' Second Amended Complaint, Defendant is
17 without knowledge or information sufficient to form a belief as to the truth of the allegations
18 contained in this paragraph and, therefore, cannot admit or deny these allegations.

19 68. Answering paragraph 68 of Plaintiffs' Second Amended Complaint, Defendant is
20 without knowledge or information sufficient to form a belief as to the truth of the allegations
21 contained in this paragraph and, therefore, cannot admit or deny these allegations.

22 69. Answering paragraph 69 of Plaintiffs' Second Amended Complaint, Defendant is
23 without knowledge or information sufficient to form a belief as to the truth of the allegations
24 contained in this paragraph and, therefore, cannot admit or deny these allegations.

25 70. Answering paragraph 70 of Plaintiffs' Second Amended Complaint, Defendant is
26 without knowledge or information sufficient to form a belief as to the truth of the allegations
27 contained in this paragraph and, therefore, cannot admit or deny these allegations.

28 71. Answering paragraph 71 of Plaintiffs' Second Amended Complaint, Defendant is
without knowledge or information sufficient to form a belief as to the truth of the allegations

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1 contained in this paragraph and, therefore, cannot admit or deny these allegations.

2 72. Answering paragraph 72 of Plaintiffs' Second Amended Complaint, Defendant is
3 without knowledge or information sufficient to form a belief as to the truth of the allegations
4 contained in this paragraph and, therefore, cannot admit or deny these allegations.

5 73. Answering paragraph 73 of Plaintiffs' Second Amended Complaint, Defendant is
6 without knowledge or information sufficient to form a belief as to the truth of the allegations
7 contained in this paragraph and, therefore, cannot admit or deny these allegations.

8 74. Answering paragraph 74 of Plaintiffs' Second Amended Complaint, Defendant is
9 without knowledge or information sufficient to form a belief as to the truth of the allegations
10 contained in this paragraph and, therefore, cannot admit or deny these allegations.

11 75. Answering paragraph 75 of Plaintiffs' Second Amended Complaint, Defendant is
12 without knowledge or information sufficient to form a belief as to the truth of the allegations
13 contained in this paragraph and, therefore, cannot admit or deny these allegations.

14 76. Answering paragraph 76 of Plaintiffs' Second Amended Complaint, Defendant is
15 without knowledge or information sufficient to form a belief as to the truth of the allegations
16 contained in this paragraph and, therefore, cannot admit or deny these allegations.

17 77. Answering paragraph 77 of Plaintiffs' Second Amended Complaint, Defendant is
18 without knowledge or information sufficient to form a belief as to the truth of the allegations
19 contained in this paragraph and, therefore, cannot admit or deny these allegations.

20 78. Answering paragraph 78 of Plaintiffs' Second Amended Complaint, Defendant is
21 without knowledge or information sufficient to form a belief as to the truth of the allegations
22 contained in this paragraph and, therefore, cannot admit or deny these allegations.

23 **SIXTH CLAIM FOR RELIEF**
24 **(BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE AGAINST DEFENDANTS GIRO AND PRO CYCLERY)**

25 79. Defendant incorporates by reference its responses and defenses to paragraphs 1
26 through 78 of Plaintiffs' Second Amended Complaint as if fully set forth herein.

27 80. Answering paragraph 80 of Plaintiffs' Second Amended Complaint, Defendant is
28 without knowledge or information sufficient to form a belief as to the truth of the allegations

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1 contained in this paragraph and, therefore, cannot admit or deny these allegations.

2 81. Answering paragraph 81 of Plaintiffs' Second Amended Complaint, Defendant is
3 without knowledge or information sufficient to form a belief as to the truth of the allegations
4 contained in this paragraph and, therefore, cannot admit or deny these allegations.

5 82. Answering paragraph 82 of Plaintiffs' Second Amended Complaint, Defendant is
6 without knowledge or information sufficient to form a belief as to the truth of the allegations
7 contained in this paragraph and, therefore, cannot admit or deny these allegations.

8 83. Answering paragraph 83 of Plaintiffs' Second Amended Complaint, Defendant is
9 without knowledge or information sufficient to form a belief as to the truth of the allegations
10 contained in this paragraph and, therefore, cannot admit or deny these allegations.

11 84. Answering paragraph 84 of Plaintiffs' Second Amended Complaint, Defendant is
12 without knowledge or information sufficient to form a belief as to the truth of the allegations
13 contained in this paragraph and, therefore, cannot admit or deny these allegations.

14 85. Answering paragraph 85 of Plaintiffs' Second Amended Complaint, Defendant is
15 without knowledge or information sufficient to form a belief as to the truth of the allegations
16 contained in this paragraph and, therefore, cannot admit or deny these allegations.

17 **SEVENTH CLAIM FOR RELIEF**
18 **(WRONGFUL DEATH AGAINST ALL DEFENDANTS)**

19 86. Defendant incorporates by reference its responses and defenses to paragraphs 1
20 through 85 of Plaintiffs' Second Amended Complaint as if fully set forth herein.

21 87. Answering paragraph 87 of Plaintiffs' Second Amended Complaint, Defendant
22 denies the allegations contained in this paragraph as they pertain to MCI. MCI is without
23 knowledge or information sufficient to form a belief as to the truth of the allegations contained in
24 this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

25 88. Answering paragraph 88 of Plaintiffs' Second Amended Complaint, Defendant
26 denies the allegations contained in this paragraph as they pertain to MCI. MCI is without
27 knowledge or information sufficient to form a belief as to the truth of the allegations contained in
28 this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

89. Answering paragraph 89 of Plaintiffs' Second Amended Complaint, Defendant denies the allegations contained in this paragraph as they pertain to MCI. MCI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

90. Answering paragraph 90 of Plaintiffs' Second Amended Complaint, Defendant denies the allegations contained in this paragraph as they pertain to MCI. MCI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

91. Answering paragraph 91 of Plaintiffs' Second Amended Complaint, Defendant denies the allegations contained in this paragraph as they pertain to MCI. MCI is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph regarding other parties and, therefore, cannot admit or deny these allegations.

EIGHTH CLAIM FOR RELIEF

DISMISSED BY COURT

92. Answering paragraphs 92 through 98 of Plaintiffs' Second Amended Complaint, the Court has dismissed the Eighth Claim for Relief, and as such no response is required to the paragraphs. To the extent a response is required, Defendant denies the allegations contained in these paragraphs as they pertain to MCI.

93. Responding to Plaintiffs’ Prayer for Relief, including the “WHEREFORE” statement and all subparts thereto, Defendant denies that it is liable to Plaintiffs in any fashion or in any amount.

94. Any and all allegations set forth in Plaintiffs' Second Amended Complaint which have not heretofore been either expressly admitted or denied, are hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Second Amended Complaint fails to state a claim against Defendant upon which relief can be granted.

///

1 **SECOND AFFIRMATIVE DEFENSE**

2 Necessary and indispensable parties may not have been joined and/or parties may have
3 been improperly joined, including Defendant.

4 **THIRD AFFIRMATIVE DEFENSE**

5 Plaintiffs' claims are barred by the doctrines of laches, waiver and estoppel.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 Plaintiffs have failed to mitigate their damages.

8 **FIFTH AFFIRMATIVE DEFENSE**

9 Defendant owed no duty to Plaintiffs and to the extent owed, breached no duty alleged.

10 **SIXTH AFFIRMATIVE DEFENSE**

11 Defendant, at all times relevant to the allegations contained in Plaintiffs' Second Amended
12 Complaint, acted with reasonable care in the performance of any and all duties, if any.

13 **SEVENTH AFFIRMATIVE DEFENSE**

14 Plaintiffs' decedent failed to exercise ordinary care, caution or prudence for his own safety,
15 thereby proximately causing or contributing to the cause of Plaintiffs' damages, if any, through
16 Plaintiffs' decedent's own negligence.

17 **EIGHTH AFFIRMATIVE DEFENSE**

18 The negligence of Plaintiffs' decedent exceeded that of Defendant, if any, and therefore,
19 Plaintiffs are barred from recovery.

20 **NINTH AFFIRMATIVE DEFENSE**

21 Plaintiffs' decedent knowingly and voluntarily accepted, and/or assumed all risks.

22 **TENTH AFFIRMATIVE DEFENSE**

23 Damages sustained by Plaintiffs, if any, were caused by the acts of third persons who were
24 not acting on the part of Defendant in any manner or form, and as such, Defendant is not liable.

25 **ELEVENTH AFFIRMATIVE DEFENSE**

26 The liability, if any, of Defendant must be reduced by the percentage of fault of others,
27 including Plaintiffs' decedent.

28 ///

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TWELFTH AFFIRMATIVE DEFENSE

The alleged injuries and damages complained of by Plaintiffs were caused in whole or in part by a new, independent and superseding intervening cause over which Defendant had no control.

THIRTEENTH AFFIRMATIVE DEFENSE

The liability, if any, of Defendant is several and not joint and several and based upon its own acts and not the acts of others.

FOURTEENTH AFFIRMATIVE DEFENSE

If Plaintiffs have settled with any other parties, Defendant is entitled to credit and set-off in the amount of such settlement.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' and their decedent's injuries are the result of material alterations or modifications of the subject product, without the consent of the manufacturer, distributor or seller, in a manner inconsistent with the product's intended use.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' injuries are the result of unforeseeable misuse of the product at issue.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claim for punitive damages cannot be sustained because an award of punitive damages that is subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount of punitive damages that may be imposed, would: (1) violate Defendant's Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution; (2) violate Defendant's right not to be subjected to an excessive award; and (3) be improper under the Constitution, common law and public policies of Nevada.

EIGHTEENTH AFFIRMATIVE DEFENSE

Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as facts were not available after reasonable inquiry upon the filing of Defendant's Answer to Plaintiffs' Second Amended Complaint, and Defendant therefore reserves the right to amend its Answer to allege additional affirmative defenses if subsequent investigation

1 warrants.

2 WHEREFORE, having fully responded to the allegations of Plaintiffs' Second Amended
3 Complaint, Defendant respectfully prays:

- 4 1. that it be granted a trial by jury as to all appropriate issues;
- 5 2. that Plaintiffs take nothing by their Second Amended Complaint;
- 6 3. that Defendant be discharged from this action without liability;
- 7 4. that the Court award to Defendant all costs, including attorneys' fees, of this action;
- 8 and
- 9 5. that the Court award to Defendant such other and further relief as the Court deems
10 just and proper.

11
12 DATED this 6th day of February, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2018, a true and correct copy of the foregoing **ANSWER TO SECOND AMENDED COMPLAINT** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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Edward Hubbard

9
10 
11 An Employee of WEINBERG, WHEELER,
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CLERK OF THE COURT
Alvin B. Hanson

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KATAYOUN BARIN,
Plaintiff,

vs.

MOTOR COACH INDUSTRIES, INC.,
Defendant.

1 LAS VEGAS, NEVADA. FRIDAY, FEBRUARY 9, 2018, 2:12 P.M.

2 * * * *

3

4 THE COURT: This is on for a status check in
5 Khibani versus Motor Coach Industries. Your names for the
6 record, please?

7 MR. KEMP: Will Kemp for Plaintiff's, Your
8 Honor.

9 MR. CHRISTIANSEN: Pete Christiansen for the
10 Plaintiffs as well.

11 MR. ROBERTS: Lee Roberts for Motor Coach
12 Industries, Your Honor.

13 THE COURT: Okay. Very good. I have a list
14 of some ideas, but I'm happy to follow your preferences.

15 MR. KEMP: Whatever you have, Your Honor.

16 THE COURT: Should we talk about jury
17 selection?

18 MR. ROBERTS: That's what we wanted to do,
19 Your Honor, and we've already been informed that the Jury
20 Commissioner is bringing in 50 the first day.

21 THE COURT: Yes.

22 MR. ROBERTS: And we've discussed out in the
23 hallway, met and conferred. The concern is that the trial
24 might be going a little bit longer than we had planned.

25 THE COURT: Yes. And we're fortunate,

1 because my confirmed two-weeks setting starting the Monday
2 after the end of this settled.

3 MR. ROBERTS: Excellent.

4 THE COURT: So that gives us a little bit
5 more breathing room.

6 MR. ROBERTS: So we were thinking that we
7 might qualify the jury on five weeks rather than three to
8 four weeks.

9 THE COURT: Okay.

10 MR. ROBERTS: And Mr. Kemp has suggested
11 that if we do go a little longer, we might be safer with
12 an additional alternate, and he has proposed five
13 alternates, and that's acceptable to MCI if that's okay
14 with the Court.

15 THE COURT: I think that's absolutely fine.
16 Five alternates?

17 MR. KEMP: Just for insurance, Your Honor.

18 THE COURT: Well, no. I've lost two in a
19 two-week trial before when I was practicing, so it
20 happens. So let's go with five alternates.

21 MR. ROBERTS: And I assume that would be
22 four strikes each to the panel, and then one each against
23 the alternates? Or two each for all the alternates now
24 that we're going up to five; however you want to do that.

25 THE COURT: I've never had five alternates

1 before.

2 MR. ROBERTS: I know, me either. That's why
3 I'm asking.

4 THE COURT: Let me issue a minute order. I
5 just want to make sure that I'm doing everything --

6 MR. KEMP: And the other thing to think
7 about, Your Honor --

8 THE COURT: But if I'm able to give you
9 more, I will, but I want to make sure I follow the law,
10 okay.

11 MR. ROBERTS: Thank you, Your Honor.

12 MR. KEMP: Sometimes we're allowed to use
13 one of our strikes on the alternates if we want to.
14 Like, for example, if I have a main problem with the
15 eighth, then one of the four strikes I can use on an
16 alternate.

17 I don't know what the Court does, but some
18 Court's do that. I don't care which way it is, but I
19 think it should be clarified before we get going.

20 THE COURT: Okay. All right. I'll make
21 sure I include that. All right. Anything else with
22 respect to that?

23 MR. ROBERTS: I don't think so. Just maybe
24 practically speaking, Your Honor, your Marshal told us you
25 start one, the back left to right, and then I think we've

1 got 2 2 up here -- no, 20 here and four down here?

2 THE COURT: The alternate jurors are going
3 to be the last five in a row, okay.

4 MR. ROBERTS: So one, ten and then 21, 22,
5 23 and 24?

6 THE COURT: Nine, nine, four.

7 MR. ROBERTS: So eight plus five is 13, plus
8 ten for strikes, we need 23. So maybe we take one of
9 these chairs out. Ten, ten, three.

10 MR. CHRISTIANSEN: Then just so I'm
11 following, Your Honor, the alternates will sit -- will be
12 the last four, or five, I'm sorry, or the last five in the
13 second row?

14 THE COURT: No. They will be the last five
15 in the row closest to the --

16 MR. CHRISTIANSEN: Closest to the bar.

17 THE COURT: Yes, the bar, okay.

18 MR. ROBERTS: Your Honor, these three plus
19 the two on the end.

20 THE COURT: The very last five in the front
21 row which is closest to the bar, the very last five to the
22 right, to my right.

23 MR. ROBERTS: So 23, 22, 21, 19, 18, great.
24 Actually, the last four because we're going to get one
25 strike each. So the last four on the top row and these

1 three, that will be our -- right?

2 MR. KEMP: No, no, no,

3 MR. ROBERTS: If we have five alternates and
4 two strikes, the last seven seats will be alternates.

5 MR. KEMP: Just start it this way and you go
6 that way, right, right? You'd start whoever is left here,
7 and you keep going and you count from here.

8 THE COURT: It is going to depend on how
9 many strikes you have for the alternate, right. So right
10 now we know that you have the usual amount, and I'm going
11 to see if we admit that or not, okay.

12 MR. CHRISTIANSEN: And, Judge, my
13 understanding is, if, for example, Juror No. 4 has a
14 reason for cause that they leave, that you would replace
15 Juror No. 4 with the next person out in line out here in
16 the audience, as opposed to in some courts, everybody
17 stand up and move down one seat, which real hard to
18 follow?

19 THE COURT: No. They're going to come from
20 here. No, I -- frankly, it's too much for me.

21 MR. CHRISTIANSEN: Perfect. I just wanted
22 to make sure I was following. That way we can expect
23 what's coming.

24 THE COURT: I'm glad we're clarifying that,
25 that's good. No, that's musical chairs, which is fine,

1 but not during trial for me. All right.

2 Mr. ROBERTS: And then Tuesday and Thursday
3 of this week, Your Honor, should we plan to start at noon
4 or 1:00?

5 THE COURT: We could start at -- what is
6 your preference?

7 MR. KEMP: I'd rather run just the noon to
8 5:00, Your Honor, just to get five hours in.

9 THE COURT: Okay, that's fine. And we
10 should be done with our calendar with enough time for the
11 Clerks to have lunch.

12 MR. ROBERTS: But if you run late, then
13 we'll wait for you to --

14 THE COURT: We'll let you know.

15 MR. ROBERTS: -- get back from lunch.
16 That's no problem.

17 THE COURT: Well, if you need to contact --
18 both parties need to contact me, I'm not going to be
19 anywhere. I'm in chambers the whole time, just so you
20 know.

21 All right. So with respect to -- I'm going to
22 ask you, I know this is something we covered in one of the
23 Motions in Limine, with respect to questions concerning
24 ethnicity or that type of bias, would you prefer me to ask
25 the question, and I will write out the question before?

1 I'm just wondering. And, by the way, I'm open to 0your
2 suggestions.

3 MR. ROBERTS: I would be more comfortable
4 with that, Your Honor, because I know that you said you
5 could ask, but you just have to be sensitive to it.

6 THE COURT: Right.

7 MR. ROBERTS: There wasn't a real bright
8 line. And so I think I would be more comfortable to have
9 the Court ask those questions.

10 THE COURT: Mr. Kemp?

11 MR. KEMP: And is that going to be focused
12 on Persian, Iranian? Or is that --

13 THE COURT: Well, let's talk about it.
14 Let's talk about that right now, because I asked you to
15 submit questions before if you were going to discuss that,
16 what are your thoughts?

17 MR. KEMP: Well, if someone is obviously not
18 a Persian or an Iranian, why ask any questions of them,
19 that's point one.

20 And then point two was, there was some discussion
21 about the immigration ordeal, and I think that could lead
22 all, you know, everyone has got an immigrant story. I've
23 got one.

24 THE COURT: I have one.

25 MR. KEMP: You have one, and I'm sure

1 Mr. Roberts has one, his probably older than mine. But
2 everyone has an immigrant story. I don't really see the
3 need to get into immigrant stories right now.

4 THE COURT: Okay. Now, it was my
5 Understanding that part of your case was going to discuss
6 his story.

7 MR. ROBERTS: Yes.

8 THE COURT: Which included fleeing from his
9 native country because of the governmental regime change.
10 I also have friends who actually went through that, so I
11 understand it very well, starting over when after they've
12 lived a very privileged life in a good way.

13 I mean. They had a wonderful life and to come
14 over and start in a country where they barely spoke --
15 some spoke the language, others didn't. I just don't know
16 how you want that to fit in.

17 MR. KEMP: Well, Your Honor, the Motion in
18 Limine said Motion to Preclude Excessive Questioning.

19 THE COURT: Yes.

20 MR. KEMP: So we've always acknowledged that
21 there's some questions they can poke into a little bit,
22 but it's how much they want to poke -- I don't know how
23 much they want to poke into them.

24 THE COURT: All right. Let's do this. Why
25 don't you submit questions then to me. We can discuss