

Case No. 78701

In the Supreme Court of Nevada

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

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

Respondents.

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APPEAL

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

**APPELLANT'S APPENDIX
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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 My question to you is, even if you don't
2 want to look at it, can you look at it with sort
3 of dispassionate eyes and take its evidentiary
4 value for what it may be?

5 PROSPECTIVE JUROR NO. 11-1278: Yes.

6 MR. CHRISTIANSEN: Will you just close
7 your eyes and say, "I'm not looking at that.
8 That's gross"?

9 PROSPECTIVE JUROR NO. 11-1278: No. It
10 is gross. How can anyone not say -- how can it
11 not bother anyone?

12 MR. CHRISTIANSEN: Sure.

13 One of the areas that the jury will be
14 called upon to decide is whether Dr. Khiabani felt
15 any pain or had any suffering before he passed.

16 Is that something you think you could
17 consider and look at?

18 PROSPECTIVE JUROR NO. 11-1278: Sure.

19 MR. CHRISTIANSEN: My kid analogy works
20 great with you. Have you ever had your boys come
21 to you about one event with two different
22 versions?

23 PROSPECTIVE JUROR NO. 11-1278:

24 Actually, when you said that, no, never.

25 MR. CHRISTIANSEN: You have better kids

1 than me.

2 PROSPECTIVE JUROR NO. 11-1278: I
3 actually thought about that, and I haven't. They
4 will claim it.

5 MR. CHRISTIANSEN: All right. The
6 analogy, however, the common sense you sort of use
7 in life, could you apply it to what witnesses in
8 here will testify about?

9 PROSPECTIVE JUROR NO. 11-1278: Yes.

10 MR. CHRISTIANSEN: Do you think you
11 would be a good judge of credibility?

12 PROSPECTIVE JUROR NO. 11-1278: Yes.

13 MR. CHRISTIANSEN: You say that pretty
14 stridently. Tell me why you think.

15 PROSPECTIVE JUROR NO. 11-1278: I think
16 I am. I think I'm very much to the point. I look
17 at facts. I dig into facts. I look at it maybe a
18 little bit differently than maybe some people.
19 I'm fairly black-and-white in that aspect. And
20 sometimes it tends to irritate people because I
21 ask a lot of questions. I do get into detail,
22 whereas some people may be trying to sway me one
23 way or another, and I'm very straightforward.

24 MR. CHRISTIANSEN: You've heard that
25 this is a products liability case. It's not a

1 case about who broke what traffic law and any of
2 that stuff; right?

3 PROSPECTIVE JUROR NO. 11-1278: Yes.

4 MR. CHRISTIANSEN: Do you think you
5 could listen to Her Honor describe -- tell you
6 what the law is and apply those facts about
7 whether or not the defect caused the death --
8 defects -- caused the death of the doctor?

9 PROSPECTIVE JUROR NO. 11-1278: Yes.

10 MR. CHRISTIANSEN: One of your sons --
11 in questions about lawsuits, you answered a
12 question that I think your son's coach got hit or
13 your son's coach hit your son or something?

14 PROSPECTIVE JUROR NO. 11-1278: No, no.
15 I was trying to be detailed. Did you know of
16 anyone who has ever been in an accident? His
17 coach was in an accident so many years ago. I
18 barely even know the details. But I wanted to be
19 open, saying it was a nasty accident. But I don't
20 know -- I didn't know them then. It was when he
21 was very young.

22 MR. CHRISTIANSEN: Anything about --
23 sounds like a pretty far removed accident that
24 your son's coach was in years ago -- that would
25 cause you to lean towards one side or the other?

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1 PROSPECTIVE JUROR NO. 11-1278: No,
2 because I don't know the details of that case.

3 MR. CHRISTIANSEN: You sound like a lady
4 who wants to know details.

5 PROSPECTIVE JUROR NO. 11-1278: I need
6 to know details.

7 MR. CHRISTIANSEN: Are details and
8 facts, in your mind, sort of stubborn things; you
9 got to stick with them?

10 PROSPECTIVE JUROR NO. 11-1278: What do
11 you mean by that?

12 MR. CHRISTIANSEN: Sometimes you hear it
13 that facts are stubborn things. People want to
14 argue, but the facts are the facts. You sound
15 like a fact-oriented lady.

16 PROSPECTIVE JUROR NO. 11-1278: I'm very
17 fact-oriented. I listen to both sides. I
18 wouldn't say that, once my mind is set, that I
19 will not change it, because I have changed it.
20 But, again, it's because I dig and I listen and I
21 get the full facts of everything.

22 MR. CHRISTIANSEN: Okay. Great. I want
23 to make sure that you can wait to make up your
24 mind. The judge is going to tell all the jury --
25 jurors that you have to wait until the end to make

1 up your mind. You can't decide after opening
2 statements. You've got to wait until the defense
3 has a chance to put their case on.

4 You can do that if so instructed?

5 PROSPECTIVE JUROR NO. 11-1278: Oh, yes.

6 MR. CHRISTIANSEN: Okay. On the issue
7 of the harms and losses suffered by Aria and Keon
8 Khiabani, those are what a jury is to consider
9 when filling out the verdict form.

10 Can you commit to only considering those
11 things?

12 Remember I talked to others who said
13 they own small businesses, so they'd be
14 thinking -- they'd be worried about what effect a
15 verdict might have, and I said that's not
16 something for the courtroom.

17 So I'm asking that same question to you.

18 PROSPECTIVE JUROR NO. 11-1278: Yes.

19 MR. CHRISTIANSEN: Poorly worded
20 question.

21 You'll not think about those other
22 things and you'll just think about what the judge
23 tells you is relevant from the jury charges?

24 PROSPECTIVE JUROR NO. 11-1278: You mean
25 not think about --

1 MR. CHRISTIANSEN: The cost of business
2 going up because of a large verdict.

3 PROSPECTIVE JUROR NO. 11-1278: No, I
4 won't.

5 MR. CHRISTIANSEN: Judge has told you,
6 Mr. Roberts and I told everybody, nobody can talk
7 about insurance or think about it.

8 Are you okay with that?

9 PROSPECTIVE JUROR NO. 11-1278:
10 Absolutely.

11 MR. CHRISTIANSEN: You understand how
12 come that's pretty important?

13 PROSPECTIVE JUROR NO. 11-1278: I do. I
14 absolutely do.

15 MR. CHRISTIANSEN: If somebody guessed
16 wrong and surmised that there was insurance for
17 one side or another and there wasn't and a verdict
18 came out, that would be very skewed; right?

19 PROSPECTIVE JUROR NO. 11-1278: Yes.

20 MR. CHRISTIANSEN: So you're okay with
21 that?

22 PROSPECTIVE JUROR NO. 11-1278: I am.

23 MR. CHRISTIANSEN: Sounds like your
24 children are rule followers. How about yourself?

25 PROSPECTIVE JUROR NO. 11-1278: Yes.

1 MR. CHRISTIANSEN: Do you think that, as
2 a community, we should abide by the rules?

3 PROSPECTIVE JUROR NO. 11-1278: Sure.

4 MR. CHRISTIANSEN: Do corporations get
5 the same treatment as individuals in your mind?

6 PROSPECTIVE JUROR NO. 11-1278: Yes.

7 MR. CHRISTIANSEN: No special breaks or
8 they're not behind or ahead?

9 PROSPECTIVE JUROR NO. 11-1278: No,
10 they're not behind or ahead.

11 MR. CHRISTIANSEN: I talked to the jury
12 as a whole about jurors' rights to hear all the
13 evidence, ask questions if they want, you know,
14 things of that nature.

15 Could you participate in that process?

16 PROSPECTIVE JUROR NO. 11-1278: Yes.

17 MR. CHRISTIANSEN: You might like asking
18 questions?

19 PROSPECTIVE JUROR NO. 11-1278: I love
20 asking questions.

21 MR. CHRISTIANSEN: You'll see that lots
22 of times the judge will tell me, for example,
23 "That's a bad question, Mr. Christiansen. Ask it
24 a different way or don't ask it at all." It
25 happens.

1 And so if the judge were to not ask your
2 question, could you put that out of your mind?

3 PROSPECTIVE JUROR NO. 11-1278: Sure.

4 MR. CHRISTIANSEN: She makes the rules.

5 PROSPECTIVE JUROR NO. 11-1278: She
6 makes the rules.

7 MR. CHRISTIANSEN: Can you unequivocally
8 tell us you'll put your own feelings aside and
9 decide this case based on the facts in the
10 courtroom?

11 PROSPECTIVE JUROR NO. 11-1278: Yes.

12 MR. CHRISTIANSEN: Can you tell us
13 unequivocally that both parties are starting from
14 the same line?

15 PROSPECTIVE JUROR NO. 11-1278: Yes,
16 they are.

17 MR. CHRISTIANSEN: And no bias or
18 prejudice will affect your consideration?

19 PROSPECTIVE JUROR NO. 11-1278: No.

20 MR. CHRISTIANSEN: My clients are
21 first-generation Americans. Their parents both
22 escaped Tehran during the revolution.

23 Anything about that going to cause you a
24 bias in favor of them or against them?

25 PROSPECTIVE JUROR NO. 11-1278: No.

1 MR. CHRISTIANSEN: Can you unequivocally
2 tell us you'll be fair and impartial?

3 PROSPECTIVE JUROR NO. 11-1278: Yes.

4 MR. CHRISTIANSEN: Treat each side
5 fairly?

6 PROSPECTIVE JUROR NO. 11-1278: Yes.

7 MR. CHRISTIANSEN: One of my earlier
8 questions to everybody was that you promise you
9 won't do your own research?

10 PROSPECTIVE JUROR NO. 11-1278: I
11 promise.

12 MR. CHRISTIANSEN: No going out and
13 taking measurements, stay off Google Maps, no
14 doing anything like that?

15 PROSPECTIVE JUROR NO. 11-1278: No doing
16 anything like that.

17 MR. CHRISTIANSEN: All right. And are
18 you open to hearing testimony from economists in
19 the case talk about things like probable support
20 of Dr. Khiabani for his boys? Could you listen to
21 the testimony?

22 PROSPECTIVE JUROR NO. 11-1278: Yes.

23 MR. CHRISTIANSEN: Similarly, if we have
24 a punitive damages section of the case, could you
25 listen to economists testify about what amounts of

1 money the defendant, Motor Coach Industries, could
2 afford to pay without being annihilated?

3 PROSPECTIVE JUROR NO. 11-1278: Yes.

4 MR. CHRISTIANSEN: Your Honor, on behalf
5 of the estate of Katy Barin and Aria Barin, we
6 pass this juror for cause.

7 MR. KEMP: We pass too.

8 THE COURT: Mr. Roberts.

9 MR. ROBERTS: Thank you, Your Honor.

10 Hi. And it's --

11 PROSPECTIVE JUROR NO. 11-1278: Hello.

12 MR. ROBERTS: Ms. Mundo; right?

13 PROSPECTIVE JUROR NO. 11-1278: Mundo.

14 MR. ROBERTS: Badge number?

15 PROSPECTIVE JUROR NO. 11-1278: 11-1278.

16 MR. ROBERTS: Okay. I'd like to follow
17 up with you on a couple of the questions from
18 Mr. Christiansen, catch you up with the rest of
19 the panel, and then we'll keep going. Okay?

20 PROSPECTIVE JUROR NO. 11-1278: Okay.

21 MR. ROBERTS: You mentioned that you had
22 to be a follower at work. Did I get that right?

23 PROSPECTIVE JUROR NO. 11-1278: Yes.

24 MR. ROBERTS: Are you a leader in other
25 parts of your life?

1 PROSPECTIVE JUROR NO. 11-1278: Yes.

2 MR. ROBERTS: What parts of your life do
3 you feel that you're a leader?

4 PROSPECTIVE JUROR NO. 11-1278:
5 Obviously, in my household. If you knew my
6 family, someone has to be a leader. Yes.
7 Obviously, through my kids' school, I was heavily
8 involved in the PTA. I was always the president,
9 because no one else would be. But I was the
10 president for nine years. I was always a leader
11 through there. I loved that. And then I also
12 worked my way through PTA in the state department.
13 I was on their board.

14 MR. ROBERTS: On the board of the
15 statewide PTA?

16 PROSPECTIVE JUROR NO. 11-1278: Yes.

17 MR. ROBERTS: That's great. Thanks for
18 your service.

19 Any other areas other than your family
20 and school? Or that sounds like it's going to
21 take about all your time since you're not working.

22 PROSPECTIVE JUROR NO. 11-1278: Yes.
23 That's my life.

24 MR. ROBERTS: And you went to Basic?

25 PROSPECTIVE JUROR NO. 11-1278: Yes.

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1 MR. ROBERTS: And that was the new
2 Basic; right?

3 PROSPECTIVE JUROR NO. 11-1278: The new
4 Basic.

5 MR. ROBERTS: How old --

6 PROSPECTIVE JUROR NO. 11-1278: Well, I
7 guess you would call it the new basic. It looks
8 brand new now.

9 MR. ROBERTS: When Mr. Kemp went there,
10 the new Basic was new.

11 PROSPECTIVE JUROR NO. 11-1278: I don't
12 know. I'm not sure what year that was. But the
13 old Basic -- my mother went to the old Basic.

14 MR. ROBERTS: Let's talk about my
15 questions on corporations.

16 Were you paying attention when I was
17 going through the detailed questions with
18 Ms. Wooters in the front?

19 PROSPECTIVE JUROR NO. 11-1278: Yes.

20 MR. ROBERTS: Okay. To sort of group
21 them together, as I did with the rest of the
22 panel, do you think that the government should
23 police large corporations somewhat more, much
24 more, or they're doing just fine?

25 PROSPECTIVE JUROR NO. 11-1278: I'm not

1 sure if I understand that exactly. Should they
2 police them more than what they do now?

3 MR. ROBERTS: Yes.

4 PROSPECTIVE JUROR NO. 11-1278: You
5 know, again, I kind of follow that line. I don't
6 know the details of how much they police them, you
7 know. Like, he gave the analogy, you can turn on
8 Fox and turn on CNN. One says they have too much
9 policing, and the other one says they don't have.

10 So I kind of don't know. I don't know
11 that answer. Do I think that they police them
12 enough? I hope so. I don't know -- I don't know
13 the facts of that, if they do. I have to assume
14 that they do.

15 MR. ROBERTS: Do you trust Fox or CNN
16 more?

17 PROSPECTIVE JUROR NO. 11-1278: Neither.

18 MR. ROBERTS: Neither. Okay.

19 PROSPECTIVE JUROR NO. 11-1278: I'm an
20 NPR person.

21 MR. ROBERTS: NPR in the mornings or the
22 afternoons?

23 PROSPECTIVE JUROR NO. 11-1278: All day.

24 MR. ROBERTS: All day.

25 Do you feel that the government favors

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1 large corporations over individuals, especially in
2 the last year or so?

3 PROSPECTIVE JUROR NO. 11-1278: It
4 depends on the politician.

5 MR. ROBERTS: What about right now?

6 PROSPECTIVE JUROR NO. 11-1278: I would
7 say as a whole, I would like to say no, but we
8 know that some of them do.

9 MR. ROBERTS: How often do you believe a
10 large corporation would lie if it could benefit
11 financially from doing so?

12 PROSPECTIVE JUROR NO. 11-1278: I don't
13 know if any of them actually lie. I think they --
14 do they skew the facts? I don't know. Because
15 they have their way of doing their business and
16 they are the experts on how their business works.

17 And I can say, yes, I think they lie all
18 the time, but then when you get into it and you
19 hear the facts, you could say I could see how that
20 way is why they do it that way, why they have to
21 make that decision. We may not agree with it, but
22 you can kind of understand the way that they go
23 with that because they're the experts in that
24 business.

25 MR. ROBERTS: I understand. Do you feel

1 that corporations should be held to a higher
2 safety standard than individuals because of the
3 number of the people their products can effect?

4 PROSPECTIVE JUROR NO. 11-1278: Yes.

5 MR. ROBERTS: Are you willing to hold
6 the corporation to the same standards as an
7 individual in this case and follow the
8 instructions of the Court despite that feeling?

9 PROSPECTIVE JUROR NO. 11-1278: Yes.

10 MR. ROBERTS: Yes.

11 You mentioned that you rode bikes and
12 that you felt the air disturbance when a vehicle
13 passes you; right?

14 PROSPECTIVE JUROR NO. 11-1278: Yes.

15 MR. ROBERTS: Have you ever been scared
16 when that happened?

17 PROSPECTIVE JUROR NO. 11-1278: Have I
18 ever been scared? I've been scared on bikes.
19 Scared of a fly too sometimes.

20 MR. ROBERTS: Have you been scared by
21 the wind?

22 PROSPECTIVE JUROR NO. 11-1278: No, no.
23 But, again, like I said, I ride in a rural area.
24 I know when the cars are approaching. So I kind
25 of, you know, do what I need to do. But, again,

1 they're small. There's no trucks that run through
2 there or any large vehicles.

3 MR. ROBERTS: Okay. And we've talked a
4 little bit -- some of the people, I think, who
5 were going and have been riding bikes who felt the
6 wind off of the vehicle, anyone that said yes to
7 that question felt scared when that happened?

8 Ms. Hall, I believe you were one of the
9 people who answered that you've felt that effect?

10 PROSPECTIVE JUROR NO. 11-0902: Yes.

11 MR. ROBERTS: Could you pass the
12 microphone down to Ms. Hall.

13 PROSPECTIVE JUROR NO. 11-0902: Sherry
14 Hall, 11-0902.

15 Yes, kind of afraid. It depends on the
16 size of the vehicle and whether or not I hear it
17 before it's upon me. But if it's -- if it's upon
18 me before I know it and I feel that, yeah, it
19 could be kind of scary.

20 MR. ROBERTS: Have you ever been knocked
21 over?

22 PROSPECTIVE JUROR NO. 11-0902: No.

23 MR. ROBERTS: You've mentioned that
24 you've felt a pull, but I wrote down a pull away
25 from the vehicle. Which way did you feel that

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1 affected you?

2 PROSPECTIVE JUROR NO. 11-0902: It pulls
3 me, like, into the curb. Most of the time, I just
4 stop so -- and to allow it to pass me by. But I
5 do small streets. I mean, I'm not on, like, Red
6 Rock and an area like that; I do small streets.

7 MR. ROBERTS: With speed limits, like,
8 35 miles an hour and under?

9 PROSPECTIVE JUROR NO. 11-0902: That's
10 what they should be doing.

11 MR. ROBERTS: On the streets that you
12 ride, the speed limit posted is 35 or under?

13 PROSPECTIVE JUROR NO. 11-0902: I would
14 say 40 and under.

15 MR. ROBERTS: Okay. And do I remember
16 correctly that you said that one of the times you
17 felt maybe scared was on Jones?

18 PROSPECTIVE JUROR NO. 11-0902: Yes. I
19 ride Jones a lot.

20 MR. ROBERTS: And that's 45; right?

21 PROSPECTIVE JUROR NO. 11-0908: I think
22 so, yeah.

23 MR. ROBERTS: Okay. Anyone on the panel
24 ever felt pulled toward a vehicle when they rode a
25 bicycle?

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1 Going back to last week when
2 Mr. Christiansen was talking, he said that the
3 parties agreed that the bus rolled over
4 Dr. Khiabani's head. Does everyone remember that?

5 Did anyone get a mental image that
6 bothered them?

7 I just wanted to clarify that, although
8 we agree that the bus's tires impacted
9 Dr. Khiabani's head, there is a difference of
10 opinion and a dispute about how he was killed,
11 what the mechanism of injury was.

12 Everyone agree to listen to that
13 evidence, wait for our case, even though it may be
14 a couple months from now, and not form an opinion
15 about how Dr. Khiabani was injured?

16 PROSPECTIVE JUROR NO. 11-0902: I
17 object.

18 THE COURT: I'd like you to approach,
19 please.

20 MR. ROBERTS: Oh, did I? Oh, gosh.
21 This is the time my brain reboots every day.

22 A couple of weeks. I misspoke.

23 THE COURT: You're all listening.

24 MR. ROBERTS: Yes, thank you. I didn't
25 even realize I'd said it.

1 A couple of weeks. I was thinking about
2 that construction defect case upstairs. That's
3 not us.

4 So -- and Pete has covered this. Is
5 there anyone left on the panel that just can't
6 bring themselves to look not only at pictures, but
7 a bystander took a video, of Dr. Khiabani right
8 after this happened? Everyone okay with having to
9 look at that?

10 One of the issues in this case is not
11 whether he caused pain and suffering. That's not
12 in dispute, that there was some pain and
13 suffering, but for how long he did. Can everyone
14 keep an open mind about the medical evidence and,
15 despite the fact he was killed by such a large
16 vehicle, that he may not have suffered for too
17 long? Is everyone open to that?

18 Ms. Phillips, I want to go back and get
19 a little information from you, if I could.

20 PROSPECTIVE JUROR NO. 11-1035: Badge
21 No. 11-1035, Pamela Phillips-Chong.

22 MR. ROBERTS: Thank you. You work for
23 Transdev?

24 PROSPECTIVE JUROR NO. 11-1035: Correct.

25 MR. ROBERTS: And we've been referring

1 to that as a bus company; right?

2 PROSPECTIVE JUROR NO. 11-1035: Yes.

3 MR. ROBERTS: But Transdev doesn't make
4 buses or sell buses; right?

5 PROSPECTIVE JUROR NO. 11-1035: No.

6 MR. ROBERTS: And you understand that my
7 client sold the bus in question?

8 PROSPECTIVE JUROR NO. 11-1035: Right.

9 MR. ROBERTS: Okay. You were describing
10 the buses you are responsible for the maintenance
11 on at work.

12 PROSPECTIVE JUROR NO. 11-1035: Yes.

13 MR. ROBERTS: And those are the
14 paratransit buses; right?

15 PROSPECTIVE JUROR NO. 11-1035: Correct.

16 MR. ROBERTS: Now, are those motor
17 coaches or transit buses, or are they modified
18 vans?

19 PROSPECTIVE JUROR NO. 11-1035: There's
20 a little bit of aftermarket on those considering
21 the camera systems. The OEM stuff is built into
22 the bus. So we get -- we get aftermarket products
23 that -- like, the backup, the Echovision, and --
24 which is part of the backup systems, where they
25 have two sensors in the rear, that if you approach

1 something, it beeps.

2 And we also have -- below the MDTs, we
3 have a screen that shows, like -- you know, they
4 show if you're going to hit something. They still
5 have accidents, though, the drivers, but still ...

6 And then we also have cameras throughout
7 the bus, because this is a personal service, we're
8 picking clients up from homes, taking them to
9 doctors and stuff like that.

10 And then we also had cameras at one
11 point in the front of the windshield, where --
12 that was for the drivers because they was having
13 issues with the clients, you know, attacking them.

14 MR. ROBERTS: And these are cameras that
15 would document what happened inside the bus in
16 case --

17 PROSPECTIVE JUROR NO. 11-1035: And
18 outside.

19 MR. ROBERTS: -- in case there was some
20 incident, it could be reviewed later?

21 PROSPECTIVE JUROR NO. 11-1035: Correct.

22 MR. ROBERTS: They weren't for the
23 benefit of the driver while he was operating the
24 vehicle?

25 PROSPECTIVE JUROR NO. 11-1035: I

1 wouldn't say that because it does constantly
2 record. And if there is a braking issue or if the
3 driver, you know, they G force, it will trigger
4 it.

5 MR. ROBERTS: Right. But the driver is
6 not monitoring those cameras as he's operating the
7 vehicle?

8 PROSPECTIVE JUROR NO. 11-1035: No, no,
9 it's the actual operations that it does.

10 MR. ROBERTS: And you mentioned a backup
11 sensor and maybe a front sensor that the driver
12 would use; correct?

13 PROSPECTIVE JUROR NO. 11-1035: We have
14 a thing called Echovision, which is -- there's two
15 immediate rear sensors. They come in a block, and
16 they have two sensors in there. And it picks up
17 anything obstructing or if they're going to back
18 into something. And it has an audible and a box
19 that beeps at them. It's right on the dash.

20 MR. ROBERTS: Any other type of sensors
21 on the vehicle, like a side sensor or a front
22 sensor?

23 PROSPECTIVE JUROR NO. 11-1035: Not that
24 I know of, no front or sides, besides cameras.

25 MR. ROBERTS: So if I wrote this down

1 right, you worked for ATC Vancom and then Laidlaw
2 and then First Transit and then Transdev.

3 PROSPECTIVE JUROR NO. 11-1035: Yeah,
4 four companies.

5 MR. ROBERTS: So were you working for
6 First Transit when they lost the bid protest? Do
7 you know about that situation?

8 PROSPECTIVE JUROR NO. 11-1035: Yes.

9 MR. ROBERTS: Did you ever go down to
10 the county commission, to those hearings at the
11 county commission?

12 PROSPECTIVE JUROR NO. 11-1035: No.

13 MR. ROBERTS: Were you upset when First
14 Transit lost that protest?

15 PROSPECTIVE JUROR NO. 11-1035: Not
16 really.

17 MR. ROBERTS: Not really? And you did
18 fine? You got hired by Transdev?

19 PROSPECTIVE JUROR NO. 11-1035: Yeah, it
20 was just a piggyback process. They just kind of
21 took the same people and gave them their jobs.

22 Like, through those four companies, I've
23 managed to stay in every time, so -- because I'm a
24 foreman, so I do graveyard.

25 And, like I was saying, we do PM on the

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1 buses. So those are considered part of our
2 safety. And we also do have safety meetings on
3 them.

4 MR. ROBERTS: And you do graveyard, but
5 you're not going to do graveyard during the trial;
6 right?

7 PROSPECTIVE JUROR NO. 11-1035: Oh, no.
8 Well, I'm doing both, working and coming here.

9 MR. ROBERTS: Are you? So are you
10 staying up all night long and then coming here?

11 PROSPECTIVE JUROR NO. 11-1035: Yes, I
12 have to.

13 MR. ROBERTS: Okay. Have you had any
14 trouble staying awake and paying attention?

15 PROSPECTIVE JUROR NO. 11-1035: No.

16 MR. ROBERTS: No? You're doing fine?

17 PROSPECTIVE JUROR NO. 11-1035: Right.

18 MR. ROBERTS: So I want to ask
19 everyone -- and I know this came up earlier, and
20 there's some people who lawyers tend to annoy.

21 Have I bothered anyone so much the last
22 couple days that you couldn't be fair to my
23 client?

24 No. Is that someone out there?

25 Going back to Mr. Christiansen. If you

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1 remember him going through and talking to a lot of
2 people about whether there was a ceiling, that if
3 he met the burden of proving that the bus
4 company -- my client, Motor Coach Industries --
5 was at fault under the standards that are going to
6 be given to you by the Court, is there a number
7 that you couldn't go above. Do you remember him
8 asking you that question?

9 I want to ask the opposite question.
10 Based on the big numbers that Mr. Christiansen has
11 been talking about, is there anyone who already
12 has an idea of a number they wouldn't go under if
13 they found that Motor Coach Industries was
14 responsible?

15 Is there anyone who wouldn't be open to
16 a number under a million dollars?

17 Hundreds of thousands, even if you found
18 that Motor Coach Industries was responsible?

19 Everyone is open to that? If you're
20 open to that, raise your hand. Come on.

21 Thank you, Ms. Brown. Oh, your head was
22 down, but you raised your hand. You're paying
23 attention.

24 MR. BARGER: She's telling you it's time
25 to finish.

1 MR. ROBERTS: I think she is.

2 MR. BARGER: Sorry.

3 MR. ROBERTS: You see, I don't know if
4 he cheated by looking at my notes, but I think I
5 am finished.

6 Could I confer just a moment with my
7 co-counsel, Your Honor?

8 THE COURT: Yes.

9 MR. ROBERTS: Your Honor, the defendant
10 would pass the panel for cause.

11 THE COURT: Okay. Thank you. I'd like
12 to see the attorneys at the bench for a moment,
13 please.

14 (A discussion was held at the bench,
15 not reported.)

16 THE COURT: We're going to take a
17 15-minute break. And I'd like you to be in front
18 of the courtroom precisely a few minutes after you
19 walk out. I'm going to admonish you again.

20 You're instructed not to talk with each
21 other or with anyone else about any subject or
22 issue connected with this trial. You're not to
23 read, watch, or listen to any report of or
24 commentary on the trial by any person connected
25 with this case or by any medium of information,

1 including, without limitation, newspapers,
2 television, the internet, or radio.

3 You're not to conduct any research on
4 your own relating to this case, such as consulting
5 dictionaries, using the internet, or using any
6 reference materials. You're not to conduct any
7 investigation, test any theory of the case,
8 re-create any aspect of the case, or in any other
9 way investigate or learn about the case on your
10 own.

11 You're not to talk with others, text
12 others, tweet others, message others, google
13 issues, or conduct any other kind of book or
14 computer research with regard to any issue, party,
15 witness, or attorney involved in this case.

16 You are not to form or express any
17 opinion on any subject connected with this trial
18 until the case is finally submitted to you.

19 Let's take a 15-minute break.

20 THE MARSHAL: All rise for the jury.

21 (The following proceedings were held
22 outside the presence of the jury.)

23 THE MARSHAL: We actually have two jury
24 rooms. I believe one is being used by Judge Wiese
25 right now.

1 MR. CHRISTIANSEN: We can go in this
2 room if that's okay, Judge.

3 THE COURT: All right. Just make sure
4 the jurors aren't --

5 MR. CHRISTIANSEN: We can be quiet,
6 close the door behind us.

7 (Whereupon, a recess was taken.)

8 THE COURT: I just want to make sure we
9 have a plan, as we discussed earlier. Is everyone
10 here?

11 I'm not sure I was on the record or not.

12 THE COURT RECORDER: We're not now.

13 THE COURT: Maybe we should go on the
14 record.

15 THE COURT RECORDER: Go on?

16 THE COURT: Yes, please.

17 You may be seated.

18 Okay. So the parties have passed for
19 cause. Now we're going into the peremptory
20 challenge for jurors. Each party has four
21 peremptory challenges.

22 So you're going to exercise those first.
23 And then each of you -- each party has three
24 peremptory challenges for the alternate jurors,
25 and those will be exercised afterwards.

1 So I understand that you may want to sit
2 further back; is that correct?

3 MR. KEMP: Lee, what do you want to do,
4 sit up here and go in the back?

5 MR. ROBERTS: I'm fine. I'm fine.

6 THE COURT: Are you sure?

7 MR. ROBERTS: Yes. We've conferred, so
8 we'll be able to do this with minimal
9 conferencing, I believe. The 15 minutes helped us
10 get that done.

11 THE COURT: Very good. I'm going to
12 keep the jurors here. I do think that Mr. Kemp
13 has a good point in that sometimes, at least for
14 me, I still can't remember some of their names.
15 Maybe it's because I'm not selecting but I'm sort
16 of in a different situation.

17 But -- and let me know when you want to
18 come up to the bench, and I will be happy to
19 excuse them. All right? Anything else?

20 MR. KEMP: Judge, I'm assuming we're
21 going to have to do a couple Batson challenges
22 just because we always do. I don't know if you
23 want us to come to the bench, given that there's
24 so many people here, or maybe we go in the back or
25 whatever --

1 THE COURT: We can go in the back and we
2 can --

3 MR. KEMP: It might be quicker going in
4 the back given the number of jurors we have.

5 THE COURT: Okay. Very good.

6 MR. KEMP: Unless Mr. Roberts assures me
7 we won't have this issue.

8 MR. ROBERTS: There won't be any valid
9 issue.

10 MR. KEMP: Oh, there won't be any valid?

11 MR. ROBERTS: I can assure you of that.

12 MR. BARGER: If you're going to go to
13 the back, you've got to make sure that it's on the
14 record.

15 (Discussion off the record.)

16 MR. ROBERTS: It's like a bench
17 conference. You can go in the back, she can grant
18 it or deny it, and then come back in the courtroom
19 and she can put it on the record.

20 (Discussion off the record.)

21 THE MARSHAL: All rise. Jury entering.

22 All jurors are accounted for, Your
23 Honor.

24 THE COURT: Thank you. Parties
25 stipulate to the presence of the jury?

1 MR. KEMP: Yes, Your Honor.

2 MR. ROBERTS: Yes, Your Honor.

3 THE COURT: Ladies and gentlemen, I
4 think I've been trying to inform you of the
5 sequence -- or the trial chronology. So the
6 parties have passed for cause now, and they're
7 going to be exercising their peremptory
8 challenges. Okay?

9 And so I'd like you to stay in your
10 seats. If you need to stand up a little bit while
11 they're doing that, that's fine, or stretch or
12 anything like that, but I need you to stay in your
13 designated seats. Okay?

14 Thank you.

15 Counsel?

16 MR. KEMP: Judge, do you have the piece
17 of paper?

18 Your Honor, can we approach?

19 THE COURT: Certainly.

20 (A discussion was held at the bench,
21 not reported.)

22 THE COURT: Ladies and gentlemen, we
23 have to confer out of the presence of the jury,
24 and we can't bring the record outside. So I'm
25 going to give you a break. And I have to admonish

1 you again.

2 You're instructed not to talk with each
3 other or with anyone else about any subject or
4 issue connected with this trial. You're not to
5 read, watch, or listen to any report of or
6 commentary on the trial by any person connected
7 with this case or by any medium of information,
8 including, without limitation, newspapers,
9 television, the internet, or radio.

10 You're not to conduct any research on
11 your own relating to this case, such as consulting
12 dictionaries, using the internet, or using any
13 reference materials. You're not to conduct any
14 investigation, test any theory of the case,
15 re-create any aspect of the case, or in any other
16 way investigate or learn about the case on your
17 own.

18 You're not to talk with others, text
19 others, tweet others, message others, google
20 issues, or conduct any other kind of book or
21 computer research with regard to any issue, party,
22 witness, or attorney involved in this case.

23 You are not to form or express any
24 opinion on any subject connected with this trial
25 until the case is finally submitted to you.

1 I believe 10 minutes should be
2 sufficient.

3 MR. CHRISTIANSEN: 10 minutes should be
4 fine, Your Honor.

5 THE COURT: And please stay close to the
6 courtroom.

7 THE MARSHAL: All rise for the jury.

8 (The following proceedings were held
9 outside the presence of the jury.)

10 THE COURT: You may be seated. There's
11 been a peremptory challenge made to --

12 MR. KEMP: To Ms. Hall, and they're
13 required to state a racially neutral reason, Your
14 Honor.

15 THE COURT: Mr. Kemp, the record is not
16 picking you up.

17 MR. KEMP: Ms. Hall, and she's badge
18 number ...

19 MR. CHRISTIANSEN: 11-0902. And she's
20 seated at Seat 16, Your Honor.

21 THE COURT: Thank you.

22 MR. BARGER: I'll handle that, if I may,
23 Your Honor.

24 THE COURT: Mr. Barger?

25 MR. BARGER: May it please the court, I

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1 will list the reasons.

2 She thinks corporations always lie.

3 With respect to the warning issue, she
4 thought somebody should be warned about hot
5 coffee. There's a warnings issue in this case.
6 And for someone to think you should be warned
7 about holding a cup of coffee, we find concern
8 with that.

9 She's a mental health counselor, of
10 which there will be issues in this case,
11 obviously, involving sympathy and with respect to
12 children losing their parents.

13 She has a BA degree in criminal justice,
14 has legal training, but she's not in the legal
15 justice system, but she did go for two years and
16 had legal training.

17 She is regularly a leader.

18 She's a bike rider, feels pull on the
19 bike, has felt air displacement, and she feels
20 scared when large vehicles come near her.

21 Those are our reasons for striking
22 Ms. Hall, respectfully.

23 Thank you, Your Honor.

24 MR. KEMP: Judge, with all due respect,
25 at least five or six other jurors also said -- and

1 I'm going down his reasons, his alleged reasons --
2 also said that they thought McDonald's should give
3 a warning. Didn't bump any of them.

4 On the corporation issue, she said in
5 response to Mr. Christiansen's questioning that
6 she would be fair to the corporation and the
7 individual.

8 And bike riders, we have at least ten
9 people who have said not only do they ride a bike,
10 but they also said that they have felt air
11 displacement. And the fact that she felt scared,
12 I don't know how that adds into a reason for
13 peremptory challenge.

14 So I think what we've heard is we've
15 heard reasons that are applicable to all the
16 jurors, not just to her; the ones they're not
17 bumping. And I don't consider any of those
18 race-neutral reasons, Your Honor.

19 And the criminal justice one, even if
20 this were a criminal case, that's not strong
21 enough showing on -- this isn't a criminal case.
22 Sometimes on a criminal case, you hear an argument
23 that the juror has expressed disdain from the
24 criminal justice system.

25 They don't even have that, Your Honor.

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1 All they have is that she takes criminal justice
2 classes. They had the opportunity to go into it.

3 So I haven't heard any, any race neutral
4 reason for bumping this juror that doesn't apply
5 to at least five or six other jurors.

6 MR. ROBERTS: Your Honor, if I could
7 respond to Mr. Kemp.

8 THE COURT: Yes.

9 MR. ROBERTS: In the case of Diomampo v.
10 State of Nevada, 124 Nev. 414 from 2008, the
11 Nevada Supreme Court discussed Batson and the
12 standard for a Batson challenge and the
13 race-neutral reason.

14 Nevada Supreme Court cited Purkett v.
15 Elem and explained that the second step of the
16 process does not demand an explanation that is
17 persuasive or even plausible. "The race-neutral
18 explanation 'is not a reason that makes sense, but
19 a reason that does not deny equal protection.' In
20 addition, we stated in Ford v. State that 'where a
21 discriminatory intent is not inherent in the
22 State's explanation, the reason offered should be
23 deemed neutral.' However, 'an implausible or
24 fantastic justification by the State may and
25 probably will be found under the third prong of

1 Batson to be pretext.'" 005287

2 And certainly the multiple explanations
3 given by Mr. Barger are plausible and rational
4 reasons for striking this juror. And in response
5 to Mr. Kemp's statement that lots of other jurors
6 had similar qualities, not many had this
7 combination of qualities, if any.

8 And, in fact, I believe that she was the
9 only juror who responded that strongly to "all
10 corporations always lie" and the other things that
11 demonstrated an anticorporate bias. Persuasion
12 strategies. There are publications that have
13 created an anticorporate bias scale which those
14 questions are based on and which highly correlate
15 high scores on an anticorporate bias scale to
16 finding that a product is defective.

17 And the fact that she believes
18 corporations always lie and was so strong and her
19 demeanor was so strong in answering the corporate
20 bias questions were the primary reasons that we
21 believe the strike was appropriate and necessary
22 for this juror.

23 MR. KEMP: Judge, the most recent case
24 on Batson from our high court is Brass v. State,
25 Your Honor.

1 THE COURT: I have to get a mic here
2 because I'm very soft-spoken, and they weren't
3 picking me up either.

4 MR. KEMP: Your Honor, that's the 2013
5 case. And the court said that the reason -- this
6 is a direct quote -- "The reason must be related
7 to the particular case."

8 So the reason they're giving has to be
9 related to this case. Okay. They've said, number
10 one, that she's got -- it's Brass v. State, Your
11 Honor. 128 Nev. 748. And I'm reading, it's
12 Headnote 9, 10, 11, and 12. I believe this is
13 Headnote 12.

14 So the reason has to be related to this
15 particular case. So let's look at their reasons.

16 She's a criminal justice major? What
17 does that have to do with this particular case?
18 Absolutely nothing, Your Honor.

19 A corporation lying? Has there been any
20 evidence introduced by either party in this case
21 about deceit or fraud by a corporation? No, there
22 hasn't, Your Honor. So the fact she thinks some
23 corporations lie -- and some of them do; I
24 agree -- doesn't have anything to do with this
25 particular case. So the reasons they've given

1 have to be related to this particular case.

2 The only thing they've said that's
3 related to this particular case is that she rides
4 a bike and that she's experienced air
5 displacement, which almost every one of the jurors
6 has said. So to suggest that that is a plausible
7 reason to disqualify this juror is not valid.

8 MR. ROBERTS: Your Honor, may I just
9 respond to one of the points raised by Mr. Kemp?

10 THE COURT: Yes.

11 MR. ROBERTS: And I haven't addressed
12 the connection. And I'd like to focus on the
13 anticorporate bias.

14 It doesn't matter whether or not there's
15 evidence of a corporation lying in this case.
16 That's not the point of the research. In the
17 research -- and I'd refer the Court, and I can
18 mark this later for the record -- August 30th,
19 2012, "The Products Survey (Part III): Safety
20 Test Your Jurors," by Dr. Ken Broda-Bahm, dealing
21 with product liability cases.

22 The questions, for example, do
23 corporations lie? "Often" would be a 3; "almost
24 always" would be a 4. Similar questions have that
25 same scale that I asked.

1 Jurors with above a 3.28 -- so somewhere
2 between always and often -- are statistically
3 designated as high-risk in a products liability
4 case and, according to this article, those with a
5 high anticorporate bias score were statistically
6 more likely to find that a product was defective
7 under a standard scenario given to both low-risk
8 and high-risk jurors.

9 That is a direct connection to this case
10 where it's a product liability issue involved.
11 And we believe, based on her anticorporate bias
12 score, one of the highest on the jury, she would
13 be more likely to find against us regardless of
14 the facts.

15 Thank you, Your Honor.

16 MR. KEMP: Your Honor, he's just
17 admitted it wasn't the highest anticorporate score
18 he had on the jury. He had other people that said
19 a lot worse things about corporations than this
20 particular juror did. All this juror said is that
21 sometimes, in her opinion, corporations lie.

22 And I think that's a truism, Your Honor.
23 Sometimes corporations do lie. We've learned that
24 in the last 30 years.

25 So to disqualify a juror because she

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1 said some corporations lie, that is not a valid
2 reason when it has to be a race-neutral reason,
3 it's got to be related to the particular case, and
4 they have to give a clear and reasonably specific
5 explanation of a legitimate reason. Okay.

6 Remember. We're dealing with a
7 constitutional issue.

8 THE COURT: I understand.

9 MR. KEMP: Yeah. So, I mean, yeah, you
10 know, first they bump an Asian. Then they bump
11 Ms. Hall. I mean, where are we going here? I
12 think I know where we're going. But, in any
13 event, Your Honor, this does not satisfy a Batson
14 challenge.

15 THE COURT: Okay. I've taken copious
16 notes on all of these jurors, but I would like
17 to -- I know it's hard to play back, but with
18 respect to the corporations, there are several
19 issues here that do not appear to be race --
20 racial discrimination. I understand that Ms. Hall
21 is a cyclist. And, with respect to air
22 displacement, I just want to be certain. I think
23 she did say she had fears.

24 MR. ROBERTS: She was the only juror who
25 indicated she was scared by the windblast, Your

1 Honor.

2 THE COURT: And then with respect to
3 corporations, was her answer that they always lie?

4 MR. ROBERTS: According to my notes,
5 Your Honor.

6 MR. KEMP: No. Her answer was that they
7 sometimes lie. Not that they always lie, that
8 they sometimes lie.

9 MR. BARGER: I don't think she said that
10 at all. She said they almost always lie. That's
11 exactly what she said. We can find it if you
12 want.

13 THE COURT: I do want to find it. It's
14 very important for this hearing.

15 (Discussion off the record.)

16 THE COURT: For the record, defense has
17 challenged juror Ms. Hall, Badge Number 11-0902,
18 because they indicate that corporations always
19 lie, she's a mental health counselor, she has a BA
20 in criminal justice, two years of legal training,
21 she's a cyclist, she discussed the air
22 displacement and said that she feared it.

23 And the madam reporter has just read
24 back her testimony -- or her answers to the
25 questions today that she believes corporations --

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1 and this is part of what the defense is saying --
2 always lie.

3 MR. KEMP: Your Honor, she said "often."
4 They said she said "always."

5 THE COURT: Can you read that back
6 again, please.

7 MR. KEMP: She said often, like I said
8 often.

9 THE COURT: Did you say often?

10 MR. ROBERTS: Your Honor, we --

11 (Record read as requested.)

12 THE COURT: On the record.

13 Madam Court Reporter has also read the
14 rest of her testimony. It's already in the
15 record, so I don't need to go through it. But,
16 apparently, she does have -- with respect to "Do
17 they often lie?" maybe not always, but she goes on
18 to discuss the Wells Fargo issues and a couple of
19 other things. What else did she talk about?

20 It appears she does not have faith or
21 believes that corporations -- it appears that she
22 very likely has an anticorporate bias.

23 And then the plaintiff, Mr. Kemp, is
24 stating that this is not a criminal case, so
25 criminal justice issues don't matter. Her

1 training -- that other jurors have answered
2 similarly or not as significantly.

3 But it's my finding that the reason
4 offered is deemed to be race-neutral. So I'm
5 going to -- I don't know if the right word is
6 decline or --

7 MR. CHRISTIANSEN: Deny the Batson
8 challenge?

9 THE COURT: Yes. Thank you. Deny the
10 Batson challenge.

11 Do you want me to bring them back in
12 now?

13 MR. KEMP: Yes, Your Honor.

14 THE MARSHAL: All rise for the jury.

15 (The following proceedings were held
16 in the presence of the jury.)

17 THE COURT: Are all the jurors present?

18 THE MARSHAL: Yes.

19 THE COURT: Do the parties stipulate to
20 the presence of the jury?

21 MR. KEMP: Yes, Your Honor.

22 MR. ROBERTS: Yes, Your Honor.

23 THE COURT: Please be seated. Welcome
24 back. We're going to continue with the selection
25 process -- or peremptory challenge process.

1 (A discussion was held at the bench,
2 not reported.)

3 THE COURT: First of all, I want to
4 thank everyone that's been here and been so good,
5 very patient, and so thorough in performing your
6 civic duty. You've paid attention to everything.
7 You've answered so many, many questions.

8 Now I'm going to excuse certain jurors
9 and also any of the jurors that are seated in the
10 gallery. I want to thank each and every one of
11 you for your service.

12 And, Marshal, you may escort them to the
13 third floor, although I think they may be closed.
14 I'm not positive.

15 THE MARSHAL: Yes, Your Honor.

16 THE COURT: So I'd like to thank and
17 excuse Badge Number 11-0867, Ms. Gagliano. Thank
18 you very much.

19 I'd like to thank and excuse Badge
20 Number 11-1200, Ms. Hannewald. Thank you so much.

21 I thank and excuse Badge Number 11-1164,
22 Ms. Flores.

23 Badge 11-1268, Ms. Beswick, thank you
24 very much.

25 Badge 11-0834, Mr. Dail.

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1 Badge 11-0902, Ms. Hall.

2 Badge 11-1278, Ms. Mundo.

3 Badge 11-0879, Ms. Rodriguez.

4 Thank you very much.

5 I'm going to further excuse Badge

6 11-1125, Mr. Kaba.

7 11-0999, Ms. Reeves.

8 Thank you.

9 Badge Number 11-0940, Ms. Graf.

10 Badge 11-1255, Ms. Wooters.

11 We do also excuse Badge 11-0915, McLain.

12 Is it Ms. McLain? Thank you very much.

13 And I'm going to excuse Badge 11-1186,

14 Ms. Vandevanter. Thank you so much for your

15 service.

16 And also all of those of you that are

17 sitting behind the attorneys, thank you very much

18 for your service and for being so patient. Bye.

19 Bye. Take care.

20 UNIDENTIFIED SPEAKER: Thank you. Glad

21 I didn't meet the requirements.

22 THE COURT: I'd just like to see counsel

23 at the bench for one moment, please.

24 (A discussion was held at the bench,

25 not reported.)

1 THE CLERK: Please rise. Please raise
2 your right hands.

3 You and each of you do solemnly swear
4 that you will well and truly try the case at issue
5 and a true verdict render according to the
6 evidence, so help you God?

7 IN UNISON: I do.

8 THE COURT: Please be seated.

9 (Whereupon, the clerk seated the
10 jurors in the jury box.)

11 MR. KEMP: Can we approach, Your Honor?

12 THE COURT: Yes, please. And,
13 Mr. Christiansen, will you bring your chart?

14 MR. CHRISTIANSEN: I will, Your Honor.

15 (A discussion was held at the bench,
16 not reported.)

17 THE COURT: All right. We have a jury.
18 So it's very important -- and you've seen the
19 thoroughness of the parties to select you. So I'm
20 very happy that we have a jury. You've been sworn
21 in, and you are now official jurors in this case.
22 And I think we're going to start tomorrow morning.

23 Correct?

24 MR. KEMP: Yes, Your Honor.

25 THE COURT: So let's see. Tomorrow

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1 morning we are going to be -- you're going to hear
2 the parties' opening statements and, I imagine,
3 some testimony from witnesses. So that's what you
4 can expect tomorrow morning. I'd like you to be
5 here at 9:30 in the morning, please. And you can
6 come straight up to the courtroom. Okay. I'm
7 going to admonish you again. All right.

8 You're instructed not to talk with each
9 other or with anyone else about any subject or
10 issue connected with this trial. You're not to
11 read, watch, or listen to any report of or
12 commentary on the trial by any person connected
13 with this case or by any medium of information,
14 including, without limitation, newspapers,
15 television, the internet, or radio.

16 You're not to conduct any research on
17 your own relating to this case, such as consulting
18 dictionaries, using the internet, or using any
19 reference materials. You're not to conduct any
20 investigation, test any theory of the case,
21 re-create any aspect of the case, or in any other
22 way investigate or learn about the case on your
23 own.

24 You're not to talk with others, text
25 others, tweet others, message others, google

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1 issues, or conduct any other kind of book or
2 computer research with regard to any issue, party,
3 witness, or attorney involved in this case.

4 You are not to form or express any
5 opinion on any subject connected with this trial
6 until the case is finally submitted to you.

7 You may tell your friends or family
8 members that you were selected as jurors in a
9 civil case in Department 14, but nothing more than
10 that.

11 See you tomorrow. Congratulations. I'm
12 very happy that you're serving. We all are. I
13 speak on behalf of the parties as well. Thank you
14 so much for your patience and your attention.

15 (Jury excused.)

16 (The following proceedings were held
17 outside the presence of the jury.)

18 THE COURT: All right. Do we have some
19 housekeeping?

20 MR. ROBERTS: Couple, Your Honor. I'm
21 sorry. If the Court would prefer, we could come
22 in early, but this shouldn't take long, hopefully.

23 THE COURT: Okay.

24 MR. ROBERTS: One is we would object to
25 the plaintiff side having two openings, in

1 accordance with the bench brief that we previously
2 wrote.

3 And, second, we understand that Mr. Kemp
4 intends to show video of depositions or read
5 deposition testimony for which we've lodged
6 objections. And we would request that no
7 deposition testimony be published to the jury or
8 exhibits be published to the jury which we filed
9 objections to without Mr. Kemp showing those to
10 the Court and opposing counsel and having a
11 ruling.

12 We shouldn't have to jump up
13 continuously during his opening and object if
14 there is something that hasn't been ruled on.

15 MR. KEMP: Judge, on the video --

16 THE COURT: Excuse me. Do you have any
17 other?

18 MR. ROBERTS: No. That's it, Your
19 Honor.

20 MR. KEMP: Judge, I'm going to go from
21 last to first.

22 THE COURT: Okay.

23 MR. KEMP: On the video clips and the
24 deposition cites, I've decided not to use those in
25 my opening because -- well, for a couple reasons.

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1 But, anyway, so that's kind of a moot point.

2 We are going to show -- which is the
3 standard procedure in this district -- pictures of
4 the witnesses and have bullet points with regards
5 to their testimony. So we are going to do that.

6 With regards to exhibits, the rule is
7 that I can show an exhibit to the jury if I have a
8 good-faith belief that it will be admitted.
9 That's the rule.

10 I do not have to tell them what exhibits
11 of the hundreds in this case I deem to be the most
12 important. That is invading our work product.
13 That's basically giving them an outline of my
14 opening statement.

15 They have asked me about a couple
16 sensitive exhibits, such as, for example, the
17 Russian truck video. And I've said I'm not going
18 to show that. And if they have any other thing
19 that they think is a real sensitive exhibit, I'd
20 be happy to discuss it with them.

21 They do have the benefit of actually
22 seeing part of my opening before because, as I
23 said to the Court at the time, there's a lot of it
24 that was given in the motion in limine hearings
25 and the motion for summary judgment hearings.

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1 But, in any event, we would object to
2 any rule that requires us to show what exhibits we
3 think are going to be used.

4 And then the first point they raised is
5 with regards to two openings. We represent
6 different clients. We made that statement on the
7 record at the very beginning. It's not unusual in
8 this district to have -- sometimes the defendants
9 have three different defendants and there's one
10 plaintiff's attorney. They have a different
11 party. There's three defendants attorneys
12 speaking, cross-examining, and one plaintiff. In
13 this case, we just happen to have two. I
14 represent two entities; they represent two
15 entities.

16 So there's nothing unusual about that.
17 It's been the rule in the case. And I really
18 object to this being raised at the last minute
19 before our opening statements after we've already
20 prepared the opening statements.

21 We're trying to coordinate it so there's
22 not a lot of overlap. I don't think there is
23 going to be a lot of overlap. So for that
24 reason -- I mean, I don't see any basis for an
25 argument that we, who represent separate parties,

1 cannot make separate opening statements.

2 MR. CHRISTIANSEN: And, Judge, just so I
3 can be heard on this, this invades my client's
4 right to counsel. Katy Barin was alive when she
5 chose me as her lawyer. She was an adult --

6 THE COURT: You're speaking to which
7 area?

8 MR. CHRISTIANSEN: Katy Barin.

9 THE COURT: No, no. Which area?

10 MR. CHRISTIANSEN: The request to not
11 allow me to give an opening statement on behalf of
12 Katy Barin, who picked me as her lawyer. The
13 estate of Dr. Khiabani chose Mr. Kemp for very
14 different reasons.

15 And so what they're asking you to do is
16 to deprive a participant in a litigation their
17 right to choice of counsel, which is a
18 constitutional violation, and you just can't do
19 it.

20 MR. ROBERTS: Your Honor, responding
21 first to the exhibits, it's -- the way this
22 jurisdiction has always worked, in my experience,
23 is you can tell the jury whatever you think you're
24 going to prove in opening. And if you don't do
25 it, I can comment on it in closing. As long as

1 there's a good-faith basis, that's fine.

2 But you can't publish exhibits. And the
3 custom and practice is to move the preadmission of
4 an exhibit if you want to use it in opening. But
5 you can't publish something to the jury before
6 it's admitted. It's improper. And the cat is out
7 of the bag at that point.

8 So that's why we would object to
9 anything not being preadmitted, to which we've
10 objected to, being published to the jury.

11 With regard to the separate
12 representation that Mr. Christiansen refers to,
13 it's a fiction. When the estate entered an
14 appearance and filed an amended complaint, both
15 Mr. Christiansen and Mr. Kemp were listed as
16 attorneys for plaintiffs. They entered an
17 appearance at the beginning of the case and in the
18 amended case as attorneys for all of the
19 plaintiffs, as both representing all of the same
20 parties.

21 So the record establishes that each of
22 them has entered an appearance for each of the
23 plaintiffs. And under the local rules, there are
24 procedures for withdrawing as counsel. Neither
25 one of them has withdrawn as counsel for someone

1 that they've entered an appearance for. They
2 haven't filed any written withdrawal, as required
3 by the local rules.

4 So the whole idea that they represent
5 separate people is just a fiction for the purpose
6 of gaining a strategic advantage in the
7 litigation. It's improper. Both sides get one
8 opening. And for them to get two and us to get
9 one is an improper procedural advantage.

10 Thank you, Your Honor.

11 MR. KEMP: Your Honor, starting with the
12 exhibit point, I've given a lot of opening
13 statements in this district. I have never once
14 had a judge say I can't show an exhibit to the
15 jury that I think in good faith -- and think how
16 silly that rule is. I can't show the jury what
17 the S-1 Gard is? I can't show the jury the
18 documents we have with regards to air blast? I
19 mean, it's ridiculous. I mean, the exhibits are
20 going to come in.

21 The one controversial thing, which
22 Mr. Terry brought up to me, I thought was the
23 motorcycle. I think we're going to get that in.
24 But I don't want to take a chance because the
25 penalty on me if I don't get the exhibit in is

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1 they stand up in closing and they say, "Well,
2 Mr. Kemp told you about Exhibit A. That exhibit
3 wasn't admitted. You didn't see it, ladies and
4 gentlemen."

5 That is the penalty. And so all it
6 requires is a good-faith belief that the exhibits
7 are going to be admitted.

8 And, frankly, number one, there's not
9 that many exhibits in this case. And, number two,
10 there's not very many controversial evidentiary
11 issues on the admission of the exhibits. The one
12 that I thought there was some controversy about,
13 the video, I've agreed not to -- I'm not even
14 going to show it. I'm not going to discuss it
15 during my opening.

16 But to suggest that I can't show the
17 jury the actual exhibits in this case at this
18 time, I think is totally inappropriate. I've
19 never heard any judge even consider such an
20 outrageous objection.

21 With regards to the appearances, if the
22 Court remembers, when we first appeared in front
23 of you, we made it crystal clear on this record
24 who represented who. And Mr. Roberts says, well,
25 they've appeared on behalf of all the plaintiffs.

1 That is not true, Your Honor. I have
2 not filed any pleadings saying I appear on behalf
3 of Katy Barin. What he is trying to suggest is an
4 appearance on behalf of Katy Barin is our
5 shorthand on the pleadings that we're the
6 attorneys for the plaintiffs; we just put that on
7 the pleadings as shorthand. That is not making an
8 appearance for Katy Barin, which I have not done,
9 Your Honor. And I think I've been very clear as
10 to who I represent in this case.

11 So what he's really trying to do -- and
12 this is the tactic defendants typically try to
13 do -- is they're trying to raise a last-minute
14 objection that probably should have been raised a
15 long time ago, a last-minute objection to try to
16 screw up the plaintiffs' openings. That's what
17 they're trying to do, Your Honor.

18 And it's not appropriate. Like
19 Mr. Christiansen said, if a client chooses you to
20 represent them as their lawyer, they have a
21 constitutional right to do that, Your Honor. And
22 to suggest that he can't stand up and talk about
23 Katy Barin tomorrow, I think is totally wrong.

24 MR. ROBERTS: We've already noted it in
25 our brief, but, in addition, when Mr. Christiansen

1 introduced himself to this panel, he said he
2 represented all of the plaintiffs.

3 THE COURT: All right. I'm sorry. The
4 other judges don't do this. I'm going to take a
5 break so I can review this. And just so you
6 know -- off the record.

7 (Discussion off the record.)

8 THE COURT: All right. Here's what
9 we're going to do. This is what I'm going to do
10 with respect to -- I'm going to allow with respect
11 to openings. Okay.

12 While -- while the second amended
13 complaint there is a paragraph before the parties
14 that indicates that both Mr. Kemp and
15 Mr. Christiansen are lodging this or preparing
16 this for the defendants and each of them, they
17 have -- they have been indicating that they are
18 representing different people. I know it's very
19 close, but this is what I'm willing to do, and I
20 think that this is reasonable. Okay?

21 I'm going to allow two openings, but,
22 Mr. Kemp and Mr. Christiansen, I want you to
23 listen very carefully. Everyone needs to listen
24 very carefully. All right. These are the
25 provisos with the two openings. Okay?

1 First, the defense is going to have the
2 same amount of time as the plaintiffs. The
3 attorney who discusses the theories concerning
4 failure to warn, products liability, and all of
5 the details and the facts in the case, you can
6 decide among you what you want to split. It is
7 not going to be cumulative because then I'll stop
8 you. Okay? Whether the defense objects or not.

9 And, Mr. Kemp, you will refer to -- I
10 believe it's Dr. Khiabani's estate; is that
11 correct?

12 MR. KEMP: Yes, Your Honor.

13 THE COURT: And you represent which of
14 the sons?

15 MR. KEMP: Keon, Your Honor, the younger
16 son.

17 THE COURT: Okay. So you may discuss
18 them.

19 And then, Mr. Christiansen, you may only
20 discuss either the theories if Mr. Kemp doesn't,
21 or however you decide to divide them. And you may
22 discuss your clients, the estate of Dr. Barin and
23 her son Aria. You represent him; correct?

24 MR. CHRISTIANSEN: I do, Your Honor.

25 THE COURT: So I'm not going to have

1 this turn into two full opening statements.

2 MR. CHRISTIANSEN: Judge, the thought
3 was -- and I'll just tell Your Honor -- was that
4 Mr. Kemp was going to discuss liability. I wasn't
5 going to touch at all on any of the details,
6 theories of the case. I was just going to talk
7 about damages to the family. That's it. That's
8 the division between the two of us.

9 THE COURT: Damages to your clients?

10 MR. CHRISTIANSEN: I was going to talk
11 about both boys.

12 THE COURT: No. They're not both your
13 clients.

14 MR. KEMP: It's really the same damages
15 claim, Your Honor, because they have a derivative
16 claim for what their father would have --

17 THE COURT: I understand. But if this
18 is really two openings, then I think you need to
19 represent your --

20 MR. KEMP: We can do that, Your Honor.

21 THE COURT: I think that's what follows
22 constitutionally, and I think that that's what
23 should be allowed. All right?

24 And no cumulative discussions of the
25 theories. Each attorney discusses the theories

1 and his clients, and the other one just his
2 clients.

3 I'd like to have a ballpark idea of how
4 much time you're going to need.

5 MR. KEMP: Your Honor, I think I'll go
6 about an hour and 45, an hour 50.

7 THE COURT: Okay.

8 MR. CHRISTIANSEN: I think I'll be 30,
9 40 minutes tops.

10 THE COURT: 40 minutes? Okay.

11 MR. CHRISTIANSEN: I bet I'm 30, but I
12 don't want to tell you and go 35 and --

13 THE COURT: Okay. All right.

14 And, Mr. Roberts, I'm going to give the
15 defense the same amount of time. And, to be fair,
16 if that's too long for one attorney and you want
17 to divide theories or areas.

18 MR. TERRY: Your Honor, I'll be doing
19 the opening. And I don't need all that time. I
20 just need between 45 minutes and an hour.

21 MR. ROBERTS: We may request to do that
22 on the closing, Your Honor.

23 THE COURT: Okay. And I'm open to that.
24 I'm trying to make this as equitable as possible,
25 as equal as possible.

1 And I know that you have objections to
2 some of the exhibits, and I realize that they have
3 not been preadmitted, but I am going to allow the
4 exhibits to be used in opening by the plaintiffs
5 and by the defense.

6 But, Mr. Kemp, you're going to be
7 talking about the theories?

8 MR. KEMP: Yes, Your Honor. And I would
9 point out for the record that yesterday I gave
10 them slides. I just went through my exhibits, and
11 each one of the exhibits I'm referencing is on the
12 slides I gave to them yesterday.

13 THE COURT: And I want to be sure that
14 you have a good-faith basis, Mr. Kemp and
15 Mr. Christiansen, for every exhibit that you're
16 going to be using in opening.

17 MR. CHRISTIANSEN: All of mine have been
18 agreed to by the defense, Your Honor.

19 THE COURT: Okay.

20 Mr. Kemp?

21 MR. KEMP: Yes, Your Honor. There's
22 only 13 exhibits. I've looked at the list, and I
23 think I have a good-faith basis for every one of
24 them.

25 THE COURT: You think or you know?

1 MR. KEMP: I do. They should be
2 admitted, if that's the question.

3 THE COURT: So that's where we are on
4 that. Is there anything else you'd like to
5 discuss right now?

6 MR. ROBERTS: No, Your Honor. Thank
7 you.

8 THE COURT: Thank you.

9 MR. ROBERTS: Sorry for keeping you
10 late.

11 THE COURT: No. See you at 9:30 in the
12 morning.

13 MR. KEMP: And, again, Your Honor, we're
14 going to be here at 8:30.

15 Your Honor, one minor thing: Can we get
16 copies of the peremptories at some point? It
17 doesn't have to be tonight.

18 THE CLERK: I'm doing it right now.

19 MR. KEMP: Okay. Thank you.

20 (Thereupon, the proceedings
21 concluded at 5:57 p.m.)
22
23
24
25

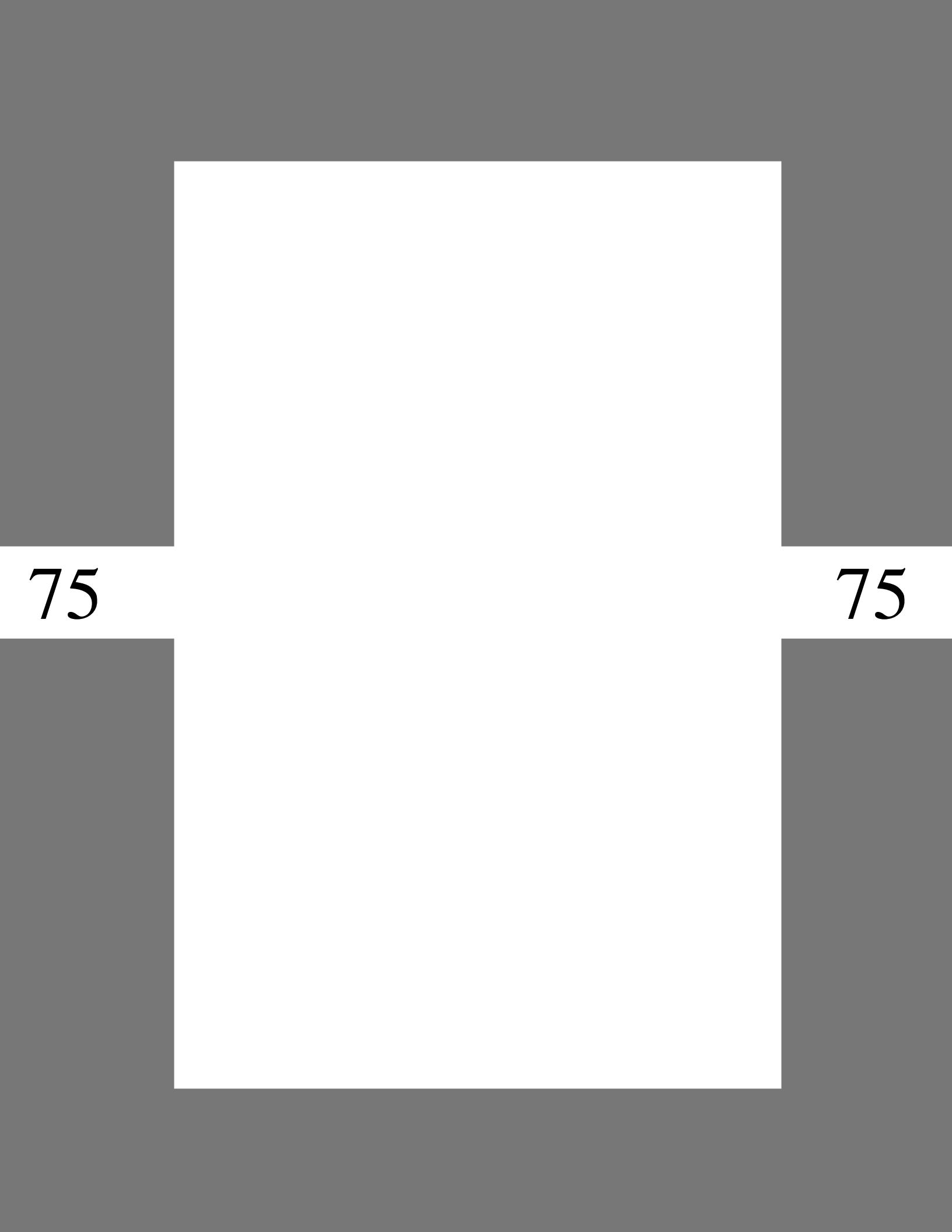
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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF
PROCEEDINGS.



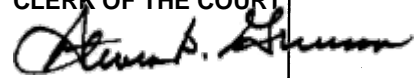
/S/ Kimberly A. Farkas, RPR

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1 **FFCL**

2
3 **EIGHTH JUDICIAL DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 KEON KHIABANI and ARIA KHIABANI,)
7 minors, by and through their Guardian,)
8 MARIE-CLAUDE RIGAUD; SIAMAK)
9 BARIN, as Executor of the Estate of Kayvan)
10 Khiabani, M.D. (Decedent), the Estate of)
11 Kayvan Khiabani, M.D. (Decedent);)
12 SIAMAK BARIN, as Executor of the Estate)
13 of Katayoun Barin, DDS (Decedent); and)
14 the Estate of Katayoun Barin, DDS)
15 (Decedent);)

16 Plaintiffs,

17 vs.

18 MOTOR COACH INDUSTRIES, INC.,)
19 MICHELANGELO EXPRESS; EDWARD)
20 HUBBARD; BELL SPORTS, INC. d/b/a)
21 GIRO SPORT DESIGN; and SEVENPLUS)
22 BICYCLES, INC. d/b/a PRO CYCLERY)

23 Defendant(s).

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

24 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

25 Plaintiffs' motion for summary judgment on foreseeability of bus interaction with
26 pedestrians or bicyclists (including sudden bicycle movement) came on for a hearing before
27 Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar
presiding, on January 23, 2018.

At the hearing, the Court announced that Plaintiffs' motion would be granted, on the
basis that any collision between a bus and a bicycle that was caused by a bus driver would be
foreseeable as a matter of law. Subsequent to the hearing, the parties began voir dire of
potential jurors and submitted trial briefs on issues relating to Plaintiffs' motion for summary

1 judgment on foreseeability of bus interaction with pedestrians or bicyclists (including sudden
2 bicycle movement).

3 After considering Plaintiffs' motion, Defendant's opposition, Plaintiffs' reply in
4 support, and both parties' trial briefs and oral argument, the Court issues the following
5 findings of fact and conclusions of law:

6 As the parties are aware, this case concerns the death of Dr. Kayvan Khiabani
7 resulting from a collision of Dr. Khiabani on his bicycle with a motor coach manufactured by
8 Defendant Motor Coach Industries. Plaintiffs allege the injury was caused (1) because of the
9 motor coach's defective design, and/or (2) because Defendant failed to warn subsequent
10 purchasers and drivers that the motor coach had particular dangerous propensities, and thus
11 that Defendant is strictly liable under a products liability theory.

12 Plaintiffs' motion requests the Court "hold that bus and pedestrian or bicyclist
13 interaction (including sudden bicycle movement) is a foreseeable 'misuse' as a matter of law
14 and can not by [sic] a 'defense.'" Mot. at 1-2. The motion further asserts that this holding
15 would "eliminate the fourth element of strict liability for defective product from consideration
16 by the jury" and "eliminate MCI's Sixteenth Affirmative Defense ('Plaintiffs' injuries were
17 the result of unforeseeable misuse of the product at issue')." *Id.* at 2.

18 In support of the motion, Plaintiffs assert that a "plethora of literature" supports this
19 ruling as a matter of law, including one particular article from a trade journal published in
20 2001 that discusses accidents factually similar to the accident at issue here. Plaintiffs further
21 assert that Defendant MCI specifically reviewed literature regarding the "S-1 Gard," a device
22 intended to protect a person who falls under a bus from being run over by the rear tires. Thus,
23 Plaintiffs contend, interaction between bicyclists and bus rear tires is foreseeable under
24 *Andrews v. Harley Davidson, Inc.*, 106 Nev. 533 (1990).

25 In *Andrews*, the trial court held that evidence of the driver's intoxication could be used
26 to prove that the design of the vehicle involved in the accident was not the proximate cause of
27 the driver's injuries. *Id.* at 535. The Nevada Supreme Court held that "negligent driving of a

1 vehicle is a foreseeable risk against which a manufacturer is required to take precautions.” *Id.*
2 at 537. Thus, the holding in *Andrews* controls here and mandates that the possibility of the
3 bus driver operating the motor coach negligently would be a foreseeable misuse, and thus
4 cannot be a defense in this case.

5 However, because a bicyclist traveling alongside a motor coach is not a “user” of the
6 motor coach, the actions of a bicyclist cannot be a “use” of the allegedly defective vehicle.
7 Plaintiffs admit this point, stating that “[r]iding a bicycle that slightly veers into a bus is not
8 even a ‘misuse’ but is instead a collision event that should be anticipated by a manufacturer.”
9 Mot. at 6. Further, this is consistent with the Court’s holding that a bicyclist is not a “user” of
10 a motor coach for the purposes of the “consumer-expectation test.”

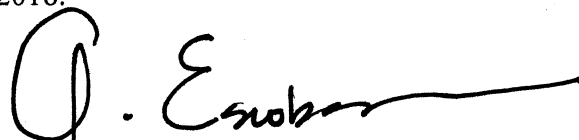
11 Thus, the holding in *Andrews* does not apply to the potential foreseeability of
12 movements of a bicyclist. While Plaintiffs are free to argue that Defendant in this case should
13 have anticipated such a collision, the facts presented in support of the motion for summary
14 judgment do not support the conclusion that no reasonable jury could find otherwise. The
15 Court therefore cannot hold as a matter of law that any “sudden bicycle movement” or
16 interaction between a bus and a pedestrian or bicyclist is foreseeable.

17 In sum, Plaintiffs’ motion for summary judgment on foreseeability of bus interaction
18 with pedestrians or bicyclists (including sudden bicycle movement) is GRANTED IN PART,
19 as to foreseeability of negligent driving of the bus, and DENIED IN PART as to foreseeability
20 of movement of a pedestrian or bicyclist.

21 Finally, the Court recognizes that the above holding conflicts with the Court’s ruling
22 on Plaintiffs’ motion in limine #3, seeking to preclude Defendant from arguing the decedent
23 was contributorily negligent. This order supersedes the portions of the motion in limine ruling
24 which state that a collision between a bus and a bicycle are foreseeable as a matter of law;
25 however, Defendant will still be precluded from arguing to the jury that Dr. Khiabani’s
26 negligence could absolve Defendant of liability even if the product is found to be defective
27 and the defect found to have caused the injury. In other words, Defendant may argue that

1 Plaintiffs cannot establish causation due to an intervening superseding cause (which would
2 not include negligence of Mr. Hubbard, as this is precluded by Plaintiffs' motion in limine
3 # 1), but Defendant cannot argue contributory negligence as an affirmative defense. *See*
4 *Young's Mach. Co. v. Long*, 100 Nev. 692 (1984) (holding that contributory negligence is not
5 a defense in a strict liability action); *Price v. Blaine Kern Artista*, 111 Nev. 515, 520 (holding
6 that an act by a third party which is both unforeseeable and the proximate cause of the injury
7 may insulate the manufacturer of a defective product from liability).

8 DATED this 22nd day of February, 2018.

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11 ADRIANA ESCOBAR
12 DISTRICT JUDGE
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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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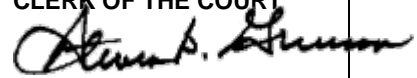
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DISTRICT COURT

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,

vs.

MOTOR COACH INDUSTRIES, INC.,
a Delaware corporation; et al.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

**BENCH BRIEF IN SUPPORT OF
PREINSTRUCTING THE JURY
THAT CONTRIBUTORY
NEGLIGENCE IS NOT A DEFENSE
IN A PRODUCT LIABILITY
ACTION**

Dated this 22nd day of February, 2018

/s/ *Eric Pepperman*

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I

INTRODUCTION

To put it mildly, the issues of foreseeability and causation have been a frequent bone of contention in this case. As a result of the parties' back-and-forth, the Court has issued multiple orders and superseding orders with respect to these complex matters. In its most recent superseding order, the Court ruled that MCI "may argue that Plaintiffs cannot establish causation due to an intervening superseding cause." 2/22/18 FFCL and Order, 3:25-4:1. There is still no dispute that MCI "cannot argue contributory negligence as an affirmative defense." *Id.*, 4:3, citing *Young's Mach. Co. v. Long*, 100 Nev. 692, 693 (1994) (holding that contributory negligence is not a defense in a strict liability action).

Given the Court's superseding order, and the complexity of this matter, Plaintiffs respectfully ask the Court to pre-instruct the jury as follows:

Contributory negligence is not a defense to a strict liability claim if the product is found to be defective and the defect is a substantial factor in causing the injury.

This is a critical issue that is ripe for a misunderstanding by the jury. Pre-instructing the jury will put this relevant issue into context and minimize the potential for any juror confusion.

Although the Court previously declined to pre-instruct the jury with standard instructions for product liability claims, the Court's underlying rationale does not apply to the requested pre-instruction, which was not one of the standard instructions that Plaintiffs previously asked the Court to give. Due to the confusion that has arisen on the issues of contributory negligence and causation, the jury should be pre-instructed that contributory negligence is not a defense in a strict liability action.

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ARGUMENT

A. The Court should pre-instruct the jury that contributory negligence is not a defense in a strict liability action.

MCI clearly intends to argue that Plaintiffs cannot establish causation because Dr. Khiabani was somehow an intervening superseding cause of his own death. In Plaintiffs' view, this violates the Court's order precluding MCI from arguing contributory negligence as an affirmative defense:

Defendant will still be precluded from arguing to the jury that Dr. Khiabani's negligence could absolve Defendant of liability even if the product is found to be defective and the defect found to have caused the injury..... **Defendant cannot argue contributory negligence as an affirmative defense.** 2/22/18 FFCL and Order, 3:25-4:3 (bold added), citing *Young's Mach. Co. v. Long*, 100 Nev. 692, 693 (1994) (holding that contributory negligence is not a defense in a strict liability action).

Given the substantial possibility that MCI's argument will confuse the layperson jurors, the Court should pre-instruct the jury that contributory negligence is not a defense to a strict liability claim if the product is found to be defective and the defect is a substantial factor in causing the injury.

B. Based on the recent circumstances, the requested pre-instruction is justified and appropriate.

In their MIL No. 8, Plaintiffs asked the Court to pre-instruct the jury with standard jury instructions for product liability claims. The Court denied Plaintiffs' motion:

The Court finds that none of Plaintiffs' suggested pre-instructions concern concepts that warrant discussion before any evidence is presented. While a products liability action includes relatively complicated issues of law, the risk of unfair prejudice to the Defendant substantially outweighs the probable utility of pre-instructing the jury. The Court finds the proposed pre-instructions bear a serious risk of suggesting what evidence the jury should be looking for to rule in Plaintiffs' favor, when Plaintiffs bear the burden of proof. 2/2/18 FFCL and Order.

Under the present circumstances, the Court’s ruling supports giving the requested pre-instruction. In light of the risk of jurors confusing superseding causation with contributory

negligence, the concept that contributory negligence is not a defense warrants a pre-instruction. Moreover, there is no risk that the requested pre-instruction, which is an accurate statement of law, will unfairly prejudice MCI. The opposite is true. If the pre-instruction is not given, there is a substantial risk that the jurors will treat MCI's allegations of contributory negligence as an affirmative defense to Plaintiffs' strict liability claims, which would unfairly prejudice the Plaintiffs. The requested contributory negligence pre-instruction has nothing to do with the evidence presented, so there is no concern that the pre-instruction will suggest what evidence the jury should be looking for to rule in Plaintiffs' favor. The pre-instruction will merely minimize the risk of juror confusion over a highly-technical legal concept that is critical to the fair adjudication of this case.

///

///

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1 **III**

2 **CONCLUSION**

3 The jury should be pre-instructed that contributory negligence is not a defense in a strict
 4 liability action. The proposed instruction is an accurate statement of law, *see Young's Mach.*
 5 *Co.*, 100 Nev. at 693 (holding that contributory negligence is not a defense in a strict liability
 6 action); it is consistent with this Court's clear ruling on the issue, *see* 2/22/18 FFCL and Order,
 7 4:3 ("Defendant cannot argue contributory negligence as an affirmative defense"); it will help
 8 minimize the potential of juror confusion on an issue that is critical to the fair adjudication of
 9 this case; and it will not unfairly prejudice either party. MCI itself agrees that contributory
 10 negligence is not a defense. Accordingly, and for all of the forgoing reasons, the Court should
 11 pre-instruct the jury that contributory negligence is not an affirmative defense to Plaintiffs'
 12 strict liability claims, as provided above.

13 DATED this 22nd day of February, 2018.

14 KEMP, JONES & COULTHARD, LLP

15 /s/ Eric Pepperman

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2018, the foregoing **BENCH**
BRIEF IN SUPPORT OF PREINSTRUCTING THE JURY THAT
CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE IN A PRODUCT
LIABILITY ACTION was served on all parties currently on the electronic service list via
the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and
Conversion Rules, Administrative Order 14-2.

/s/ Eric Pepperman

An Employee of Kemp, Jones & Coulthard

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1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 * * * * *

7 KEON KHIABANI and ARIA)
8 KHIABANI, minors by and)
9 through their natural mother,)
10 KATAYOUN BARIN; KATAYOUN)
11 BARIN, individually; KATAYOUN)
12 BARIN as Executrix of the)
13 Estate of Kayvan Khiabani,)
14 M.D. (Decedent) and the Estate)
15 of Kayvan Khiabani, M.D.)
16 (Decedent),)
17 Plaintiffs,)
18 vs.)
19 MOTOR COACH INDUSTRIES, INC.,)
20 a Delaware corporation;)
21 MICHELANGELO LEASING, INC.)
22 d/b/a RYAN'S EXPRESS, an)
23 Arizona corporation; EDWARD)
24 HUBBARD, a Nevada resident,)
25 et al.,)
Defendants.)
_____)

20 REPORTER'S TRANSCRIPTION OF PROCEEDINGS

21 BEFORE THE HONORABLE ADRIANA ESCOBAR
22 DEPARTMENT XIV
23 DATED FRIDAY, FEBRUARY 23, 2018

24 RECORDED BY: SANDY ANDERSON, COURT RECORDER

25 TRANSCRIBED BY: KIMBERLY A. FARKAS, NV CCR No. 741

005328

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005329

1 LAS VEGAS, NEVADA, FRIDAY, FEBRUARY 23, 2018;

2 9:34 A.M.

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

4 * * * * *

5 THE MARSHAL: All rise. Department 14
6 is now in session. Honorable Adriana Escobar
7 presiding.

8 THE COURT: Good morning. Please be
9 seated. I'd like counsels' appearances for the
10 record, please.

11 MR. KEMP: Your Honor, Will Kemp on
12 behalf of the estate of Dr. Khiabani and on behalf
13 of the minor child.

14 MR. CHRISTIANSEN: Good morning, Your
15 Honor.

16 MR. KEMP: Keon, Your Honor.

17 MR. CHRISTIANSEN: Peter Christiansen,
18 Kendelea Works, Whitney Barrett on behalf of the
19 estate of Katy Barin, and Aria Khiabani.

20 MR. PEPPERMAN: Eric Pepperman on behalf
21 of the estate of Dr. Kayvan Khiabani and the
22 minor, Keon Khiabani.

23 MR. TERRY: Michael Terry, Lee Roberts,
24 Darrell Barger on behalf of the defendant Motor
25 Coach Industries.

005330

1 THE COURT: Good morning.

2 So before -- we have a few things to
3 discuss this morning.

4 I received a bench brief in support of
5 preinstructing the jury that contributory
6 negligence is not a defense in a product liability
7 action from the plaintiffs.

8 MR. KEMP: Judge, I didn't intend to
9 argue that; I just wanted to file our brief. I
10 think I understand your position, but we just
11 wanted to make it clear for the record that we are
12 asking for that preconstruction and we think it
13 should be given.

14 THE COURT: Mr. Kemp, they had to mic me
15 so that it would be louder.

16 MR. KEMP: How's that, Your Honor?

17 THE COURT: Try again.

18 MR. KEMP: How's that?

19 THE COURT: A little bit better. What I
20 don't want to do is have to ask you to speak up
21 during the trial so that I'm not interrupting you.
22 Okay?

23 All right. So this isn't something --

24 MR. KEMP: Your Honor, we've argued this
25 three or four times. We just wanted to file our

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1 brief and ask for it one more time before the
2 opening so there's no possible argument on the
3 record that we waived this argument.

4 THE COURT: Understood.

5 Mr. Roberts?

6 MR. ROBERTS: Yes, we continue to oppose
7 this instruction. Giving one instruction on the
8 law without giving all of the applicable
9 instructions on the law needlessly highlights one
10 instruction that they want and gives it importance
11 over all the other instructions the jury needs to
12 consider to put this in context. We don't think
13 it would be appropriate.

14 We never said the words "negligence" or
15 "contributory negligence" during voir dire. No
16 confusion has arisen over whether contributory
17 negligence is a defense. So we would oppose this
18 instruction being given in isolation unless all of
19 the instructions are given.

20 There is just as much possible confusion
21 with regard to what the standard is for a product
22 to be defective. They asked if a product could be
23 made safer, should it be made safer, who thinks
24 it's okay to needlessly endanger the community.
25 Well, that's not the standard for proving a

1 product defect. So if the Court is going to start
2 clearing up confusion, there are a lot of
3 instructions we would like to -- thank you, Your
4 Honor.

5 MR. KEMP: Your Honor, in brief
6 response, that's why we filed a motion to offer
7 nine different instructions, including the ones --
8 that was our original motion, to solve that exact
9 objection. They opposed that, Your Honor. They
10 opposed that. They don't want this instruction.
11 They don't want any instructions.

12 THE COURT: Right. And I've held before
13 that I'm not going to preinstruct the jury. I
14 realize this is very technical, but there will be
15 no preinstructions. I understand that you're
16 preserving your record, Mr. Kemp, on behalf of
17 your clients.

18 And I do fear that -- that some of these
19 definitions would not be good to introduce a jury
20 to without the others. And, at this point, this
21 is going to be consistent with my earlier ruling.
22 So I'm going to deny that.

23 Do we have anything else with respect to
24 housekeeping before --

25 MR. ROBERTS: Not from the defense, Your

1 Honor.

2 MR. KEMP: No, Your Honor.

3 THE COURT: Are we ready for the jury?

4 MR. KEMP: Yes, Your Honor.

5 THE COURT: I have to give some general
6 preinstructions that I didn't give yesterday.

7 Okay? That shouldn't take too long. Okay?

8 THE MARSHAL: All rise for the jury.

9 (The following proceedings were held
10 in the presence of the jury.)

11 THE COURT: Please be seated. I'd like
12 you to start with roll call, please.

13 THE CLERK: Byron Lennon.

14 JUROR NO. 1: Here.

15 THE CLERK: John Toston.

16 JUROR NO. 2: Here.

17 THE CLERK: Michelle Peligro.

18 JUROR NO. 3: Here.

19 THE CLERK: Raphael Javier.

20 JUROR NO. 4: Here.

21 THE CLERK: Dylan Domingo.

22 JUROR NO. 5: Here.

23 THE CLERK: Aberash Getaneh.

24 JUROR NO. 6: Here.

25 THE CLERK: Jaymi Johnson.

1 JUROR NO. 7: Here.

2 THE CLERK: Constance Brown.

3 JUROR NO. 8: Here.

4 THE CLERK: Enrique Tuquero.

5 JUROR NO. 9: Here.

6 THE CLERK: Raquel Romero.

7 JUROR NO. 10: Here.

8 THE CLERK: Pamela Phillips-Chong.

9 JUROR NO. 11: Here.

10 THE CLERK: Gregg Stephens.

11 JUROR NO. 12: Here.

12 THE CLERK: Glenn Krieger.

13 JUROR NO. 13: Here.

14 THE CLERK: Emilie Mosqueda.

15 JUROR NO. 14: Here.

16 THE COURT: Good morning, ladies and
17 gentlemen. Today we start the next phase of the
18 trial, which is opening statements by each party.
19 And they're going to give you a sketch of what
20 they intend to prove in this case.

21 I'm going to give you some general
22 instructions. We wrapped up a little bit late
23 yesterday, but I need to give these to you.

24 So, first and foremost, I want to
25 confirm that you have your notebooks and pencils.

1 Do each of you?

2 Okay. And also badges, your permanent
3 badges. You are to wear those at all times,
4 please. Don't put them on your purse or your
5 pocket. Make sure that they're visible to
6 everyone so that anyone who sees you is aware that
7 you're jurors. Okay?

8 All right. So this is intended to serve
9 as an introduction to, generally, this trial as we
10 move forward. This is not a substitute for the
11 detailed instructions on the law which I will give
12 you at the close of the case and before you retire
13 to consider your verdict.

14 This is a civil case, as you're aware,
15 and was commenced by the plaintiff against the
16 defendant. This case is based upon a complaint
17 that was filed by plaintiff to which the defendant
18 has filed a response.

19 Do counsel desire to have the pleadings
20 read?

21 MR. KEMP: No, Your Honor.

22 MR. TERRY: No, Your Honor.

23 THE COURT: So counsel will state to you
24 the nature of their respective claims when they
25 give their opening statements. So, ladies and

1 gentlemen, you have no way of knowing what the
2 facts will be presented to you during the trial.

3 No juror may discuss with any fellow
4 juror any fact relating to this case of his or her
5 own knowledge. If you discover during the trial
6 or after the jury has retired that you or any
7 other juror has personal knowledge of any fact of
8 controversy in this case, you must disclose that
9 to me in the absence of the other jurors. And the
10 way that you would do that is to talk to the
11 marshal.

12 This means that if you learn during the
13 course of the trial that you are acquainted with
14 the facts of the case or the witnesses and you
15 have not previously told us of the relationship,
16 you must then declare that fact to me, to the
17 Court. Okay?

18 The way that you communicate with the
19 Court throughout our trial is through the marshal.
20 He is present at all times while you are in
21 session.

22 During the course of the trial, the
23 attorneys for both sides and the court personnel
24 other than the bailiff are not permitted to talk
25 with you, including anyone on the court team.

1 I've explained this to you. It's not anything
2 personal; it's because even saying hello or any
3 type of communication would be a significant
4 problem, and it's something that all parties,
5 including court staff, must follow. Okay?

6 While you're here in the courthouse,
7 please always wear your badge. During the breaks,
8 and during your lunch break when you are in the
9 elevators, please only talk to the other jurors
10 and never talk about the case. When you come in
11 through the metal detector in the morning, you may
12 have noticed that the marshal is down there.

13 They've not had -- just make sure you let them
14 know that you're jurors in a trial. By wearing
15 your badge, you may be able to get in a bit
16 sooner. All right?

17 If you should recognize a witness or be
18 familiar with the facts of the case when a witness
19 is testifying, please make a little note on your
20 pad that you recognize that witness and how it is
21 that you recognize or know that witness.

22 When you have an opportunity, please
23 hand the note to the marshal, and he will present
24 it in the court -- to the Court.

25 It's not uncommon for a juror or anyone

1 to not recognize a witness by name, but they
2 may -- you may recognize them when you see them.
3 So if that should happen, please make a note and
4 do the same thing, let the marshal know.

5 We've reviewed this before in your
6 admonishment, but you are not to visit the scene
7 of any of the occurrences made mention in this
8 trial unless specifically told so by this Court.

9 You're prohibited from doing any
10 investigation with regard to this case or with
11 regard to anyone having to do with this case. It
12 seems like a simple instruction, but it's very
13 simple -- sometimes people may not even realize it
14 and be discussing something or viewing something.
15 So if that happens, immediately stop.

16 This also means that you cannot get on
17 the internet and google any questions about the
18 issues that are going to be presented to you in
19 this case. So no investigation, including
20 computer-aided research. You are not to discuss
21 with any other person any issue relating to this
22 case, either in person, by Facebook, Twitter,
23 email, messaging, texting, by telephone or any
24 other means of communication.

25 Other than bringing with you everyday

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1 common sense, you are limited to the documents and
2 the evidence which are presented to you during
3 trial. And we have reviewed this quite a few
4 times, but it's important to discuss it now.

5 The parties may sometimes present
6 objections to some of the testimony or evidence.
7 At times I may sustain objections or direct you to
8 disregard certain testimony or exhibits. You must
9 not consider any evidence to which an objection
10 has been sustained or which I have instructed you
11 to disregard.

12 It is the duty of the lawyers to object
13 to evidence which he or she believes may not be
14 properly offered, and you should not be prejudiced
15 in any way against an attorney or a lawyer who
16 makes an objection on behalf of the party which he
17 or she represents.

18 Anything that you may have seen or heard
19 outside the courtroom is not evidence and must
20 also be disregarded.

21 Throughout the trial, if you cannot hear
22 a question asked by an attorney or the answer
23 given by the witness, please raise your hand as an
24 indication. If I don't see your hand, please say
25 "excuse me" and "I didn't hear that," and I will

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1 make sure that the question is repeated --
2 okay? -- or the answer.

3 Additionally, if you need to use the
4 restroom or if you feel ill, please raise your
5 hand as an indication. We will take intermittent
6 breaks as the Court sees fit, usually about every
7 90 minutes. So I want you to be as comfortable as
8 possible. You may bring drinks with you, but you
9 must have a lid on them. Okay? You cannot eat
10 during the trial.

11 So if you feel that you need a break or
12 someone needs to go to the restroom, please let
13 the marshal know. All right?

14 I'm going to take notes during the
15 trial. I take a lot of notes. Okay? You are not
16 to make any inference from that action. I am
17 required to prepare for legal arguments of counsel
18 during the trial. And, for that reason, I will
19 take notes.

20 If you wish, you may take notes to help
21 you remember what any witness has said. If you do
22 take notes, please keep them to yourselves until
23 you and your fellow jurors go to the jury room to
24 decide the case.

25 With regard to notes, you should really

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1 rely upon your own memory of what was said and not
2 be overly influenced by the notes of the other
3 jurors when you go back. And don't be so
4 concentrated on taking notes that you miss any
5 question or answer asked of the witnesses. Okay?

6 The case, I've already indicated the
7 trial chronology to some extent. The plaintiffs
8 will make opening statement, then the defense.
9 Then the plaintiff will begin the case and start
10 calling witnesses and introducing evidence.

11 Opening statements by attorneys are not
12 evidence. The attorneys are not witnesses to any
13 of the facts at controversy in this case. Okay?
14 That's really important for you to keep in mind.
15 Opening statements are a synopsis of what each
16 party is going to be proffering in this trial.

17 At the conclusion of all of the
18 evidence, I will instruct you on the law. You
19 must not be concerned with the wisdom of any rule
20 of law stated in these instructions or in the
21 instructions which I will read to you after the
22 evidence.

23 Regardless of any opinion you may have
24 as to what the law ought to be, it would be a
25 violation of your oath to base a verdict upon any

1 other view of the law than that given to you by
2 this Court.

3 And it's important for you to understand
4 that the Court doesn't make up the law. It's the
5 law that's pertinent in the state and by the
6 Nevada Supreme Court and so forth. Okay? So
7 that's what I will be reading to you. All right?

8 Okay. After the instructions of the law
9 are read to you, each party has the opportunity to
10 argue orally in support of his or her case, and
11 that's called closing argument. What is said in
12 closing argument is not evidence. The arguments
13 are designed to summarize and interpret the
14 evidence for you and to show you how the evidence
15 and the law relate to one another.

16 Because the plaintiffs have the burden
17 of proof, the plaintiff will get to argue twice to
18 you at the end of trial, and the defense will
19 argue -- so the plaintiff will start, the defense
20 will argue, and then the plaintiffs have another
21 opportunity to discuss everything with you.

22 After the attorneys have presented their
23 arguments, you'll retire, select a foreperson to
24 deliberate, and arrive at your verdict. Faithful
25 performance by you of your duties is vital to the

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1 administration of justice. It's vital.

2 It is your duty to determine the facts
3 and to determine them from the evidence and the
4 reasonable inferences arising from such evidence.
5 And in so doing, you must not indulge in guesswork
6 or speculation. The evidence which you are to
7 consider consists of the testimony of the
8 witnesses and the exhibits that are admitted into
9 evidence.

10 The term "witness" means anyone who
11 testifies in person or by way of a deposition, and
12 it may include the parties to the lawsuit. A
13 deposition is simply an examination of the
14 witnesses at a prior date under oath with the
15 attorneys present where the testimony was taken
16 down in written format, and those written
17 questions and answers may be read to you during
18 the trial.

19 Admission of evidence in court is
20 governed by the rules of law. From time to time,
21 it may be the duty of the attorneys to make
22 objections and my duty as the judge to rule on
23 those objections and decide whether a certain
24 question may be answered or whether certain
25 evidence may be admitted.

1 You are not to concern yourself with
2 objections made by the attorneys or with the
3 Court's reasons for the rulings. You must not
4 consider testimony or exhibits to which an
5 objection has been sustained or which has been
6 ordered stricken.

7 Further, you must not consider anything
8 which you may have seen or heard when the court is
9 not in session, even if what you see or hear is
10 said or done by one of the parties or one of the
11 witnesses.

12 In every case, there are two types of
13 evidence: direct evidence and circumstantial
14 evidence. And I'm going to use the example that I
15 learned in law school 29 years ago. Okay?

16 Direct evidence is testimony of what
17 that person saw or heard or did. Circumstantial
18 evidence is testimony or exhibits which are proof
19 of a particular fact from which, if that fact is
20 proven, you can infer the existence of a second
21 fact.

22 If a witness testifies that they just --
23 all right.

24 Direct evidence is when you walk outside
25 and you see the rain. It's raining on you, and

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1 you actually see the rain or the witness actually
2 sees the rain. Okay? That's direct evidence.

3 Circumstantial evidence is if you've
4 been here all day in this trial and, at the end of
5 the evening when we recess, you walk out and you
6 see puddles of rain, puddles of water, cars that
7 are wet, the appearance that it's rained, that's
8 circumstantial evidence. Okay? One is you
9 actually see it and the other is evidence that it
10 occurred.

11 You may consider both direct and
12 circumstantial evidence in deciding this case.
13 The law permits you to give equal weight to both
14 types of evidence, but it is up to you to decide
15 how much weight to give any particular piece of
16 evidence.

17 No statement, ruling, remark, or facial
18 expression which I may make during the course of
19 the trial is intended to indicate my opinion as to
20 what the facts are. I don't get to decide the
21 facts. You are the one to determine the facts.

22 In this determination, you alone must
23 decide upon the believability of the evidence and
24 its weight and value. In considering weight and
25 value of the testimony of any witness, you may

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1 take into consideration the appearance, attitude,
2 and behavior of the witness, the interest of the
3 witness in the outcome of the case, the
4 relationship to any party to the case, the
5 inclination of the witness to speak truthfully or
6 not, the probability or improbability of the
7 witness's statements, and all other facts and
8 circumstances in evidence. Thus, you may give the
9 testimony of any witness just such weight and
10 value as you believe the witness is entitled to
11 receive.

12 Let me remind you again that, until this
13 case is submitted to you, do not talk to each
14 other about this case or about anyone who has
15 anything to do with it until the end of the case
16 when you go to the jury room and decide your
17 verdict.

18 Do not let anyone else talk to you about
19 this case or about anyone who has anything to do
20 with this case. If someone were to try to talk to
21 you about this case while you are serving as a
22 juror, please report that to me immediately by
23 contacting the marshal.

24 You may need to tell your employer or
25 your spouse or significant other what is going on,

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1 but all you can tell them is that you have been
2 chosen as a juror in a civil case and that the
3 judge has told you that you're going to be in
4 trial several weeks. And you may also tell them
5 that, once the trial is over, you may -- and once
6 you're discharged as jurors, you may discuss the
7 case with them but not until then.

8 Do not make up your mind about what the
9 verdict should be until after you have gone to the
10 jury room to decide the case and you and your
11 fellow jurors have discussed the evidence. It is
12 important throughout the trial to keep an open
13 mind. At the end of the trial, you will have to
14 make a decision based upon what you recall of the
15 evidence. You will not have a written transcript
16 to review.

17 Even though we have a court reporter and
18 a court recorder who takes down the testimony,
19 it's very hard to have testimony read back to you.
20 Therefore, I urge you to pay close attention to
21 the testimony and evidence as it is presented.

22 With respect to questions, you will have
23 the opportunity to ask written questions of any of
24 the witnesses called to testify in this case. You
25 are not encouraged to ask large numbers of

1 questions because that is a primary responsibility
2 of the attorneys. Questions may be asked only in
3 the following manner:

4 After both attorneys have finished
5 questioning a witness, and only at that time, if
6 there are additional questions you would like to
7 ask the witnesses, you should write your question
8 down with your juror number, your badge number, on
9 a full sheet of paper -- they can provide it for
10 you -- and raise your hand. All questions from
11 the jurors must be factual in nature and designed
12 to clarify information already presented.

13 In addition, the jurors must not place
14 undue weight on the responses to their questions.
15 The marshal will pick up your questions and give
16 them to me. All questions must be directed to the
17 witnesses and not to the lawyers or to the judge.

18 After consulting with counsel, I will
19 determine if your question is legally proper. If
20 I determine that your question may properly be
21 asked, I will ask it. No adverse inference should
22 be drawn against either side if the Court does not
23 allow a particular question.

24 Okay. For the record, the parties have
25 invoked the exclusionary rule as to lay witnesses

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1 but not experts; correct?

2 MR. KEMP: Yes, Your Honor.

3 MR. TERRY: That is correct, Your Honor.

4 THE COURT: Okay. All right. It's now
5 time for the plaintiffs to start their opening
6 statement.

7 MR. KEMP: Thank you, Your Honor.

8 Ladies and gentlemen of the jury, my
9 name is Will Kemp, K-e-m-p. And I just want to
10 reiterate one thing Your Honor said. If anybody
11 needs a break, and not just during the opening,
12 but during the whole trial, because sometimes we
13 get into it with the witnesses and our backs are
14 to you, and we can't see that you're
15 uncomfortable. But if anybody needs a break, just
16 give me some sort of sign or give Mr. Christiansen
17 some sort of sign -- we're the ones nearest to
18 you -- and we'll take a break. This is not an
19 endurance contest. We can stop and start. It's
20 not like we're watching a compelling scene in a
21 movie. So if anybody needs a break, just give me
22 a signal. All right?

23 And I'm thinking this is going to go
24 about an hour 40, hour 50.

25 So let's start out with the accident

1 itself. And the first thing I want to do is I
2 want to make sure that everyone is familiar with
3 the general area. I know some of you are, but
4 some of you are from different parts of town.

5 This is Charleston. This is a street
6 called South Pavilion Center, and that's the
7 street that's replicated here. This is the same
8 picture. Okay. So this is South Pavilion Center.
9 This is where the Red Rock Casino is. You can see
10 the parking garage here. Okay. So the Red Rock
11 is here. 215 -- I don't want to do anything to
12 cause any more damage. 215 comes all the way
13 around here. Okay. So the 215 exits up here.
14 Come off the 215 exit, go west on Charleston, turn
15 right, which is traveling south down Pavilion
16 Center. This street's called Griffith Peak Drive.
17 Okay. Griffith Peak Drive.

18 So this is the overview. All right.
19 That's the overview of the location where the
20 accident occurred. This is the City National Bank
21 building. This, you see the construction
22 equipment? This is where they put the new hockey
23 team's practice field, right here. This is about
24 where Downtown Summerlin is, over here. So this
25 is the location where the accident occurred, and

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1 that's why I've blown it up for you on a bigger
2 map here. Can you all see this? All right.

3 Now, what happened on the day of the
4 accident, which occurred on April 18th -- make
5 sure I've got my mic on. Can you hear me? All
6 right.

7 What happened on the day of the accident
8 was a bus driver -- his name was Edward Hubbard,
9 H-U-B-B-A-R-D. He's going to be here to testify.
10 He picked up some passengers at McCarran. He
11 drove all the way around 215. He got off 215 on
12 this ramp over here. Came down on Charleston
13 heading to the east. That's east down Charleston.
14 Turned here, and the accident occurred here.

15 Dr. Khiabani was riding a bike. This is
16 the actual bike. I'm going to show you something
17 about it in a minute. But this is the actual
18 bike. Dr. Khiabani was riding his bike in the
19 bike lane here. See the bike lane? You can
20 barely see it.

21 He's riding his bike and he was in front
22 of Mr. Hubbard in the bus. Bus was behind him.
23 Dr. Khiabani was in the front.

24 Mr. Hubbard's going to testify that he
25 noticed Dr. Khiabani somewhere on Charleston.

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1 Dr. Khiabani turned right, and he headed south
2 down South Pavilion Center. And that's this
3 street.

4 This is the same picture, ladies and
5 gentlemen. This is just blown up a little more.

6 So he headed down Pavilion Center. You
7 see the bike lane here? There's a bike lane here.
8 Let me give you the dimensions real quick.

9 This is a drawing that has the
10 dimensions of the bike lane. The bike lane is
11 4 feet 6. So what we have here is 4 feet 6 all
12 the way down, 4 feet 6 here, 4 feet 6 here, 4 feet
13 6 here. Picks up on the other side, 4 feet 6. It
14 actually -- originally, there's a bike lane that
15 continues through the intersection, but the
16 traffic has obscured it. In any event, the bike
17 lane's 4-foot 6.

18 We have two lanes of travel on Pavilion
19 Center. We have the right lane of travel where I
20 have this white car. This is not a picture of the
21 day of the accident. This is some other time.
22 But this is the right lane of travel, which is
23 immediately to the east of the bike lane. Red
24 Rock's over here. Okay? Red Rock's over here.
25 So this is east. This is west. This is north.

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1 This is south.

2 The bike lane, like I said, is 4 feet
3 6 inches. Each one of the travel lanes is
4 11 foot. So 11 foot, 11 foot. In addition to
5 that, we have a turn lane here. Okay. So we have
6 a bike lane, right travel lane, right travel lane,
7 we have a turn lane.

8 And I should also point out that there's
9 a bus stop right here. So when you come in, you
10 can turn and you can use a bus stop right here.
11 And that's important for a reason I'll get to in a
12 minute.

13 So on the day of the accident,
14 Mr. Hubbard -- and this is a 51 -- 50-to-1 scale
15 drawing. Okay. This is 50 to 1. This is a
16 50-to-1 scale replica of the J4500 bus that was
17 involved in the accident. Exact same scale as the
18 scale of the drawing. This is a 50-to-1 replica
19 of a bicycle. Okay. Exact same scale as the
20 drawing, same scale as the bus. Let me put the
21 bike here.

22 Mr. Hubbard's going to be here and he's
23 going to testify, first of all, this is over
24 500 feet. You see how I have it marked, 0, 50,
25 100, 150, 200, 250, 300? And then you can see

1 where we're at in the bigger drawing? So it's
2 over 500 feet, probably more like 6 or 700 feet,
3 between Charleston and this street called Griffin
4 Peak.

5 Mr. Hubbard's going to testify that,
6 while he did notice the bike here on Charleston,
7 that after they made the turn, he never saw the
8 bike again. And what we're going to do with
9 Mr. Hubbard is the same thing we did when we
10 talked to him before the trial. We placed the bus
11 here. He's going to testify he did not see the
12 bike or Dr. Khiabani.

13 We placed the bus at the 250 mark.
14 Hubbard's going to testify he didn't see the bike
15 or Dr. Khiabani. He's in the right travel lane.
16 Doesn't see the bike or Dr. Khiabani. 250, does
17 not see the bike or Dr. Khiabani. 200, does not
18 see the bike or Dr. Khiabani. 150, does not see
19 the bike or Dr. Khiabani. 100, does not see the
20 bike or Dr. Khiabani. 50, does not see the bike
21 or Dr. Khiabani. He overtakes and passes
22 Dr. Khiabani right here at this intersection.

23 How do I know? How do I know it's right
24 there at the intersection? Because we have a
25 picture, ladies and gentlemen. There was a video

1 taken. This is the actual bus immediately before
2 the accident. See the crosswalk here? That's the
3 crosswalk here. See the two crosswalk pieces?
4 Same crosswalk. See the bus here? That is the
5 actual bus at the time of the accident.

6 See this line here? That is the line
7 that separates the right turn lane -- or excuse
8 me -- the right thru lane from the left thru lane.

9 So you can see that, when he's going
10 into the intersection, Mr. Hubbard in the bus is
11 in the exact location that I have it here.

12 Dr. Khiabani is in the bike lane. This is a
13 critical fact, ladies and gentlemen.

14 Now, we're going to talk about why the
15 bus driver drove over 500 feet and did not see
16 Dr. Khiabani in a minute. We're going to talk
17 about that in detail. But, basically, it's a
18 right-side blind spot that's in this bus. I'm
19 going to tell you the evidence about that in a
20 second. There's a right-side blind spot in this
21 bus. But, first, I want to talk about a couple of
22 the witnesses.

23 In addition to the photographic
24 evidence -- the photographic evidence is to the
25 location of the bus, that it's in the right turn

1 lane -- we have an eyewitness on the scene. This
2 is Mr. Sacarias. I call him Luis the gardener.
3 He's a landscaper or gardener that works at Red
4 Rock, works up there five days a week. He's
5 worked there for years. He was standing right
6 about here and witnessed the entire accident.

7 And to show you where Mr. Sacarias is,
8 I've prepared a block that says Sacarias on it and
9 I'll put it approximately where he was standing.

10 He's going to testify that he was
11 standing here. When he first saw the bus, the
12 front end of the bus had already passed the bike.
13 So it's exactly -- exactly the location I have it
14 here.

15 Next place, Shane.

16 The second witness is going to be Erica
17 Bradley. She was in a car with her husband
18 driving down Pavilion Center. Again, this is
19 Pavilion Center Drive. She was in a car behind
20 the bus. So I have a mark for her.

21 She's also going to testify that
22 Dr. Khiabani was in the bike lane. The bus was in
23 the right turn lane when the bus passed
24 Dr. Khiabani. The gardener, Mrs. Bradley. Okay.

25 There's going to be a third witness --

1 excuse me. Can I go back to Mrs. Bradley? She's
2 in behind. She saw the bike in the bike lane, the
3 bus in the right thru lane. And she says that she
4 saw the bike start to wobble; the bike started to
5 wobble. And she's going to testify to that. And
6 then after the bike started wobbling, it lost
7 control and veered into the left.

8 She's also going to tell you that she
9 saw Dr. Khiabani crushed by the rear tires. The
10 gardener's going to say the same thing. He's
11 going to testify that he saw three inches of tire
12 tread run over the doctor's head.

13 Next, please.

14 This is Samantha Kolch. I don't know if
15 you can see it in this picture. Again, this is an
16 actual picture of the accident scene. You see
17 these two little objects over here? These are two
18 motorcycles that -- Samantha Kolch was on one and
19 her boyfriend was on another one. And they're
20 both going to be here to testify. So you see she
21 has a diagonal angle of it, so let's put her over
22 here where she was, approximately.

23 She's going to testify that she saw the
24 bike and the bus at the zero portion of the
25 intersection, what I've marked zero, approaching

1 the crosswalk. Again, bike is in the bike lane,
2 bus is in the right-hand travel lane. She's going
3 to say that she could see the front half of the
4 bike. If you see her angle, you can see that she
5 would see the front half of the bike. See the
6 angle she's got? And she's going to say she saw
7 Dr. Khiabani peddling the bike.

8 After the accident -- and I'm going to
9 show you video in a minute where you're going to
10 actually see this happen. After the accident,
11 first her boyfriend runs across the street to
12 assist Dr. Khiabani, and then she runs across the
13 street to assist Dr. Khiabani. So she is actually
14 in the scene of the video that you'll see shortly.

15 But after the accident, she saw
16 Dr. Khiabani moving his upper body. She's going
17 to say that he moved both his right shoulder and
18 his left shoulder. He was trying to get up. And
19 she thought he was okay.

20 Now, this is going to be important when
21 we get to the damages case because, as Mr. Roberts
22 alluded to yesterday, there's going to be some
23 testimony about the pain and suffering that
24 Dr. Khiabani incurred when he was run over by the
25 bus. So that's the importance of her testimony.

1 But what I'm focusing on now is we have
2 one, two, three witnesses and photographic
3 evidence that, when the bus first passed
4 Dr. Khiabani's bike, the bus was in the right
5 travel lane; Dr. Khiabani's in the bike lane.

6 Next, this is the fourth eyewitness.
7 His name is Robert Pears. He was a Chicago
8 tourist who got on the bus at McCarran to go to
9 Red Rock. And, again, as I told you, Mr. Hubbard
10 was the bus driver. He drove the bus to McCarran,
11 picked up some passengers, and he was bringing
12 them to Red Rock. All right?

13 Mr. Pears is located in the front seat
14 of the bus, the far right side. So I'm going to
15 put this on top of the bus. He's not on top of
16 the bus. Okay? He's inside the bus, but I've got
17 to put it somewhere.

18 All right. Mr. Pears is going to
19 testify that the bus driver mistakenly turned --
20 remember I told you there was a bus turn in here.
21 He's going to say the bus driver was coming down
22 the right turn lane, that he crossed over the bike
23 lane, that he went into this, and then he crossed
24 back over into the bike lane and he continued his
25 routes of travel.

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1 The only reason this is important is
2 because it helps me explain why the bus didn't
3 catch up with Dr. Khiabani until this point.

4 Okay. So we have one, two, three, four
5 eyewitnesses and a picture all going to prove to
6 you that the bus was in the left -- or excuse
7 me -- the right turn lane and the bike was in the
8 bike lane when the bus started passing.

9 And as I said already, Bradley is going
10 to testify that, after the bus started passing the
11 bike, there was a wobble.

12 Now, the photograph -- and I don't think
13 this is going to be disputed, ladies and
14 gentlemen. I mean, there's four eyewitnesses;
15 there's a picture. I don't think it's going to be
16 disputed that Dr. Khiabani was in the bike lane
17 and the bus was in the travel lane when the bus
18 started passing him. I don't think it's going to
19 be disputed that Erika Bradley saw the bike start
20 wobbling.

21 What is going to be disputed is what
22 caused the wobble. That's going to be disputed
23 and discussed in the case. So I'm going to get
24 back to that, but I'm going to tell you what
25 happened after -- after the bike started wobbling

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1 and Dr. Khiabani lost control.

2 The bus -- I'm going to show you a video
3 in a minute. The bus comes over this way.

4 Dr. Khiabani loses control, and the bike -- this
5 is the actual bike. This is the actual bike that
6 Dr. Khiabani was riding. I'm going to show it to
7 you in a minute. The bike loses control and
8 strikes the bus approximately here. There's a
9 black mark that I'm going to show you in a minute.

10 You know, this never happens in
11 practice.

12 So there's a black mark here where the
13 handlebar of the bike strikes the bus. And then
14 Dr. Khiabani gets run over by the right rear tire
15 here. All right? Okay.

16 Now, both sides have hired experts that
17 are called accident reconstruction experts. And
18 what they do is they look at the debris that's
19 left over after the accident. They look at the
20 eyewitness testimony. In this case, there's
21 actually a video that I'm going to show you in a
22 minute. They look at the video. And they give
23 you their opinion as to how the accident happened.
24 And usually there's a lot of divergence. You
25 know, one side says X and the other side says Y.

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1 Usually, there's a lot of argument about what
2 happened.

3 In this case there's not really a lot of
4 argument. Our accident reconstruction expert is
5 named Robert Caldwell, C-A-L-D-W-E-L-L. Their
6 accident reconstruction expert is named Rucoba
7 R-U-C-O-B-A. And they're both going to tell you
8 pretty much the same thing. Okay? They're both
9 going to tell you the same thing. And I think the
10 reason they're going to tell you the same thing is
11 because, as I've said a couple times already,
12 there's a video that I'm going to show you in a
13 minute.

14 There is one difference in the approach
15 that our accident reconstruction expert takes and
16 their accident reconstruction expert takes.

17 Our accident reconstruction expert is
18 going to tell you that you just can't look at
19 whether where the cars wind up after the accident
20 to determine what happened. That's not the way to
21 do it. Okay.

22 Their approach is going to be to look at
23 what happened at the time of impact, after impact.
24 That's where they're going to jump to. Because
25 they don't want to talk about what caused the

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1 wobble. I'm going to get into that in a minute.

2 But, anyway, that's going to be the key
3 difference between the accident reconstruction
4 experts, how they analyzed this.

5 Now, let's talk about the areas of
6 agreement. They both agree that Mr. Hubbard is
7 traveling down Pavilion Center in the right thru
8 lane. They both agree that the bike was in the
9 bike lane. They both agree that the bus was
10 traveling 25 miles per hour. That's posted for
11 30 miles an hour. So he was traveling five miles
12 under the speed limit, and he was traveling that
13 during the entire time we see the video. Okay.

14 And the reason they can say that with
15 such certainty -- they both say that -- is because
16 they take the video and they measure the length of
17 the bus and they see how many milliseconds it
18 takes to get from X to Y. So they know that the
19 bus was going 25 miles an hour. That's not going
20 to be a disputed point.

21 They're going to agree also where the
22 point of first impact was.

23 Can I have my next slide, Shane.

24 This is a blowup from the bike. Okay?
25 If you can see the handlebar there, that is the

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1 left handlebar. As I told you, this is the actual
2 bike. This is the bike Dr. Khiabani was riding at
3 the time of the accident. You see the left
4 handlebar right about -- sorry. I can't really
5 see it. See how it's torn? Yeah, here it is.
6 See how it's torn here? That's where the
7 handlebar hit the bike. Okay. We know exactly
8 where it hit the bike on the bus.

9 Can I have my next one, Shane.

10 This is where it hit the bus. Do you
11 see that black mark? This is where the handlebar
12 hit the bus. We have measured that black mark,
13 how far it is up from the ground.

14 Do I have a measurement, Shane?

15 Well, in any event, it's 29 to
16 30 inches, 29 and a half. Oh, there it is. Okay.
17 There's the measurement. You see the 2. That's
18 2 feet. And then we go up. And so they have the
19 measurement there, how far it is, 20 -- two feet's
20 24 inches. If you add another five, you see where
21 the mark is. So it's 29 inches at the bottom,
22 maybe 30 at the top. So I'm going to call it 29
23 and a half inches. All right. That's where the
24 handlebar hits the bus.

25 Now, important point, ladies and

1 gentlemen. For a bike's handlebar to hit the
2 bus -- and I've marked this, this dot here. This
3 is 29 1/2 inches up from the ground. For a bike
4 handlebar to hit -- to hit this, the bike has to
5 be at this angle, out of control. Dr. Khiabani's
6 bike was out of control at the time that the bike
7 hit the bus. That's pretty much agreed to. Both
8 the accident reconstruction experts are going to
9 tell you the same thing, and we have the
10 photographic evidence.

11 Now, I told you that I'm going to show
12 you the video. This is a video taken by a Red
13 Rock surveillance camera. The video's
14 approximately in this position. Okay? Or, excuse
15 me, the camera's in this position. So the camera
16 is shooting down this way. So you will see what
17 happened -- you will see the bus come through the
18 intersection.

19 Now, remember, this is a casino
20 surveillance video. And I don't know if any of
21 you've had experience with that, but they have
22 what's called a slow capture rate. This is not
23 Steven Spielberg going 35 millimeters or -- this
24 is a slow capture rate. And they do that because
25 they have to store all this stuff and it's a

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1 faster capture rate, they have to store more. So
2 it's a slow capture rate. And when you have a
3 slow capture rate, you don't see details. Things
4 are blurry. So you're going to see the bus very
5 clearly in this video, very clearly. And I've
6 seen the video many times.

7 You will not be able to see Dr. Khiabani
8 and the bike in the video. However, after you
9 watch the video, I'm going to show you some stills
10 that were made from the video that will show you
11 Dr. Khiabani on the bike.

12 Okay. Shane, can I have the Red Rock --
13 and this is not the entire Red Rock video. The --
14 there's a couple minutes before. There's a period
15 afterwards. They focus on the scene. They have
16 Dr. Khiabani laying there. So I'm just showing
17 you the part where the bus goes through the
18 intersection now.

19 Go ahead, Shane.

20 (Video playing.)

21 MR. KEMP: Okay. Before I play it
22 again, I want you to notice three things. One,
23 that when the bus comes over the crosswalk, it's
24 in the right turn lane, just like I've said a
25 couple times. Two, at some point, the bus starts

1 veering to the left. Okay? And, three, you're
2 not going to see Dr. Khiabani, but you'll see that
3 the bus is going through the intersection.

4 Let's see it one more time, Shane.

5 You're probably going to see this over
6 and over again in the case, ladies and gentlemen,
7 so -- so don't feel obligated to memorize it now.

8 (Video playing.)

9 MR. KEMP: Okay. I told you you
10 couldn't see Dr. Khiabani in that video. Told you
11 that.

12 All right. Shane, can I have my first
13 still.

14 From the video -- remember, it's a slow
15 capture rate. So we can only capture 4
16 pictures -- not 5, not 10, not 15 -- 4 pictures
17 that show Dr. Khiabani and the bike from the
18 entire video.

19 This is the first one. Do you see the
20 kind of black, blurry image that's -- it's
21 immediately behind the bus and it's in front of
22 the tire. That's Dr. Khiabani on the bike. We're
23 going to have experts testify to that. So if you
24 see where it's circled, that is where Dr. Khiabani
25 is on the bike. Okay? This is before the bike

1 falls.

2 Next one, Shane.

3 Okay. This is the second video in the
4 series or the second still from the video. See
5 the bus has come forward. It's come over a little
6 bit. You still see Dr. Khiabani. You can barely
7 see the tire. He's still in front of the right
8 front tire.

9 Next one, Shane.

10 Again, pretty much the same as the
11 previous video. But you see the dark mark there.
12 That's Dr. Khiabani.

13 Next one, Shane.

14 Okay. And you can barely see
15 Dr. Khiabani behind the palm tree frond in this
16 particular vehicle.

17 Now, if you compare the two videos -- or
18 excuse me. If you compare some of the stills --
19 Shane, can I have the comparison, please.

20 Again, this is just to show you that,
21 when the bus starts through the intersection, he's
22 in the right thru lane, just to make sure there's
23 no dispute about that.

24 Next one.

25 All right. I'm comparing the first

1 video with the fifth one. Remember, there's four.
2 The first -- the first picture's the one of the
3 bus just entering -- just coming over the
4 crosswalk, that line. So this is 2 and this is 5.
5 So the second video -- and the reason we're
6 showing you this is so you can see that the bus is
7 starting to pull over. See how the bus is veering
8 to the left? And the reason that's important is
9 because it shows that the driver in this case had
10 pretty good reaction time. And that's going to be
11 important to a point I get to later.

12 Now, you see the pink there? Okay.
13 What we've done is we've taken this portion of the
14 crosswalk and we made it pink in both pictures.
15 And the reason we've done that is so you can
16 see -- you can see that, in the difference between
17 the two videos, the buses come forward and it's
18 veering over. Okay?

19 And you see where the crosswalk is? You
20 see how we made one of them pink? So what we're
21 trying to show you there is that the bus is
22 starting to come over to the left as it crosses
23 the intersection.

24 Again, you see Dr. Khiabani's shape in
25 both the videos, more prominently in the first

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1 one, but you see him also in the second one. All
2 right.

3 Next one, Shane.

4 I've told you about right-side blind
5 spots. You're going to hear a lot in this case
6 about right-side blind spots, and the reason is
7 because Dr. Khiabani was on the right side of the
8 bus.

9 This is where the bus driver sits.
10 Mr. Hubbard was sitting on the left side;
11 Dr. Khiabani is on the right side. So there's
12 going to be testimony from a lot of people about
13 right-side blind spots. This is what's called a
14 3D visualization. This is prepared by our 3D
15 visualization expert. His name is Josh Cohen,
16 C-o-h-e-n.

17 What he does is he takes a laser, and
18 they put the laser in the actual bus, and the
19 laser shoots out like this, puts it in the driver
20 seats. And then he takes a laser and he lasers
21 the actual bike, and he tries to get some sort of
22 perspective for you as to what the driver would
23 see depending on where the bike is.

24 Now, the perspective change is depending
25 on how close the bike is to the bus. The closer

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1 the bike is to the bus, the harder it is to see
2 the bus. If the bike is farther away, it's easier
3 to see. But Josh is going to be able -- if you
4 want -- remember the Court said you could ask
5 questions. Josh is going to be able -- when he's
6 on the stand, if you want him to show you what the
7 right-side blind spot looks like when the bike is
8 one foot away, two foot away, three foot away, two
9 foot behind, two foot forward, he can do that for
10 you. He can do it on the fly. Okay? But this is
11 just to exemplify for you the right-side blind
12 spot problem that we're going to discuss in the
13 case.

14 And, again, like I said at the
15 beginning, Mr. Hubbard is going to testify that he
16 drove all the way down Pavilion Center, did not
17 see Dr. Khiabani once. Walked him through all
18 these points, did not see Dr. Khiabani.

19 Now, I told you we had the actual bike,
20 and I showed you the handlebar abrasion picture.
21 This is the actual bike. It's going to be a piece
22 of evidence. You can take it back in the jury
23 room with you. You can touch it. You can do
24 whatever you want to with it. The experts have
25 all examined it. And I'm going to get into what

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1 they didn't find in a second, but this is the
2 actual bike that Dr. Khiabani was riding.

3 You see it's relatively undamaged. No
4 damage to the wheel, handlebar still moves
5 appropriately. The one spot it is damaged is here
6 where the abrasion is. And there's a little mark
7 on the -- what do you call those things? -- pedal,
8 the pedal on the bottom, which is really not that
9 important. So that's the actual bike that you
10 will see in the case.

11 Now, Josh, I told you he's going to do a
12 visualization. Again, the picture on the left is
13 the actual Red Rock still I showed you already.
14 This is Josh's visualization. As you can see,
15 when I matched up the handlebar with the
16 29 1/2 inches, the bike is really tipping a little
17 more than it is in the visualization. But this
18 is -- this is what Josh is going to visualize, 3D
19 animate, as to how the bus -- or excuse me -- the
20 bike first came in contact with the bus.

21 Now, I told you Erika Bradley saw that
22 there was a wobble when the bus first began
23 passing the bike. There's a wobble. She's going
24 to testify there's a wobble. And I'm going to get
25 into the debate about what caused the wobble in a

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1 minute, but she's going to tell you there's a
2 wobble.

3 Both of the experts agree that what
4 happened is the bike went out of control somewhere
5 in this particular area. The bike veered into the
6 bus. And at the point it hits the bus, the back
7 tires of the bike are approximately 3 1/2 feet
8 outside of the bike lane. No dispute that, when
9 the bus was passing, the bike was in the bike
10 lane, but, after the wobble, after they lose
11 control, the outside tires of the back, about
12 3 1/2 feet -- the handlebar is about 5 1/2 feet or
13 6 feet outside the bike lane. And the reason
14 there's a difference is because the bike is
15 tipped, so you've got to measure the handlebar and
16 the back tire. That's the reason there's a
17 difference there. Okay?

18 Now, when Dr. Khiabani hit the side of
19 the bus, he fell to the ground and -- he was
20 wearing a helmet. I'm going to show you the
21 helmet in a second. His left-hand side hit the
22 ground. This is the actual helmet. We have a
23 picture of it. This is the actual helmet that
24 Dr. Khiabani was wearing at the time of the
25 accident. It's going to be an exhibit in the

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1 case. You can take it back to the jury room with
2 you and look at it.

3 You will see the left side of the helmet
4 is crushed, not the right side of the helmet. The
5 left side of the helmet was what was sitting on
6 the ground. The bus runs over the helmet, and
7 there's a circular skull fracture here. This is
8 what ultimately killed Dr. Khiabani. I can show
9 you an MRI of the circular skull fracture in a
10 minute.

11 Because there's going to be a dispute
12 here, and I'm going to get into it in a lot of
13 detail. Basically Luis, the gardener, testified
14 that 3 inches of the tire tread went over the
15 helmet. Our helmet reconstruction skull fracture
16 expert is going to testify that the bike had to
17 have run over the helmet to create the circular
18 skull fracture.

19 The defendants are going to argue to you
20 that the bus was over slightly a couple inches and
21 that only the sidewall hit the helmet and somehow
22 or another caused some sort of pinching to the
23 circular skull fracture. I don't understand the
24 theory, but that is their theory. But, in any
25 event, this is the actual helmet he was wearing.

1 And the point to make now is that we have all the
2 damage on the left side.

3 Let me put that away because this is an
4 important exhibit.

5 Okay. The first big debate in the case:
6 What caused the bike to wobble? When the bus
7 passed the bike, what caused the bike to wobble?
8 That's the first big debate in the case.

9 All right. This is what the evidence is
10 going to show. I have possible wobble causes:
11 the air blast, a bike problem, a road
12 impediment, physical impairment. I have the
13 plaintiff's position. I have the evidence
14 according to MCI, because I'm trying to narrow
15 down the issue here.

16 Okay. Bike problem. We looked at the
17 bike, their experts looked at the bike, and you're
18 going to be able to look at the bike. Nothing
19 wrong with the bike. As I've already said, no one
20 can find anything wrong with the bike.

21 So their experts are going to say that
22 there is no evidence that the bike problem caused
23 the wobble. Their experts are going to say that.
24 Our experts are going to agree.

25 Next possibility: road impediment.

1 Okay? In theory, there could have been a big --
2 even in Summerlin, they have potholes, ladies and
3 gentlemen. But, in theory, there could have been
4 a big pothole here or a rock or something, and
5 then Dr. Khiabani hit it, and that caused the bike
6 to wobble. You know, it's pretty coincidental
7 that the pothole pops up right when the bus starts
8 passing.

9 But, in any event, they examined the
10 road with a fine-tooth comb. The experts for both
11 sides have been up and down this area of the road.
12 They've taken a real good look at it. And they're
13 both sides, both sides -- our expert,
14 Mr. Caldwell, Mr. Rucoba -- they're both going to
15 tell you that there's no road impediment, no
16 pothole, no elevation of asphalt, nothing that
17 could explain a wobble.

18 And so their experts are going to say no
19 evidence of road impairment.

20 Next possibility: physical
21 impairment. Was Dr. Khiabani physically impaired?
22 Sometimes when you ride a bike for a long time,
23 you get dehydrated and your muscles start
24 cramping. Sometimes that happens. So what
25 happened in this case is, after the death, they

1 took the body down to UMC and the coroner looked
2 at it. She's going to be here to testify. Her
3 name is Lisa Gavin.

4 They did some testing on Dr. Khiabani's
5 electrolytes. Okay? And I don't really
6 understand this as well as I probably should, but
7 they found that there was no dehydration, no signs
8 of physical impairment. So their experts are
9 going to tell you -- tell you that there's no
10 evidence of physical impairment.

11 So what does that leave? That leaves
12 the air blast. Back in 1890, there was a book,
13 one of the first Sherlock Holmes books was
14 published. And it was called "The Sign of the
15 Times," and that was the book where Sherlock
16 Holmes came up with the famous saying that when
17 you've eliminated all the other causes, whatever
18 is left is the truth. When you have eliminated
19 all the other causes, whatever is left is the
20 truth. And the truth in this case is what caused
21 the air blast.

22 Now, they dispute that it was an air
23 blast, so I'm first going to talk about our
24 evidence with regards to air blasts.

25 And I say they dispute there's an air

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1 blast, but when we get Mr. Rucoba on the stand,
2 he's going to tell you he doesn't know. He has no
3 opinion as to why this bike wobbled, no opinion,
4 no idea. This is their expert has no idea. We're
5 going to bring some experts, but let's see the air
6 blast evidence.

7 Okay. First off, I want to explain what
8 I call aerodynamics 101, because, surprisingly,
9 most of us know more about aerodynamics than we
10 think we do. Okay?

11 The first picture is just a hand, a
12 child's hand. I did this. When you're driving in
13 the car and you're five or six years old, you
14 stick your hand out and feel the wind rushing. It
15 moves your hand back. If you don't want your hand
16 to be moved back, you turn your hand this way. So
17 you learn that flat objects cause more disturbance
18 than round objects. Okay?

19 That's what the next graphic is
20 attempting to illustrate for you, that a round
21 object -- in this case, a skier -- I don't know if
22 you've been watching the Olympics, but you don't
23 see the skiers do the races standing up. They
24 want to get low in what they call a tuck position
25 because they want less air disturbance.

1 And the third example, I think, is
2 probably the most famous example of aerodynamic
3 engineering. This is a picture of the bullet
4 train from Japan. The bullet train debuted in the
5 1964 Tokyo Olympics. It caused a huge sensation
6 because no one had ever seen anything like this
7 before, rounded front. It's a good example of
8 aerodynamic engineering.

9 And we're not suggesting that the bus
10 should have been designed like the bullet train.
11 Don't get me wrong. I'm not suggesting that.
12 What I am suggesting is that it's pretty generally
13 understood that flat objects cause more
14 disturbance than round objects.

15 Now, let's take a look at the evidence.
16 This is the evidence that's going to be presented
17 in the case about the air blast.

18 First evidence we have: science. We
19 start with the science. This is a 1981 paper by
20 someone named Dr. Kato. I'm going to talk to you
21 about it in a minute. What he did is he put blunt
22 objects like buses in a wind tunnel. He had a
23 stationary bicycle, and he was trying to determine
24 what caused the wobble. And I'll tell you what he
25 found in a minute. That's the first piece of

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1 evidence.

2 The second piece of evidence is the
3 testimony from Dr. Breidenthal. He is an
4 aerodynamic engineer. He's the only aerodynamic
5 engineer who is going to testify in this case. He
6 has a doctorate in aerodynamics. They have a
7 number of experts. We will prove to you that none
8 of them has even a bachelor's degree. They don't
9 have a bachelor's degree, a master's degree, a
10 doctorate in aerodynamics. Dr. Breidenthal does.
11 They did not hire their own aerodynamic engineer
12 for whatever reason.

13 The third piece of evidence will be
14 Brian Sherlock's testimony. I'm going to get into
15 that in a minute.

16 The fourth piece of evidence about the
17 air blast is admissions, admissions when we took
18 the depositions of the MCI engineers. They
19 admitted that the bus has air displacement.

20 The fifth thing we're going to talk
21 about is a 1985 paper by Dr. Cooper. And I'm
22 going to go into all this in a second. And in
23 that paper, he discovers -- and this was 33 years
24 ago -- he discovers that, if they just round the
25 front corners of a bus and round the top, they

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1 make it more aerodynamically efficient. You know,
2 I don't know if that's such a big discovery. You
3 know, children know that.

4 But, in any event, the last piece of
5 evidence we're going to talk about is the 1993
6 wind tunnel test that MCI did. This is an
7 exhibit. It's already been admitted. It's
8 Exhibit 126. This is going to be a key exhibit in
9 the case, and I think you're going to find out
10 why.

11 Okay. Let's start with Dr. Kato's
12 paper. Okay. This is a paper, Dr. Kato was a
13 Japanese scientist, 1981, long before our case
14 started. And what he was trying to find out are
15 the reasons why a bicycle is caused to wobble by a
16 passing vehicle. So this is the core signs.

17 He says aerodynamic effects to a bicycle
18 by a passing vehicle will have been investigated
19 experimentally at their -- theoretically. That's
20 what he does in this paper.

21 Can I have my next one, Shane.

22 So this is what he finds. He finds
23 that, when a bus first starts passing a bicycle,
24 there is an outward force, an outward force.
25 We're going to call it an air blast just for

1 shorthand, but he finds there's an outward force.
2 That's what he's saying here.

3 Then, when the bus pulls even with the
4 bicycle, outward force creates a negative pressure
5 zone. Then there's a slight pull. This is what
6 Dr. Kato found in 1981. Big push, slight pull
7 when the bus passes the bicycle.

8 Next one, please.

9 These are his conclusions. The force
10 acting on a stationary bicycle -- and what he did
11 in this case is he had a wind tunnel and he put a
12 stationary bike in. And then he had a bus came up
13 behind him and he measured what happened. That's
14 how he did the experiment.

15 So he found out that the force on the
16 bicycle is in a direction away from the moving
17 vehicle -- moving vehicle in this case is the
18 bus -- for the first time when the passing begins.
19 So the bus starts passing, bus starts passing,
20 it's a push out.

21 When they come more even, it pulls. And
22 the pulling increases depending on how far away
23 the bike is from the bus.

24 Now, remember Mr. Sacarias is going to
25 testify that it's about 2 1/2 feet away.

1 Mrs. Bradley is going to testify that she thinks
2 the bike was 3 feet away. Mr. Pears is going to
3 say under 3 feet. So those are what the
4 eyewitnesses are going to say. I've already shown
5 you the still pictures.

6 Next.

7 So let's apply Dr. Kato's conclusions to
8 what happened in this case. The bus comes up on
9 the bicycle, first starts passing the bicycle.
10 There's a pushing -- pushing motion pushing the
11 bicycle. That's the first thing that happens.

12 Go back to that one.

13 This is the spot -- see the blur? This
14 is where the bus first comes up on Dr. Khiabani.
15 So this is where, according to Dr. Kato's paper,
16 there's a pushing impact. And, by the way,
17 Dr. Breidenthal -- Dr. Kato's paper is pretty
18 deep, pretty deep, so Dr. Breidenthal is going to
19 try and explain it to you in a little more
20 simplistic terms.

21 But in the first picture, if you see,
22 the bus is coming up on the doctor there, that's
23 where you have the pushing effect.

24 Next one, Shane.

25 This, the bus is now passing him. This

1 is where we start having the slighter pulling
2 effect.

3 Next one, Shane.

4 This is where we have some more pulling
5 effect.

6 So that's just applying the science to
7 what happened in this accident, ladies and
8 gentlemen.

9 Next slide.

10 Told you about Dr. Breidenthal. He's
11 the only aerodynamics expert that's going to
12 testify in this case. He has nice bright blue
13 eyes. He's going to tell you a couple general
14 things, first of all.

15 Buses and other large objects like
16 trains and trucks create air blasts when they
17 travel because air hitting the front of the bus
18 has to go around the bus, can't go through the
19 bus. The front of the bus is not a screen door.
20 So the air cannot come through the front of the
21 bus; it's got to go around the bus. That's the
22 general principle he's going to explain to you.

23 Second, he's going to say that a
24 J4500 -- that's the bus in this case. It's a
25 J4500 made by MCI. He's going to say that, when a

1 J4500 is traveling 25 miles per hour -- and,
2 remember, everybody agrees the bus was traveling
3 25 miles an hour when it passed Dr. Khiabani --
4 he's going to say it creates a 10-pound side
5 blast, 10 pounds. That's how he measures it.

6 Now, he's going to explain to you that
7 manufacturers, when they make these big buses and
8 trucks and the like, they use wind tunnels and
9 computer modeling to try to get the optimal design
10 shapes. Okay?

11 I don't think I was quite done, was I?
12 See, Shane, you're trying to -- if you've got to
13 go to the bathroom, you can give me one of these
14 too.

15 Okay. So they use that to reduce the
16 amount of air blast and make the product more
17 aerodynamically efficient.

18 Next one.

19 Now, he's also going to discuss with you
20 Plaintiffs' Exhibit 126. I've already told you
21 about that. That is the wind tunnel test that
22 MCI, the defendant in this case, did in 1993 to
23 test bus fronts. I'm going to get into that in
24 two seconds.

25 But he's going to say that they found a

1 bus front that was a safer alternative to what
2 they have on this bus. They found it in 1993.
3 They didn't use it. It resulted in a greater wind
4 blast. Dr. Breidenthal is going to say some other
5 things, but those are the highlights.

6 Next.

7 This is a very important witness. The
8 Amalgamated Transit Union -- you know, I asked him
9 what amalgamated means, and he told me. I can't
10 remember what the heck he said, but the
11 Amalgamated Transit Union -- it's called the
12 ATU -- it has over 190,000 members in the United
13 States, in Canada. It's the bus drivers union.
14 This is the bus drivers union.

15 This man, Mr. Sherlock, works for the
16 bus drivers union. He is a bus safety specialist
17 for the bus drivers union. He has investigated
18 hundreds -- hundreds -- of bus accidents. I call
19 him the Sherlock Holmes of bus accidents because
20 he investigates them to determine the cause.

21 He's going to tell you, first of all,
22 that the ATU, the bus drivers union, they call
23 buses mobile manslaughter machines. And the
24 reason they call them -- this is the union calling
25 them that. They call them mobile manslaughter

1 machines because a poorly designed bus can be very
2 dangerous. He's investigated hundreds of
3 accidents, including an accident he's going to
4 tell you about that happened in Seattle that's
5 similar to this accident, where a bus overtook a
6 bicycle, the bike wobbled because of the
7 aerodynamic forces, and steered into the bus.
8 He's going to tell you about that prior case.

9 Next.

10 He's going to tell you he studies air
11 flow on the sides of buses, and he's run a lot of
12 experiments where he drives buses near parking
13 lots where they have automobiles. I don't know if
14 your automobile has them; I don't think mine does.
15 Some automobiles have alarms that are usually
16 triggered by motion. So he drives buses by these
17 automobiles, and he triggers the motion detector
18 with them. He's going to tell you that. And he's
19 going to tell you that the air blast from this bus
20 caused the bicycle to wobble and lose control.

21 And he's also going to tell you that he
22 told the MCI -- he told the engineers that are
23 employed by the defendant about the air blast
24 problem in 2015 and 2016, before this accident
25 occurred. And he suggested that they round the

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1 corners on the bus. He made that suggestion to
2 them.

3 Next.

4 Another witness, we're going to present
5 him by video. This man's name is Brian Couch.
6 It's spelled couch, but it's pronounced kooch.
7 He's from Canada. I don't even know if that's the
8 way it's spelled, but it is pronounced kooch,
9 because I asked him in the deposition.

10 He was the head designer. They had a
11 big team, and he was the head guy on the design
12 team for the J4500. And he's going to admit in
13 the deposition -- and we'll play it for you --
14 that he knew that air displacement from buses can
15 affect bicyclists -- his word, "effect."

16 And he knew that reducing the drag
17 coefficient -- all right. Big word. Let me stop
18 for a second and explain to you what drag
19 coefficient is.

20 Drag coefficient just means how much
21 wind displacement, how much air displacement or
22 air blast there is. So when we use the words
23 "drag coefficient, air blast, air displacement,"
24 we're all talking about the same thing. It's a
25 measurement. And there's a scale which I'm going

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1 to talk about in a second.

2 But he knew that reducing the drag
3 coefficient, making the bus more streamlined,
4 would reduce the air blast and that the effect of
5 this would be to protect bicyclists. He knew it.
6 He knew it when they designed the bus.

7 Next one.

8 He knew that all he had to do was round
9 the front of the bus. And I'm going to show you
10 the 1993 wind tunnel test in a minute, and I'll
11 show you.

12 And so I asked him, "Well, if you're not
13 going to round the bus and you're going to keep it
14 with the air blast risk, at least you should warn
15 people about it."

16 And so he says, "Well, that's not our
17 job. Nevada DMV should be giving warnings about
18 our bus." This is what he actually said in the
19 deposition. We're going to play it for you.

20 Next, please.

21 This is the actual J4500 in this case.
22 Okay? This is the left side of the bus. Again,
23 Dr. Khiabani was on the right side of the bus.
24 But this is the bus in this case. All right.

25 Next one, Shane.

1 Now, we're going to prove to you that
2 there were three different safety options -- not
3 just one, but three different safety options that
4 were invented in the 1993-1998 time frame that MCI
5 didn't use on this bus.

6 The first one, in 1993, they -- they
7 designed a safer bus front. And I'm going to show
8 it to you. 1995, an S-1 Gard patent issued.
9 That's a protective barrier. I have one here.
10 I'm going to show that to you in a second.

11 Proximity sensors, the patent was issued
12 for the Eaton proximity sensor. They're all
13 either radar or what they call lidar. It's just
14 invisible beams that shoot out and bounce back.

15 So that's when they got their patent in
16 1998. And then they made this bus. It was a 2008
17 bus. They made it sometime in 2007. The sales
18 date was September 20, 2007. But they made it.
19 They didn't use the safer rounded bus front that
20 they had made themselves, what, 7 plus -- 14, 15
21 years earlier. They made it without the rear tire
22 protectors, the S-1 Gard, or any rear tire
23 protector. They made it without side cameras.
24 And they made it without proximity sensors.
25 That's how they made this bus.

1 Okay. Next one, please.

2 So our argument is going to be that the
3 bus is unreasonably dangerous for three reasons.
4 First, they didn't design the bus to reduce the
5 air blast. I'm going to show you the design they
6 had that they didn't use.

7 Second reason. They knew, they knew
8 that there was a right-side blind spot problem on
9 this bus. They knew about it. They didn't use
10 side cameras, front cameras, or proximity sensors.

11 Third reason. They didn't have any sort
12 of rear protective barrier. If you look at the
13 model bus -- remember the pictures I showed you?
14 There's no rear protective barrier on the rear
15 tires of this bus.

16 Next.

17 And I've already pointed out they didn't
18 provide a warning of the air blast, and they're
19 going to tell you DMV should have done it.

20 Next.

21 So there's three design defects:
22 Aerodynamic, side camera, proximity sensor. And
23 in -- they're really the same thing. You can --
24 you know, you can solve the right-side blind spot
25 problem in a number of different ways. One --

1 one, can design the bus a little differently. But
2 if you don't do that, you can either use a side
3 camera, proximity sensor, some sort of front
4 camera. There's a couple solutions here.

5 And then the rear tire protective
6 barrier, there's a couple solutions there too.
7 They didn't do any of them.

8 Next.

9 This is the next piece of evidence I'm
10 going to show you. This is a 1985 paper by a
11 world-renowned aerodynamics engineer named
12 Mr. Cooper. Dr. Cooper, I'll call him. He found
13 that if you just round the edges of the front of
14 the bus slightly, you can reduce the air blast.
15 And on top of finding that, he gave his data out.
16 He said what the optimum edge radius -- and
17 "radius" and "radii" are terms you might hear a
18 little bit. All that means is how round the front
19 is. Okay? They call it radii and radiuses. All
20 that means is how round the corner is.

21 So he published the optimum radius for
22 buses. He published it in 1985.

23 Next one, please.

24 And he said that it's easier to reduce
25 the air blasts for a bus than it is for something

1 like a truck or a trailer. And the reason for
2 that is buses are relatively simple. You know,
3 it's a big rectangle traveling down the street. A
4 truck is hooked onto something. A trailer's --
5 you know, there's more aerodynamic issues with
6 those.

7 So he says it's easier. This is
8 Dr. Cooper.

9 Next, please.

10 So what do they -- what do they do when
11 they find out about Dr. Cooper's paper? And we
12 will prove to you they had it in their files.
13 They went and hired Dr. Cooper. They went and
14 hired the man who wrote the '85 paper and they
15 said, "We want you to test our bus, test the drag
16 coefficient, the air blast, test it against our
17 competitors, and come up with a safer part for
18 us." That's what they hired him to do.

19 This is going to be an exhibit in the
20 case. This is the actual exhibit that's admitted.
21 Court clerk has asked me not to stray too far
22 because sometimes these things get lost. But this
23 is Exhibit 126. You'll be able to see it. This
24 is the MCI test report that Dr. Cooper did. This
25 is one of the key exhibits in the case, ladies and

1 gentlemen. August 1993, wind tunnel investigation
2 of the aerodynamic characteristics of buses.

3 Okay. Next, please.

4 So -- and you can tell this is kind of
5 old. I mean, look at their hairdos and their
6 clothes. Okay? This was done in 1993.

7 Basically, what they do is they build smaller
8 scale models of the bus and then they test it in
9 wind tunnels and they see what the drag
10 coefficient, the air blasts are. That's what they
11 do. So this is a picture of them putting one of
12 the buses in a wind tunnel before they push the
13 wind button on and they do the measurements of it.

14 Next, please.

15 Okay. This is from the exhibit. You'll
16 have it. These are the buses they tested. Now,
17 remember, this was back in 1993. The bus in this
18 case was designed between 1993 and 2000. So all
19 this was done before they designed the bus in this
20 case.

21 So they had to test it on something, so
22 what they did is they took the standard CJ3, which
23 is the -- which is an MCI bus, and they compared
24 it to what's called a Setra 315. That's a bus
25 made by Mercedes. And then Prevost -- this is

1 their big competitor. Okay. Prevost is a Volvo
2 bus. So they threw that in the wind tunnel test.
3 Another Mercedes. And then the next things are
4 their alternative parts that they're trying to
5 make the bus aerodynamically efficient.

6 So this is what -- these are all the
7 shapes they put in the wind tunnel. And you can
8 see what they did, ladies and gentlemen, is they
9 just made the front shapes and then they took them
10 off. They put it on the same bus body when they
11 tested it. Just those -- it's all exactly the
12 same except the front. Because what they're
13 trying to do is they're trying to find the front
14 that creates less of an air blast.

15 And if you look, one, two, three, four,
16 five, six, that's going to be the winner. Okay?
17 That is what's called alternative one, proposal 1.
18 The third one from the right, the sixth one from
19 the left, take a look at it. See how the corners
20 are more rounded than the others? They tested
21 this in the wind tunnel and what did they find?
22 Here's what they found.

23 Oh, excuse me. This is the introduction
24 of the report. Again, Dr. Cooper was paid by MCI
25 to do this. This is what he wrote. He writes:

1 "The aerodynamic side force," the side air blasts,
2 rowing moment and yawing moment," I don't want to
3 get into that now, "are important to handling
4 because they provide disturbance that deflects a
5 bus from its path of movement in the presence of
6 side winds or passing vehicles."

7 So one of the things they're looking at
8 is trying to reduce the air blasts because they
9 don't want their own bus to wobble. That's what
10 they're trying to do. As I showed you before,
11 Mr. Couch realized that, by reducing the air
12 blasts, he could help bicyclists.

13 Next, please.

14 All right. These are the test results.
15 And this is Exhibit 126. You'll have this. Okay.
16 Here's what they found. Their bus, the MCI CJ3,
17 has a .58 drag coefficient. And the way this
18 works is 0 is best and 100 is worse. Okay? If
19 there's -- there -- the bus is just traveling
20 through space, it will have a 0 drag coefficient.
21 If it's traveling through a brick wall, it will
22 have 100. Okay? So 0 -- or 1, excuse me. So 0
23 to 1 is the scale here. The higher up you are
24 means more air blasts. The lower you are, the
25 better.

1 So what did they find out? They found
2 out that their big competitor, Prevost, which is a
3 Volvo bus -- it's made by the Volvo group out of
4 Sweden. This is their big competitor at the time.
5 They find out the big competitor only has a .40
6 drag coefficient. .40. Yet their bus has a .4 --
7 .58. And what's that mean? If you do the math,
8 45 percent more air blast. This is their testing,
9 45 percent more air blast on their bus than the
10 Volvo, 45 percent. Those are the numbers.

11 So, you know, they realized this wasn't
12 good. So I told you they developed a safer
13 alternative front. Here's what they developed. I
14 showed you the picture of it before they put it in
15 the wind tunnel. This is another diagram that's
16 in Plaintiffs' Exhibit 126. This is proposal 1.
17 This is the safer alternative front that they
18 developed. Okay? They developed it, MCI, they
19 made it. They did it. Dr. Cooper designed it
20 with them.

21 That's the standard CJ3. You know, I
22 wonder what the standard CJ3 looks like. But in
23 any event, Dr. Breidenthal's here to discuss that.

24 But they had a safer, alternative part
25 in 1993. And how much safer was it? Well, they

1 tested this in the wind tunnel too. They found
2 that their safer alternative part dropped the air
3 blast to .34. Almost cut it in half. So if they
4 had just used the safer front -- and here's what
5 they call it. These are their words -- best
6 aerodynamic configuration for a new bus. And,
7 again, the new bus being designed at that time was
8 the J4500.

9 So they found that the best one that
10 they could design resulted in a .34 against their
11 .67.

12 Okay. Next one, please, Shane.

13 Okay. Now, we're going to try to give
14 you some real-world examples so you can understand
15 what drag coefficient means. This is a chart that
16 Dr. Breidenthal's going to use that he actually
17 lifted off of Tesla. I don't know if any of
18 you've read about it. Tesla just came out with
19 this new electric truck that they are arguing is
20 super-duper aerodynamically efficient. And
21 that's -- it's called the "Tesla Summary, A Made
22 Semi." And they have managed to get a .36 drag
23 coefficient. Pretty good. Pretty good. Because,
24 like I said before, trucks are tougher than buses.
25 Okay? So that's the Tesla.

1 A regular diesel truck's somewhere
2 between .65 and .70. The Bugatti Chiron -- okay.
3 I -- some of the women may not know what a Bugatti
4 is. All the men know what a Bugatti is because
5 they want one. You have Ferraris, Maseratis, and
6 then the most expensive sports car in the world is
7 a Bugatti. Okay? I've never even seen one.
8 Maybe Mr. Roberts has, but I haven't.

9 In any event, a Bugatti has a .38 drag
10 coefficient. .38. So here's what the CJ3 -- this
11 is their bus -- had, .6. Here's what the Prevost,
12 the competitor made by Volvo, had, .40. And
13 here's what their alternative had, .34. They had
14 a part that they designed, that they made, that
15 they could have used in 1993 and forward that
16 would have made this bus more streamlined than a
17 Bugatti sports car. That's going to be
18 undisputed, ladies and gentlemen.

19 Next one, please, Shane.

20 Okay. So, you know, we went to the
21 design team and we took their depositions, and we
22 said, "Well, you do know that if you round the
23 front of the buses, it will make it
24 aerodynamically efficient." Because these are
25 smart guys. Oh, yeah, they all knew that. And so

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1 we asked them, "Well, why didn't you use the safer
2 alternative part that you yourself designed in
3 1993? Why didn't you use it on the J4500?"

4 This is Mr. Lamothe's testimony. "No
5 practical reason. No practical reason."

6 Can't even give me a reason. Didn't
7 even consider making this key safety change,
8 didn't even consider it despite the fact they'd
9 done the wind tunnel tests.

10 Next one, please.

11 Okay. We talked about the three design
12 defects, and I spent a lot of time on aerodynamics
13 because, as I said, that's the first issue in the
14 case, what caused the bike to wobble. Let's talk
15 about side cameras now and proximity sensors.

16 And anybody? Trust me, this is a good
17 time if anybody wants to take a run. Don't be
18 shy. Anybody? Everybody good. Okay. All right.

19 This is the right-side blind spot, a 3D
20 animation from Josh Cohen again, just to
21 illustrate from the right-side blind spot. We're
22 going to present a lot of evidence to establish
23 that there is a right-side blind spot.

24 Next, please.

25 This is Mr. Couch again.

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1 Next, please.

2 This is Mr. Sherlock. I read the first
3 part of his to you.

4 Continue, please. Continue.

5 Okay. He's going to say that there's
6 safer buses -- before I finish in aerodynamics,
7 he's going to say there's safer buses with better
8 aerodynamics. And I already gave you the example
9 of the Volvo that they tested.

10 But moving over to blind spots. He's
11 going to say -- and this is his word. This is
12 the -- what I call the bus safety Sherlock Holmes
13 for the union. He's going to testify that there
14 are enormous -- that's his word -- enormous blind
15 spots in the J4500. He's going to say the vision
16 is terrible and it can be difficult to impossible
17 to see things on your right-hand side, especially
18 see things that are relatively low. And he's
19 going to give you some examples of bad design that
20 created the blind spot, one of which is a high
21 dash. And all that means is the dash is in front
22 of the driver. So if you measure how far the dash
23 is from the ground to the top, this has a high
24 dash compared to other dashes which have a lower
25 dash. And by having a high dash, you're causing

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1 the bus drivers to have problems seeing. He's
2 going to explain this to you.

3 He's also going to explain they have a
4 side rail here where the window ledge is. He's
5 going to explain that this is relatively high too
6 and that, because it has a high dash daylight
7 opening and a high right corner bottom, that this
8 contributes to the blind spots. And then he's
9 going to talk about visual crowding, which is a
10 concept that I'm going to leave to him.

11 Next, please.

12 He's going to tell you that there were
13 alternative designs that they could have come up
14 with to reduce the right-side blind spot. Didn't
15 have to have a right-side blind spot to begin
16 with. Okay? It's because of the way they
17 designed the bus.

18 He's also going to tell you that he told
19 the New Jersey Transit Authority before this
20 accident, before this accident, that these buses
21 were unreasonably dangerous because they had poor
22 lines of sight.

23 Next one, please.

24 All right. I told you about the high
25 dash. Okay. I'm just giving you a comparison.

1 To the right we have the J4500. You see how high
2 the dash is? You see the top of the red line
3 there? That is the dash that the driver has to
4 look over.

5 To the left is a competing bus that's
6 called the VCI Falcon 45. And by the way, 4500
7 just refers to the length of the bus. So 4500
8 means 45 feet long. This bus weighs, I believe,
9 about 37,000, 38,000 pounds, 19 tons. 19 tons,
10 45 feet long. This is why they call it
11 potentially a mobile manslaughter machine if you
12 don't design it appropriately.

13 And to give you some comparison to cars,
14 last year the Toyota Camry was the number one
15 selling car in America. It weighs 3300 pounds as
16 opposed to 19 tons. And it's 13 feet long as
17 opposed to 25 feet.

18 Okay. The other thing -- see the
19 difference in the two dashes? Okay. The other
20 thing he's going to talk about is the different
21 mirrors. You see the mirrors on the left? Those
22 are what's called European mirrors. Okay. And
23 those are kind of like the antennas of a praying
24 mantis. Or maybe the hands. I haven't seen a
25 praying mantis in a while. But in any event, they

1 come over the front end of the bus. Okay? You
2 see how they're aerodynamically streamlined. And
3 then you see the mirrors on the left-hand side and
4 the right-hand side. This is the actual bus. So
5 MCI uses the traditional mirrors. And so
6 Mr. Sherlock's going to explain to you that the
7 European style mirrors have less blind spots than
8 the regular style mirrors.

9 Next one, please.

10 All right. We're going to call
11 Mr. Hoogestraat. Tough name to pronounce, but I
12 think I got it right. Hoogestraat. He was also
13 on the MCI design team for the J4500. And when we
14 want to take depositions -- you know, we don't
15 take depositions of -- sometimes the defendant has
16 hundreds of thousands of employees. You know,
17 it's not practical to take all the depositions.
18 So instead, we say, "We want you to give us a
19 witness on this topic." Okay? It's a little
20 shortcut that the law uses to try to get these
21 things done easier. And that's called what a
22 30(b)(6) witness is. So he is the 30(b)(6)
23 witness or the person most knowledgeable on a
24 number of topics, including right-side blind
25 spots.

1 So they picked him out of all the
2 employees in the company as the person that knew
3 the most about right-side blind spots, the
4 proximity sensors, and a couple other things.

5 He's going to agree -- this is their key
6 witness -- is going to agree that the J4500 has a
7 right-side blind spot. And when we get to the
8 proximity sensor case, he's going to say he knew
9 about off-market proximity sensors like the VORAD
10 system we're going to talk about. This is
11 Mr. Hoogestraat. This is their witness.

12 Next one, please.

13 He knew that the tires were exposed. I
14 mean, it's obvious they're exposed. You just have
15 to look at the bus to see that they're exposed.
16 He knew before 2000 that bicyclists could be run
17 over by buses. That's pretty obvious. He knew
18 about spats. And I'm going to explain to you what
19 a spat is in a second, show you a picture of one.
20 The other types of barrier protection that they
21 could have used. Instead of having wide open rear
22 tires, they could have used some sort of
23 protection. He's going to tell you about it.

24 Then we're going to call Mary Witherell.
25 And we're still on the blind spot issue. She has

1 driven J4500s for years. Okay? Lot of
2 experience. She's going to tell you that the
3 J4500 has a right-side blind spot problem. In
4 addition, it has a right-side blind spot problem
5 that is very problematic for this case because
6 she's going to tell you that the closer you get to
7 a bicycle on your right side, the harder it is to
8 see that bicyclist. The closer you get, the
9 bigger blind spot problem you have. And she's
10 going to tell you that it's hard for a bus driver
11 to determine where the bicyclist is. Can't
12 determine how far away it is. And she's also
13 going to tell you that buses should have proximity
14 sensors because of this blind spot problem.

15 Next, please.

16 This is just an illustration of how a
17 proximity sensor works. You know, like air
18 blasts, proximity sensors, the rays are invisible.
19 Can't see them with the naked eye. So this is
20 just an illustration that Mr. Cohen has done to
21 show you that a proximity sensor can shoot out
22 from the front of the bus, detect something and
23 then whatever warning system they have in the bus.
24 Some proximity sensors have red lights that come
25 on on the mirrors. Some of them have red lights

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1 that come on in the dashboard. Some of them
2 have -- they make noises. You know, there's
3 different ways to do it, but in every method,
4 there's some sort of alert system.

5 Next one, please.

6 All right. This is what's called the
7 Eaton installation guide. Eaton, again, is -- I
8 showed you a slide earlier that had the date of
9 the patent for the Eaton proximity sensor system.
10 I want you -- this is their installation guide.
11 Look at the date. It's July 2005. July 2005.
12 Over two years before the bus in this case was
13 made.

14 And look at the one on the bottom, the
15 Eaton VORAD blind spot. That's the type of system
16 we are talking about, July 2005.

17 Next, please.

18 See where they put it? They put -- this
19 is the installation guide. They're showing how to
20 put it on a bus. Okay?

21 Next.

22 And this is Eaton's literature. They're
23 showing how their blind spot detection system
24 works. Again, these are the invisible lines that
25 you can't see or invisible VORAD -- or excuse me,

1 lidar or radar.

2 Next, please.

3 So what do they say the blind spotter
4 does? It warns drivers of obstacles in their
5 blind spot. That's what a proximity sensor does.
6 That's what a side camera, front camera does. It
7 allows better vision. And it gives you a constant
8 visual alert when the object's detected in the
9 blind spot. This is the Eaton system available in
10 2005.

11 Next, Shane.

12 This is the front page of the leading
13 industry magazine that MCI and all the other big
14 bus people subscribe to. It's dated October 15th,
15 2007. The name of the magazine -- it comes out
16 twice a month -- is "Bus & Motorcoach News."
17 That's the name of the magazine. We will present
18 testimony to you that MCI subscribed to this.

19 In this particular issue, and the reason
20 I'm focusing on this, is this is October 2007.
21 The bus in this case was sold in September 2007.
22 This is a competing bus that's called the BCI,
23 which is -- I think it's Bus Coach International.
24 BCI Falcon 45. Again, 45 is how long the bus is.
25 Competing bus. All right?

1 Shane, can I have my popup?

2 This bus is going to zero in more on
3 safety, this particular bus, the BCI. And they're
4 going to offer the Eaton system, the proximity
5 sensor I just showed you, as a standard piece of
6 equipment on their bus. And the reason they're
7 doing that is to help drivers keep a safe distance
8 from vehicles in front of them and warn them, warn
9 them, of objects on the side.

10 So that's why this particular bus
11 manufacturer in October 2007 made proximity
12 sensors standard on their buses.

13 Next one, please.

14 Now, there's going to be evidence in
15 this case that MCI has taken the position -- and
16 I'm going to talk about this in a second. They've
17 taken the position that MCI, even though they've
18 been selling buses for decades, even though
19 they're the largest bus seller in North America,
20 even though they have sold tens of thousands of
21 J4500s and other buses, there's going to be
22 evidence that they actually claim that they didn't
23 know, didn't know about proximity sensors. So
24 that's why I've blown this up.

25 Go back, Shane. Go back.

005410

1 This is the front page of the industry
2 magazine. Do you see this little ad on the bottom
3 of the article about the BCI 4500? This is an
4 article that MCI put in the exact same magazine
5 for their bus. You know, it's kind of like these
6 marijuana shops that buy the billboard in front of
7 the other marijuana shop. You know, they try to
8 get out in front of the competitors.

9 So what MCI did in this case is they
10 bought an ad for the J4500 right in front of the
11 article about the competing bus that was made by
12 their competitor.

13 Next one, Shane.

14 All right. And, again, I'm going to
15 show you what they have claimed later, but
16 Mr. Hoogestraat, he is going to tell you he knew
17 about these off-market systems. That's what they
18 call the VORAD system that you buy and install on
19 the bus, an off-market system. He knew about it.
20 He knew about it at the time they made this bus.
21 And it's hard to fathom that the largest bus
22 seller in North America could not know about
23 proximity sensors. But in any event, he's going
24 to admit they knew about them.

25 Next, please.

005411

1 He knew that the rear tires were
2 exposed -- this really goes to the barrier
3 protection issue -- knew that the bicycles could
4 be run over, knew about spats.

5 Next thing.

6 All right. So I've told you about the
7 evidence on the aerodynamics, the air blast. I've
8 told you about the evidence on the side camera and
9 the proximity sensor, some of the evidence. I
10 haven't told you everything. After all, it's
11 going to be a two-week trial. I can't do it all
12 in two hours.

13 Okay. Now I'm going to move to the rear
14 protective barrier. Okay? There's different
15 types of rear protective barriers. Okay? And
16 we're going to be talking a lot about the S-1
17 Gard. I'm going to show you one in a second.
18 That's in the middle. But there's also spats or
19 their people -- I mean, they do have some good
20 designers -- are going to admit that if they
21 wanted to, they could have designed their own
22 protective barrier. You know, this is not a novel
23 concept. If any of you've seen the picture of
24 those old railroad trains, they have a cowcatcher
25 in the front to move something out of the way

005412

1 before the train runs into it. Not a real novel
2 concept here. They're going to admit that they
3 could have come up with something like that on
4 their own, but I'm going to show you what was on
5 the market.

6 Next, please.

7 Okay. This is their bus. This is the
8 exact bus. And this picture was taken by the
9 coroner about two hours after the accident. This
10 is the right side tire of the bus. I'm just
11 showing this to show you how exposed it is. Look
12 how exposed it is. There's nothing that protects
13 a pedestrian or a bicyclist from coming into that
14 tire. There's no outer cover.

15 Now, I told you about spats.

16 Next, please. Next, please. Next.

17 Okay. Spats. Let me show you the
18 picture of a strut first.

19 Go ahead, Shane.

20 Okay. We're going back to the BCI 4500
21 again. This is the one that's on the cover of the
22 magazine that they put the ad on. You see the
23 back tires? You see how the fender comes down to
24 the axle level there? That's call a strut. That
25 provides a little bit of protection.

1 Now, look at what MCI did, no protection
2 whatsoever, wide open.

3 Next, please.

4 This is a CAT bus going to Nellis. This
5 is what's called a spat. They put it on the
6 outside. It's called a spat. And the reason they
7 do this is so people don't come in contact with
8 the tires. Okay? They knew about this. They
9 knew about all these different options.

10 Next one, please.

11 And that's Hoogestraat. He's going to
12 testify he knew about these different type of
13 protective barriers.

14 This is the S-1 Gard. This is a
15 protective barrier that's widely used in the bus
16 industry. This is some of their literature. See
17 how it says -- and this is old literature. This
18 is literature from the late '90s. They say it's
19 installed on over 30,000 buses worldwide. Now
20 it's on over 50,000 buses worldwide.

21 Next, please.

22 This is a picture of the S-1 Gard. And
23 I have an actual one here. What they do is they
24 mount it in front of the right rear tire like
25 this. There's something it slides into, which I

1 don't want to -- but the general idea is if
2 someone falls under the bus, they will get moved
3 out of the way. That's the general idea of this
4 device. I'm going to show you exactly how it
5 works in a minute. This is an actual S-1 Gard;
6 that's a picture of it.

7 Is our video next?

8 This is a video that was prepared by the
9 S-1 Gard manufacturer. And in this video --
10 there's actually three videos. I'm going to show
11 you the first video, then I'm going to show it in
12 slow motion to give you an idea of how the S-1
13 Gard works, then I'm going to show you a second
14 video.

15 And, again, this is a promotional video
16 by the S-1 Gard manufacturer. And it's relatively
17 dated. This one was also made in the '90s.

18 Go ahead.

19 (Video played.)

20 MR. KEMP: See, just like a cowcatcher,
21 pushes you out of the way so the tire doesn't run
22 you over.

23 (Video played.)

24 MR. KEMP: Okay. All right. This is
25 the same image, but at a little lower speed just

1 to show you how it works.

2 Next one, Shane.

3 This is a bicyclist hit by a bus and
4 falling under the rear tire. This was made in the
5 '90s. So this manufacturer knew that there was
6 the potential for bicyclists to fall under buses,
7 and that's one of the reasons they made the safety
8 device.

9 Show the video, please.

10 (Video played.)

11 MR. KEMP: Okay. Now, the defendants
12 are going to say, "Ladies and gentlemen, ignore
13 those videos. Forget the man behind the curtain."
14 Okay? "Those are just done by stuntmen. Real
15 S1 Gards don't work that way." That's what
16 they're going to tell you. All right?

17 So we went and got, first of all, a
18 deposition from the inventory of the S-1 Gard.
19 His name is Mark Barron, pretty interesting guy,
20 billionaire, of course. They all are. He lives
21 in Quincy Jones's house, just as a little aside,
22 old house.

23 But, in any event, he invented the S-1
24 Gard and got a 1995 patent on it. They invented
25 this before 1995. That's when the patent was

1 issued. They had to apply for it a couple years
2 before.

3 He's going to tell you that the
4 S-1 Gard, this device that I held in my hand, is
5 now on 50,000 buses, including down at Disney
6 World and on something called the Santa Monica Big
7 Blue Buses. They have some buses in Santa Monica
8 that take people around. He's going to tell you
9 that he offered the S-1 Gard for free. He offered
10 it to them for free, to MCI. And he's going to
11 explain why --

12 MR. TERRY: Your Honor, I have to
13 object. That is not the testimony of Mr. Barron.

14 MR. KEMP: Your Honor, if he wants to
15 show the testimony to dispute that, he can do that
16 in his opening statement.

17 MR. TERRY: I understand that he is at
18 liberty to say what he expects the evidence to
19 offer, but he made the statement that that's what
20 Mark Barron testified to.

21 MR. KEMP: That is what Mark Barron
22 testified to, Your Honor.

23 MR. TERRY: It's not what Mark Barron
24 testified to.

25 MR. KEMP: If he wants to cover it in

1 his opening, no problem, Your Honor.

2 THE COURT: Sustained.

3 MR. KEMP: Okay. He's going to tell you
4 that they didn't want to test it. They didn't
5 even want to test the S-1 Gard. And he's also
6 going to tell you that all buses should have
7 S-1 Gards. That's his opinion.

8 Next, please.

9 Now, again, this is their safety
10 literature for the S-1 Gard. This describes an
11 actual accident that happened in California
12 involving a bus that had an S-1 Gard on it. It
13 happened on April 9th, 2003. This is the person
14 that was involved in the accident. His name, I
15 believe, is Parada.

16 It happened on Wiltshire Boulevard. He
17 was on a bicycle. There's the picture of him and
18 the bike. The bus was going 25 miles an hour,
19 overtook him. He fell under the bus, fell under
20 the right tire -- I'm not saying it was an MCI
21 bus. Well, it couldn't have been because there
22 was an S-1 Gard.

23 In any event, he fell under the bus.
24 The S-1 Gard pushed him out of the way, and the
25 result was minor scrapes and abrasions.

1 So we didn't want you to just rely upon
2 the product literature; we went down and took his
3 deposition. See, that's the picture from the
4 deposition; that's the picture from the product
5 literature, same man that was involved in the
6 accident back in 2003. He's going to tell you he
7 was riding his bike.

8 He didn't even have a helmet on.
9 Dr. Khiabani had a helmet on. He did not even
10 have a helmet on. The bus was going 25 miles per
11 hour, same speed as the bus in this case, 25 miles
12 per hour. The S-1 Gard pushed him out of the way.
13 The only injuries he had were scrapes and bruises.
14 He went to work after the accident -- went to work
15 after the accident. Okay?

16 This is a true story, a true event.
17 He's going to be on video and tell the story to
18 you.

19 Next, please.

20 So this is a list of bus companies that
21 use the S-1 Gard. I already told you Disney World
22 did. New Flyer, Gillig, Daimler. Daimler is
23 Mercedes; that's the group name for Mercedes.
24 North American Bus Industries, Volvo, Veolia
25 Transportation -- I think they were here in Clark

1 County here at one time -- FIBA Canning, Orient,
2 Eldorado, some Swedish bus person, and major theme
3 parks, Disney World, international airport
4 shuttles. These people are using the S-1 Gard,
5 50,000 buses.

6 Next, please.

7 Where is MCI? They don't use the
8 S-1 Gard.

9 So these are the safety inventions they
10 didn't use: the rounded front that they came up
11 with themselves; the S-1 Gard, patent '95; the
12 proximity sensor, or a side or front camera, '98,
13 the patent was issued. Made this bus in 2007
14 without any of these three safety features.

15 Next, please.

16 I want to switch over to the warnings
17 case a little bit. Our argument is that there's
18 three reasons the bus is dangerous. In the
19 warnings case, we're arguing that they didn't warn
20 bus drivers that their bus had a side air blast
21 that was 45 percent greater than Prevost, their
22 competitor. They didn't warn that it had any air
23 blasts. There was no warning.

24 So this is the actual sales agreement
25 when they sold the bus. And this is the warnings

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1 section. This is the only warning they gave to
2 people who bought the bus, that the vehicle has
3 some sort of refrigerant that destroys the ozone
4 layer. That's it. That's the only warning they
5 gave.

6 Next, please.

7 We went down to LA, and we took
8 Mr. Dorr's deposition. He is the bus salesman for
9 this particular case. He sold the bus in
10 September 2007. He's been an MCI bus salesman for
11 20 years. He has a CDL license to drive buses.
12 He was a part owner of a tour company for over
13 four years -- for years. Sold the bus in this
14 case.

15 He didn't know that there was a side
16 blast, didn't know about it. And he says they
17 didn't warn the customers about it.

18 Next, please.

19 This is Mr. Hubbard. I told you he was
20 the bus driver in this case. He's going to tell
21 you that he drove buses for 20 years. We didn't
22 have a rookie here. This guy drove buses for 20
23 years, first in New York, then in Nevada. Didn't
24 know about the air blast risk. If he had known
25 about the air blast risk, he's going to tell you,

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1 he would have changed his driving behavior.

2 Next.

3 This is our warnings expert, Dr. Cunitz.
4 He is the former chief -- he looks pretty old
5 because he is old. He was the former chief of the
6 human factors section for the U.S. Bureau of
7 Census. Human factors is they study human
8 behavior and warnings and things like that. He
9 held this job in 1972. That's how long he's been
10 involved with human factors. He's testified in
11 thousands of product liability cases in the last
12 40 years.

13 He's going to tell you that MCI should
14 have given a warning of the air blast danger. And
15 he's going to tell you their excuse -- you know,
16 the DMV should have done it -- that's their
17 excuse, Nevada DMV should have done it -- you'll
18 hear Mr. Couch say that -- he's going to say
19 that's not a valid excuse and explain why.

20 Next, please.

21 Again, this is Mr. Sherlock. I've gone
22 over the first part of his testimony. I think
23 I've gone over this part.

24 Next.

25 He's going to tell you --

005422

1 Next, please. Next.

2 Okay. I guess we did all of
3 Mr. Sherlock. Back to Couch.

4 Couch knew about the air blasts, knew
5 that all he had to do was round the front to get
6 rid of them. And he's the one who's going to tell
7 you that Nevada DMV should give the warning in
8 this case, Nevada DMV.

9 Next.

10 And now I'm going to focus on some of
11 the arguments that the defendant isn't going to
12 make in this case. They're not going to argue to
13 you that it would have cost too much, that these
14 safety alternatives would have cost too much.

15 Here's the rounded proposal. They were
16 making a bus front anyway. There will be no
17 evidence that it would have cost one cent more to
18 make this rounded proposal. No evidence.

19 The air blast, I've already told you
20 what Mr. Barron is going to testify. I don't want
21 to light Mr. Terry up, so let's just play his
22 deposition. We'll see what he says.

23 The Eaton system costs \$300. So for
24 \$300 all three of these safety alternatives could
25 have been put on this bus. This bus cost

1 \$400,000. That's the retail price for this bus,
2 \$400,000. For \$300, they could have had all three
3 safety options. Warning cost them nothing as
4 well.

5 Next.

6 Now, let's talk about the wobble cause
7 evidence. I've already told you there's no
8 evidence -- and they're going to admit it -- on
9 the bike problem, road impediment or physical
10 impairment, no evidence whatsoever. The air
11 blast, they're going to dispute that it's a
12 significant air blast. I don't know what that
13 word means to them because they won't quantify it
14 for me. I asked them what is significant, what is
15 insignificant. They don't give me an answer.

16 But they're going to come in front of
17 you, bring their expert and say, "Oh, yeah, every
18 bus has some air displacement, but ours isn't
19 significant."

20 Really? That's why yours is 45 percent
21 more than the Volvo bus, your competitor, in your
22 own wind tunnel test? Yours is not significant?
23 That's going to be their argument.

24 Next, please.

25 And, again, this just shows the rounded

1 front that they made. They made the rounded front
2 in 1993, just didn't use it. Obviously, they
3 didn't tell anyone about it either, because when
4 we get Mr. Hoogestraat on the stand, he's going to
5 say he didn't even -- he was on the design team.
6 He didn't even know about the '93 wind tunnel
7 test. They didn't give it to him, didn't give it
8 to him. And he's on the design team.

9 So there was some sort of breakdown
10 there. I don't know exactly what it was; it's not
11 important. But they had the product, they had it
12 designed; they just didn't use it.

13 Next, please.

14 All right. They're going to attack
15 Dr. Breidenthal. He's our aerodynamics expert.
16 And what they're going to say about
17 Dr. Breidenthal -- well, they're going to say a
18 lot of things about Dr. Breidenthal, but one of
19 the things they're going to say is, "Gee,
20 Dr. Breidenthal, you should have spent hundreds of
21 thousands of dollars of the Khiabani's family
22 money and done a wind tunnel test on the bus. You
23 should have taken this bus and taken it down to
24 NASA, or wherever they do these wind tunnels, and
25 done an actual wind tunnel test." That's what

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1 they're going to say about Dr. Breidenthal. And
2 since you didn't do a wind tunnel --

3 MR. TERRY: Your Honor, may we approach?

4 THE COURT: Yes.

5 (A discussion was held at the bench,
6 not reported.)

7 THE COURT: We're going to take a
8 15-minute comfort break at this point. I'm going
9 to admonish you, the jury, before we take the
10 break.

11 You're instructed not to talk with each
12 other or with anyone else about the subject or
13 issue connected with this trial. You're not to
14 read, watch, or listen to any report of or
15 commentary on the trial by any person connected
16 with this case or by any medium of information,
17 including, without limitation, newspapers,
18 television, the internet or radio.

19 You are not to conduct any research on
20 your own relating to this case, such as consulting
21 dictionaries, using the internet, or using any
22 reference materials. You're not to conduct any
23 investigation, test any theory of the case,
24 re-create any aspect of the case, or in any other
25 way investigate or learn about the case on your

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1 own.

2 You are not to talk with others others,
3 text others, tweet others, message others, google
4 issues, or conduct any kind of book or computer
5 research with regard to any issue, party, witness,
6 or attorney involved in this case.

7 You are not to form or express any
8 opinion on any subject connected with this trial
9 until the case is finally submitted to you.

10 Please stay on this floor, ladies and
11 gentlemen, and let's take 15 minutes.

12 THE MARSHAL: All rise for the jury.

13 **(The following proceedings were held**
14 **outside the presence of the jury.)**

15 THE COURT: Take a 15-minute break.

16 (Whereupon, a recess was taken.)

17 THE MARSHAL: All rise.

18 THE COURT: Before we bring the jury
19 back, I'd like to see counsel at the bench,
20 please.

21 (A discussion was held at the bench,
22 not reported.)

23 THE COURT: I think it's time for the
24 jury to come back. Can you please bring the jury
25 back.

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1 THE MARSHAL: All rise for the jury.

2 (The following proceedings were held
3 in the presence of the jury.)

4 THE MARSHAL: All jurors accounted for,
5 Your Honor.

6 THE COURT: Do the parties stipulate to
7 the presence of the jury?

8 MR. TERRY: Yes, Your Honor.

9 MR. CHRISTIANSEN: Yes, Your Honor.

10 THE COURT: Mr. Kemp, please continue.

11 MR. KEMP: Ladies and gentlemen, if you
12 could hang in 15 or 20 minutes. I'll finish and
13 you can go have lunch. Okay?

14 All right. We were talking about
15 Mr. Barron's testimony that he offered the
16 S-1 Gard for free for MCI. I want to read you the
17 exact testimony.

18 Question -- and you'll hear this.
19 You'll hear the video where he testifies to this.

20 "QUESTION: They didn't even want to try
21 them out for free?

22 "ANSWER: I gave them evaluation parts.
23 Yeah, I'd say no."

24 That was the question and answer.

25 Now, let's go back to doctor --

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1 MR. TERRY: Your Honor, may I exercise
2 optional completeness at this point or in opening?

3 THE COURT: In opening.

4 MR. TERRY: Thank you, Your Honor.

5 MR. KEMP: Let's go back to their
6 attacks on Dr. Breidenthal. They're going to say
7 that Dr. Breidenthal's opinion -- again, he's the
8 aerodynamics guy. They're going to say he doesn't
9 have sufficient foundation because Dr. Breidenthal
10 should have done a wind tunnel test, take the
11 actual bus and put it into a wind tunnel. They're
12 going to say that Dr. Breidenthal should have done
13 that.

14 Well, let me show you what they did.

15 Can I have it, Shane. Skip over that.
16 We'll come back to that.

17 Interrogatory answers. We are allowed
18 to send written questions to them before the
19 trial. We the lawyers can send written questions.
20 So we sent them a written questions. Remember,
21 they came out with the J4500 in approximately
22 2000. They've sold tens of thousands, if not
23 hundreds of thousands, of these buses.

24 So I asked them a question. And this is
25 after -- after Mr. Sherlock told them that there's

1 a wind blast problem, after they did their wind
2 tunnel test in 1993 where they found out that it
3 was 45 percent more air blasts than their
4 competitor, afterwards. This is in December of
5 this year. I asked them, "Okay. What is the drag
6 coefficient? What is the air blast?"

7 This is after Dr. Khiabani was killed,
8 eight months after. And their answer? They don't
9 know. They don't know, as we sit here today, is
10 their position, that they don't know what the air
11 blast is.

12 Now, the next thing they're going to
13 argue -- let's go back to those pictures of
14 Dr. Breidenthal. These are pictures that were
15 taken in Dr. Breidenthal's deposition. And
16 they're going to say, "Oh, geez. This guy can't
17 draw very well."

18 He can't. He can't draw very well. All
19 he was trying to do in these pictures is show that
20 a rounded front has less air blasts than a
21 straight front. That's all he was going to do.

22 And see the R there? That's the radii
23 measurement. So they're critiquing him because,
24 at the time of his deposition which was taken in
25 October of 2017, at the time of his deposition, he

1 didn't know the exact radii. Why didn't he know
2 the exact radii? Because they hadn't produced
3 that yet. They hadn't produced that to us yet.
4 They did produce it later.

5 Next one.

6 This is a slide. You see? There's the
7 exact radii for this bus. One of their experts
8 determined it by taking laser measurements of it.
9 It's 198.44. Dr. Breidenthal is going to explain
10 what it is. But you can't critique a guy's
11 opinion because you didn't produce the relevant
12 information -- you didn't produce the relevant
13 information.

14 Next they're going to say that the
15 S-1 Gard -- this is going to be one of their big
16 arguments, ladies and gentlemen. They're going to
17 say that the S-1 Gard would not have prevented
18 this accident. Okay?

19 Remember, I told you the gardener is
20 going to testify that 3 inches of the tire ran
21 over him. And we're going to call an expert.

22 Can I have my next one in order, Shane.

23 This is the premiere skull fracture
24 expert in the world -- and I don't say that
25 lightly -- Dr. Stalnaker. He has over 40 years'

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1 experience in biomechanical. He testifies in
2 helmet and skull fracture cases.

3 In 1970, he wrote the book on skull
4 fractures. 1970s, a little bit different than
5 nowadays. They didn't have PETA in 1970. So what
6 he did is he did a lot of animal testing on skull
7 fractures, and he did a lot of cadaver analysis on
8 skull fractures, to determine, when you get a
9 circular skull fracture like the one we have in
10 this case how much force does it take and how can
11 that happen? He wrote the book on it. This is
12 the book. It was published in 1972.

13 Next one.

14 So I've shown you this before. This is
15 Josh Cohen's illustration of Dr. Stalnaker's
16 position. And what Stalnaker looked at was the
17 helmet, looked at the damage to the helmet. And
18 he determined -- and then he looked at the skull
19 fracture that I'm going to show you in a second --
20 and he determined where Dr. Khiabani's head had to
21 be.

22 Now, there's no dispute that
23 Dr. Khiabani had his left head on the ground. So
24 what we're arguing is consistent with what Luis
25 argued and consistent with the physical evidence

1 from the helmet, that the tire ran over at least 3
2 or 4 inches of the helmet. That's what we're
3 arguing, and that's what Dr. Stalnaker is going to
4 explain to you.

5 What they're arguing is that -- and they
6 call this the pinched -- the pinch theory, that
7 the side of the tire pinched the top of the head.
8 And the reason they're arguing the pinch theory is
9 because if it had just pinched the top of the
10 head, the S-1 Gard wouldn't have pushed the head
11 out of the way. That's the reason they're arguing
12 that. Okay?

13 So we have the crush theory,
14 Dr. Stalnaker and the coroner's theory. And Lisa
15 Gavin is going to come down here and she's going
16 to talk about the skull fracture. And she's going
17 to explain to you pretty much the same thing
18 Dr. Stalnaker is going to explain to you, that
19 when you have a circular skull fracture like this,
20 it's got to be crushed. It can't be pinched from
21 the top.

22 This is their expert, Dr. Carhart. He's
23 the proponent of the pinch theory.

24 Okay. I told you I'd show you a skull
25 fracture. They took Dr. Khiabani to UMC after the

1 accident. That is the circular skull fracture
2 from the left side of his head. Okay. And again,
3 his head was laying on the ground. There's no
4 dispute that his head was laying left side on the
5 ground. Our expert's going to say the bus ran him
6 over and that since there's no -- when your left
7 side of your head's on the ground, there's no
8 place for the force to go. That's what causes a
9 circular skull fracture.

10 And that's why Dr. Stalnaker's expertise
11 is so important in this case, because he has
12 studied and written the book on skull fractures
13 and done the primate testing on skull fractures.
14 So he's going to tell you how much force it takes
15 to create a skull fracture like that.

16 And again, they're going to argue --
17 and, you know, for the life of me, I can't
18 understand their argument. Maybe a lightbulb will
19 come on at some point. But they're going to argue
20 that somehow the side of the tire pinched the top
21 of the head and that this resulted in force that
22 caused a skull fracture on this side. I don't
23 understand that theory, but Stalnaker Stalnaker's
24 going to tell you it's wrong. He might use some
25 stronger language than that. But, anyway, that's

1 the pinch versus crush issue that you're going to
2 hear about.

3 I've already told you they're not making
4 a cost argument. They have agreed that the cost
5 isn't an issue in the case. Again, \$400,000 bus.

6 They are going to argue -- or I should
7 say it this way. There will be evidence that the
8 company's position is that they weren't aware of
9 proximity sensors in 2007. Okay? They can't --
10 and why is this important? Because of conscious
11 disregard. And we're talking about punitive
12 damages evidence now. If they knew about a safe
13 alternative product and they didn't use it, that's
14 conscious disregard. That's going to be our
15 argument. So if they knew about it and they
16 didn't use it, that proves conscious disregard.

17 Now, there's three design defects. The
18 aerodynamic. Obviously, they knew about the safer
19 alternative rounded front because they designed it
20 and made it back in 1993. So they can't argue
21 that they didn't know about it because they made
22 it. They just didn't use it. Obviously, they
23 didn't tell a lot of the design engineers about it
24 because Mr. Hoogestraat, the person most
25 knowledgeable, didn't know about it. But in any

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1 event, the company knew about it. They knew about
2 it because they did it in '93.

3 Now, let's take a look at side cameras
4 or right side proximity sensors.

5 Okay. Next one, Shane.

6 This is what I call the ostrich defense.
7 I'm not trying pejorative here or derogatory, but
8 an ostrich, when an ostrich is threatened, it
9 sticks its head in the sand, okay, hides from
10 nature, just doesn't acknowledge it's there. So
11 the -- there will be evidence that this is their
12 position. They are going to tell you that MCI,
13 the largest seller of buses in North America for
14 decades, for decades, didn't know that proximity
15 sensors were available in 2007. That's their
16 position. And the reason they're arguing that is
17 because if they admit that they knew about
18 proximity sensors, it's conscious disregard not to
19 use them. If they admit they knew that there were
20 side cameras or front cameras available, it's
21 conscious disregard not to use them. So that's
22 why they're taking that position.

23 We submit that this is not true, not
24 accurate, for a couple of reasons. First, this is
25 Mr. Hoogestraat. Again, he's the person most

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1 knowledgeable. They produced him as the person
2 that knew the most about certain issues in the
3 case, one of which was proximity sensors. He's
4 going to testify he knew about it. He knew about
5 off-market proximity sensors like the Eaton
6 system, the one I've already shown you. That's
7 the first reason we think their ostrich defense
8 fails.

9 Second -- skip that. Skip that.

10 Second. This -- I've shown you this
11 already. This is the front page of the lead
12 industry publication. They subscribe to this.
13 There will be testimony that they subscribe to
14 this. I don't know how many subscriptions they
15 have, but we know it's more than one.

16 But in any event, front page, it talks
17 about this competitor, this competitor that makes
18 proximity sensors. And as I've shown you already,
19 they put an ad right underneath this for the bus.

20 So they're going to say to you, "We
21 didn't know about proximity sensors. We didn't
22 read the leading industry publication that talked
23 about our competitor having proximity sensors. We
24 didn't go to trade shows where the competitor was
25 showing the bus and see the proximity sensors."

1 It's a ridiculous argument.

2 Next one.

3 They're going to say that they never
4 heard about the S-1 Gard. And, again, why are
5 they saying this? Conscious disregard. They
6 don't want -- skip that one, please. Skip. Skip.
7 Skip. Okay.

8 I've already talked about the testimony
9 from Mr. Barron and I've read it to you -- I don't
10 want to read it again -- about how he offered it
11 to them for free for evaluation.

12 This is a man named Pablo Fierros who's
13 going to testify. He's the head, the number one
14 guy of the MCI parts division from 1997 through
15 2000. And that's about the time period that these
16 S-1 Gards started coming out. That's why this is
17 a critical time period.

18 He is supervised by the president. It's
19 a separate division, but the president of MCI
20 himself is the direct supervisor of Mr. Fierros.
21 He's going to admit -- and why do they have a
22 parts division? Well, buses are like cars. They
23 break down. They have to have parts. You can't
24 go into NAPA or Pep Boys and buy bus parts. You
25 have to have a parts division to get them. So

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1 they all have parts divisions. He's the head of
2 the MCI parts division during this time.

3 He's going to admit that he saw the S-1
4 literature at the bus trade shows. And he
5 remembers, he remembers, talking to the S-1 Gard
6 people. And, again, he is directly supervised by
7 the president of MCI.

8 Okay. Hoogestraat, again, he's the PMK.
9 He's not going to say he knew about S1 Gards, but
10 he is going to say he knew about a lot of other
11 protective barriers, like the spats. He knew the
12 rear tires were exposed. I believe he's also
13 going to admit that he knows about struts. But
14 he's going to admit that he knows about the
15 concept of barrier protection in general. And as
16 I've already said, this is not a new concept. You
17 know, these cowcatchers were around in 1860.

18 Next, please? Oh, that's it.

19 Lunchtime. Well, thank you very much
20 for your attention. I'll see you after lunch.

21 THE COURT: Okay. We're going to take
22 an hour break. And I must admonish you again.

23 You're instructed not to talk with each
24 other or with anyone else about any subject or
25 issue connected with this trial. You're not to

1 read, watch, or listen to any report of or
2 commentary on the trial by any person connected
3 with this case or by any media of information,
4 including, without limitation, newspapers,
5 television, the internet or radio.

6 You're not to conduct any research on
7 your own relating to this case such as consulting
8 dictionaries, using the internet or using any
9 reference materials. You're not to conduct any
10 investigation, test any theory of the case,
11 recreate any aspect of the case or in any other
12 way investigate or learn about the case on your
13 own.

14 You are not to talk with others, text
15 others, tweet others, message others, Google
16 issues, or conduct any other kind of book or
17 computer research with regard to any issue, party,
18 witness, or attorney involved in this case.

19 You're not to form or express any
20 opinion on any subject connected with this trial
21 until the case is finally submitted to you.

22 See you here -- let's see. It's 12:30.
23 We'll take a break until 1:30. Okay. Thank you.

24 THE MARSHAL: All rise for the jury.

25 (The following proceedings were held

1 outside the presence of the jury.)

2 THE COURT: Okay. Take a break.

3 MR. CHRISTIANSEN: Thank you, Your

4 Honor.

5 MR. TERRY: Thank you, Your Honor.

6 (Whereupon, a recess was taken.)

7 THE MARSHAL: All rise.

8 (The following proceedings were held

9 in the presence of the jury.)

10 THE COURT: Good afternoon. Please be

11 seated.

12 MR. TERRY: Can we approach, Your Honor?

13 THE COURT: Yes.

14 (A discussion was held at the bench,

15 not reported.)

16 THE COURT: Before we start, Juror

17 No. 1, Mr. Lennon -- I just got a note from the

18 marshal -- states that his employer keeps calling

19 and texting him. They are requesting to speak

20 with the judge or someone official concerning his

21 being here. So perhaps I should make a quick call

22 before.

23 MR. KEMP: Is that from his employer?

24 THE COURT: His employer wants to speak

25 to the judge or someone official.

1 MR. BARGER: A juror does?

2 THE MARSHAL: Juror's employer wants to
3 talk to the judge.

4 MR. PEPPERMAN: I was actually just
5 emailing her when we talked about the two Venetian
6 employees. They've agreed to let them -- to pay
7 them pursuant to the parties' stipulation. And
8 we're submitting -- she asked me to send them just
9 a formal memorialization for that. And I didn't
10 know that they were going to be on the jury for
11 certain. So now that they are --

12 THE COURT: Okay.

13 MR. PEPPERMAN: -- I'm emailing her that
14 I'm drafting something.

15 THE COURT: Mr. Pepperman, I do -- if
16 it's okay with the parties, please follow through.

17 MR. PEPPERMAN: Yeah, I --

18 THE MARSHAL:

19 THE COURT: If they need to speak to the
20 judge, I can take a five-minute recess after the
21 openings are finished and call them back. Okay?

22 MR. KEMP: Let's let Mr. Pepperman try
23 to run some interference first, Your Honor.

24 THE COURT: No, that's what I just
25 asked, Mr. Kemp, of the parties. Let's start

1 there. All right?

2 MR. KEMP: Judge, I had one point. I
3 thought that there were four major procedural
4 violations during my opening statement.

5 First of all, there were speaking
6 objections by Mr. Terry. And I thought the rules
7 here were that we were to ask to approach the
8 bench rather than shout out something in front of
9 the jury. And here's what he shouted out in front
10 of the jury. "Your Honor, I have to object. That
11 is not the testimony of Mr. Barron." Once wasn't
12 good enough for him. He said again, quote, it's
13 not what Mark Barron testified to, unquote. He
14 said that in front of the jury, Your Honor.

15 So, first of all, he made a speaking
16 objection. Second of all, he challenged my
17 credibility in front of the jury. Then we went to
18 the bench. We discussed the issue. And you ruled
19 that we could read the transcript to the jury,
20 which I did.

21 As soon as I got done reading my
22 transcript portion to the jury, he got up, yet
23 again, in front of the jury, and yelled
24 "Completeness." Okay?

25 Three times he made speaking objections

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1 in front of the jury, once after a bench
2 conference. Your Honor, that is just not
3 appropriate. There's judges in -- and, you know,
4 interrupting my opening statement, I haven't had
5 that happen in over two decades, Your Honor. I
6 mean, it's just outrageous in and of itself, but
7 to make speaking objections in front of the jury
8 on top of that is inappropriate.

9 And some judges in this district, he'd
10 be gone. He'd be on a plane back to Texas
11 already. Okay?

12 I just want to put this down as a marker
13 right now as the first what I think is a very
14 significant procedural violation. And as I
15 predicted before, we're going to see more during
16 their opening. And we'll just wait, but I just
17 want to put down the marker right now that I'm
18 very concerned about it, that I think speaking
19 objections should stop right now. We haven't made
20 any, you know. They're the only ones making
21 speaking objections.

22 And if the rule's going to be different,
23 Your Honor, please tell us. Because I can do the
24 same kind of stuff they're doing. If they want to
25 play this way and you think that's what we should

1 do, that we should do speaking objections in front
2 of the jury, just tell me because I want a level
3 playing field. Either they've got to stop or
4 you've got to let us start doing it. And so I
5 think the rule's pretty clear that they're not
6 supposed to make speaking objections in front of
7 the jury.

8 But I would just ask that, number one,
9 they be admonished not to make further speaking
10 objections in front of Mr -- during
11 Mr. Christiansen's opening statement. And we can
12 at least proceed in some sort of a professional
13 fashion in this case.

14 MR. TERRY: Your Honor, the marker is
15 acknowledged and accepted. It's not necessary to
16 admonish me. I will not make a statement or an
17 objection during any other opening statement.

18 THE COURT: So your point is well taken.
19 And from this moment on, both parties will object
20 and we'll discuss it at the bench. Okay?

21 MR. TERRY: For clarification, Your
22 Honor, when we do that, do I just simply request
23 permission to approach or do I make the statement,
24 objection?

25 THE COURT: You can make --

1 MR. KEMP: Judge, he's seen me do it a
2 hundred times. I've said "May we approach." We
3 approach.

4 THE COURT: Yes, "May we approach" and
5 then we'll make -- we'll go over the objection
6 here. I'm not going to send Mr. Terry on an
7 airplane back to Texas. I know other judges have
8 done it, but that's not what I'm going to do.

9 MR. KEMP: And also, Judge, we have
10 decided some very important issues based upon oral
11 motions made out of order at the last minute. For
12 example, you know, the one plaintiff/two plaintiff
13 issue. We've made some very important decisions.
14 I would ask that the Court at least -- and I don't
15 mind an order shortening time, I don't mind
16 argument an hour later, but I think we shouldn't
17 be doing these things sua sponte on the spot, you
18 know?

19 Like yesterday's motion, they should
20 have at least filed a motion on it even though
21 it's late. You know, they shouldn't just wait
22 until the day before opening and require -- and
23 ask the Court to change the rules in the middle of
24 a trial.

25 I would just ask that we have a motion

1 so we can make an informed opposition. I'm not
2 asking for an unreasonable amount of time. You
3 know, we can get our reply done in an hour or two.
4 But to just throw things out like they've been
5 trying to do, it just opens up more and more
6 errors and they throw more and more things out.
7 It's just not appropriate, Your Honor. They
8 should be required to make a written motion. I
9 just ask that before we get into a bunch of other
10 sideshow issues.

11 MR. ROBERTS: Addressing the first --
12 just a clarification on the point of objections.
13 I -- although certainly I know we can say "May we
14 approach" and that's sufficient to preserve
15 because we have the record, that the rule against
16 speaking objections would not prevent us from
17 saying, "Objection, may we approach," or
18 "Objection. Form. Objection. Hearsay.
19 Objection. Prejudice being probative." That's
20 not a speaking objection and we shouldn't -- if
21 it's something obvious and quick, we shouldn't be
22 precluded from making it, then seeing if the Court
23 can just rule on it without the necessary bench
24 conference with every single objection.

25 MR. KEMP: I don't disagree with that,

1 Your Honor. What I object to is him saying things
2 like "That's not the testimony. That's not what
3 he testified to," challenging my credibility in
4 front of the jury. That's what I object to.

5 THE COURT: Okay.

6 MR. ROBERTS: Understood. And I think
7 Mr. Terry's already addressed that issue.

8 But with regard to the alleged changing
9 the rules, the rules allow one opening per side.
10 And we filed a bench brief on Monday morning
11 before we asked the Court on Thursday to limit
12 them to one statement. So they did have four
13 days' notice of our position on this issue and
14 chose not to file any brief -- bench brief in
15 between.

16 And Rule 7 provides for oral motions as
17 necessary during trial. As long as both sides are
18 present in the courtroom, notice of motion or
19 written motion is not necessary under our rules.
20 We, in that case, filed a bench brief so the Court
21 was apprised of what our position would be, and
22 Mr. Kemp was apprised. But we could have just
23 brought it as an oral motion yesterday afternoon
24 with no notice whatsoever. And we would object to
25 being chilled in our right to make oral motions

1 pursuant to Rule 7.

2 MR. KEMP: Judge, what he's leaving out
3 is this issue was previously brought up to the
4 Court and the Court previously decided the issue
5 and didn't put any sort of restriction on us.
6 They filed a bench brief seeking to rehear it.
7 And that is -- that kind of makes my point, Your
8 Honor.

9 We should not be deciding these
10 important issues by just throwing mud on the wall
11 at the end of the day and making a decision,
12 which, in my view, is what's happened on at least
13 three very important issues.

14 All I'm asking is that they be required
15 to file a written motion. Give us some notice and
16 it's fair to us. It's fair to the Court. You
17 know, if we need more than an hour or two to get
18 an opposition in, I'll ask for it. Okay. But we
19 cannot be making critical issues on the fly. Just
20 can't be doing it, Your Honor. It's not fair to
21 us. It's not fair to the proceeding. This is a
22 big case. It's not fair to the Court. I'm just
23 asking that, in the future, that they file a
24 motion, an appropriate motion when it's an issue,
25 a significant issue such as this.

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1 And I agree with him, he's going to be
2 able to make objections to hearsay. That's minor,
3 Your Honor. I'm not talking about that. I'm
4 talking about them trying to do a major shift in
5 something. And they know what I'm talking about.

6 Your Honor, if we have something
7 important, it's to our benefit to do a written
8 motion and fully advise the Court of the premises.
9 But I can't agree to waive our right to file oral
10 motions during the trial.

11 THE COURT: Understood.

12 Just so both parties are -- we're all on
13 the same page, you may find that I'm going to be
14 curtailing a lot of this stuff. Your rights will
15 be preserved, but I'm not going to be giving
16 things as much time and interrupting as much as I
17 have been. Okay?

18 I gave you a lot of leeway on voir dire
19 because I think it's critical. Everything that
20 happens in a trial is critical, but we need to get
21 going. And let's get everything out there.

22 And I know that you're both -- you're
23 all pursuing your clients' -- you have a duty and
24 the right to pursue your clients' -- what's in
25 their best interest. But I also have a right to

1 control this courtroom and to make sure we move
2 forward.

3 So, you know, I'm not going to turn into
4 one of those screaming judges because it's not my
5 style, and I'm not going to start using the gavel
6 or throwing anything or be crazy. But you may
7 find that I'm going to make sure things move along
8 a little bit quicker, understanding that you need
9 to prove your case or respond to defend your case.
10 Okay?

11 MR. KEMP: Okay.

12 MR. ROBERTS: Thank you, Your Honor.

13 THE COURT: Just so you know where I am
14 coming from because I'm very, very, very patient,
15 but -- and I prefer to be patient because I think
16 it's the correct thing. It's the way I was
17 raised, everything else. But there's also a limit
18 to how much I'm going to let things be derailed in
19 this -- in these proceedings. Do you understand
20 me?

21 MR. KEMP: Your Honor, we -- in my view,
22 we haven't derailed anything.

23 THE COURT: I'm just asking you if you
24 understand what I'm saying.

25 MR. KEMP: I understand what you're

1 saying.

2 THE COURT: I think you understand what
3 I'm communicating.

4 MR. KEMP: I hope you apply that too.
5 But I think the problem is --

6 THE COURT: I'm going to apply it
7 evenhandedly. Okay? It will be applied to
8 both -- to all parties.

9 MR. KEMP: Understand, Your Honor.

10 MR. ROBERTS: Thank you, Your Honor.

11 THE COURT: All right. Thank you.
12 Let's -- my concern is -- Mr. Pepperman, I don't
13 want a juror who's worried about his boss firing
14 him, if I have to take two more minutes and call
15 the person.

16 MR. KEMP: That's fine with me.

17 MR. ROBERTS: That's fine, Your Honor.

18 THE COURT: I mean, really, he's just
19 spoken to the marshal, so --

20 MR. PEPPERMAN: Did they give a name?
21 Because if it's Nicole Lesani --

22 THE COURT: That's the person I spoke
23 with.

24 MR. PEPPERMAN: But is that the person
25 that is -- the juror's asking you to --

1 THE COURT: Will you ask him?

2 THE MARSHAL: Yes, ma'am.

3 THE COURT: I mean, I think I wrote down
4 and gave information to the parties the other day.
5 I don't have it in front of me right now.
6 Remember, I canvassed him and asked him the
7 name --

8 MR. ROBERTS: Yes.

9 THE COURT: -- and the phone number,
10 everything.

11 MR. ROBERTS: Yes. That would have been
12 on the --

13 THE COURT: Yay.

14 MR. ROBERTS: -- on the record at some
15 point.

16 THE COURT: And, frankly, I don't have
17 that information handy because I thought it was
18 already dealt with, but I might be --

19 MR. KEMP: We're lucky, Your Honor.
20 Okay. Mr. Lennon's supervisor was Kyle Donaldson.

21 THE COURT: Okay. One moment.

22 MR. KEMP: He had two.

23 THE COURT: Yes, he did. Okay.
24 Donaldson. What's his phone number?

25 MR. KEMP: Kyle Donaldson, and I have

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1 702-378-58, I think it's 52. I'm not positive,
2 Your Honor. And then I have a second one named
3 Nick Coronado, again from Mr. Lennon. And I have
4 that number written down a little better. It's
5 702-271-1325. That's the director -- the
6 supervisor.

7 THE COURT: All right. Marshal, did you
8 find out which one?

9 THE MARSHAL: It's Kyle Donaldson.

10 THE COURT: All right. And his number?

11 THE MARSHAL: That's the immediate
12 supervisor. Should I --

13 THE COURT: I'll try the number.

14 THE MARSHAL: Let me --

15 THE COURT: Let's just make sure, just
16 in case it's not right, because I don't want to
17 spend more time. But I do want to address this.

18 MR. PEPPERMAN: And, Your Honor, I can
19 just, you know, quickly advise you on myself and
20 Howard Russell for the defendants, we contacted
21 Nicole Lesani, said if it was okay with the
22 Venetian, we would stipulate to pay their --

23 THE COURT: Yes.

24 MR. PEPPERMAN: -- their fees. She got
25 back. She said, "It's preliminarily okay. I have

1 to run it by the departments because they're the
2 ones who would be advancing the money and then
3 we'd pay them back." And then I followed up on
4 Tuesday, heard back from Ms. Lesani. She said,
5 "Yes, I've confirmed with the departments that
6 your proposal's okay. Please send written -- you
7 know, something to memorialize our arrangement."
8 And I waited until we knew for sure that the two
9 employees would be on the jury. When they were, I
10 emailed, just before you mentioned it today, that
11 they were both on the jury and I would send
12 something memorializing it to her. I'll draft it
13 over the weekend, send it to her Monday, so...

14 THE COURT: All right. In the meantime,
15 I'm going to briefly speak to Mr. -- attempt to
16 speak to Mr. Donaldson.

17 MR. PEPPERMAN: So just so you're aware
18 of that.

19 THE COURT: Thank you.

20 MR. KEMP: Judge, I think I have the
21 number now.

22 THE COURT: Right. Apparently, his
23 supervisor, Mr. Donaldson, has not heard from
24 counsel yet.

25 MR. KEMP: There's 7500 people who work

1 at the Venetian.

2 MR. PEPPERMAN: Pardon me?

3 MR. KEMP: There's 7500 people who work
4 there.

5 THE COURT: I understand, but...

6 MR. KEMP: The number I have is
7 702-378-5852.

8 THE COURT: Correct.

9 MR. KEMP: Okay.

10 MR. PEPPERMAN: I'll be right back.

11 (Whereupon, a recess was taken.)

12 THE MARSHAL: All rise.

13 THE COURT: Please be seated.

14 All right. I've spoken to Mr. Lennon,
15 juror in the first seat's supervisor,
16 Mr. Donaldson, and explained your stipulation to
17 them, that counsel will be covering two weeks
18 after the first 10 days?

19 MR. PEPPERMAN: We'll cover whatever it
20 is over it.

21 THE COURT: Okay. All right. So he
22 understands that. I guess I can talk to him
23 afterwards. And I really want to move forward.

24 Is there anything that I haven't ruled
25 on or --

1 MR. TERRY: I'm not aware of anything,
2 Your Honor.

3 THE COURT: Okay. All right. Let's get
4 going. Okay? I really -- it's time to move this
5 trial forward.

6 I would like to communicate with
7 Mr. Lennon before the rest of the jury comes in.
8 Perhaps we can bring him in first very quickly.

9 MR. KEMP: And leave him in, Your Honor?

10 THE COURT: Pardon me?

11 MR. KEMP: Leave him in rather than
12 marching him back and forth.

13 THE COURT: Yes. That's a good idea.
14 Okay. Let's get going.

15 THE MARSHAL: Now, Your Honor?

16 THE COURT: No. Afterwards.

17 (The following proceedings were held
18 in the presence of the jury.)

19 THE MARSHAL: All rise for the jury.
20 All jurors are accounted for, Your Honor.

21 THE COURT: Do the parties stipulate to
22 the presence of the jury?

23 MR. CHRISTIANSEN: Yes, Your Honor.

24 MR. ROBERTS: Yes, Your Honor.

25 THE COURT: All right. Hope you all had

1 a nice break. Now Mr. Christiansen is going to
2 follow through with his portion of the opening
3 statement.

4 MR. CHRISTIANSEN: Thank you, Your
5 Honor.

6 IN UNISON: Good afternoon.

7 MR. CHRISTIANSEN: Good afternoon. My
8 name is Pete Christiansen. I represent the estate
9 of Katayoun Barin, or Katy as her friends refer to
10 her. Katy is how I refer to her. And also the
11 oldest -- her oldest son, Aria.

12 At the time of her husband's death, Katy
13 was 47 years old, and Aria was 16, a junior in
14 high school. Keon, his younger brother, was a
15 freshman in high school. And they, the couple,
16 had been married 19 years.

17 You heard Mr. Kemp talk this morning
18 about portions of the case that we refer to as
19 liability; and that is who's responsible for what.
20 I'm not going to talk about anything that happened
21 prior to the moment in time when Dr. Khiabani was
22 injured. I'm just going to talk about the
23 portions after the fact that us lawyers call
24 damages.

25 I think you have heard, and if not, I'll

1 tell you now, the incident occurs at approximately
2 10:30 a.m. on the morning of April the 18th, 2017,
3 on southbound Pavilion Center. I took down the
4 big, giant map and everything to scale so that
5 there was some room to talk.

6 First responders -- before we get there,
7 first responders come -- these were some pictures
8 that were taken by -- do you remember the person
9 Mr. Kemp put on top of the bus. He said he wasn't
10 really on top; he was inside the bus. He's a
11 gentleman named Robert Pears, P-E-A-R-S.

12 Mr. Pears was a passenger on the bus and he took
13 just a couple of photos with his phone. When
14 Mr. Barger and I were out in the Chicago area
15 taking his deposition, he gave them to us, and
16 this is one of the photos he took.

17 It sort of gives you a northbound view
18 of that Pavilion Center. If you were thinking
19 about it, Red Rock would be on your left. And you
20 can see that City National Bank building in the
21 back. You can see first responders; right?
22 There's an ambulance there. I'm sorry, a fire
23 truck in this picture. And you can see police
24 officers.

25 And what you'll learn is that, shortly

1 after the incident, Dr. Khiabani was transported
2 to UMC, where, curiously, Dr. Khiabani had worked
3 for the previous 16 years as the head of plastic
4 surgery and hand surgery. That's what he did for
5 a living.

6 This is another one of Mr. Pears'
7 pictures, and I put this -- this one, put that up,
8 Shane.

9 I put this up for you to show you who
10 likely will be the first witness this afternoon,
11 if all of us lawyers can hurry up and sit down.
12 That's the gardener. See this little work vehicle
13 right here? That gentleman to the left of that
14 work vehicle is -- remember Mr. Kemp's little
15 block that said Sacarias? That's the gardener,
16 Luis the gardener. He should be here this
17 afternoon if we can conclude these opening
18 statements and be ready to go.

19 That little vehicle is near the area,
20 his testimony will be, where he was blowing
21 leaves. He worked for a company called Par 3.
22 But his assignment was the Red Rock, the outdoors
23 at Red Rock Casino. And you can kind of see that
24 as the north -- the northwest corner of the
25 Griffith Peak/Pavilion Center intersection.

1 There's a fire hydrant there. And that's exactly
2 where he's standing. And, again, this is a photo
3 taken by Mr. Robert Pears with his phone after the
4 incident.

5 You can see where the -- see the bus,
6 the back of the bus looks? That's where it
7 stopped, according to Mr. Hubbard. He stopped
8 there. You can see where Dr. Khiabani was laying
9 with the bike before he was taken away. You'll
10 see today Luis is the gentleman that Mr. Kemp told
11 you took a video of the immediate aftereffects of
12 the bus running over Dr. Khiabani.

13 At approximately 11:00 a.m. -- and I'm
14 doing my best to tell you what the records show
15 all of us -- Dr. Khiabani was pronounced dead at
16 the University Medical Center. And you may hear
17 some testimony of it was people looking for
18 identification of Dr. Khiabani. And once they
19 found it, everybody realized, oh, this is Kayvan,
20 this is the guy that works here and has worked
21 here.

22 So that day was a pretty horrific day,
23 the evidence will show, for the Khiabani family.
24 I told you I made just sort of a timeline for the
25 18th. The incident occurs about 10:30. About

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1 11:00, Kayvan, Dr. Khiabani, is pronounced dead.
2 His wife, my client, Katy Barin, gets her first
3 notification about 2:00 p.m. And the notification
4 is that "Your husband has been in an accident.
5 Can you please come to UMC?"

6 You'll hear Katy testify that -- you all
7 know she passed October the 12th of 2017. She
8 succumbed to cancer. Prior to her passing, we
9 took her videotape deposition. And so I'm not
10 guessing when I tell you what she's going to say.
11 We all sat through it, asked her questions, heard
12 her answers.

13 And she told us what I'll tell you via a
14 videotape, that about two o'clock she gets a phone
15 call that "Kayvan, your husband, has been injured.
16 Can you come to UMC?" That strikes her as odd
17 because that's where he worked.

18 Now, she gets to UMC about 2:30, and
19 they place her in what Katy calls a comfort room
20 and tell her that, you know, her husband of 19
21 years is gone.

22 That's a bit problematic, as Katy will
23 testify, as will Aria, because the boys are at
24 different spots. Aria is doing his last day of an
25 externship at a place called Mass Mutual. You all

1 are going to learn that Aria is sort of a special
2 boy. He has a particular interest in finance.
3 And so he wanted to do an externship, and he'd
4 been working for free at Mass Mutual learning from
5 people about how to maybe get into business, and
6 it was his last day.

7 And so the family had -- Katy, learning
8 her husband has passed, has to make arrangements
9 to tell her boys. And her brothers -- I'm
10 sorry -- Siamak Barin, who is here, this is her
11 younger brother. Siamak and her older brother,
12 Babak, live in Montreal. They're Canadians.
13 That's where Katy and Kayvan came to the U.S. from
14 after, as you all know, they both separately
15 escaped Iran.

16 Katy sort of has to get her wits about
17 her -- and she testifies to this, and you'll see
18 it -- and figure out how she's going to tell her
19 boys that their dad is gone.

20 She gets his belongings, Kayvan's,
21 including his wedding ring, that she wears through
22 the remainder of her life around her neck, about
23 3:00 p.m. from the coroner investigator. That's
24 sort of how it works. Somebody dies, the Clark
25 County Medical Examiner's office is assigned to

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1 figure out cause and manner of death.

2 Dr. Lisa Gavin, who you heard briefly,
3 will testify here. Tiffany Brown was the
4 investigator who handed Ms. Barin her husband's
5 belongings. And it took until about 5:00 or 5:30,
6 to the best of Katy's recollection in her
7 deposition, to sort of corral her boys.

8 You'll sort of understand why that's
9 relevant. At the time, that particular moment in
10 time, Kayvan's parents, who were quite elderly,
11 were in the United States. They had come to visit
12 their son and their grandchildren from Iran. So
13 Kayvan's parents are at the house. Aria is over
14 at Mass Mutual doing his last day of his
15 internship. Keon is finishing school and going
16 home. And Katy is trying to figure out how to
17 manage.

18 The passing of Kayvan resulted in two
19 services, the first here in the U.S. and the
20 second in Montreal, Canada. Aria, on behalf of
21 his mother and brother, spoke at his father's
22 service. And Her Honor has been nice enough to
23 preadmit that. And rather than me telling you
24 about that, I thought we'd just play it.

25 (Video played.)

1 MR. CHRISTIANSEN: So Aria is the only
2 family member of the immediate Khiabani family
3 that spoke. Obviously, he spoke for his brother,
4 who was weeping next to him; his mom, who was
5 grieving with him. And as the video plays,
6 several things pop out. And you'll hear testimony
7 about those things from Katy via her deposition
8 and Aria and his uncles. And that is that Aria,
9 in whatever week it was between the 18th and the
10 funeral, is the new man of the house. That's what
11 this death caused. And he's speaking for his
12 brother, his mom.

13 And when I told you he was an amazing
14 kid, the first time I watched the video, I had to
15 get a thesaurus because I didn't know what myriad
16 or malleable meant. I knew what multifaceted was.
17 But that is this young man in a nutshell, a kid
18 who, at 16, gives that speech to a packed house
19 and does it with a straight face.

20 As I told you -- that's just a map --
21 Kayvan Khiabani was buried at the Mount Royal
22 Cemetery in Montreal, Quebec. That's where he and
23 Katy had met 20 years before at university in
24 undergraduate. You'll hear Katy describe that for
25 you in her deposition.

1 So I thought I would speak about Katy
2 first. But this is the post -- or after, using
3 normal people words -- April the 18th, 2017. The
4 Khiabani family is no longer a whole family. And
5 Katy -- and the loss of her husband is unique and
6 particular to Katy, as the loss of any spouse
7 would be to the surviving spouse.

8 And, unfortunately, three months before,
9 or January the 27th of 2017, Katy Barin had pain
10 in her side. She thought maybe she was having
11 appendicitis. She went to her doctor, had an MRI,
12 a scan, something was abnormal. And she got
13 referred to Anthony Nguyen. That's really how you
14 say that last name, Nguyen, with all those
15 consonants. And she had colon cancer.

16 And Katy started chemotherapy February
17 the 2nd. I'm not getting into any of the medical
18 records; I'm just telling you where it was and who
19 she treated with. She treated at the
20 Comprehensive Cancer Center of Nevada. Sometimes
21 the acronym is CCCN. You may have seen it.

22 Dr. Nguyen will tell you his treatment
23 plan was to treat her aggressively for two or
24 three months with chemotherapy to try to shrink
25 the tumors in her colon so they could be resected,

1 or taken out.

2 And Katy went about every two weeks or
3 every three weeks to her cancer treatment here in
4 town. That's of note because you'll hear that
5 Kayvan went with her every time. Katy is a
6 dentist, practices up in Summerlin in Town Square
7 sort of near that big roundabout right in the
8 middle with the Agassi fitness club and the
9 Smith's Food King.

10 She worked full time during these
11 months. They juggled her schedule, her testimony
12 is in her deposition, so she worked Monday through
13 Thursday. Thursday afternoon, got off, went for
14 her chemotherapy so she could be sick all weekend,
15 back up and ready to go Monday morning.

16 And in those three months, the treatment
17 was starting to work. She was improving. The
18 tumor shrunk.

19 April the 18th, Dr. Khiabani --

20 MR. TERRY: Excuse me. Can we approach,
21 Your Honor?

22 THE COURT: Yes.

23 (A discussion was held at the bench,
24 not reported.)

25 THE COURT: We're just going to take a

1 quick break, but everyone needs to stay in their
2 seats except for Mr. Lemon.

3 You're in the first seat. I'd like to
4 meet you outside with the marshal just for a
5 moment.

6 (Whereupon a brief recess was taken.)

7 THE MARSHAL: All rise.

8 THE COURT: No, no, you can remain
9 seated. Thank you. This is a good time to stand
10 up and stretch if you feel like it, move around a
11 little bit.

12 MR. CHRISTIANSEN: May I proceed, Your
13 Honor?

14 THE COURT: Yes. Go ahead.

15 MR. CHRISTIANSEN: Sorry about the
16 delay, folks.

17 So from January 27, 2017, until his
18 death April the 18th, 2017, Kayvan Khiabani
19 attended chemotherapy and every doctor visit with
20 Katy. The testimony will be, ask tough questions
21 of the doctors. He was a doctor, was there to
22 help his wife. He had a special skill set to help
23 his wife.

24 He passed April the 18th. Katy's cancer
25 treatment continued. And it continued until she

1 succumbed to cancer. And I want to be
2 specifically clear. Katy died from cancer. Katy
3 had cancer before her husband was killed. Katy's
4 grief and sorrow and loss of companionship and
5 comfort is what Katy suffered from April the 18th
6 until she passed October the 12th, but there is no
7 claim that anything about this case caused Katy's
8 death. Katy died from cancer; right? Everybody
9 understand that?

10 However, there was changes in who could
11 help her post April 18th. Kayvan was no longer
12 there. She was still treating with Dr. Nguyen.
13 And her chemo continued just two days after the
14 death. She had another chemotherapy session. She
15 had to travel, as you all saw, to Montreal to bury
16 her husband. When she got back, her first
17 appointment was May the 4th, and she was weak.

18 She had other appointments. And by
19 June, her care was transferred to a Dr. Braiteh.
20 Dr. Braiteh screened her for depression June 21st,
21 and she went on to treat all the way through
22 September with Dr. Braiteh, who is a palliative
23 care specialist in the area of oncology.

24 The difference is Katy couldn't work
25 full time from her cancer. Katy could not work

1 full time anymore from her cancer. You'll
2 actually see a photo of a bed that was sort of
3 placed in the kitchen area so she could rest in
4 between patients at her little dental office up in
5 Summerlin. Because she tried real hard.

6 The brothers and sisters-in-law of Katy
7 Barin -- Babak; his wife, Marie-Claude Rigaud;
8 Siamak; his wife, Alicia -- will testify that in
9 the final weeks and months of Katy's life, she was
10 unlucky that she was dying from cancer and having
11 to prepare her boys for that, but fortunate
12 because she had great family and friends.

13 The evidence will show that the brothers
14 sort of did like musical chairs. One would come
15 and the other would go from Montreal. And Katy
16 was never alone. And she always had a friend or a
17 family member here to take her. She just didn't
18 have Kayvan.

19 Katy sat for her deposition September
20 the 22nd of this year. We did it in Mr. Kemp's
21 office. Mr. Roberts and others were present,
22 asked questions of her.

23 The next day after this, Katy
24 participated in a charity walk for cancer --
25 persons with cancer that she sort of organized.

1 And her friends all came to town to do it with
2 her. It was a 5K. She walked and got pushed in a
3 scooter, sort of, for the 5K. And her boys and
4 her brothers will tell you that was about Katy's
5 last good day.

6 She succumbed to cancer October the 12th
7 in the early morning hours here in Las Vegas in a
8 hospital in the southwest surrounded by her boys
9 and her brothers. But what the case is about
10 relative to Katy Barin is what was the loss of her
11 husband during those months. The months that she
12 survived him, she suffered pain, loss, grief,
13 sorrow, companionship, anguish -- and one other
14 word that's in the statute that I neglected to put
15 in there -- comfort, the comfort of knowing her
16 spouse and boys' father would survive her to raise
17 their boys. That's what she lost.

18 And all of it is unique to Katy. She
19 had the cancer, unfortunately, before, so she
20 suffered that in light of life circumstances
21 unique to her.

22 She as well was buried in Montreal.
23 They had a service in Montreal first. They did it
24 in reverse order for Katy. They had to get her to
25 Montreal, the service was there, then they had a

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1 service here in Las Vegas after that. And she was
2 buried next to her husband in the Mount Royal
3 Cemetery in Montreal, Canada.

4 What's left of the family after October
5 the 12th are the two boys. And questions that
6 will be posed to you all as jurors in this case is
7 for Aria -- that's my client, so that's who I'm
8 going to talk about. How do you value the loss of
9 a dad?

10 These are a series of pictures that
11 demonstrate what the evidence will overwhelmingly
12 bear out, which is that Kayvan Khiabani was a
13 great dad. To quote Aria, he traveled well, he
14 played well, he loved a lot, fought with his wife
15 about who loved who more. And these photos bear
16 some of that out.

17 Next slide, Shane, after the photos,
18 please.

19 The photos, I tried to put them in sort
20 of a youngest-to-oldest order of the boys with
21 their father because we're talking about the loss
22 of a father. And the law allows Kayvan's sons to
23 recover for pain, loss, grief, sorrow, loss of
24 companionship, and anguish and comfort.

25 The evidence that you'll hear about in

1 this case will come from the boys, come from Aria
2 and Keon. It will come from their aunts and their
3 uncles. And it may come from sort of a very funny
4 woman named Ladan Daneshmand, who was good friends
5 with Kayvan and Katy, a Persian lady.

6 She met Aria when he was two and her
7 daughter, Darya, was two. And Katy and her had
8 the kids at the library. And they sort of figured
9 out they both were Persian. Both had kind of
10 unique names for Las Vegas. And they became
11 life-long friends.

12 The question for you all isn't in a
13 vacuum, however, and the evidence you'll hear
14 isn't evidence of a theoretical loss. It's
15 evidence relative to these boys, Aria
16 specifically.

17 Katy explains in her deposition what the
18 loss -- what she observed, what Katy, the mom, saw
19 her sons go through when they lost their father,
20 perhaps no better perspective. And this is a lady
21 who perceived it, knowing or expecting at some
22 point she would not survive.

23 Aria will, I'm sure, using big words and
24 fantastic oration, explain to you the loss of his
25 father, what he'll miss. He missed homecoming

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1 junior year, Kayvan did. He missed graduation,
2 all things that his son, as you heard the story
3 Aria relayed, looked forward to having with his
4 father.

5 You'll also hear evidence of loss of
6 probable support. There's an economist that's
7 going to testify, Dr. Stokes. And he will explain
8 to you that probable support is earning capacity
9 of Dr. Khiabani minus what he would have used
10 himself for personal consumption. He'll offer you
11 that evidence as an expert in this case.

12 Potentially, if there is a punitive
13 damage phase of the case, he'll offer evidence
14 about the amount of money the defendant could pay
15 and not be annihilated to punish the defendant for
16 the conduct -- for its conduct in this case.

17 And, lastly, as you all probably figured
18 out from my long jury selection, I tried to
19 explain who's who to you so you know who you're
20 going to see and who you're going to be dealing
21 with and how they relate to the case.

22 You've met Siamak, Katy's younger
23 brother. Katy's older brother's wife is
24 Marie-Claude. I introduced her to you via a
25 picture. And, folks, the evidence will show that

1 it's real tough to get everybody here from
2 Montreal at once. So you're going to see a bit of
3 a musical chairs. Marie-Claude, or MC, may be
4 here, at times, Babak; Siamak; his wife, Alicia;
5 and the boys. The boys are in school. We can't
6 very well have them here for the entire time, but
7 they'll be here.

8 Some of you saw Aria last week, is my
9 recollection. Marie-Claude Rigaud is the legal
10 guardian of both boys. She's married to -- she is
11 an associate professional at the law school in
12 Montreal. She's married to Babak, who is a judge
13 in Montreal.

14 Siamak, I had to get a better picture of
15 Siamak from last week. He looked like a criminal
16 last week. Siamak is the younger brother. He is,
17 on the pleadings, the administrator of the estates
18 of both his sister -- his big sister -- and her
19 husband, Kayvan. We've got legal requirements
20 under our wrongful death statute.

21 And that's the parties that play out.
22 These are just the names of the witnesses I've
23 spoken to you folks about.

24 What you will learn from the evidence in
25 this case is that the death of Kayvan Khiabani was

1 preventable. It occurred because of the -- the
2 evidence will show, because of the bus sold by MCI
3 that they knew or had reason to know was
4 dangerous, that they had opportunity, time and
5 time again, to correct, and they chose with a
6 conscious disregard to ignore.

7 The standard is a preponderance of the
8 evidence. And because of that conscious
9 disregard, the evidence will support a claim for
10 punitive damages by clear and convincing evidence
11 because this outcome was preventable.

12 All finished, Your Honor. Thank you.

13 THE COURT: Mr. Terry, are you ready to
14 start your opening statement?

15 MR. TERRY: Yes. But could I have about
16 two minutes?

17 THE COURT: Certainly.

18 MR. TERRY: Thank you. I'll be right
19 back.

20 MR. ROBERTS: While he's doing that,
21 Your Honor, could we approach?

22 THE COURT: Yes.

23 MR. ROBERTS: Thank you.

24 (A discussion was held at the bench,
25 not reported.)

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1 THE COURT: Okay. Mr. Terry?

2 MR. TERRY: Thank you, Your Honor.

3 May it please the Court, Mr. Barin,
4 Counsel. Ladies and gentlemen, good afternoon.

5 My first time to speak to you. I'm
6 Michael Terry. I'm with the MCI boys. I am the
7 youngest, sort of. And I have been given the
8 opportunity to speak to you at this phase of the
9 case called opening statement.

10 I want to begin by reminding you what
11 Her Honor told you at the outset. Lawyers do not
12 testify. What we say to you in opening statement
13 is not evidence and should not be considered by
14 you as evidence because we are not witnesses. We
15 do not take an oath to testify. We were not
16 there. We do not know the evidence as the
17 witnesses do. And it is right, fitting, and
18 proper that you listen carefully and weigh and
19 evaluate what we tell you the evidence is, bearing
20 in mind that you have to be the judges.

21 One of the reasons I say that is
22 because, when Mr. Kemp began this morning, he laid
23 out his photograph of Pavilion, and he had the
24 bus, and he had the bus at this end, and he said
25 when Mr. Hubbard, the driver, came onto Pavilion,

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1 he didn't see the bike until he got all the way
2 down to here. And he placed the bike at the mouth
3 of the intersection between Pavilion and Griffith
4 Park. And he put the bike to the right
5 shoulder -- the right front of the bus. And he
6 said, "And that's the first time that Mr. Hubbard
7 saw the bike when he came down Pavilion."

8 Mr. Kemp, however, never, ever told you
9 what the evidence was of where the bike went, what
10 path he followed between the time he entered
11 Pavilion until he got to that location. He
12 suggested that he might have been in the bike path
13 the whole way because he made reference to
14 sensors -- side sensors not picking up, blind spot
15 on the side. But Mr. Kemp never said what the
16 evidence will be about where the bike was between
17 the time he entered Pavilion until he got to the
18 right front corner of the MCI bus at the
19 intersection.

20 Mr. Kemp said that he expects Erika
21 Bradley, who operated the vehicle that traveled
22 behind the bus, to testify that she saw
23 Dr. Khiabani, at or near the intersection, wobble
24 and fall into the bus. And wobble is a big item
25 or a big element of their claim because wobble

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1 indicates that he somehow lost control of his
2 bike, that it's wobbling left and right.

3 I believe, however, that what
4 Ms. Bradley will actually testify to when she is
5 called is that, at a certain point while we were
6 driving, I don't know if it was --

7 MR. KEMP: Your Honor, can we approach?

8 THE COURT: Yes.

9 (A discussion was held at the bench,
10 not reported.)

11 MR. TERRY: Erika Bradley will be called
12 to testify as a witness before you. Erika Bradley
13 will testify about what she saw and observed back
14 in April of 2017. And I anticipate that she will
15 testify that, as she was following the bus, she
16 saw the bike to the right of the bus. And at the
17 intersection, she saw the bike swerve into the
18 front of the bus.

19 I expect that, when she will be asked
20 whether or not she observed a wobble, she will
21 say, "I don't remember a wobble. I am familiar
22 with the wobble, and I don't remember seeing it."

23 So you will be called upon to evaluate
24 Erika Bradley's testimony when it is delivered to
25 you, and I submit to you that she is going to say,

1 when she is called, that she saw the bike swerve
2 into the bus.

3 We had a disagreement about Mark
4 Barron's --

5 May I approach the bench, Your Honor,
6 for just a moment?

7 MR. KEMP: Your Honor, I don't have an
8 objection.

9 MR. TERRY: We had a concern about Mark
10 Barron testifying. Mark Barron, you will hear,
11 was the inventory of the S-1 Gard back in the
12 early '90s. He claimed that he had a meeting with
13 or a visit with a representative of Universal
14 Parts, Pablo Fierros, at a trade show, and that he
15 talked to him about the S-1 Gard. And the
16 representation made that he offered the S-1 Gard,
17 quote, for free.

18 We had a disagreement about what
19 actually occurred. And I believe that the
20 testimony will be, picking up where Mr. Kemp read,
21 "They didn't even want to try that out for free.
22 I gave them an evaluation. Yeah, I'd say no."

23 "QUESTION: The meeting that you had with
24 Pablo -- oh, I'm sorry. The meeting that you
25 had with Pablo, he was Universal Coach Parts;

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1 correct?

2 "ANSWER: I believe so.

3 "QUESTION: And that's a company that
4 sells bus parts?

5 "ANSWER: Yes.

6 "QUESTION: And you wanted him to become
7 a distributor of the S-1 Gard?

8 "ANSWER: Yes.

9 "QUESTION: So that he would include it
10 in the inventory of things that he sells;
11 right?

12 "ANSWER: Uh-huh. Yes. He would be a
13 distributor.

14 "QUESTION: He would be your distributor?

15 "ANSWER: Yes.

16 "QUESTION: And he told you that it did
17 not fit with the kind of equipment that he
18 was selling?

19 "ANSWER: I believe so.

20 "QUESTION: What was he selling?

21 "ANSWER: Bus parts.

22 "QUESTION: Do you know what kind of bus
23 parts?

24 "ANSWER: Radiators and fuel pumps and
25 alternators and fan belts.

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1 "QUESTION: So he, Pablo, did not pass
2 judgment on whether or not the S1 was a
3 useful device. He simply said it's not part
4 of what we sell; correct?

5 "ANSWER: I believe so."

6 So to assert that Mr. Barron made a
7 representation to MCI, the motor coach company,
8 that we are going to provide you free S1 Gards, we
9 just want you to use them, is not actually
10 correct.

11 He went to someone who sold parts, said,
12 I'd like you to be the distributor, and our parts
13 guy said, no, we don't distribute that kind of
14 part.

15 And that is the reason that you have to
16 be careful about what we tell you the evidence is.
17 That is the reason that you have been given the
18 power that you have.

19 Now, on behalf of our vice president,
20 Mr. Nalepka, and the men and women who work for
21 MCI, I want to take this opportunity to thank you,
22 to thank you for coming, because we recognize that
23 you responded to a summons. You did not
24 volunteer, that you came here because it was your
25 civic duty and you have been here through the

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1 process, as tedious as it is for all parties, to
2 select a jury.

3 And I have watched and observed, and you
4 have paid attention. You have participated in the
5 process. You have devoted your time and your
6 effort to the process of jury selection. And now
7 you have been sworn in as jurors and you have been
8 given the title of jurors. And we reasonably
9 believe and expect that you will continue to
10 exercise attention and you will follow what goes
11 on and you will listen and observe. And you will
12 give both sides a fair opportunity because now you
13 are jurors. You are not potential jurors; you
14 have been sworn in as jurors.

15 And I want you to appreciate for us
16 everything that happens in this room. Everything
17 about this room reminds us of who you are. It is
18 not a mistake that you are separated from me by
19 this rail. It is not a mistake that your chairs
20 are elevated above mine. It is not a mistake that
21 I operate here in the well and I am not permitted
22 to deal with you directly, even in casual
23 conversation, to try and persuade you or talk to
24 you because you are jurors. You are judges.

25 And the only one that you should

1 communicate with directly other than Her Honor is
2 the marshal. If you need to take a break, talk to
3 the marshal, don't talk to the parties, because
4 everything about this room reinforces that you are
5 separate from us.

6 We rise when you come in. We rise when
7 you leave. We do not do anything with respect to
8 evidence unless you are here to watch it. Nothing
9 is admitted into evidence unless you are here.
10 And if you don't hear it, it doesn't count.

11 And when this case is concluded, Her
12 Honor will give you the law, instructions about
13 what you are supposed to do, and questions you are
14 supposed to answer. And you will take that and
15 you will retire to the jury room alone. No one
16 goes with you. You are on your own. You select
17 your foreman. You conduct your deliberations and
18 you return your judgment of the disputed matters
19 of fact, your judgment on the questions that Her
20 Honor asks you.

21 All you have given us is your oath.
22 And, ladies and gentlemen, that is enough because
23 you are citizens of this state and of this
24 country. You have given your oath and your time,
25 and we expect that you will abide, as you have so

1 far, and we will respect your judgment.

2 We are the only nation on the planet
3 that entrusts this kind of decision to citizens.
4 Make no mistake about it. Others have
5 professional deciders, judges. Others have
6 arbitrators. Others have bureaucrats. We do not.

7 We entrust this decision to our
8 citizens. And that right for all of us is the
9 Seventh Amendment to the United States
10 Constitution. It is a guaranteed constitutional
11 right.

12 And at the risk of sounding overdrawn or
13 overboard, I believe that that is the reason that
14 we are a free nation, a free country, and we will
15 remain free as long as we, the people, such as
16 you, are in charge of the affairs that we have.
17 That we, the people, make these decisions and not
18 others. And that is why we entrust the decision
19 to the jury. That is why we will wait your
20 verdict. And that is why we expect that you will
21 give us your attention, your resolve, and you will
22 render a verdict fair and true.

23 Now, the reason that I'm permitted to
24 make an opening statement is not because I'm a
25 better lawyer talking than they are and my lawyer

1 talk evidence is better than theirs. The reason
2 I'm permitted to give you an opening statement is
3 so that you understand what we, MCI, believe the
4 evidence will be, what we think the issues are,
5 and what we think the evidence will lead you to
6 conclude based on what you hear and observe.

7 Again, I'm a lawyer. I'm a lawyer
8 talking. Listen to what I have to say, I ask you.
9 I try to be accurate. But remember that you are
10 the sole judges of the actual evidence when it
11 comes in. And it comes in from the witness chair
12 and from the physical objects that Her Honor
13 permits you to consider.

14 I want you to know that there are
15 certain things about this case that are not in
16 dispute, that are not really at issue. And once
17 the evidence comes in, there will be no quarrel
18 about those things.

19 And first and foremost about what is not
20 in dispute is that these two young men lost their
21 father April 18, 2017, before the time that they
22 should have lost him. They should have had him
23 longer than they did.

24 They lost their mother in October 2017
25 because of a disease that is not connected,

1 because of an occurrence that is not connected to
2 the lawsuit. But it doesn't change the fact that
3 they lost their mother. And while what she
4 suffered while she suffered cancer is not part of
5 the lawsuit, the treatment she received or the
6 pain that she suffered as part of the cancer is
7 not part of the lawsuit, the fact remains, we all
8 know, it has affected the two young men. And
9 there is no argument or dispute about that.

10 We also know and recognize that, through
11 no fault of their own, because of the loss of
12 their parents, their lives have been turned upside
13 down. They were here. They were in high school
14 here. They had their lives here. They had their
15 friends here. They had their activities here.
16 And it's all gone.

17 Their family has taken them in. Their
18 family will take care of them, but they had to
19 leave. They had to go to some other place, and
20 that does affect young men, and there's no way to
21 get around it.

22 Those things are not in dispute. That's
23 not part of the lawsuit. You will hear the
24 evidence about it and no one will quarrel that
25 they lost their father, they lost their mother,

1 and their world turned upside down and they had to
2 go live with their family in Canada.

3 We know where the event occurred. We've
4 got -- you've seen. This is a photograph of the
5 area. You're familiar with it. This is looking
6 toward Griffith Park [sic]. You've seen the
7 aerial photograph of the area, this one right here
8 which shows the intersection. And you have also
9 seen a more detailed aerial photograph that shows
10 the complete area.

11 Now, this area here -- if I could,
12 gentlemen. I'm sorry. If I could, this is
13 Charleston down here. Turn right and then they go
14 down Pavilion. This is the bus cutout which
15 you've heard about. This is where the city buses
16 stop. Then you go all the way down to the
17 intersection of Pavilion and Griffith Park [sic].
18 The actual collision occurs within that
19 intersection.

20 There's no dispute about the vehicles
21 involved. We have a coach. This is a J4500 put
22 together, assembled or manufactured in 2007, sold
23 in 2008. Mr. Kemp is correct, 4500 refers to the
24 length. It's 45 feet long. And J is the model
25 number or model that we have for that particular

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1 style of bus.

2 The J bus is a descendent or
3 modification of the E bus. And the E bus was a
4 brand-new bus designed before this one. This one
5 was simply a modification of that one. This is a
6 photograph of the actual bus involved.

7 We also know that there was a bicycle
8 involved and it was Dr. Khiabani's bicycle. It
9 was here in this picture. No dispute about the
10 vehicles involved in this event. Our bus that we
11 made, that we did not own, that we did not
12 operate, we did not employ the driver. We had
13 nothing to do with the actual delivery that he was
14 making that day. We made the bus. And this
15 bicycle that Dr. Khiabani used on that day and
16 earlier.

17 We also know, and there is no dispute,
18 that the -- going back to the diagram.

19 If you would focus in on the
20 intersection itself. Up a little bit, sir. Up a
21 little bit more. The intersection with Griffith.
22 Just a little bit more. Little bit more. The
23 actual intersection. That's it. Okay.

24 We know that the actual occurrence was
25 within the intersection of Pavilion and Griffith

1 Park [sic]. And we know that, at the time the two
2 came together, the bus was inside the intersection
3 and the bicycle came into the lane occupied by the
4 bus. The bicycle came into that lane and the
5 point of impact between the bicycle and the bus
6 was within 6 feet of the lane occupied by the bus.
7 The bike was in the bus lane. The bike left
8 whatever lane it was in and entered the bus lane.

9 And I tell you that, but that is not
10 going to be an issue because it has been decided
11 by those that reconstruct accidents, those who
12 look at the physical evidence left behind in terms
13 of gouge marks, in terms of physical damage to the
14 vehicles, in terms of damage to the road, and they
15 fix the point of impact. And both their expert,
16 Caldwell, and ours, Rucoba, are in agreement that
17 the connection or the collision or the contact
18 between the bicycle and the bus occurred 6 feet
19 inside the bus lane.

20 Dr. Khiabani did lose control of his
21 bike as a result of the collision. He did fall to
22 the ground. He fell off his bike. He hit the
23 pavement. There was contact between his head and
24 the right rear wheel, first wheel, of the bus. He
25 suffered a brain injury and he was killed.

1 Those things are not in dispute. Once
2 you see the evidence, there will never be a
3 contest again about where it happened, where they
4 came together, that Dr. Khiabani suffered a head
5 injury and lost his life, and the vehicles that
6 were involved.

7 After that, when you start to look at
8 the actual case itself, the specific facts, then
9 it becomes a little different, because now we are
10 talking about things where the parties do not
11 agree.

12 Now, the question that I began with
13 asking you was where was the bicycle between the
14 time the bike entered Pavilion until it came in
15 contact with the bus? There are going to be four
16 witnesses that I believe will help you decide or
17 that will help you or will show you what happened.
18 You have heard the names before except for the
19 last one. Edward Hubbard, employee of
20 Michelangelo's, was the tour bus driver on the day
21 of the occurrence. Erika Bradley was the operator
22 of a vehicle. Her husband was her passenger. She
23 was behind the bus. Robert Pears or Pears was a
24 passenger on Mr. Hubbard's bus. He was located in
25 the very first row on the right. And Michael

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1 Plantz was also a passenger who was located in the
2 very first row right behind Mr. Hubbard, the
3 driver. The two of them were picked up at
4 McCarran and were being taken to the Red Rock
5 where they were going to attend a convention for
6 their employer. And that's why they were on the
7 bus and why they were headed to the Red Rock.

8 Now, Edward Hubbard will testify that he
9 came down Charleston. He turned right onto
10 Pavilion behind the bicycle, that he lost sight or
11 believes he passed the bicycle at or near the bus
12 turnout, which is some 300 feet away, and he never
13 saw the bicycle again until it was at his right
14 front coming in. That's the next time he saw it.

15 What that means is that Mr. Hubbard
16 cannot offer any testimony from his own
17 observation of where the bicycle was on the road
18 between the bus cutout and when he showed up at
19 the right front of the bus.

20 Mr. Hubbard will also testify, however,
21 that, as part of his practice driving a bus, he
22 always maintained vigilance on his sides, on his
23 mirrors. And he will testify that, on the basis
24 of that, he concludes that the bike was not in the
25 bike lane to the right of the path that he

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1 occupied, that it was not in the bike lane, but he
2 does not know where it was.

3 Erika Bradley will testify that she did
4 not see the bike at all until she got at or near
5 the intersection. And when she saw the bike at or
6 near the intersection, it was in the bike lane.
7 She saw it, and it swerved into the bus. But she
8 does not know where the bike was at any time prior
9 to her first seeing it at or near the
10 intersection. She can't tell us.

11 Now, Mr. Pears was in the bus. And he
12 will testify that when they -- that is,
13 Mr. Hubbard and Mr. Plantz and the bus driver --
14 were on Charleston, they were aware of the bike.
15 And then he will testify, Mr. Plantz, that at this
16 location here, right here, that I've got depicted
17 here, that he saw the bike where it is indicated
18 here on this photograph, which is in the right
19 turn lane.

20 Mr. Pears will testify that at that
21 point in time, the bus crossed over the bike --
22 crossed over to the bike lane as if he was going
23 to turn right. The driver said, "Oops," and then
24 went back to the main travel lane. And at the
25 time that occurred, Mr. Pears saw that the bike

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1 was where he indicated on that photograph.
2 Mr. Pears, from that point until just about the
3 time the event occurred, focused on the driver.
4 He does not know where the bike went between the
5 time he saw it in the right-hand turn lane until
6 he saw it again in the bike lane entering into the
7 bus lane and then what he believes is turning into
8 the bus. And that's here.

9 This is when he sees it again. This
10 line here up at the top is the 50-foot line from
11 the intersection and that's where he puts the
12 bike. But he cannot tell us where the bike was
13 between the time when he saw it in the right-hand
14 lane and the time when he saw it there.

15 Now, Mr. Plantz will testify. When he
16 testifies, he will testify that he, himself, was a
17 bike rider and that he was interested in this
18 particular bike rider and that he watched him. He
19 watched him from the time he first saw him until
20 they completed the turn, all the way down until
21 the event occurred. And he knows where he was.

22 This picture that you will see during
23 the course of the trial is where Mr. Plantz puts
24 the bus, and then he puts the bike up toward the
25 top of the photograph in the right-hand lane on

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1 the curb.

2 So Mr. Plantz is watching, and he says,
3 "I saw the bike. The bike was in the right-hand
4 turn lane at the curb traveling slowly." He will
5 describe watching the front wheel go back and
6 forth as if the doctor was just resting a little
7 bit. He will describe traveling down along the
8 right turn lane at the curb, not in the bike lane,
9 in the right turn lane at the curb.

10 And then he will put the doctor at this
11 point right here as the bus enters the
12 intersection. And he will put Dr. Khiabani on his
13 bike at that line at that location right there.
14 And Mr. Plantz, who is the only witness who
15 watches Dr. Khiabani from the time he enters
16 Pavilion until this point right here, says that's
17 where he was.

18 We submit to you that the evidence will
19 be that there is nothing about the design of our
20 bus, nothing about the aerodynamic properties of
21 our bus, that causes the bike to go from that
22 location and turn left into the bus. There's
23 nothing about the design of the bus that makes
24 that happen.

25 We believe that the doctor made a turn

1 into the bus and he did it from that location
2 right there. We do not believe that he was in an
3 area that couldn't be seen. We do not believe
4 that he was in an area in the bike lane. We do
5 not believe he was in an area anywhere close to
6 the bus until he turned from this position into
7 the bus. And that's the reason we do not believe
8 that our design was defective, our design was a
9 cause of what happened to Dr. Khiabani.

10 I need to talk to you about this notion
11 of an air blast, because you have heard Mr. Kemp
12 and you have heard him say that this bus had a
13 property of causing air blasts, that the air blast
14 upset Dr. Khiabani and, as a result, he lost
15 control of his bike. That's the claim. And the
16 air blast that they talk about is the result of
17 our coach.

18 Now, I'm going to show you a picture of
19 our coach again. This is a motor coach. It is
20 not a rocket train or a bullet train that travels
21 200 miles an hour on tracks. It is not a Bugatti
22 that races in Le Mans over in Europe. It is not a
23 jet plane. It is not a rocket ship. It is a
24 motor coach. And this motor coach at the time of
25 the occurrence was traveling at 25 miles an hour.

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1 That's all.

2 This motor coach is one that we
3 designed, that we put together, and that we
4 manufactured. And this motor coach is a
5 descendent of the E coach, not the coach front
6 that was tested in 1993.

7 You will see the exhibit about the
8 testing that MCI had done in 1993 to test the
9 aerodynamic properties of bus fronts, including
10 two we put together, the one that was standard,
11 and a couple of our competitors.

12 This bus is not the bus that was tested
13 in 1993. This bus is a descendent of the E bus,
14 and the E bus was designed brand spanking new.

15 Now, there is no question at all that,
16 as a vehicle of that size, as a vehicle of our
17 suburbans, as a vehicle of our cars, as a vehicle
18 of our -- whatever we drive, as they move on down
19 the road, they displace air. That is a fact of
20 physics. It just happens. As the bus moves down
21 the road, it displaces air. And there is nothing
22 you can do to change that short of shooting it
23 into space and having it go through a vacuum. As
24 long as the bus and objects like it move through
25 air, they displace air and that air displacement

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1 occurs.

2 Now, you can do things to control the
3 displacement, but you cannot eliminate it. And
4 even when you begin to control it, you do not
5 reduce it, because the volume of air that is
6 displaced is a function of the size of the vehicle
7 and the speed that it's moving.

8 All right? So when you start talking
9 about air displacement, it is simply a fact of
10 nature that that's what occurs.

11 Drag. You've heard the term "drag."
12 Drag is a measure of a force that operates
13 opposite the vehicle's direction of travel. Drag
14 is like friction. Drag retards or slows the
15 progress of the object. It is not a measure of
16 air blast. Drag is not air blast. Drag is not
17 air displacement. Drag is the force that retards
18 the vehicle, just like friction.

19 And in moving these objects,
20 particularly objects of this size, you have to
21 take into account how much of your engine power is
22 dedicated to overcoming friction and drag.
23 Because that's what consumes the fuel.

24 Drag coefficient is a formula that
25 assists the engineer in measuring how much drag at

1 different speeds, because there's more drag at 75
2 than there is at 25. There's more drag at 100
3 than there is at 30. And the coefficient is a
4 measure of that. It's a formula. And when you
5 see it, and I'm sure that you will, you will note
6 that that formula uses as its principle function
7 velocity. It is related to the square of the
8 velocity.

9 When you talk about drag and
10 coefficient, drag coefficient, you are not talking
11 about air blast. You are not talking about air
12 displacement to the side, to the top, or to the
13 bottom. You're talking about the forces involved.

14 Now, they are related because they all
15 involve the wind, the air that has to be
16 displaced, but they are not the same thing and you
17 cannot say you can go from a particular drag
18 coefficient or particular drag value and calculate
19 what effect that has on the air displacement left,
20 right, top, and bottom. You can't do it. They
21 are different concepts.

22 So calling air displacement air blast
23 doesn't give you any information because it's not
24 quantitated. It's just simply a word description
25 used by us. What you are interested in is what is

1 the air displacement in the area that would affect
2 the bike rider.

3 Now, they talk about their aeronautical
4 engineer, Breidenthal, and he drew a diagram that
5 you will see in evidence -- excuse me -- that you
6 will see in evidence. This is a diagram of two
7 separate bodies. The one on the right has got
8 rounded corners. The one on the left is square,
9 shaped like a brick. Dr. Breidenthal did this not
10 to represent any particular bus but just simply to
11 talk about what he had in mind.

12 When you get to the rounded, you will
13 note that the streams, which is what you see in a
14 wind tunnel, moves smoothly around the bus. When
15 you get to the one that looks more like a brick,
16 there is what they call a separation between the
17 boundary layer and the vehicle itself so that it
18 moves away and then reattaches so that the wind,
19 if you will, extends out farther to the left than
20 it would if it was rounded corners.

21 So when we start talking about the
22 effect of the air displacement around the bus,
23 this is the mental picture that we use. And you
24 want to get as close as you can to the one to the
25 right. Not that you removed air displacement, not

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