

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 A. Right. Shadow may not be the right word. I
2 don't mean to imply that that was the sun casting a
3 shadow of his, but shadowy-looking area on the bus.

4 Q. Well, you've been talking about shadows for a
5 few hours here. A shadow is when the sun is blocked by
6 something and the shadow comes on the other side?

7 A. Yes.

8 Q. For instance, you see the palm, the palm
9 limbs there?

10 A. Yes.

11 Q. Okay. The sun is which way in that?

12 A. The sun is going to have been to the
13 southeast.

14 Q. Which way is that?

15 A. Well, again, if I can point.

16 Q. Please. Do you want the pointer?

17 THE MARSHAL: Mic, sir.

18 THE WITNESS: See? Glad we've got you to
19 remind me here.

20 Obviously, south is going to be the direction
21 the bus is going. East is going to be approximately
22 here. And so this is in the midmorning that this is
23 occurring. And so the sun is up in the southeast sky,
24 is what it looked like to me.

25 /////

1 BY MR. BARGER:

2 Q. All right. And do you see the palm branches
3 there? There's a shadow on the palm branches; right?

4 A. I'm not sure what you're referring to there.

5 Q. Well, you see the darker halves of the palm
6 branches on this side? If I may step right beside you.
7 You see this right here? That's a shadow of a palm
8 branch, right, from the sun?

9 A. Very well may be, yes.

10 Q. Well, what do you think it is if it may very
11 well be? Isn't that the shadow?

12 A. Well, it might have some different textures.
13 The wind may be moving the leaves around. I can't tell
14 you for sure if that's a shadow or not.

15 Q. You can't tell us that the backside of the
16 palm trees, where the front side is facing the sun, is
17 a shadow? You can't tell us that?

18 A. No. I could tell you that if I could tell
19 for sure, but all I see is a discontinuity in the
20 coloration, and I can't tell you for sure that's due to
21 shadow.

22 Q. Okay. Now, if the bus -- would -- would the
23 bus produce a shadow? Have you seen shadows in the
24 bus, of the photographs?

25 A. Yes, the bus is going to be casting a shadow

1 in the same general direction that we see the -- the
2 trees, the palm trees and the signal poles.

3 Q. If I'm driving and going down and the sun is
4 up there, the shadow's going to be to my right as well;
5 right?

6 A. Yes.

7 Q. All right. And if -- if that was
8 Dr. Khiabani -- and we'll let other people talk about
9 whether they think it is or isn't. If the shadow that
10 you think you see and you've been calling the shadow
11 for seven hours, was Dr. Khiabani on his bicycle, then
12 he would be in the shadow of the bus and he wouldn't be
13 producing the shadow at all, would he?

14 A. That's correct. That using the word "shadow"
15 may not have been the best technical term I could have
16 chosen, but I meant to say an indistinct shape against
17 the side of the bus.

18 Q. Sir, you've been doing this for a lot of
19 years and you use your words very carefully. And
20 you've been calling this a shadow, not only today, but
21 for a long time, haven't you?

22 A. I have, yes. I thought that was a reasonable
23 description of what it was, although not technically
24 correct.

25 Q. Okay. So let's go back to the slide just

1 before this, to Slide 1. How far -- how fast was the
2 bus driving? 25.

3 A. Traveling at 25.

4 Q. How many feet per second would that be?

5 A. 36.7.

6 Q. In one second this bus would travel
7 36.7 feet?

8 A. Correct.

9 Q. And if the bicyclist is going 30 -- excuse
10 me -- 12 to 13 miles an hour, what's he going to be
11 traveling? What, 19 feet per second, something?
12 18 feet per second?

13 A. Approximately. But that's one I don't have
14 memorized, so let me just run the numbers.

15 Q. I don't either. That's why I'm asking you to
16 do it.

17 A. At 12 miles an hour, it's 17.6 feet per
18 second.

19 Q. All right. So over twice as fast, as we've
20 discussed.

21 A. Yes.

22 Q. Okay. So if you move the frame before --
23 and, by the way, the video -- this is only a portion of
24 the video. There was a lot of video before here;
25 right? And you watched it all?

1 A. Yes.

2 Q. It goes on for several minutes. So you could
3 have taken stills before for several feet; right?

4 A. Before what?

5 Q. Before that one, that exhibit -- that
6 exhibit, that still No. 2. Okay?

7 A. Yes. And I've -- I've looked at stills from
8 times before.

9 Q. All right. So if the bus is going at twice
10 as fast per second, you back that bus up one second so
11 the bus is 36 feet further back, but the bicyclist is
12 only, what, 17 feet further back?

13 A. Roughly, yes. 36 feet and then half of that
14 again is going to be 18 feet.

15 Q. So the bicyclist is out in front of the bus
16 one second before this -- this still right here; right?

17 A. Yes, the bike would be out in front of the
18 bus.

19 Q. Okay. The bike, in fact, if we can visualize
20 this, here's -- here's where we are right here, the
21 bus. Okay? And to the right, you're saying that
22 shadow, you think, is Dr. Khiabani on the bicycle, just
23 about even with the bus; right?

24 A. Well, the darker area -- we won't call it a
25 shadow anymore.

1 Q. I'm not going to argue that with you. I'm
2 going to use what you said, shadow. I'll change it to
3 darker area. Okay?

4 A. Okay.

5 Q. All right. That circle is where you think
6 the bicycle was?

7 A. When I'm first able to see something that
8 looks like it's likely a bicycle.

9 Q. So back that up one second. That means that
10 bus is 36 feet back and the bicyclist is 17 feet back.
11 That means he's at least 17 or 18 feet in front of the
12 bus; right?

13 A. Well, probably not quite because there, it
14 looks like he's right alongside the front. And so not
15 to quibble with you, but it's probably a little less
16 than that.

17 Q. You will give me 14 feet?

18 A. Probably something like that.

19 Q. Okay. So the bus is here. This is one
20 second before that slide. The bus is here, and 14 feet
21 in front of the bus is the bicyclist. And you're
22 saying you don't know exactly where he was, but he
23 might have been in the bicycle lane; is that fair?

24 A. He certainly could have been in the bicycle
25 lane.

1 Q. But you don't know where he was?

2 A. Well, we know he doesn't get hit until after
3 he's out in the intersection.

4 Q. The point is you don't know where he was?

5 A. That's correct, exactly.

6 Q. Now, let's back it up another second.

7 So now the bus is 72 feet back from this
8 slide; right?

9 A. Yes.

10 Q. And the bicyclist is 34 feet in front of the
11 bus; right?

12 A. Yes.

13 Q. Okay. Can you step off 34 feet at -- you're
14 a civil engineer, but I was a surveyor once, and I
15 thought my step was about 3 feet. But I'd like for you
16 to step off, if you can and if you don't mind and if
17 the judge will let you, 34 to 36 feet.

18 A. Okay. I'm pretty confident of my pace as
19 well.

20 Q. Good. I'm not confident in my mine anymore.
21 I did a long time ago. But let's assume the bus is
22 right here. This is the bus. Two seconds before that
23 video, would you tell me where the bicyclist was out in
24 front of the bus?

25 A. Well, we have to move the bus over here.

1 Q. Right. Let's just assume this is the bus.
2 Okay?

3 A. All right. Probably about here.

4 Q. So if I'm driving a bus in my right-hand
5 travel lane, I should -- I could look out and see where
6 you are is where the bicycle would be going -- he'd be
7 going that way, towards the entrance; right?

8 A. I haven't studied that angle, but I would
9 assume that would be true.

10 Q. Okay. Did you ever see -- I'm sorry. You
11 need to probably go back.

12 A. Excuse me.

13 Q. Did you ever see in the video the bicyclist
14 in front of the bus?

15 A. Not that I could tell, no.

16 Q. Okay. And I'm going to do this one more
17 time; then I'm going to -- I think the point will be
18 made.

19 If you back that frame up 3 seconds -- 1001,
20 1002, 1003 -- the bus would be how far back from where
21 it is right now? 3 times 36?

22 A. Yes.

23 Q. Help me with my math.

24 A. 108, is that?

25 Q. 108 feet back; right?

1 A. Yes, I think so.

2 Q. Okay. All right. And the bicyclist would
3 be, if he was in the bicycle lane, would be how far
4 back?

5 A. Well, he's going to be 51 feet in front of
6 the bus.

7 Q. Okay. So in other words, if the bicyclist,
8 if that darkened spot is the bicyclist and if he was in
9 the bicycle lane for 3 seconds, he would have been
10 50 feet in front of the bus; correct?

11 A. In 3 seconds, yes.

12 Q. In 2 seconds he would have been 36 feet or
13 so, 34 feet in front of the bus?

14 A. Yes, sir.

15 Q. All right. Now, if the bicyclist is not in
16 the bicycle lane but is over in the right-hand turn
17 lane, he won't be directly in front of bus, would he?

18 A. Well, he's not going to be directly in front
19 of the bus even in the bike lane. He'll just be more
20 offset laterally to the right.

21 Q. 5 or 6 feet?

22 A. Yes.

23 Q. Okay. 5 or 6 feet. In other words, from
24 about here to there, 50 feet up there, and then 36 feet
25 as the bus is getting to that point; right?

1 A. To be within the bike lane.

2 Q. Right, if he's in the bike lane.

3 A. Yes, sir.

4 Q. If he's not in the bike lane, then he would
5 not be in front of the bus within 5 or 6 feet, would
6 he?

7 A. He would be offset probably another 6 to
8 8 feet.

9 Q. If he was in the right-hand turn lane?

10 A. Centered in the right-hand turn.

11 Q. Okay. Am I correct -- and it's your
12 opinion -- you have no opinion as to what point in time
13 prior to the accident had Dr. Khiabani departed the
14 bike lane, if he was in the bike lane?

15 A. Well, we know he had to have at least crossed
16 it, but I can't tell you exactly where that would have
17 been if he did, in fact, do that.

18 Q. Okay. If you're crossing the bike lane, then
19 you would be in the right-hand turn lane; right?

20 A. That's why I said he's either in the bike
21 lane or he would have had to come across the bike lane.

22 Q. Okay. But you have no opinion as to when
23 that occurred, if it occurred; correct?

24 A. That's correct.

25 Q. Okay. Now, one explanation -- and I did not

1 attend your deposition, but I did read it. Okay? And
2 one explanation with respect to how this accident --
3 where the contact with the bike and the bus would be in
4 the bus travel lane would be that the -- the bicyclist
5 was going to the left to make a turn. That's one
6 explanation, isn't it?

7 A. As I said in my deposition, I didn't think
8 that was accurate but I thought it was possible.

9 Q. It's possible that, if this -- if he's not in
10 the bike lane or if he is in the bike lane, one
11 explanation could be that he was making a left turn.

12 A. Again, I have to assume that's a possibility,
13 but I don't think likely.

14 Q. Okay. Prior to your deposition, you produced
15 your entire file to us; correct, sir?

16 A. Yes.

17 Q. Okay. It was done on a disk, if I recall.
18 Do you remember that?

19 A. Thumb drive, I think.

20 Q. Thumb drive. Do you have that thumb drive
21 with you? And do you have your computer?

22 A. I think I have it.

23 Q. May I ask if you could turn that computer on
24 and put the thumb drive in and ask you a couple of
25 questions.

1 A. Make sure I brought that.

2 I don't think I have it.

3 Q. You don't have the thumb drive that has your
4 entire file on it for us?

5 A. I think I gave both of them away at my
6 deposition, one to Mr. Howard and one to plaintiffs'
7 counsel.

8 Q. So you don't have your file with you here
9 today; correct?

10 A. I do.

11 Q. Well, you do have your file.

12 A. Yes. I just don't have the thumb drive.

13 Q. Is it the entire file?

14 A. It should be, yes.

15 Q. Could I look at it real quick?

16 A. Sure.

17 MR. BARGER: May I ask -- may I do that, Your
18 Honor?

19 THE COURT: Yes.

20 THE WITNESS: The one exception is that I
21 didn't print out all of the reports. Those were only
22 electronic.

23 BY MR. BARGER:

24 Q. And probably you didn't print any of the
25 depositions, I would assume.

1 A. No, I didn't print depositions either.

2 Q. Okay. Do you have the PowerPoint that was in
3 that thumb drive here with you?

4 A. There -- I don't think there was a PowerPoint
5 on the thumb drive.

6 Q. Well, what you gave us, we printed out.
7 Okay? And let me show you a PowerPoint that has your
8 name on it. Okay?

9 A. Okay.

10 MR. BARGER: And this comes out of
11 Plaintiffs' Exhibit 206, Your Honor.

12 BY MR. BARGER:

13 Q. You see this PowerPoint, where it says
14 "Dr. Khiabani crash, crash date April 18th, 2017,
15 prepared by Robert Caldwell, PE"? Is that your
16 PowerPoint?

17 A. Yes.

18 Q. And where is that PowerPoint?

19 A. That hadn't been prepared at the time of my
20 deposition.

21 Q. Oh, so that was prepared after your
22 deposition?

23 A. Yes.

24 Q. All right. So it was prepared -- and your
25 deposition was what date? Do you remember?

1 A. I think it was in October, but I don't have
2 the exact date at the tip of my tongue.

3 Q. If you had your computer, you could tell us
4 the exact date you prepared that; right?

5 A. I'm not sure I can.

6 Q. Well, you would have the metadata from the
7 PowerPoint, wouldn't you? It would tell you the date
8 and time it was prepared?

9 A. Presumably.

10 Q. Okay. And you don't have that with you, and
11 I understand that.

12 Do you normally take your file on the
13 computer to a courtroom? I know you've testified
14 often. I assume that you take it in today's world.

15 A. I usually bring the print file, sir.

16 Q. Well, you didn't bring that PowerPoint, did
17 you?

18 A. I did not.

19 Q. Okay. And why didn't you bring the
20 PowerPoint?

21 A. I'd already -- or my staff had already sent
22 it to plaintiffs' counsel.

23 Q. Oh, okay. But why didn't you bring it today?

24 A. I didn't see any reason to.

25 Q. Okay. Did you prepare the PowerPoint?

1 A. No.

2 Q. Did you review it?

3 A. I did.

4 Q. Did you agree with it?

5 A. With one glaring exception, yes.

6 Q. What was the glaring exception that you
7 didn't agree with?

8 A. One of my staff members put in what was a
9 paraphrased statement from a Mr. Pears, that the
10 bicyclist was making a left turn.

11 Q. Okay. In fact, look at page -- let me just
12 show you page 5 of your PowerPoint.

13 At page 5 of your PowerPoint -- and I'm just
14 going to read it -- if I may stand next to you.

15 A. Okay.

16 Q. Okay. PowerPoint No. 1 says "reconstruction
17 summary"; correct?

18 A. Yes.

19 Q. And it says, "The MCI bus was headed
20 southbound in the No. 2 travel lane of South Pavilion
21 Center Drive." That's correct; right? That's what it
22 says? I read that correct?

23 A. Yes.

24 Q. Bullet Point No. 2, it says, "The bicyclist
25 was also headed southbound and was attempting to turn

1 left onto Griffith Peak Drive."

2 That is your reconstruction summary; correct?

3 A. At least that's what my staff wrote there,
4 and which I disagreed with.

5 Q. Well, did you ever change the PowerPoint?

6 A. I, frankly, didn't catch it.

7 Q. Okay. When did you catch it? Just then?

8 A. No. I had been aware of it probably two
9 weeks ago.

10 Q. Did you tell anybody?

11 A. Yes.

12 Q. Who did you tell?

13 A. Plaintiffs' counsel.

14 Q. Okay. I don't want to go into what you told
15 him right now.

16 Then it says, "The bus and the bicycle made
17 contact approximately 6.2 feet laterally from the edge
18 of the bike lane into the No. 2 travel lane"; right?

19 A. Yes.

20 Q. Okay. So your reconstruction summary -- this
21 is your work. It's got your name on it, and you
22 approved it. And it says, "The bicyclist was also
23 headed southbound and was attempting to turn left onto
24 Griffith Peak Drive," which you've testified is a
25 possibility here, haven't you?

1 A. Yes, but I am not buying into that. That was
2 a mistake. And I --

3 Q. That you never corrected?

4 A. That I didn't catch.

5 Q. You didn't tell anybody but -- but counsel?

6 A. Yes.

7 Q. Okay.

8 A. That's correct. I told them.

9 Q. And you've never made a subsequent
10 PowerPoint, and you didn't bring this one with you
11 today, did you?

12 A. No, the -- that line was corrected. But that
13 draft had apparently already been distributed.

14 Q. Well, where was it corrected? I mean, how do
15 we even know that? You didn't produce that to us.

16 A. We made another PowerPoint, but --

17 Q. Well, where is that?

18 A. I don't have it. It was sent to counsel.

19 Q. Well, who's "we" made another PowerPoint?

20 A. My firm.

21 Q. Okay. Not you?

22 A. Not me.

23 Q. All right. You signed off on this one.

24 A. I take blame for it, but I didn't do it. It
25 was a mistake.

1 Q. That's your testimony here today, "It was a
2 mistake."

3 A. Yes, that was a mistake.

4 Q. Now, you stick by your testimony, do you not,
5 as you gave in your deposition, that one explanation
6 for this accident occurring is 'cause the bicyclist was
7 turning left? You said that, didn't you?

8 A. I said that I couldn't eliminate that as a
9 possibility.

10 Q. Okay. Now, do you remember some of the
11 witnesses testifying that, just prior to this impact,
12 that Dr. Khiabani took his hand off the left handlebar
13 and looked back and was surprised? Have you read that
14 testimony?

15 A. My recollection is that there was only one
16 witness that testified that way. But, yes, I'm aware
17 of that.

18 Q. Who was that witness? Do you remember?

19 A. Mr. Plantz, I think. But I could be -- it
20 could have been Mr. Pears.

21 Q. Or it could have been both?

22 A. I don't recall being more than one, but I'd
23 have to go back and preview my notes.

24 Q. Okay. So somebody on the bus -- somebody on
25 the bus has testified in this case that you read the

1 deposition -- so it would have to be Pears, Plantz, or
2 both -- testified that, just prior to this impact,
3 Dr. Khiabani looked back and had a surprised look on
4 his face and he had his head -- he had his hand off the
5 left handlebar; right?

6 A. I'm not sure if that's a completely accurate
7 recounting of the testimony but something to that
8 effect.

9 Q. Okay. We'll let the jury hear what the
10 witnesses actually say, but you think it's not
11 completely accurate. Where was I mistaken?

12 A. I'm not -- I can't recount it to you
13 verbatim, and so I'm just saying that I recall
14 something to that effect, but it may not have been
15 exactly those words.

16 Q. Okay. There is something -- there is
17 testimony in there that the jury will hear that he took
18 his hand off the left handlebar and pointed or did
19 something with it, whatever the witness says. And he
20 looked back, and that's when he had a surprised or
21 shocked look on his face.

22 Would you agree that that pretty accurately
23 describes what the witness said?

24 A. I believe that is at least a summary of what
25 the statement was.

1 Q. Do you have an opinion as to whether that is
2 accurate?

3 A. I have no way of determining one way or
4 another.

5 Q. Right. Because that's what the witness said;
6 you weren't there and you didn't see it.

7 A. That's correct.

8 Q. So you can't say it's accurate or you can't
9 say it's inaccurate, but we know the eyewitness says
10 it's accurate. Okay?

11 A. That's the testimony.

12 Q. Okay. Now, I also read that you have -- you
13 have an opinion that -- well, that you don't have an
14 opinion and you're not opining that prior to the handle
15 to this brake on the left-hand side, up here, that --
16 prior to the impact, that Dr. Khiabani had lost
17 control. You cannot say whether he lost control or
18 not?

19 A. That's correct. And, as I explained in my
20 direct testimony, the bike was definitely in an at-risk
21 position, but I can't tell you for sure that it wasn't
22 recoverable.

23 Q. So you can't tell this jury from a reasonable
24 engineering probability that Dr. Khiabani had lost
25 control of his bike prior to the impact with the bus.

1 Is that a fair statement?

2 A. If I can define loss of control the way I
3 just did; in other words, that the condition may have
4 been recoverable had there not been a contact between
5 the two vehicles.

6 Q. But prior to the impact, you can't say that
7 he had lost control?

8 A. That is correct, with that understanding.

9 Q. What you did say -- and I'm going to read --
10 I'm going to ask you to -- I'm going to read from your
11 deposition your exact words. Did you opine that he had
12 gotten himself to a position he didn't want to be in?

13 Is that what you said?

14 A. Something to that effect, yes.

15 Q. Okay. And that's still your testimony today,
16 that when that impact occurred in the right travel
17 lane, that you thought he had gotten himself to a
18 position he didn't want to be in?

19 A. Absolutely. I don't think he was trying to
20 commit suicide by bus.

21 Q. I'm not going there. I'm just saying that
22 you didn't think -- you thought he was in a position
23 that he didn't want to be in.

24 A. I think that's correct.

25 Q. Okay. I want to talk to you a little bit

1 about the angle that we talked about -- that you talked
2 about with Mr. Kemp this morning. Okay?

3 A. Okay.

4 Q. All right. And Mr. Kemp had you assume the
5 bicyclist was making a left-hand turn into the bus.
6 Okay? That was part of the assumption; right?
7 Remember that slide?

8 A. Well, that, based on the exhibit from the
9 opening statement, that the bus had moved out into the
10 travel lane from the right turn lane.

11 Q. Okay. And what you said was the most likely
12 angle of the bicycle at impact was -- what? -- 30
13 degrees?

14 A. Well, I said if you lose the -- use the
15 straight line, the red line, on that exhibit, it was
16 20.

17 Q. Right.

18 A. And if you use -- look at the yellow line,
19 it's going to be 35 degrees.

20 Q. Okay. So you're not using -- you didn't use
21 a straight line. So I think y'all used up here
22 approximately 30- to 35-degree angle; is that fair?

23 A. That's correct.

24 Q. Okay. Now, I think we --

25 MR. BARGER: I want to show that

1 demonstrative.

2 Your Honor, we're going to show a
3 demonstrative of a bicyclist that I've shown Mr. Kemp.
4 And I don't think he has any objection just to showing
5 it on the board.

6 MR. KEMP: I have no objection, Your Honor.

7 THE COURT: Go ahead.

8 MR. KEMP: Okay.

9 BY MR. BARGER:

10 Q. Okay. So that bicyclist is turning over
11 10 miles an hour. Would you agree with that?

12 A. It would have to be well over 10 miles an
13 hour to hold that kind of lean angle.

14 Q. You're a bicyclist and you have ridden
15 bicycles?

16 A. Absolutely.

17 Q. Do you ride bicycles like that, or are you,
18 like me, not quite like that?

19 A. I would say I don't go to that extreme.

20 Q. Okay. Fair. I'll agree with you.

21 But he is turning over 10 miles an hour;
22 right?

23 A. He would have to be in order to hold that
24 lean angle.

25 Q. Right. And you see his front tire? It's

1 straight, isn't it?

2 A. Yes.

3 Q. It's not -- when that bicyclist is turning,
4 that front tire is not turning with him; he keeps the
5 bicycle tire straight and he's turning. Right?

6 A. Well, at speed, the bike turns by bank angle.
7 At lower speeds, that's when you're actually steering
8 the handlebars.

9 Q. Okay. At 13 miles an hour, the bike -- the
10 bicyclist is turning and the wheels are going to be
11 straight, aren't they?

12 A. Close to it. You'll have some turn angle of
13 the handlebars at that speed.

14 Q. So I guess the way you say it is the tires
15 stay parallel with the frame once you get into the
16 turn. Is that a fair way of saying it?

17 A. Yes, I think that's reasonable.

18 Q. Okay. Because if they didn't stay parallel,
19 you would just turn yourself right over, wouldn't you?

20 A. Well, it's a question of degree. You
21 would -- you would change your rate of turn by turning
22 the handlebars.

23 Q. Right. But you're -- but the point is the
24 tires stay -- stay going straight?

25 A. At speed, they're going to be aligned with

1 the frame, yes.

2 Q. Okay. Now, what I want to do is ask the
3 Court if I could have you come up to the bike, if you
4 can, like you did with Mr. Kemp.

5 MR. BARGER: If that's okay, Your Honor?

6 THE COURT: Yes.

7 MR. BARGER: All right. And, with
8 permission, I'm going to have Mr. Roberts help me do
9 this, so I can talk and he can --

10 THE COURT: That's fine.

11 MR. BARGER: -- assist.

12 BY MR. BARGER:

13 Q. So let's take the bike, and I want
14 Mr. Roberts to place it -- I want you to make sure he's
15 doing it correctly. Okay? I'm going to ask you just
16 to look.

17 He's going to -- I want to ask him to put it
18 at a 30-degree approach to this box, this bus. This is
19 the bus. Okay?

20 MR. BARGER: And, Your Honor, if the jury
21 wants to stand from the back row, are they allowed to
22 do that?

23 THE COURT: Yes. Absolutely.

24 BY MR. BARGER:

25 Q. Okay. So just for what we're doing here,

1 this is the bus right here.

2 A. All right.

3 Q. Now, turning the bike at 30 degrees into the
4 bus -- but we actually had more than that, because what
5 you did is that you had the bike leaning 30 degrees as
6 well; right?

7 A. Well, 26.

8 Q. All right. 26 degrees. So have -- see if
9 Mr. Roberts can lean it approximately 26 degrees and
10 see if you agree with him.

11 A. That's probably a little far, but something
12 like that.

13 Q. Okay. So the front tire is still going to be
14 going straight, isn't it?

15 A. Approximately. Again, there -- there could
16 be some steer angle to the tire at that speed.

17 Q. But approximately it's still going parallel,
18 straight with the bike?

19 A. Well, close to it, with some probable angle.

20 Q. Now, is it -- isn't it possible that this
21 left front -- you see where it's marked, and that's
22 where you say it made impact; correct?

23 A. No. This is some scarring from the pavement.
24 This is where impact -- where contact is.

25 Q. I don't know if they can see that, but

1 contact is right here?

2 A. Yes.

3 Q. Okay. And you call that point what, sir?

4 It's called what, the technical term?

5 A. The brake hood.

6 Q. Right. The brake hood. Contact on the left
7 side of the brake hood.

8 Now, isn't it possible, at 30-degree angle
9 with 30-degree leaning, that that brake handle actually
10 strikes the bus before the tire?

11 A. In the configuration you have it there, yes.
12 But with some steer angle, no.

13 Q. Okay. But we're talking about 30-degrees, as
14 you testified to this morning, and 26 degrees to the
15 left, as you testified to this morning; right?

16 And under that scenario, this tire would not
17 hit the bus, would it?

18 A. If you have it straight without a steer
19 action imposed.

20 Q. But you don't know whether he had a steer
21 action or not, do you?

22 A. Well, given the fact that he's at -- banked
23 over toward the bus, I would expect that he did.

24 Q. Given the fact that he was turning left, is
25 that the steer action you're talking about?

1 A. No, I'm talking about the fact that the
2 bicycle was in the process of tipping to the left.

3 Q. 30-degree, 26 degrees, you would agree that
4 it is possible that the front tire wouldn't even hit
5 the bus and it's being hit, as we just showed right
6 here; correct, sir?

7 A. Well, it's possible, if you want to put it in
8 the way you described it, but that's not the way I feel
9 it happened.

10 Q. I know, but I put it in the way you described
11 it this morning.

12 A. No, you did it without any steer angle.

13 Q. You don't know what steering was put into it,
14 do you? You have no idea -- if you're steering, that
15 means you're turning left?

16 A. Well --

17 Q. Is that what you're saying?

18 A. -- he's -- there was a described wobble.
19 He's probably turning one way and then the other way.
20 That's what's describing that wobble action of the
21 bike.

22 Q. Okay. You -- you -- you did not --
23 obviously, you weren't there. You didn't see a wobble.
24 You don't know whether it wobbled or not, do you?

25 A. No, I'm talking about a witness's sworn

1 testimony.

2 MR. BARGER: If I may have a minute, Your
3 Honor?

4 THE COURT: Yes.

5 MR. BARGER: In fact, is this a good time for
6 a break?

7 THE COURT: Okay.

8 MR. BARGER: Is it? I mean, if it is, it's a
9 good time for me.

10 MR. KEMP: If it's good for you, it's good
11 for me.

12 THE COURT: We're going to take a ten-minute
13 break.

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

21 You're not to conduct any research on your
22 own relating to this case, such as consulting
23 dictionaries, using the internet, or using any
24 reference materials. You're not to conduct any
25 investigation, test any theory of the case, re-create

1 any aspect of the case, or in any other way investigate
2 or learn about the case on your own.

3 You're not to talk with others, text others,
4 tweet others, message others, google issues, or conduct
5 any other kind of book or computer research with regard
6 to any issue, party, witness, or attorney involved in
7 this case.

8 You are not to form or express any opinion on
9 any subject connected with this trial until the case is
10 finally submitted to you.

11 Stay on this floor, and we'll see you back in
12 ten minutes.

13 THE MARSHAL: All rise. Court is in recess.
14 The time is 3:51. You guys can exit.

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

17 THE COURT: Okay. See you back in ten
18 minutes. Is there anything we need to discuss?

19 MR. CHRISTIANSEN: Not from us, Your Honor.
20 Thank you.

21 (Whereupon a short recess was taken.)

22 THE MARSHAL: Please remain seated. Come to
23 order.

24 THE COURT: Are we ready for the jury?
25 Everyone ready? Yep.

1 MR. KEMP: Yes, Your Honor.

2 THE COURT: All right. Great. Thanks,
3 Jerry.

4 (Discussion was held off the record.)

5 THE MARSHAL: All rise.

6 (The following proceedings were held
7 the presence of the jury.)

8 THE MARSHAL: All the jurors are present,
9 Your Honor.

10 THE COURT: Thank you, Marshal.

11 THE MARSHAL: Please be seated. Come to
12 order.

13 THE COURT: Counsel, do you stipulate to the
14 presence of the jury?

15 MR. BARGER: Yes.

16 MR. KEMP: Yes, Your Honor.

17 THE COURT: Very good.

18 Mr. Barger, you may proceed.

19 BY MR. BARGER:

20 Q. Mr. Caldwell, couple of questions, and I'm
21 done.

22 Did you read the deposition of Mr. Pears?

23 A. I did.

24 Q. And he is in the right front passenger of the
25 bus; right?

1 A. Yes.

2 Q. Did you read the deposition of Mr. Plantz?

3 A. I did.

4 Q. And he -- as we've talked about before -- was
5 in the left right front -- the left front just behind
6 the driver; right?

7 A. Yes.

8 Q. And both those gentlemen said they saw this
9 bicycle at times during this event; correct?

10 A. Yes.

11 Q. All right. Did you read the deposition of
12 Erika Bradley?

13 A. I did.

14 Q. And she was in -- a lady driving a car behind
15 the bus some distance back that the jury will hear
16 about; correct?

17 A. Yes.

18 Q. And Mr. Pears said, did he not -- the
19 testimony is, at least -- that the bicyclist turned
20 left? That's what he said, wasn't it?

21 A. Can you show me the transcript? I don't
22 recall his exact words.

23 Q. I think the jury will hear from Mr. Pears. I
24 want to know what you know.

25 Is it your recollection that Mr. Pears

1 testified -- gave a deposition saying that Dr. Khiabani
2 turned left?

3 A. I believe he said this in a handwritten
4 statement that he later --

5 Q. I want to talk to you about his deposition --
6 I want to talk to you about his deposition, sir. I
7 didn't ask -- I just want to know, in his deposition,
8 did he say he turned left? That's all I'm asking. If
9 you don't remember, that's fine. I will move on to the
10 next one.

11 A. Well, the cyclist moved left. I don't recall
12 him saying that he was making a left turn.

13 Q. Okay. Mr. Plantz. Where did he put
14 Dr. Khiabani just prior to the impact?

15 A. To the right front of the bus.

16 Q. Where was he located? Which lane was
17 Dr. Khiabani when he saw him? Did he testify in his
18 deposition he was in the right-hand turn lane that goes
19 into the Red Rock and he swerved to the left?

20 A. I believe he testified that he was the one
21 that testified that he was in the right-hand turn lane.

22 Q. And he swerved to the left?

23 A. And he turned to the left.

24 Q. Or turned to the left?

25 A. Swerved to the left, yes.

1 Q. What did Erika Bradley say?

2 A. That she observed the cyclist, and I believe
3 in the bike lane, and that she saw the bike wobble and
4 then interact with the left side of the bus.

5 Q. Okay. She said she saw the bike wobble?

6 A. That's my recollection.

7 Q. Do you have her deposition?

8 A. Not print, no.

9 Q. Do you recall her testifying that she saw the
10 bike swerve to the left?

11 A. Well, I think prior to that, she was
12 describing a wobble, if I remember the testimony
13 correctly.

14 Q. I'm going to get a copy of her deposition if
15 that's what you're -- if that's what you're saying she
16 said.

17 A. Well, I'll have to check that because I'm
18 relying on my memory of that transcript.

19 Q. I understand. It's better to look at what
20 she said, better than your memory of something you read
21 last year; right?

22 A. Well, I read it more recently than that,
23 but ...

24 Q. Can you tell me the date that Erika Bradley
25 gave her deposition?

1 A. August 15, 2017.

2 Q. All right. And turn to page 42. And don't
3 read out loud. I just want you to read to yourself to
4 refresh your memory.

5 A. Page 42, you say?

6 Q. Yes, sir.

7 A. Okay.

8 Okay. I've read just the first question and
9 answer.

10 Q. Okay. I'm going to read it to you. Probably
11 need to --

12 MR. BARGER: Can Mr. Kemp and I approach?

13 THE COURT: Yes.

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

16 BY MR. BARGER:

17 Q. I'm going to just visit with you -- I want
18 you to read that. I am not going to read it out loud.
19 The jury can hear it from the witness. But didn't she
20 say, in paraphrasing, that she saw the bicyclist swerve
21 in front of the bus and she gasped?

22 A. Yes.

23 Q. Did she say -- did she give an indication of
24 what she thought the bicyclist was doing?

25 A. Just a second. I lost my place.

1 Q. Did she have -- look at page 42. And, again,
2 I'll -- I'm not going to read the words; I want you to
3 paraphrase. Because you've read this, what, twice now?

4 A. The deposition?

5 Q. Yeah.

6 A. Yes, I've read this twice, I believe.

7 Q. Okay. Well, actually, isn't it somebody
8 else -- have you personally read every line in every
9 deposition, or did somebody paraphrase it for you and
10 give it to you in a summary?

11 A. Well, as I explained in my deposition, yes, I
12 have the deposition summarized, and then I go through
13 the transcripts with the summary and then focus on the
14 areas of my interest.

15 Q. Okay. So you may not always read every line
16 and every deposition.

17 A. That's correct.

18 Q. Okay.

19 A. I'm sorry.

20 Q. The question was have you read page 42?

21 A. Yes.

22 Q. Doesn't she indicate that the bicyclist
23 swerved towards the bus?

24 A. Yes.

25 Q. Okay. Now, you talked about a wobble. Look

1 at page 46. I want you to read that to yourself, not
2 out loud.

3 A. (Witness reviewing document.)

4 Q. Actually, starting at page -- at line 13, I
5 think that's what you need to read.

6 A. (Witness reviewing document.)

7 Q. Or line 9. Sorry, sir.

8 A. Yes, I see that.

9 Q. And what does she say about whether she saw a
10 wobble or not?

11 A. Well, she says she was asked if it was a
12 series -- I guess I'm not supposed to read it; right?

13 Q. Didn't she say she didn't recall -- look at
14 line 23. I'm not going to read the question, but isn't
15 what she said was she didn't recall seeing something
16 like that?

17 A. That isn't how I read her testimony. That --
18 I read her testimony that she was indicating that she
19 saw the bike wobble.

20 Q. You know what? I'm going to save it for the
21 jury, because there is some disagreement on that.

22 A. All right.

23 MR. BARGER: I will just save -- and I will
24 pass you, sir. Thank you.

25 THE WITNESS: Thank you.

1 MR. BARGER: I have no further questions.

2 REDIRECT EXAMINATION

3 BY MR. KEMP:

4 Q. Mr. Caldwell, do you still have Bradley's
5 deposition up there?

6 A. Yes.

7 Q. All right.

8 THE COURT: Mr. Kemp.

9 MR. KEMP: Can you hear me, Your Honor?

10 THE COURT: I would like you to speak a
11 little bit louder.

12 MR. KEMP: Okay. I don't know that the
13 battery --

14 THE COURT: Do we have battery issues?

15 MR. KEMP: Are you getting pickup? I'm okay?

16 BY MR. KEMP:

17 Q. Now, you got Mrs. Bradley --

18 THE COURT RECORDER: I don't hear you.

19 THE MARSHAL: I don't think you're plugged
20 in. Right?

21 THE COURT: Jerry, can you give --

22 MR. KEMP: I think the lights.

23 THE COURT: And we may have a battery issue
24 too. You never know.

25 MR. KEMP: Yeah, Judge. Why don't I try --

1 for me to yell a little bit.

2 THE COURT: You have to be consistent about
3 it.

4 MR. KEMP: All right.

5 BY MR. KEMP:

6 Q. So you have Mrs. Bradley's deposition; right?

7 A. Yes, sir.

8 Q. And would you take a look, first of all, at
9 page 47, line 4.

10 A. Okay.

11 Q. What is the term there that she uses to
12 describe what happened with the bike?

13 A. Well, she agrees with questions where the
14 term "wobble" is used.

15 Q. Okay. She uses the word "wobble"; correct?

16 A. Yes.

17 Q. Okay. And, second, would you look at 47:9,
18 line 9.

19 A. Yes.

20 Q. And what word does she use there?

21 A. Again, she agrees with the question, using
22 the word "wobble."

23 Q. And she says she saw him wobble to the left;
24 right?

25 A. Yes.

1 Q. Or correct. All right.

2 And would you take a look at page 99, No. 23.

3 A. Okay.

4 Q. And what is the word she uses there?

5 A. She is agreeing with the question that wobble
6 is a more accurate depiction than an abrupt swerve.

7 Q. And she says what she saw was a wobble;
8 right?

9 A. Yes.

10 Q. Okay. Now, if you take a look at page 100,
11 line 24, what word does she use?

12 A. Well, again, she's agreeing with the question
13 using the term "wobble."

14 Q. Okay. So she uses the word "wobble" one more
15 time; correct?

16 A. Yes.

17 Q. And if you take a look at 109, paragraph --
18 or excuse me -- 109, line 11, what is the word she
19 uses?

20 A. Again, the word "wobble" is used in the
21 question, which she agrees with.

22 Q. Okay.

23 MR. BARGER: Excuse me. I know we're not
24 going to be reading this, but I have to object with
25 respect to what he just said.

1 THE COURT: Mr. Kemp?

2 MR. KEMP: And I think the objection is that
3 the -- the term wobble was in the question; right? Is
4 that?

5 THE WITNESS: I don't know what the objection
6 is, but that's the word that's used.

7 MR. KEMP: I think that's his objection. The
8 term "wobble" is in the question. Okay.

9 MR. BARGER: Well, that's -- that's half of
10 it.

11 MR. KEMP: What's the other half?

12 THE COURT: Please approach.

13 MR. BARGER: Maybe we should approach.

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

16 MR. KEMP: Okay. We have a green light, Your
17 Honor. So I think we are good.

18 BY MR. KEMP:

19 Q. All right. Okay. And with regards to the
20 wobble, where does she say the bus was in relationship
21 to the bicycle when she first saw the wobble?

22 A. That the bike had just -- or the bus had just
23 overtaken the bicyclist.

24 Q. Okay. Now, Mr. Barger asked you about some
25 testimony where she used the word "swerve."

1 Do you recall his questions?

2 A. Yes.

3 Q. What did Mrs. Bradley say she meant by the
4 word "swerve"? And I will direct your attention
5 specifically to her deposition, page 99, line 11.

6 A. Yes, I see that.

7 Q. And what does she say the word "swerve"
8 meant?

9 A. That she was seeing swerve and -- and wobble
10 as being the same in her mind.

11 Q. Okay. Now, we talked about Mr. Pears'
12 deposition a little bit.

13 A. Yes.

14 Q. What did Mr. Pears say about whether or not
15 the bike went into the municipal bus lane at one
16 point -- or excuse me -- the bus went into the
17 municipal bus lane at one point?

18 A. Meaning that the bus stop area that is
19 back --

20 Q. Right.

21 A. -- north of the intersection?

22 Q. Right.

23 A. That the bus had started steering into that
24 area.

25 Q. Now, Mr. Barger asked you to assume that the

1 bus was going 25 miles an hour the entire way.

2 Remember those questions?

3 A. I do.

4 Q. And you did the 72 feet, the 128 feet, the
5 what have it?

6 A. Yes.

7 Q. Would the bus have been going 25 miles per
8 hour the entire way if it had went into the municipal
9 bus lane?

10 A. No.

11 Q. Okay. All right. Now, with regards to one
12 of his questions, you used the term "suicide by bus."

13 Do you recall that?

14 A. Yes.

15 Q. What do you mean by "suicide by bus"?

16 A. Well, like, a deliberate steer into the side
17 of the bus.

18 Q. Any evidence in this case of suicide by bus?

19 A. None whatsoever.

20 Q. And does Mr. Rucoba agree with you?

21 A. To my knowledge, he does, yes.

22 Q. Okay. Now, you said it was possible,
23 theoretically possible, that the doctor made an
24 intentional turn left. Okay?

25 A. I did.

1 Q. Right?

2 Can I have Red Rock video No. 2, please.

3 MR. BARGER: Frame or the video?

4 MR. KEMP: Excuse me. Red Rock still No. 2,
5 which, for the record, is Exhibit 221.

6 THE COURT: Okay. I'm sorry. Excuse me a
7 moment.

8 THE COURT RECORDER: Is that on?

9 THE WITNESS: No.

10 THE COURT RECORDER: Okay. I'm getting
11 feedback.

12 THE COURT: All right.

13 THE MARSHAL: Still getting feedback.

14 THE COURT RECORDER: I have a constant
15 buzzing.

16 THE MARSHAL: Someone have a cell phone near
17 the mic?

18 MR. BARGER: That's just a hot spot. Is that
19 better?

20 THE COURT RECORDER: Nope.

21 MR. KEMP: Okay. Well, it's not me.

22 THE MARSHAL: Do you have a cell phone in
23 here?

24 THE WITNESS: No.

25 MR. BARGER: Will, I think it's -- do you

1 see --

2 THE COURT: I just have my cell phone out
3 because I rarely bring it into the courtroom.

4 THE COURT RECORDER: Do you have a phone up
5 there?

6 MR. BARGER: No. That's a microphone.

7 THE COURT RECORDER: Yeah, actually, it is.

8 MR. KEMP: Is that it?

9 THE COURT RECORDER: That's it. Thank you.

10 MR. CHRISTIANSEN: The one technical issue
11 I'll solve in my life.

12 BY MR. KEMP:

13 Q. All right. I suggested to you -- I suggested
14 that Mr. Pears indicated that he went into the
15 municipal bus lane. What Mr. Pears actually said is
16 the bus turned into the right turn lane; correct?

17 A. Yes, that -- in the area where the bus stop
18 was.

19 Q. And if he had done that, the -- the -- it's
20 still true that he wouldn't have been going 25 miles
21 per hour?

22 A. I would not have expected him to be at a
23 constant speed through that maneuver.

24 Q. All right. Now, at this point, where we have
25 Red Rock video No. -- still video No. 2, Exhibit 221,

1 how far is the front of the bus and the bike past the
2 crosswalk roughly?

3 A. I estimated that the front of the bus was
4 12 feet to the south of the south edge of the
5 crosswalk.

6 Q. Okay. And you said it was theoretically
7 possible that Dr. Khiabani intentionally made a left
8 turn at this point; correct?

9 A. Yes.

10 Q. Okay. But you also said it was not likely.

11 A. Correct.

12 Q. And can you tell the jury why it's not likely
13 that someone would go 12 feet into an intersection and
14 then start turning left?

15 A. Well, first of all, that's not going to be at
16 a place where you're going to be making a left turn at
17 that intersection. I mean, typically, you would have
18 moved over into the left turn lane if you're intending
19 to make a left turn there.

20 But, in addition to that, even if you were
21 going to turn left, your left turn from that position
22 is going to put you into the westbound traffic lane.
23 So, in other words, coming from the upper right down
24 toward the bus, in that frame, whereas the eastbound
25 lanes on Griffith Park would have been much further

1 south.

2 Q. So if Dr. Khiabani had turned --
3 intentionally turned left in that -- at that point, he
4 would have been going right into traffic coming from
5 Pavilion Center heading to the north, the traffic from
6 heading north that's turning into Red Rock.

7 A. Yes, or traffic waiting to proceed on
8 Griffith Park.

9 Q. Okay. Last point. You said it was 5.4 --
10 5 feet 4 inches from the bike lane to the handlebar,
11 the point of impact; correct?

12 A. To the center of the handlebar, not where the
13 contact was.

14 Q. Okay. How far was it from the back tire to
15 the bike lane at the point of impact?

16 A. When you tip the bike at the angle that I've
17 calculated at that back tire would be about 4.2 feet
18 from the bike lane.

19 Q. And I said last point. This is the last
20 point.

21 You did the exercise with Mr. Roberts and
22 Mr. Barger where you held the bike up; right?

23 A. Yes.

24 Q. And they said if the bike tire was -- was
25 straight, it's -- it's possible that the hood hit

1 first?

2 A. Yes.

3 Q. Is that a realistic scenario?

4 A. No.

5 Q. Why not?

6 A. Because when the bike is tipping to the
7 rider's left, the corrective action the rider takes to
8 keep the bike from tipping over completely is to steer
9 left, so you steer into the direction the bike's
10 leaning. And so in that kind of maneuver the rider
11 would be steering left.

12 Q. Okay. And why would the rider, if he's
13 tipping left, steer left?

14 A. Because that's how you right yourself if
15 you're starting to tip over, you know, back in the day
16 when you learned to ride a bike and you're having to
17 use the handlebars to keep yourself upright.

18 Q. If you're tipping left, what happens if you
19 turn right?

20 A. Then you tip further left more rapidly.

21 Q. So in your opinion, is it more likely than
22 not that, when he was at the 30-degree angle, he was
23 trying to turn left to right the bike?

24 A. That would be the natural rider's instinct.

25 MR. KEMP: Okay. No further questions.

1 BY MR. KEMP:

2 Q. And -- excuse me -- if that was the case,
3 what would hit first, the tire or the left hood?

4 A. In the angles that we've established there,
5 the tire would definitely hit first.

6 Q. There's no evidence that that happened?

7 A. Correct.

8 Q. And that's why you eliminate Mr. Terry and
9 Mr. Pears' theory of the case; correct?

10 A. Correct.

11 MR. KEMP: Okay. Thank you.

12 THE COURT: Redirect? Or recross?

13 MR. BARGER: Just a couple.

14 THE MARSHAL: Are you okay, ma'am? It's
15 okay?

16 THE COURT RECORDER: I hear static. I can
17 pick up the record. It's just I've got static.

18 MR. BARGER: Can you hear me?

19 THE COURT RECORDER: I can totally hear you.

20 MR. ROBERTS: We probably need to step away
21 from that.

22 THE COURT RECORDER: I mean, we're making a
23 record.

24 THE COURT: Okay. We're okay. I just sent
25 IT a note.

1 Okay. Let's go on. Go ahead.

2

3 RECROSS-EXAMINATION

4 BY MR. BARGER:

5 Q. I don't know what I'm doing, Mr. Caldwell,
6 trying to hold this microphone. Okay.

7 I tell you what I'm going to do. Rather than
8 prolong and go through all these depositions, I'm going
9 to let the actual witnesses tell the jury what they
10 said. Is that fair?

11 A. I think that's a better way to do it.

12 Q. That's probably a better way than you trying
13 to paraphrase what people said or didn't say; right?

14 A. I agree.

15 Q. All right. So we're going to do that.

16 Secondly, we don't have the video that shows
17 which way he was turning or what angle he was or
18 anything else. So to try to speculate as to what a
19 normal rider would do is just pure speculation, isn't
20 it?

21 A. No, sir. We know what angles the bike is at.
22 It has to be tipped to 26 degrees in order for that
23 mirror hood to -- or not mirror hood -- brake hood --

24 Q. That's not what I'm talking about. I'm
25 talking about whether he's countersteering or not. You

1 don't know what he did then because we don't have that
2 on video, do we?

3 A. We can't see that in the video.

4 MR. BARGER: Thank you, sir.

5 I have no further questions.

6 MR. KEMP: No further questions, Your Honor.

7 THE COURT: Thank you.

8 THE MARSHAL: Questions? Any other
9 questions? Just one.

10 THE COURT: Thank you, Mr. Caldwell. Subject
11 to recall?

12 MR. KEMP: No, we have jury questions.

13 THE COURT: Yes, I know. Thank you.

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

16 THE MARSHAL: We have one other, Your Honor.

17 THE COURT: All right. Mr. Caldwell, we have
18 two jury questions for you.

19 THE WITNESS: Okay.

20 THE COURT: "Are you able to estimate
21 approximately how windy it was that day?"

22 THE WITNESS: Yes. And some of this isn't
23 based on my own work. I checked the weather at
24 McCarran Airport, and I came up with a more severe wind
25 velocity there than what was reported in Summerlin.

1 In Summerlin, according to the report by the
2 meteorologist that researched the weather that's much
3 closer to the accident site just before the event, it
4 was blowing at 2 miles an hour out of the west and
5 gusting to 6. And then, a few minutes after the
6 accident was over, the observation was the wind was at
7 6 miles an hour from the west, gusting to 12 miles per
8 hour.

9 MR. KEMP: Your Honor, is that for both
10 questions?

11 THE COURT: Yes. And so the second question
12 is consistent with the first.

13 "Was it windy, the day of accident?"

14 THE WITNESS: And, again, I would consider
15 those reported wind velocities not significant for a
16 bicyclist in terms of it -- it being windy. Obviously,
17 there's -- there's some gustiness that's probably about
18 a factor of 2 on the -- on the constant wind velocity,
19 but I don't consider those to be very windy conditions.
20 It was much windier in the report at McCarran Airport.

21 FURTHER REDIRECT EXAMINATION

22 BY MR. KEMP:

23 Q. Okay. But the weather station in Summerlin
24 was approximately how far from the accident? Do you
25 remember?

1 A. I don't recall, but it was within a couple
2 miles or less.

3 Q. Okay. And, generally, would you use the
4 weather station that's closest to the accident or one
5 that's 13 miles away?

6 A. You'd use the one closest to the site.

7 Q. And, again, what did the Summerlin weather
8 station say about the wind speed at the time of the
9 accident?

10 A. Well, it wasn't an observation at exactly the
11 time of the accident, but the closest one was 2 miles
12 an hour from the west, with gusting to 6.

13 Q. And based on that, your opinion is the wind
14 had nothing to do -- this accident had nothing to do
15 with wind?

16 A. I -- I don't see that the wind would be a
17 factor at those velocities.

18 MR. KEMP: Thank you.

19 MR. BARGER: I don't have --

20 THE COURT: Mr. Barger?

21 MR. BARGER: I have no questions, Your Honor.

22 THE COURT: Okay.

23 Mr. Caldwell, you are excused.

24 THE WITNESS: All right. Thank you, Your
25 Honor.

1 THE MARSHAL: Watch your step, sir.

2 MR. BARGER: Will, you want to approach?

3 (A discussion was held at the bench,
4 not reported.)

5 THE COURT: All right. Ladies and gentlemen,
6 we're going to take our evening break now. And
7 tomorrow we're going to resume at 11:00 a.m. Okay? So
8 be here about just a few minutes before that. I'm
9 going to admonish you.

10 And, again, during our break, you're
11 instructed not to talk with each other or with anyone
12 else about any subject or issue connected with this
13 trial. You are not to read, watch, or listen to any
14 report of or commentary on the trial by any person
15 connected with this case or by any medium of
16 information, including, without limitation, newspapers,
17 television, the Internet, or radio.

18 You are not to conduct any research on your
19 own relating to this case, such as consulting
20 dictionaries, using the Internet, or using reference
21 materials.

22 You are not to conduct any investigation,
23 test any theory of the case, re-create any aspect of
24 the case, or in any other way investigate or learn
25 about the case on your own.

1 You are not to talk with others, text others,
2 tweet others, google issues, or conduct any other kind
3 of book or computer research with regard to any issue,
4 party, witness, or attorney involved in this case.

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

8 Have a great evening. We'll see you tomorrow
9 at 11:00.

10 THE MARSHAL: All rise.

11 (The following proceedings were held
12 outside the presence of the jury.)

13 THE COURT: All right. Counsel, is there
14 anything we need to address?

15 MR. CHRISTIANSEN: Judge, I have a brief
16 matter.

17 THE COURT: Yes --

18 MR. CHRISTIANSEN: Try to stand --

19 THE COURT: -- Mr. Christiansen?

20 MR. CHRISTIANSEN: I will try to stand near a
21 microphone, Your Honor.

22 Your Honor, pretrial motions -- the
23 plaintiffs' motion in limine 17 dealing with the
24 defendants' consciousness of guilt and bringing in the
25 actions of the defendant investigator Sonny Hildreth,

1 during the last -- the cross-examination done by
2 Mr. Barger, questions were asked and answers elicited
3 relative to what Mr. Pears told Mr. Hildreth,
4 specifically precluded by Your Honor under this order.

5 And the order says, specifically at No. 23,
6 "If defendant alludes to or elicits -- or elicits
7 testimony of allegedly false statements of Mr. Plantz
8 or Mr. Pears prepared by Mr. Hildreth, plaintiffs may
9 at sidebar conference request to cross-examine the
10 witness on the circumstances surrounding the statements
11 written by Mr. Hildreth."

12 Mr. Barger asked Mr. Caldwell whether
13 Mr. Plantz, in his deposition, had testified
14 Dr. Khiabani turned left. Specifically at page 46 of
15 his deposition, Mr. Plantz testifies, "I did not see
16 him turn." So that does not come from a deposition.
17 And Exhibit 5 to Mr. Pears's testimony --

18 Shane, can you put that up for me, please.

19 I will show it to you, Your Honor. This is a
20 statement that --

21 THE COURT: You know, I don't have anything
22 on this one. Is there any way --

23 MR. CHRISTIANSEN: I'm sorry, Your Honor.
24 Can you see -- no, you can't see that one probably.

25 THE COURT: I can see pretty well.

1 MR. CHRISTIANSEN: You see where it says --
2 Judge, this is Exhibit 5 to Mr. Pears's deposition,
3 where Mr. Hildreth, at the direction of MCI --

4 THE MARSHAL: That better?

5 THE COURT: Yeah, that's much better. Can I
6 have any more screens up here? Will you start again?

7 MR. CHRISTIANSEN: Yes, Your Honor.

8 This is Mr. Hildreth's statement that he
9 writes as if he is Mr. Pears. In other words, Sonny
10 Hildreth, the investigator hired by MCI, goes to
11 Illinois, and in violation of Illinois law, writes, as
12 if he is Mr. Pears, the following statements.

13 "Since the cyclist turned left from the right
14 turn lane, the cyclist never had the right -- never had
15 the right-of-way."

16 So what Mr. Barger just did is asked this
17 witness something precluded by Your Honor in a motion
18 in limine, opening the door to all the conduct of Sonny
19 Hildreth which you've previously kept out that now --
20 I'm just reading the Court's order. It says we need to
21 have a sidebar and request to cross-examine the witness
22 on the circumstances surrounding the statements written
23 by Mr. Hildreth.

24 So now I think they've opened the door to
25 everything you've kept out. Mr. Rogers should be

1 allowed to testify as to his opinions relative to the
2 content of these statements -- because Mr. Pears,
3 Judge, in his deposition the day after they give us
4 this statement, completely refutes this is an accurate
5 statement.

6 And now the jury's been tainted with the
7 notion that, hey, in his deposition, Robert Pears said
8 he turned -- Dr. Khiabani turned left. No, that's not
9 right.

10 Sonny Hildreth on behalf of MCI wrote as if
11 he was Robert Pears that's what Robert Pears said.
12 Robert Pears, the next day, disavowed it. So pursuant
13 to your order, they've opened the door and we should be
14 allowed to get into it.

15 MR. ROBERTS: Your Honor, what happened is
16 Mr. Barger asked him if a certain thing was said in the
17 deposition. The witness volunteered that there was
18 something in a written statement. Mr. Barger stopped
19 him and said, "I don't want to know anything about a
20 written statement. I want to know about the
21 deposition."

22 And then the witness went on to discuss the
23 deposition. The fact that their witness volunteered
24 the written statement, they should have coached their
25 witness not to bring up the written statement if they

1 didn't want it raised in court. The fact that their
2 witness brought it up and Mr. Barger steered him away
3 immediately does not violate the motion in limine and
4 there's no cause to change the Court's initial ruling
5 on this subject.

6 MR. CHRISTIANSEN: Judge, I'll read it to you
7 accurately so I can correct Mr. Roberts.

8 "QUESTION: And Mr. Pears said, did he
9 not, that testimony is at least that the
10 bicyclist turned left. That's what he said,
11 wasn't it?"

12 Doesn't say "in the deposition"; he says the
13 testimony is by Mr. Pears that he turned left. That's
14 the only place -- in a demonstrative exhibit that was
15 withdrawn by us pursuant to your order, that is the
16 only place you'll find Mr. Pears saying it. And it's
17 not Robert Pears; it's Sonny Hildreth on behalf of MCI
18 in violation of the Illinois law.

19 MR. ROBERTS: If it's not in the deposition,
20 then they can point out in closing I -- you saw his
21 deposition; he never said that.

22 MR. CHRISTIANSEN: And your order
23 specifically says, Judge -- your order says, "If the
24 defendant alludes to or elicits testimony of the
25 allegedly false statements."

1 They just elicited testimony of the alleged
2 false statements, so they have opened the door.
3 Doesn't get any clearer.

4 MR. ROBERTS: I can't find the realtime, Your
5 Honor. Maybe we could address this in a few minutes
6 before the Court. Our computer's locked up, and I
7 can't locate to quote the Court exactly.

8 MR. CHRISTIANSEN: I'm happy to do it in the
9 morning, Judge. We're coming early. If that's okay
10 with Lee -- Mr. Roberts. I'm sorry.

11 MR. ROBERTS: Thanks.

12 MR. KEMP: Your Honor, you still have the
13 Hoogestraat confusion on that one little point.

14 THE COURT: Do we really have confusion on --

15 MR. BARGER: I'm sorry?

16 MR. CHRISTIANSEN: I think in one area they
17 just have some parts they don't agree to, Mr. Kemp and
18 Mr. Pepperman.

19 THE COURT: All right.

20 MR. PEPPERMAN: Your Honor, if you recall,
21 there was the sustained objection to 35:3.

22 THE COURT: So I -- I was giving you page --
23 how I numbered them. Let me go -- let me see which --
24 which one that is.

25 MR. PEPPERMAN: I think it would be number --

1 THE COURT: 35 -- I have 35:24 and ...

2 MR. PEPPERMAN: Yeah, through 44, 9 through
3 21. Yeah, I think that 35:24 is a mistake. It should
4 be 35:3-24.

5 THE COURT: I show 35:24 -- so it should be
6 what? Excuse me?

7 MR. PEPPERMAN: 35:3-24.

8 THE COURT: Okay.

9 MR. PEPPERMAN: I can -- I think in writing
10 the objection we just left out the 3.

11 THE COURT: All right.

12 MR. PEPPERMAN: Mr. Russell and I agreed that
13 at least that portion, 35:3-24 will be allowed.

14 MR. RUSSELL: That's true, Your Honor.

15 MR. PEPPERMAN: And then --

16 MR. RUSSELL: Yeah, that's -- that section is
17 fine. I think that's fair within the aerodynamic study
18 he was looking at.

19 THE COURT: Okay. Okay. Wait. So I want to
20 make my notes so that I can make sure I'm following
21 everything that you want read following through the
22 trial.

23 So there's no objection to 35:3-24; correct?

24 MR. RUSSELL: Correct.

25 MR. PEPPERMAN: Correct.

1 THE COURT: All right. Very good.

2 MR. PEPPERMAN: And this block of objections
3 is the one where he read a couple of questions and you
4 sustained the objection. And I said, well, let's not
5 throw out everything because some of it, we think, is
6 appropriate. So that first part is -- is appropriate,
7 we at least agree as to that much.

8 The next page, 36:15-25, I think, you know,
9 based on your ruling, that that would be sustained and
10 taken out. So I'm not going to --

11 THE COURT: I'm not following you,
12 Mr. Pepperman. I'm sorry. Next section?

13 MR. PEPPERMAN: Yeah, on page 36:15-25.

14 THE COURT: Let me just go there.

15 Okay.

16 MR. PEPPERMAN: Judge, you sustained the
17 objection. And I don't want to reargue things that I
18 think fall within your ruling that you made, but I do
19 want to point out a couple of the portions of this
20 within this block through 45:9-21, that I think are
21 properly in, and I just want to direct you to those
22 areas.

23 So 36:15-25, I'm not going to, you know, try
24 to reargue it. I think those are out based on your
25 ruling.

1 37, lines 11 through 20, I think those
2 fall -- are, you know, asking him about his knowledge.
3 So, at a minimum, if it's not -- if he's not the
4 managing speaking agent, and I believe this is
5 nonbinding, I think asking him about his knowledge of
6 these things and his personal knowledge, we should at
7 least be allowed to play.

8 MR. RUSSELL: Well, I guess my -- my problem
9 with this, Your Honor -- and, again, we -- we've talked
10 about it a little bit earlier.

11 I'm trying to understand how we're going to
12 keep instructing the jury as to, well, this part is
13 okay and that part is not okay.

14 Whether it was managing speaking agent or as
15 a -- or percipient employee, he's being asked a
16 hypothetical question about how far the wind comes out
17 when he's not an expert. He's not here to provide
18 expert testimony. He's never been designated as an
19 expert. We can call him a corporate representative or
20 an employee, whatever it may be, he -- the foundation
21 hasn't been laid for him to offer quasi expert
22 testimony. That's exactly what that is.

23 THE COURT: I'm going to -- I'm going to
24 continue my -- my -- what this Court has held is going
25 to stay on this. Okay?

1 MR. PEPPERMAN: Well, there are also some
2 other -- I mean -- portions here that I think were
3 excluded in a large ruling based off arguments that
4 don't apply.

5 THE COURT: Okay. Let's go -- you can show
6 me what else.

7 MR. PEPPERMAN: So 37, 11 through 20, is that
8 still out?

9 Because we're not asking him a hypothetical
10 or any -- any expert question; we're just asking him if
11 he knows one way or another if the air goes out more
12 than 2 inches. And he says, "I don't know."

13 And we say, "Does anyone at MCI know?"

14 He says, "Not that I'm aware of."

15 MR. RUSSELL: And so now we're -- we're
16 slipping back into I'm asking you about MCI's knowledge
17 on an issue you weren't designated as the corporate
18 representative. How could that be relevant or
19 admissible? It's completely speculative, and it wasn't
20 an issue he was designated to speak on.

21 MR. PEPPERMAN: It's not speculative; it's
22 his personal knowledge. If it's not -- if it's outside
23 the scope of his designation, then it's not binding on
24 the company. They can't bring someone in and say, "We
25 do know this."

1 MR. RUSSELL: It's no different than what the
2 Court has already sustained on our motion in limine in
3 asking lay witnesses expert opinions. That was our
4 motion in limine 15. It's no different.

5 THE COURT: Okay. Let's move on. I'm going
6 to -- the holding is the same, Mr. Pepperman.

7 MR. PEPPERMAN: Okay.

8 THE COURT: Is there any other part?

9 MR. PEPPERMAN: 38.

10 THE COURT: Just bear with me a moment.
11 Okay.

12 MR. PEPPERMAN: Lines 16 through 21. Okay?

13 "Now when the air comes out of the front,
14 let's say a foot or two, do you have an understanding
15 as to whether there's a negative pressure zone being
16 created?"

17 Again, asking him his knowledge.

18 "It's possible. I don't know if that's true
19 or not."

20 So he's just saying that he doesn't know this
21 information as a design -- as the design person for MCI
22 on the bus. So, obviously, him not knowing about
23 something is relevant to the design of the bus.

24 There's no -- the objection on the -- in the
25 designations are lack of foundation, outside the scope.

1 There was no such objection made at the deposition. So
2 even if that were true, we had no opportunity to lay a
3 better foundation or correct the question. And that's
4 the whole point of making objections at the deposition,
5 so we have that opportunity.

6 And I think it's in a proper -- it's a proper
7 question as is, but even if it isn't, it should still
8 be allowed to be played because we weren't given the
9 opportunity to rephrase it or lay a better foundation.

10 MR. RUSSELL: If you'll see, Your Honor, I
11 objected to the question before and I objected to the
12 question after it. They keep asking the same thing
13 over and over again.

14 MR. PEPPERMAN: And I'm not asking to get
15 those questions in. I've skipped over those, and I'm
16 looking at this question where there's no objection.

17 MR. RUSSELL: And the question is, "Now, when
18 the air comes out front, let's say a foot or two, do
19 you have an understanding as to whether there's a
20 negative pressure zone being created?"

21 How much more technical and hypothetical
22 could we get with a lay witness who's not there to
23 testify as an expert and who wasn't designated for
24 negative pressure zones on behalf of MCI? I mean,
25 we're getting way too far afield here.

1 MR. PEPPERMAN: He's the representative on
2 aerodynamic studies. Our aerodynamic expert is going
3 to come in and testify there's this negative pressure
4 zone and that it's highly dangerous and it causes -- it
5 could cause bicyclists to lose control and fall off the
6 bike. And their representative on this issue saying,
7 "I know nothing about this -- this problem."

8 MR. RUSSELL: No, he's --

9 MR. PEPPERMAN: That's relevant. That's
10 important.

11 MR. RUSSELL: He's not a representative.

12 THE COURT: Mr. -- excuse me. I'm sorry. I
13 have a question for Mr. Pepperman.

14 Does this question go directly to a study?

15 MR. PEPPERMAN: Well, I mean, it doesn't --
16 it's not asking about a specific study, but it goes to
17 the aerodynamic issues that he was the rep -- company
18 representative on, including hazards, identification of
19 hazards, mitigation to reduce these types of hazards.

20 I mean, this is the guy. This is MCI's guy
21 saying, "I don't know anything about this hazard." I
22 don't understand how there could be any question that
23 this testimony isn't admissible. And there's no
24 objection at deposition.

25 MR. RUSSELL: There's nothing in there about

1 a hazard. They're defining it as a hazard. They
2 didn't ask Mr. Hoogestraat if he thought a negative
3 pressure zone, if the air is coming out 1 or 2 feet,
4 creates a hazard.

5 MR. PEPPERMAN: They can say it's not a
6 hazard, but that's a question of fact. We can present
7 evidence on it.

8 MR. RUSSELL: And the evidence they're
9 presenting is an expert. They've hired an expert to
10 talk about these issues, and they want to force us to
11 rebut it with a lay witness who was not designated as
12 an expert to talk about this issue, and who is not an
13 aerodynamic engineer.

14 MR. PEPPERMAN: So they don't designate an
15 expert -- an aerodynamics expert, and we can't ask the
16 design MCI representative on identifying hazards if he
17 has heard of this hazard or knows anything about it?
18 And there's no objection in -- in the records so
19 it's -- the only question here -- their only objection
20 is foundation and outside the scope.

21 And they didn't make that objection at the
22 deposition. Had they made it, we could have rephrased
23 the question, asked differently, laid a different
24 foundation, and there would be a much better record
25 before the Court. But because they didn't do that, we

1 have what we have. The objection is waived, and this
2 is appropriate.

3 THE COURT: Let's go up to line 8,
4 Mr. Pepperman. There's a question there.

5 "QUESTION: So basically you do have an
6 understanding that it will come out at least a
7 foot or two?

8 "MR. RUSSELL: Objection. Foundation.
9 Incomplete hypothetical.

10 "THE WITNESS: It may. It depends on the
11 speed."

12 MR. PEPPERMAN: And that's out. They
13 objected to it there. You've made your ruling. I'm
14 not going to reargue it.

15 And the next question at line 22:

16 "QUESTION: If there is a negative
17 pressure zone being created, will that attract
18 air back into the side of the bus?

19 "Foundation."

20 "I'm not asking for that to be read, just
21 the question before, where he's asking him if
22 he has knowledge if there is a negative
23 pressure zone being created. And he says:

24 "ANSWER: It's possible. I don't know if
25 that's true or not."

1 That's the MCI design engineer for this bus,
2 who's designated as the representative on identifying
3 and mitigating hazards, being asked about a potential
4 hazard. And he's saying he doesn't know about it, he
5 doesn't know if it existed.

6 And they can say, well, it's not a hazard.
7 We can say that it is a hazard. But that's a -- that's
8 a question to be decided by the jury, if it's a hazard
9 or not.

10 Certainly, the fact that their
11 representative doesn't know about it is relevant to
12 their decision.

13 MR. RUSSELL: So their position is he asks a
14 hypothetical question, I object to it being
15 hypothetical, he asks it again, and then somehow I've
16 waived the objection. That's their position. And then
17 he asks it a third time, and I object again. But since
18 I didn't object to it the second time, that I've waived
19 that objection.

20 I think the Court can see the rather
21 ludicrous nature of that position. Clearly, it was an
22 improper question. Clearly, I was objecting to this
23 line of questioning. And, most importantly, this is
24 not within his expertise. He's not an aerodynamic
25 engineer. And he wasn't asked to testify to

1 hypothetical questions about what plaintiffs think is
2 going to be a hazard. They've got an expert that can
3 talk about those things.

4 MR. PEPPERMAN: It's not the same question.
5 It's completely different. It's the -- he acknowledges
6 in 35, 3 through 24, that the bus is displacing air and
7 air is being pushed out to the side. And the question
8 before asks, "Do you have an understanding if it will
9 come out at least a foot or two," talking about the
10 air. And that was objected to. And -- and he says,
11 "It may. It depends on the speed."

12 You know, I think he should be allowed to say
13 that, but I'm not rearguing the Court's ruling. The
14 next question is a completely different question, which
15 is, "Now, when the air comes out of the front" -- which
16 he acknowledged happens in 35, 3 through 24 -- "do you
17 have an understanding" -- an understanding. That's a
18 foundational question. "Do you know as to whether
19 there's a negative pressure zone being created?"

20 "It's possible. I don't know one way or the
21 other."

22 That's the question and answer. It's not
23 objected to because it's not objectionable. He's just
24 asking -- asking him do you know --

25 THE COURT: You were talking about page 35?

1 MR. PEPPERMAN: On 38, 16 through 21.

2 THE COURT: Do you have anything else?

3 MR. PEPPERMAN: I am just -- I've pulled the
4 rule for you, Judge. It's 32(3)(B) [sic]. "Errors and
5 irregularities occurring at the oral examination in the
6 manner of taking the deposition, in the form of the
7 questions or answers, in the oath or affirmation, or in
8 the conduct of parties, and errors of any kind which
9 might be obviated, removed, or cured if promptly
10 presented are waived unless seasonable objection
11 thereto is made at the taking of the deposition."

12 THE COURT: Okay. Is there anything else?

13 MR. RUSSELL: No. I mean, all I'll say, Your
14 Honor, is if you go -- if you go through -- there's a
15 set of five questions. The same question keeps
16 asking -- asked over and over again. I objected three
17 times to that line of questioning. And they didn't
18 rephrase, they didn't change the tone of the question.
19 They kept asking the same question over and over again.

20 So, I mean, beyond that -- but, again, beyond
21 that, it -- just because it wasn't -- because those two
22 object -- those questions don't have an objection next
23 to them, it doesn't change the fact that they're still
24 improper questions and they're still inadmissible based
25 on the Court's own ruling that lay witnesses who are

1 not experts don't get to give expert testimony.

2 That would be our position.

3 MR. PEPPERMAN: Why is it an improper
4 question to ask the PMK on hazard identification if
5 he's aware of a particular type of hazard?

6 MR. RUSSELL: There's no -- the word "hazard"
7 isn't anywhere on that page.

8 "Did you recognize a hazard of this?" That
9 would have been a different question, wouldn't it?

10 THE COURT: Is there anything else,
11 Mr. Pepperman? Because I'm going to issue a minute
12 order probably back there when I take a break.

13 MR. PEPPERMAN: Sorry.

14 THE COURT: That's okay.

15 MR. PEPPERMAN: Last one is page 44, lines 9
16 through 21. This is a totally different line of
17 questioning. "What is the reason" --

18 THE COURT: I'm sorry. Line?

19 MR. PEPPERMAN: Line 9 through 21.

20 "What is the reason that a drag
21 coefficient is important to a bus manufacturer?
22 Fuel economy?"

23 MR. RUSSELL: I'm going to stop you,
24 Mr. Pepperman. I had marked that earlier. That's --
25 we're not going to fight about this one. That's fine.

1 I think that's within his scope.

2 THE COURT: So page 44, 9 through 21, is in.

3 MR. RUSSELL: That's fine.

4 THE COURT: All right. I'll issue a minute
5 order on that -- that little area, that small area we
6 just discussed.

7 MR. PEPPERMAN: Fair enough. And at the risk
8 of burdening the Court even more, I just have one minor
9 additional issue.

10 THE COURT: Go ahead.

11 MR. PEPPERMAN: We have our medical expert,
12 Dr. Hubbard, who we expect to be very short testimony,
13 maybe an hour or two. And he is currently in Palm
14 Desert. And bringing him out here next week from Palm
15 Desert, even though it's very close, has turned into
16 quite the logistical issue.

17 THE COURT: Spring break?

18 MR. PEPPERMAN: Yes. And so we've -- I've
19 talked to opposing counsel, and they've agreed that
20 they would allow us to present his testimony over a
21 videoconference link from a location in Palm Springs.
22 And, if the Court is acceptable, then we'll try to find
23 a location that can connect and do it that way.

24 THE COURT: Is that --

25 MR. ROBERTS: Defense has no objection. But

1 it was our suggestion that we test the link first, as
2 I've had the links not work very well.

3 THE COURT: Absolutely.

4 MR. ROBERTS: Which can be --

5 THE COURT: Many, many years ago, I had lots
6 of hearings that were via -- who knows what they were.
7 So it's not a problem, as long as you have someone to
8 swear him in.

9 MR. PEPPERMAN: Okay. That's --

10 THE COURT: I just -- I just want to specify.
11 This doctor is Dr. Khiabani's doctor?

12 MR. PEPPERMAN: No. He's a medical expert.

13 THE COURT: A medical -- I'm sorry.

14 MR. PEPPERMAN: Yeah, he's an expert.
15 Basically, just talking about Dr. Khiabani's --

16 THE COURT: Dr. Khiabani.

17 MR. PEPPERMAN: Yeah, after the accident.

18 THE COURT: Okay.

19 MR. PEPPERMAN: His consciousness and pain
20 and suffering.

21 THE COURT: Understood. That's not a
22 problem. We do need to test it.

23 MR. PEPPERMAN: Sure. I will set it up.

24 THE COURT: You have to swear him in. And I
25 don't know -- that's up to you --

1 MR. PEPPERMAN: Thank you.

2 THE COURT: -- how you handle that.

3 MR. ROBERTS: And I was able to get our
4 computer unlocked and found the relevant testimony.
5 I'd be happy to address it now or in the morning, at
6 the Court's convenience.

7 THE COURT: Why don't we address it now so I
8 can think about it when I get off the bench.

9 MR. ROBERTS: Okay. Thank you, Your Honor.

10 MR. CHRISTIANSEN: Judge, unfortunately, I
11 shut all my stuff down. When Mr. Roberts said he
12 couldn't get it, I put all my stuff away. So I can do
13 it by memory, but I had it in front of me then and I
14 don't now.

15 MR. ROBERTS: What if I let you use mine?

16 MR. CHRISTIANSEN: I don't want to get sick.

17 MR. ROBERTS: Well, that's --

18 THE COURT: You can share. Let's share.

19 MR. CHRISTIANSEN: He's sick. So I'm trying
20 to avoid him.

21 THE COURT: Oh, you're sick? I hope you feel
22 better.

23 MR. ROBERTS: The jury or my daughter one or
24 the other finally got me.

25 Your Honor, the -- the relevant testimony to

1 this motion starts at page 100, line 7, just a couple
2 of questions into Mr. Barger's cross-examination of
3 Mr. Caldwell.

4 And the way he leads into this subject at
5 100, page 7, is "Did you read the deposition of
6 Mr. Pears?"

7 He says, "I did."

8 So that's the lead-in. He says, "Did you
9 read his deposition?"

10 Then he asks about the deposition of
11 Mr. Plantz and "Did both these gentlemen say they saw
12 the bicycle?" "Yes."

13 All right. And then we get to him going back
14 to Mr. Pears.

15 The part that Mr. Christiansen read to the
16 Court begins at line 101 -- excuse me -- page 101,
17 line 2:

18 "And Mr. Pears said, did he not, the
19 testimony is, at least, that the bicyclists
20 turned left? That's what he said, wasn't it?"

21 So we've led in by asking him if he read a
22 deposition, and then he refers to testimony, not a
23 statement. Testimony generally refers, among lawyers,
24 to things given under oath at a deposition or a
25 courtroom.

1 But, regardless, even if that was vague, it
2 doesn't elicit any answer. What the witness says at
3 line 5, is "Can you show me the transcript? I don't
4 recall his exact words."

5 Mr. Barger then says:

6 "I think the jury will hear from
7 Mr. Pears. I want to know what you know. Is
8 it your recollection that Mr. Pears -- is it
9 your recollection that Mr. Pears testified,
10 gave a deposition, saying that Dr. Khiabani
11 turned left?

12 "ANSWER: I believe he said this in a
13 handwritten statement that he later" --

14 And that's where Mr. Barger cuts him off and
15 says:

16 "I want to talk to you about his
17 deposition. I want to talk to you about his
18 deposition, sir. I didn't ask -- I just wanted
19 to know, in his deposition, did he say he
20 turned left? That's all I'm asking. If you
21 don't remember, that's fine and I'll move onto
22 the next one."

23 So he says, "Did you read his deposition?"
24 He refers to testimony. The -- the witness
25 interrupted, asked a question. Mr. Barger went back

1 and clearly asked what he said in his deposition. The
2 witness, unsolicited, blurted out the statement that
3 they have objection to.

4 So, Your Honor, in this situation, we did not
5 elicit the testimony on the statement. Their witness,
6 their paid expert, clearly volunteered that information
7 and wasn't even allowed to complete his sentence, as
8 Mr. Barger cut him off.

9 I will also add that the proposed
10 Exhibit 401, page 27, is a written statement that this
11 same witness, Mr. Pears, gave to the police or -- or it
12 could have been Red Rock, but it's in the Las Vegas
13 police report, at page 27, where he talks about the
14 driver suddenly pulling toward the bus to the left.

15 So the statement that Mr. Christiansen gives
16 that this witness only gave his testimony in the
17 written statement taken by the private investigator is
18 also not true. He gave that same testimony to the
19 police, and it's part of the police report in this
20 case.

21 So we have no -- no improper question, and
22 this isn't information that could have come only from
23 the statement taken by the private investigator.

24 Thank you, Your Honor.

25 MR. CHRISTIANSEN: Super brief, Judge.

1 The question isn't in the deposition "Did he
2 say this?" The question is "Isn't this true, his
3 testimony was" -- Mr. Pears' testimony -- "the
4 bicyclist turned left?"

5 And I don't want to get sick from Mr. Roberts
6 by touching his computer, but he doesn't say in the
7 deposition, within the body of the question, the only
8 place you will find that testimony is in the
9 handwritten statement of the MCI investigator, acting
10 as if he is Robert Pears. You won't find it in the
11 police report because it doesn't say he turned left.

12 That's the question. Did he turn left?
13 That's not in the Metro police report that Pears gives.
14 There's some thing about "Does he go to the left?" or
15 something of that nature, but I think the term of art
16 used -- and it's used in the context of trying to get
17 this witness to adopt that it's in Pears' deposition.

18 It's not in the deposition, Your Honor. It's
19 in Hildreth's handwritten statement. Your order says
20 if they do that, either they address those statements
21 or they elicit -- you'll elicit an answer -- that's
22 what Mr. Barger did -- elicited an answer, trying to
23 get the expert to adopt something that's not in a
24 deposition but, rather, in Hildreth's statements,
25 knowing full good and well you kept it out.

1 And he got an answer which referred to the
2 statement that you said, once that happened, they've
3 opened the door and I get to get into it.

4 MR. BARGER: Judge, can I say something?

5 THE COURT: Yes.

6 MR. BARGER: I asked a question, very simple,
7 and he volunteered. I didn't open any door.

8 THE COURT: No. In fact, Mr. Barger, you
9 tried to close the door immediately --

10 MR. BARGER: I tried to slam it in his face.

11 THE COURT: -- before it was even open. Yes.

12 And so I can tell you right now that
13 that's -- I'm not going to sustain that. I'm not going
14 to sustain this. Okay? I don't believe that the door
15 has been opened. I think, for the reasons enunciated
16 from Mr. Roberts, it was very clear to me -- I paid
17 close attention -- that it's very -- what would happen
18 with respect to Mr. Barger's cross-examination is
19 correct, and I don't believe that -- that this is --
20 this is not what this Court intended, in other words.
21 I mean -- I mean, sure, any witness can say something,
22 but I don't believe that Mr. Barger was eliciting that
23 specifically. He was asking about his deposition. He
24 kept using the word "deposition" over and over again.
25 Read the transcript tonight.

1 MR. CHRISTIANSEN: I did. The Court will
2 agree with me, that was not in the question that was
3 posed that elicited the answer, though; correct? I
4 mean, he said testimony, not deposition.

5 THE COURT: I'm not sure. I'm not sure if I
6 agree with that because I don't have it in front of me,
7 but I am not -- I do not -- my analysis is that this
8 did not open the door, that Mr. Barger, if he even
9 thought an answer was coming, made him stop. He did
10 the same thing when -- when Mr. Caldwell said something
11 about --

12 MR. BARGER: Suicide.

13 THE COURT: -- suicide. He immediately
14 stopped him. He immediately stopped him when he
15 started going -- if he even tried -- so, no, I'm not --
16 I'm not going to bring in consciousness of guilt. I
17 don't -- I think that's completely unwarranted, what
18 I've seen thus far.

19 MR. CHRISTIANSEN: Fair enough, Your Honor.
20 I'll tell the Court, from the opening statement, the
21 statement of Mr. Plantz that they referred to in the
22 picture we've all seen up there with the bike in the
23 right turn lane, that statement comes on the heels of
24 Mr. Hildreth's interview as a, quote/unquote, ex-FBI
25 agent with Mr. Plantz where he changes from his initial

1 statement to what he gives in his deposition.

2 So we'll argue that when we come to it, but I
3 venture to -- I'm suggesting to the Court that I think
4 you're going to see this issue again as we go.

5 THE COURT: I may see this issue again, and I
6 know that sometimes witnesses, without any of these
7 issues, see things a little bit differently, they
8 remember things differently. You know this very well.

9 MR. CHRISTIANSEN: Fair enough.

10 THE COURT: And they're not -- thus far, I
11 haven't seen them go there. Okay?

12 MR. CHRISTIANSEN: Fair enough, Your Honor.
13 Thank you for your time.

14 MR. BARGER: Thank you, Your Honor.

15 THE COURT: And, Mr. Pepperman, I will get
16 your minute order out in a couple of days.

17 MR. CHRISTIANSEN: Judge, what time do you
18 want us here? I know you told the jury 11:00. Do you
19 want us here at 11:00?

20 THE COURT: Why don't you -- is there
21 anything else that we have to discuss before? I mean,
22 I'm going to be here at 9:00.

23 MR. CHRISTIANSEN: I don't think so, Your
24 Honor, but I just want to make sure.

25 THE COURT: You can be here earlier if you

1 want. You have that. But -- and if we need to discuss
2 anything, I don't know if it's too soon to start
3 talking about jury instructions, the ones that you
4 agreed to, so I can start reviewing early.

5 MR. CHRISTIANSEN: Yes, Your Honor.

6 THE COURT: Okay? And then, you know,
7 anything that you think you're going to be offering,
8 that would be good. I mean, you don't have to have
9 them yet.

10 Have a great evening, everyone.

11 MR. BARGER: You want us at 10:30?

12 MR. ROBERTS: 11:00.

13 MR. BARGER: Oh, 11:00.

14 MR. ROBERTS: But that's 10:00 for you.

15 (Thereupon, the proceedings
16 concluded at 5:10 p.m.)

17
18 -oOo-

19
20 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF
21 PROCEEDINGS.

22

23

24

25


KRISTY L. CLARK, CCR #708

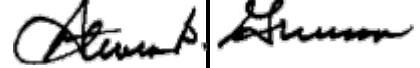
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Steven D. Grierson

CLERK OF THE COURT



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.)

21 REPORTER'S TRANSCRIPTION OF PROCEEDINGS

22 BEFORE THE HONORABLE ADRIANA ESCOBAR
23 DEPARTMENT XIV

24 DATED TUESDAY, FEBRUARY 27, 2018

25 RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
VIRGIL HOOGESTRAAT	6			
MARY WITHERELL	49	67	101	104
			189	111
			112	
SAMANTHA KOLCH	115	149	159	161

E X H I B I T S

Number	Admitted
Ex. 462	121
Ex. 216B	146

005837

1 LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 27, 2018;

2 11:30 A.M.

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

4 * * * * *

5
6 THE MARSHAL: All rise. All the jurors
7 are present, Your Honor.

8 Please be seated. Come to order.

9 THE COURT: Good morning, ladies and
10 gentlemen. Will you please take roll call.

11 THE COURT CLERK: Yes, Your Honor.

12 Byron Lennon.

13 JUROR NO. 1: Here.

14 THE COURT CLERK: John Toston.

15 JUROR NO. 2: Here.

16 THE COURT CLERK: Michelle Peligro.

17 JUROR NO. 3: Here.

18 THE COURT CLERK: Raphael Javier.

19 JUROR NO. 4: Here.

20 THE COURT CLERK: Dylan Domingo.

21 JUROR NO. 5: Here.

22 THE COURT CLERK: Aberash Getaneh.

23 JUROR NO. 6: Here.

24 THE COURT CLERK: Jaymi Johnson.

25 JUROR NO. 7: Here.

005838

1 THE COURT CLERK: Constance Brown.

2 JUROR NO. 8: Here.

3 THE COURT CLERK: Enrique Tuquero.

4 JUROR NO. 9: Here.

5 THE COURT CLERK: Pamela Phillips-Chong.

6 JUROR NO. 11: Here.

7 THE COURT CLERK: Gregg Stephens.

8 JUROR NO. 12: Here.

9 THE COURT CLERK: Glenn Krieger.

10 JUROR NO. 13: Here.

11 THE COURT CLERK: Emilie Mosqueda.

12 JUROR NO. 14: Here.

13 THE COURT: Do the parties stipulate to
14 the presence of the jury?

15 MR. KEMP: Yes, Your Honor.

16 THE COURT: I apologize for having you
17 wait so long. We've had technical difficulties in
18 the courtroom and tried to smooth them out before
19 you came in.

20 Also, you will likely be hearing a
21 videotaped deposition. And there's a buzzing at
22 certain times. It's in the actual video. So
23 please try not to let that -- please follow the
24 substance. Okay?

25 All right. Thank you very much.

005839

1 All right. Go on.

2 MR. KEMP: Your Honor, we call Virgil
3 Hoogestraat by video.

4 THE COURT: Okay. Very good.

5 (Whereupon, the videotaped deposition
6 of Virgil Hoogestraat was played in open court and
7 transcribed by the reporter as follows:)

8 BY MR. KEMP:

9 Q. Will you state your name again and spell
10 it for the court reporter.

11 A. Virgil Hoogestraat. First name
12 V-i-r-g-i-l; last name is Hoogestraat,
13 H-o-o-g-e-s-t-r-a-a-t.

14 Q. A-a-t. And it's pronounced Hoogestraat?

15 A. Generally, it's pronounced Hoogestraat.

16 Q. Hoogestraat. Okay. Hoogestraat.

17 Is that Dutch?

18 A. That's Dutch. Double vowels is Dutch.

19 Q. Okay. All right. Can you give me the
20 extent of your educational background?

21 A. I have a bachelor's in mechanical
22 engineering.

23 Q. And where did you get that?

24 A. South Dakota State University.

25 Q. Where is South Dakota State at?

005840

1 A. Brookings, South Dakota.

2 Q. What's the difference between an
3 intercity coach and a transit bus?

4 A. Well, transit buses are generally what
5 you see in town here operated on the city streets,
6 relatively low-speed operation predominantly,
7 although they have suburbans, which can go higher
8 speed. But, predominantly, it's for stopping, go
9 to corner to corner if that's where the bus stop
10 is.

11 Intercity coach was more like a
12 Greyhound-type style bus that goes over the road.
13 It's used for tour charter, in addition to what we
14 call light haul, which is hauling passengers
15 pointed to point, say from Phoenix to Tucson or
16 Phoenix to Las Vegas. That's more of an intercity
17 coach.

18 So it required baggage compartments for
19 baggage, parcel racks, more of a higher-speed
20 operation.

21 Q. So from '93, '94 forward, what was your
22 job position with MCI?

23 A. Well, we had a small group in Roswell
24 that was still working on intercity coaches. Then
25 around '95, I was sent to Winnipeg for -- until

005841

1 around '96 sometime and -- to assist in the launch
2 of the E coach.

3 And prior to -- the group in Roswell at
4 that time was predominantly involved in, A, we
5 were owned by DINA corp. by that time. They were
6 assisting DINA in Mexico, as well as they were
7 doing some powertrain work on an MC12 for prison
8 coaches and that kind of work. They had a project
9 assigned in that regard.

10 Q. When you say "a small group in Roswell,"
11 are you talking about a small group of engineers?

12 A. Yes.

13 Q. And small would be 10 to 20? What?

14 A. Roughly 20.

15 Q. 20. Okay. So when you're designing the
16 E coach -- helping design the E coach series, you
17 were actually working for MCI, but it's owned
18 by DINA; is that fair?

19 A. MCI owned -- yeah. It was toward the
20 end of the development, mostly to assist in the
21 launch of the product.

22 Q. And what was your job responsibility as
23 a design engineer for E coach?

24 A. I was mostly helping them in certain
25 areas, like finishing up the design before they

005842

1 launched a product into production. So it varied.

2 We did some suspension work. I did some
3 areas in the body. There's general -- just
4 general work to assist them when they were going
5 to launch the product.

6 Q. Okay. But at that time you were
7 employed by MCI as opposed to TMC?

8 A. Correct.

9 Q. All right. And then the E coach was
10 launched approximately when?

11 A. '97, if I recall correctly. In that
12 time period, '97-98.

13 Q. Was there a principal designer or one or
14 two principal designers for the E coach?

15 A. Well, at the end. I mean, it changed
16 some. There was a Mark Sealy at the early stages.
17 And then at the end, there was -- Brian Couch was
18 kind of over -- the design authority.

19 Q. So it was your understanding that,
20 towards the end, Couch -- would have been some
21 time '95, '96, '97, Mr. Couch was the overall head
22 of design for the E coach series?

23 A. Yeah. I was just there to assist them
24 while they were launching it.

25 Q. Was the J coach developed before that

005843

005843

1 time or after that time?

2 A. J coach was started around 2000, late
3 '99, 2000, and was launched around 2001.

4 Q. Did you have anything to do with the
5 design or development of the J coach?

6 A. Yeah. I was up in Winnipeg part of the
7 time. Part of the time, I was in Seguin; part of
8 the time, I was in Roswell; and another part of
9 the time, I was in Winnipeg to assist in the
10 launch of the J coach.

11 Q. Yeah, that doesn't sound -- okay.

12 And with regards to the J coach, we've
13 been advised that that's basically a continuation
14 of the E coach?

15 A. It was a variant of the E coach.

16 Q. And at that time, you were employed by
17 MCI?

18 A. Yes.

19 Q. And is it MCI, Ltd., or MCI U.S. at that
20 time?

21 A. Well, it wasn't MCI, Ltd. So it had to
22 be MCI in the U.S. someplace, according to my
23 paycheck.

24 Q. All right. Okay. Item 1 -- do you have
25 Item 1 there? -- is wind tunnel tests performed

005844

1 for buses from the time period 1997 to 2016,
2 including, but not limited to, tests for the MCI
3 J4500?

4 A. Yes.

5 Q. And if we -- let's just focus on -- the
6 letter just wants us to talk about the E and J
7 series. Okay? Are you aware of any wind tunnel
8 tests performed during that time period?

9 A. I have not found any records showing
10 that we did any.

11 Q. Okay. Now, they gave me a wind tunnel
12 test yesterday, which I think was '94 or
13 something. Are you aware of any wind tunnel tests
14 that were performed prior to 1997?

15 A. I found a record of something that we
16 had done in 1993 -- that our records showed was
17 1993.

18 Q. Okay. And that was the wind tunnel test
19 that was done by someone named Cooper?

20 A. I don't recall that; I just remember the
21 name of the organization. It's in Ottawa, Canada,
22 that ran the wind tunnel test.

23 Q. Okay. But that was not specific to the
24 E or the J series; right?

25 A. It was -- it was a -- no, it was not

005845

1 specific; it was a study.

2 Q. Handing you a document that's marked for
3 identification as Exhibit 3. Is that the wind
4 tunnel test you referred to just a second ago?

5 A. Yes.

6 Q. And the date of it is August 1993;
7 correct?

8 A. Yes.

9 Q. And what is the entity that did it for
10 you?

11 A. It was a firm -- Institute of Aerospace
12 Research.

13 Q. Okay. And were you involved personally
14 in any way, shape, or form in preparing this or
15 contracting for this wind --

16 A. No, I was not.

17 Q. So any knowledge you have is just from
18 reading it?

19 A. That's correct.

20 Q. Okay. Do you know if this was used or
21 relied upon in any way, shape, or form for the
22 design of the E series or the J series?

23 A. I would -- I don't know personally
24 because I was not involved in that part.

25 Q. Okay.

005846

1 A. This is a general study of what you
2 should consider if you're designing a bus for
3 aerodynamic effects.

4 Q. Okay. And without getting too
5 simplistic, basically, if you make the corners
6 round, it will be more aerodynamically efficient
7 than if they're just a 90-degree angle; right?

8 A. In general. In a very broad sense,
9 that's correct.

10 Q. So round is better than tight angles.
11 Is that fair to say?

12 A. In a broad reference, that's true.

13 Q. All right. Is this your area,
14 aerodynamics?

15 A. No.

16 Q. Okay. And do you have an understanding
17 as to what the values on some of these wind tunnel
18 test runs mean?

19 A. If you're looking at -- which values are
20 you referring to?

21 Q. I'm referring to the drag coefficients,
22 I think.

23 A. Oh, that's the coefficient of drag.

24 Q. Yes.

25 A. Yeah, I know roughly what that means.

1 Q. Okay. And with regards to the
2 coefficient of drag, let's see what your
3 understanding is. So Run 13 results in a drag
4 coefficient -- is it a drag coefficient or
5 coefficient of drag?

6 A. I'd say coefficient of drag, but okay.

7 Q. Okay. Is that technically the way you
8 should say it?

9 A. Well, I've heard it both ways. So I
10 can't tell you which way is technically. They're
11 the same number.

12 Q. All right. So the drag coefficient in
13 whatever Run 13 is is what?

14 A. .376.

15 Q. And what does that mean?

16 A. That's the coefficient of the drag.
17 That's the resistance of a body going through a
18 fluid.

19 Q. And the fluid would include air in
20 your --

21 A. Air is fluid.

22 Q. Okay. All right. And then we go down
23 to Test 19, and I see a .584; right?

24 A. Yeah.

25 Q. So would I be correct that a .36 is more

1 aerodynamically efficient than a .584?

2 A. Well, yeah, the drag coefficient is
3 lower, so its resistance is lower, if that's what
4 you mean.

5 Q. Okay. So would you expect a lower drag
6 coefficient to displace less air when the vehicle
7 is traveling through -- or traveling, all things
8 being equal?

9 A. No.

10 Q. No?

11 A. No.

12 Q. Why not?

13 A. It's still the vehicle. You're still
14 displacing air. The fact that you're allowing the
15 air to travel around the vehicle with less
16 resistance, but you're still displaying air.

17 Q. Okay. Let's just get real simple here.

18 The bus is traveling, and the front of
19 the bus is confronting the air?

20 A. Right.

21 Q. So the air has got to go somewhere?

22 A. Right.

23 Q. And so some of the air goes to the side?

24 A. Right.

25 Q. What do you call that?

005849

1 A. Well, I don't call it side forces.
2 That's just displacement of the air that's moving
3 around the vehicle.

4 Q. Okay. Have you heard the term "air
5 blast"?

6 A. No, I don't know what air blast is.

7 Q. Okay. With regards to the displacement
8 of air from the front of the vehicle, do you have
9 an understanding as to where that goes?

10 A. On the front of the vehicles, quite a
11 bit of it goes across the top because of the
12 slanted windshield. Some comes around the corners
13 of the vehicle.

14 Q. Okay. And some protrudes out from the
15 vehicle?

16 A. It can.

17 Q. Okay. You've said that the air will go
18 from the front to the side of the bus; yes?

19 A. It goes over the top and some comes
20 around the side.

21 Q. Okay. And when it comes around the
22 side, it does not just stay an inch or two from
23 the side -- from the vehicle; is that correct?

24 A. That would depend on the speed. At
25 60 miles an hour, it would not always stay tight

005850

1 to the edge of the vehicle. But I don't know how
2 much it will go out.

3 Q. Okay. When you say it wouldn't stay
4 tight, in my example, I said 2 inches. So it
5 would probably go out more than 2 inches. Do you
6 know that one way or the other?

7 A. I don't know.

8 Q. Okay. Does anyone know at MCI?

9 A. Not that I'm aware of.

10 Q. Okay. So, basically, you do have an
11 understanding that it will come out at least a
12 foot or two?

13 A. It may. It depends on the speed.

14 Q. Okay. Now, when the air comes out the
15 front, let's say a foot or two, do you have an
16 understanding as to whether there's a negative
17 pressure zone being created?

18 A. It's possible. I don't know if that's
19 true or not.

20 Q. Okay. If there is a negative pressure
21 zone being created, will that attract air back
22 into the side of the bus?

23 A. The air eventually -- it gets alongside
24 of the vehicle. It comes back in.

25 Q. So the air hits the front of the bus,

005851

1 goes out 1 or 2 feet, whatever, and then somehow
2 or another it comes back in, it's entrained back
3 in?

4 A. I don't know if it goes out 1 or 2 feet.
5 I just know at some point in time it's along the
6 side of the vehicle.

7 Q. Okay. Fair. But it comes back in
8 because of the negative pressure zone?

9 A. Well, if there is a negative pressure,
10 it's very small.

11 Q. Okay. Fair enough.

12 Back to the drag coefficient. Would the
13 side force -- and I'm using "side force" to refer
14 to the air that hits the front of the bus and
15 comes out the side, that we've been talking about,
16 the 1 or 2 feet?

17 A. You used the term 1 or 2 feet. I said I
18 don't know.

19 Q. Okay. I thought you said that you felt
20 air coming out of buses and you were 1 or 2 feet
21 away?

22 A. I did. That was roughly at 60 miles an
23 hour.

24 Q. Okay. So you don't disagree that you
25 will have some air displacement that a human being

005852

1 will be affected by at 60 miles an hour at 1 or
2 2 feet?

3 A. I said I felt some air movement. I
4 don't agree with your affect -- it will be
5 affected by.

6 Q. Well, if you felt it, you were affected
7 by it?

8 A. I disagree. If you feel air movement --
9 I mean, I feel wind when I'm outside. I'm not
10 affected by it; I just feel it.

11 Q. All right. I don't want to argue about
12 semantics.

13 Using the situation again where you feel
14 air at 1 or 2 feet with a 60-mile-an-hour bus,
15 would the amount of force of that air change
16 depending on the drag coefficient of this
17 particular bus?

18 A. I don't know.

19 Q. So, in other words, if bus A had a .36
20 drag coefficient and bus B had a .584 drag
21 coefficient, do you know whether or not the
22 intensity of what I've called the side force
23 changes one way or the other?

24 A. No, I don't.

25 Q. Okay. All right. What is the reason

005853

1 that a drag coefficient is important to a bus
2 manufacturer?

3 A. Fuel economy.

4 Q. Any other reason?

5 A. Not that I'm aware of.

6 Q. So the better the aerodynamics in
7 general, the better the fuel economy?

8 A. Generally.

9 Q. And is fuel economy a selling point when
10 you sell the buses?

11 A. Can be an item of discussion, but I
12 don't know that it sells buses -- helps sells
13 buses.

14 Q. Item No. 2 is aerodynamic studies
15 performed for buses, including, but not limited
16 to, aerodynamic studies for the J4500.

17 Do you know of any aerodynamic studies
18 other than this wind tunnel test that we've talked
19 about as Exhibit 3?

20 A. Not that I've been able to find.

21 Q. So, as far as you know, there would be
22 no aerodynamic study specifically for the E
23 series; correct?

24 A. I did not find any aerodynamic studies
25 specific to the E coach.

1 Q. And you didn't find any aerodynamic
2 studies specific to the J coach either; correct?

3 A. That's correct.

4 Q. All right. And then the last one
5 would -- or excuse me -- the third one is
6 aerodynamic studies for the rear wheels of the --
7 I guess we're limited to the E series and the J
8 series. Did you find anything like that?

9 A. The only thing I did see is there was
10 some looking into the spray pattern coming off the
11 wheels as far as it affected the radiator intake
12 or the alternator intake, but it's really not an
13 aerodynamic study.

14 Q. And by "spray pattern," are we talking
15 about water? debris? What's being sprayed?

16 A. Whatever gets sprayed off the tires.

17 Q. Would include water and debris?

18 A. Yes.

19 Q. And by "spray pattern," you're just
20 basically looking at where that goes?

21 A. Correct.

22 Q. Okay. Does that really have anything to
23 do with aerodynamics?

24 A. I didn't think so, but, I mean --

25 Q. All right. Now, Item No. 4 asked for

005855

1 the general parameters of the design or
2 engineering for the right-side visibility for the
3 time period 1997 to 2016.

4 Do you see that one?

5 A. Yes.

6 Q. And what were the general parameters
7 limited to the E and the J series?

8 A. At that time, we did a computer model
9 that we'd look and we'd locate the eye in the
10 driver's seat. And from that eye, get the view
11 that the driver would see. There was studies done
12 in that regard. There's no records of those
13 studies because they were studies.

14 Q. Okay. Are those called line of sight or
15 visibility optimization studies or something like
16 that?

17 A. Well, we called them line of sight
18 because it would show you what you could see from
19 the driver's seat. You would locate the driver's
20 eye, and you would look out as far as what the --
21 particularly the windshield and the wiped area and
22 the defrost area, those kind of areas, what would
23 be cleared.

24 Q. So you think there was computer modeling
25 done for the E series and the J series?

005856

1 A. It was not done for the J series. I
2 think it was done for the E series because that
3 would be common practice.

4 Q. And so the computer modeling in general
5 is done to try to see what the driver would see
6 with regards to, in this case, we're talking about
7 right side visibility?

8 A. In that particular case, it would be
9 what he would see looking through the windshield
10 to the mirror and down to the right side
11 visibility.

12 Q. And you've said you don't think the
13 computer modeling exists as we sit here today?

14 A. I have found no records of it. But back
15 then and still today, when we do computer
16 modeling, we do not do a record of it because it's
17 an engineering study.

18 Q. There's no printout made at some point?

19 A. No. Because it's done on a computer.

20 Q. Right.

21 A. It's done by engineers. Drawings are
22 intended for communication of the design intent.
23 And this is not a communication of design intent,
24 so we don't do a computer printout.

25 Q. Okay. So what you're saying is you

005857

1 always have some visibility obstruction with a bus
2 no matter what you make it out of? Is that pretty
3 much what you're saying?

4 A. I'm saying that there is, like, the
5 mirror, whatever is behind that mirror when you're
6 looking out there. So the driver on a commercial
7 vehicle has to move sometimes in his seat to be
8 able to see what's on the other side of that
9 mirror.

10 Q. Yeah, let's -- let's -- so the mirror
11 would block visibility in some cases, yes?

12 A. Mirror -- what's behind that mirror
13 would block his visibility.

14 Q. In some cases?

15 A. In some cases.

16 Q. And the same would be true of the
17 A-pillar?

18 A. The A-pillar, if it's -- not in your
19 scenario where it's all glass.

20 Q. Let's go to a real J4500.

21 A. Let's go to real world --

22 Q. Okay.

23 A. -- if that's all right. And, yeah, it
24 will -- it is a blind spot, although, because the
25 driver is quite a ways away from it, the angle is

1 very narrow for the right-hand A-pillar. But an
2 A-pillar in all vehicles creates somewhat of a
3 blind spot.

4 Q. Okay. And what about -- between the
5 window and the bottom of the side of the bus,
6 there's something called a sill we've heard it
7 referred to? The sill divides the window on the
8 right side from the bottom. What do you call
9 that?

10 A. You can call it anything you want, but
11 it can be called a sill.

12 Q. Okay. So the solid structure, if it is
13 solid, of the bus under the window from the sill
14 on down, that would also be a right-side
15 obstruction?

16 A. No.

17 Q. Why not?

18 A. Because, when the driver is driving the
19 bus, his number one thing is to look out the
20 windshield to see where he's going.

21 Q. Okay.

22 A. You don't want him looking back behind
23 him while you're driving forward.

24 Q. And you don't want him looking sideways?

25 A. Well, he uses his mirrors to look along

005859

1 the side. And he has to -- on a turn, he may look
2 to the side but not to the back of it.

3 Q. The back of the bus?

4 A. You don't want him looking backwards
5 when he's driving forward.

6 Q. Do you want him looking sideways?

7 A. If he's turning that direction, he made
8 turn sideways to see if there's an obstruction or
9 something and a danger for him that he should take
10 into account.

11 Q. If he's driving straight, though, you
12 wouldn't want him to look to the right side?

13 A. No, I'm saying I don't want him to look
14 back.

15 Q. I know. We're past that.

16 A. Okay.

17 Q. You want him to look to the right side?

18 A. He can. If he sees -- if he's checking
19 around, that's part of his function.

20 Q. Okay. But, anyway, the reason you do
21 the line-of-sight study is to attempt to minimize
22 the right-side blind spots from the mirror,
23 A-pillar, and other --

24 A. You try to enhance his visibility as
25 much as you can.

005860

1 Q. That's the reason you do the
2 line-of-sight study?

3 A. That's correct.

4 Q. Okay. But, anyway, the reason you do
5 the line-of-sight study is to attempt to minimize
6 the right-side blind spots from the mirror,
7 A-pillar, and other --

8 A. You try to enhance his visibility as
9 much as you can.

10 Q. That's the reason you do the
11 line-of-sight study?

12 A. That's correct.

13 Q. So, basically, there were some sort of
14 line-of-sight comparison studies between that
15 prototype bus's hang-down mirrors and the mirrors
16 such as the J4500 has?

17 A. We didn't do a comparison. We did a --
18 we did the typical line of sight, and we did the
19 mirrors. We showed it to a customer. And the
20 drivers would not accept it. They said it was
21 more -- created more of a blind spot than what we
22 normally had. So we had to scrap it and go back
23 to what we had been doing previously.

24 Q. And the blind spot you normally had,
25 you're just referring to the type of blind spot

005861

1 we've already discussed for the J4500 for the
2 mirrors, the A-pillar --

3 A. Correct. It was a blind spot -- the
4 mirror blind spot, they thought, was greater than
5 the typical mirrors we installed on the bus. So
6 that's why we had to scrap it.

7 Q. Okay. All right. With regards to 6,
8 the PMK topic is the general parameters of the
9 design or engineering of any and all proximity
10 sensors being designed or investigated from 1996
11 to 2016, including, but not limited, for the MCI
12 J4500 in general and for the 2008 MCI J4500.

13 Did I read that right?

14 A. Yes.

15 Q. And do you know of any proximity sensors
16 that were designed and investigated during the '97
17 through 2016 timeframe for the J or E series?

18 A. What do you mean by proximity sensors?

19 Q. Okay.

20 A. There's a lot of proximity sensors in
21 the market for various functions. So what are you
22 referring to?

23 Q. You can have a proximity sensor that
24 would disable cruise control, for example; right?
25 That's called adaptive cruise control?

005862

1 A. That's adaptive cruise control. That's
2 typically a radar system.

3 Q. But that's referred to by some as a
4 proximity sensor?

5 A. Yes.

6 Q. And you could also have a proximity
7 sensor that's intended to do something with the
8 right-side objects or left-side objects; right?
9 Correct?

10 A. You can have a device like that, yes.

11 Q. Okay. And so can we call that a side
12 proximity sensor?

13 A. If you'd like.

14 Q. Okay. All right. And then you can also
15 have a proximity sensor that's directed at the
16 back so the bus doesn't back into a wall or run
17 over a baby carriage or something like that;
18 right?

19 A. Yeah, there are some out there.
20 Certainly, in automotive they have some.

21 Q. So -- right. I mean, if you just wanted
22 a warning system, you could buy the 399 system and
23 put it on the bus; right? That wouldn't have
24 brake compatibility, but it could give the
25 warning?

1 A. Warning of what?

2 Q. Side objects, objects to the side of
3 you.

4 A. You can buy systems that give little
5 warnings, if that's -- I guess.

6 Q. Okay. Okay. So what you came out with
7 was a warning system integrated with an automatic
8 braking feature; correct?

9 A. For collision mitigation.

10 Q. Okay. Collision mitigation. All right.
11 And let's focus on the J coach for a minute. You
12 said that was available in 2014?

13 A. That's what I recall.

14 Q. Okay. And it's called collision
15 mitigation?

16 A. Collision mitigation.

17 Q. Okay. Now, we've heard terms such as
18 Wingman. Have you heard that term?

19 A. Yes. That's the trade name by Bendix.

20 Q. For this system?

21 A. For that system. It's a part of that
22 system. That's their trade name.

23 Q. So it was the Wingman system that was
24 put in in 2014?

25 A. Yes.

005864

1 Q. And when I say put in, that was
2 available as an option or that was standard?

3 A. It was an option.

4 Q. Okay. Is it standard today?

5 A. I don't believe so. I think it's still
6 an option.

7 Q. Okay. And there's been a suggestion --
8 and maybe it's wrong because no one is right all
9 the time. There's been a suggestion that, in
10 January 2017, that's a standard feature. Is
11 that --

12 A. It may be today because it was launched
13 as an option to see what customer interest was,
14 and it may have evolved to standard because
15 they're all taking it anyway.

16 Q. Okay. So would it be fair to say that
17 customer interest in the Wingman collision
18 mitigation system has been good?

19 A. It has been growing, yes. They can
20 still, I'm sure, still take -- insist it be taken
21 off if it is standard, but the acceptance has been
22 improving.

23 Q. Okay. So prior to 2014 -- I'm back to
24 Topic 6 -- was there any attempt to design a
25 proximity sensor for collision avoidance made by

1 MCI?

2 A. Not that -- I don't know of any.

3 Q. Okay. So you didn't try and make your
4 own, in effect?

5 A. No, we did not.

6 Q. Okay. Is there a reason for that?

7 A. Yes.

8 Q. What's that?

9 A. Technical expertise. We don't have the
10 technical expertise to design that. We rely on
11 the suppliers to do that.

12 Q. Okay. And do you know of any effort to
13 investigate collision avoidance proximity sensors
14 prior to 2014?

15 A. Well, I was involved in looking into it
16 prior to that, but that's when it became where we
17 could then obtain it. And then we started the
18 development to install it.

19 Q. Okay. Was there any consideration given
20 to retrofitting buses that were made prior to 2014
21 with the collision avoidance system?

22 A. Can you repeat that question.

23 Q. Was there any consideration given to
24 retrofitting buses made prior to 2014 with
25 collision avoidance systems?

005866

1 A. If I recall correctly, the question was
2 explored, and there was issues in the
3 communication system with the engine because we
4 used braking, being able to do that, communicate
5 where you decel the engine -- I mean, you actuate
6 the brakes, and there was major issues in
7 regarding to accommodate that.

8 Q. Okay. Was there any consideration to
9 using a proximity sensor that did not include
10 brake involvement prior to 2014?

11 A. Not that I'm aware of.

12 Q. And are you aware that there are
13 retrofit kits on the market for proximity sensors
14 that will purportedly give you some sort of
15 warning of side collisions?

16 A. There's a lot of aftermarket kits for
17 various things out there.

18 Q. Okay. And do you know whether there's
19 an aftermarket kit for proximity sensors that
20 would serve as some sort of warning of side
21 detection?

22 A. I'm sure there is. There's a lot of
23 kits for various things out there.

24 Q. Okay. And has MCI investigated those?

25 A. Well, today MCI has a 360-camera system

005867

1 that it -- it offers, and it also offers a camera
2 in the mirror.

3 Q. Okay. Before we get to that, let's talk
4 about the off-market kits that we were talking
5 about.

6 Did MCI investigate whether or not to
7 use any of those?

8 A. Not that I was involved in.

9 Q. Okay. And, in theory, that type of
10 off-market kit could be retrofitted to a J series
11 bus and at least have a warning feature, if not an
12 automatic brake disablement; correct?

13 A. I don't know. Depends on the kit. I
14 don't know what it does.

15 Q. Okay. Taking a look back at Exhibit 1,
16 Item No. 7, which discusses meetings between MCI
17 and its division, including, but not limited to,
18 Universal Coach Parts and Mark Barron or
19 salespeople for S-1 Gards.

20 Do you see that one?

21 A. Yes.

22 Q. Okay. And you know in general what an
23 S-1 Gard is?

24 A. I do now.

25 Q. Okay.

005868

1 A. In general.

2 Q. Okay. In general. I've got one here if
3 you want to look at it.

4 Do you know whether or not there were
5 any meetings between MCI or any of its division,
6 including, but not limited to, Universal Coach
7 Parts and S-1 Gard personnel?

8 A. Not that I know of.

9 Q. Okay. We took the deposition of a man
10 named Pablo Fierros.

11 Does that name sound familiar to you?

12 A. Yeah. He ran the parts group for a
13 little while.

14 Q. Okay. And he indicated that he met
15 with -- I take so many depositions; I can't
16 remember what they say sometimes.

17 I think he indicated that he had a
18 meeting with Mr. Barron and/or some other
19 gentlemen whose names elude me, but I can bring it
20 in.

21 Do you have any information about that
22 one way or the other?

23 A. No.

24 Q. Okay. Have you talked to Pablo about
25 whether or not he knew about the S-1 Gard or had

005869

1 any meetings about it?

2 A. No, I have not talked to Pablo.

3 Q. Okay. But, as far as you know, as the
4 PMK -- again, that's 30(b)(6). As the 30(b)(6),
5 you don't think there was any contact between MCI
6 and anyone at S-1 Gard?

7 A. For what time period?

8 Q. Well, let's say '98 through -- let's go
9 back a little bit. Let's go '96 to 2016.

10 A. Not that I know of.

11 Q. Okay. Do you know of any investigation
12 or analysis that MCI did with regards to the
13 S-1 Gard?

14 A. Not that I can find.

15 Q. Okay. And prior to April 18, 2017, had
16 you personally heard of an S-1 Gard?

17 A. I had not.

18 Q. And so your only knowledge of S-1 Gards
19 came in the course of this litigation?

20 A. That's where it started, yes.

21 Q. Okay. Let me ask it a little
22 differently. Do you recognize that there's a
23 theoretical potential that pedestrians or
24 bicyclists could potentially be run over by rear
25 tires of a bus under some scenarios?

005870

1 A. There may be a scenario where that could
2 occur.

3 Q. Okay. And generally -- you understand
4 generally that that could happen under some
5 scenarios?

6 A. It's possible that that can happen.

7 Q. Okay. And, basically, bus manufacturers
8 have always known that?

9 A. Have always known what?

10 Q. Let me put it differently.

11 You knew back in, let's say, 2000 that
12 this was a potential scenario?

13 A. There's a potential that a bus tire can
14 roll over something, that's correct.

15 Q. Okay. Including people?

16 A. Anything, yeah. Tires on all vehicles
17 can run over something.

18 Q. Okay. And you knew that back in 2000?

19 A. Yes.

20 Q. Probably before that time?

21 A. Probably before that time.

22 Q. Okay. What exploration, if any, did MCI
23 do, that you're aware of, with regards to some
24 sort of protective barrier, whether it's an
25 S-1 Gard or some other type of barrier, a

005871

1 protective barrier for the rear tires?

2 A. What do you mean by protective barrier?

3 Q. Well, the S-1 Gard would be something
4 that would be a protective barrier; right?

5 A. I don't know that.

6 Q. All right. You remember the old trains
7 that had the cowcatchers on them?

8 A. Yes.

9 Q. Okay. Has MCI given any consideration
10 to having a cowcatcher, a diversionary device,
11 anything of the sort with regards to the rear
12 tires?

13 A. I don't know of any cowcatcher we've
14 ever looked at for the rear tires.

15 Q. Okay. Any type of protective device?

16 A. Protect for what?

17 Q. Protect people or objects that could
18 potentially be run over by the rear tires.

19 A. Well, objects that get underneath the
20 bus, there's a potential that the rear tires can
21 run over them. That's true.

22 Q. As we sit here today, do you know
23 whether or not an S-1 Gard could be placed on a
24 J4500 without impacting the functionality or
25 integrity of other systems in the bus -- or coach?

005872

1 Excuse me.

2 A. I don't know that at this time.

3 Q. So you don't know one way or the other?

4 A. I do not know.

5 Q. Okay. So could be done, couldn't be
6 done. We just don't know -- you just don't know?

7 A. I don't know. I don't know. But if we
8 tried to do that, we would also have to look at
9 what would happen if it did get damaged.

10 Q. Okay. With regards to PMK Item No. 11,
11 could you look at that? See, I told you there was
12 some repetition here. I'm down to 11.

13 A. Okay.

14 Q. So the PMK, or the 30(b)(6), topic is,
15 quote, whether it is feasible to place an S-1 Gard
16 on a 2008 MCI J4500, unquote.

17 Did I read that right?

18 A. Yes.

19 Q. So if I understand you correctly, you
20 don't know one way or the other, as we sit here
21 today, whether it's feasible to put the S-1 Gard
22 on the 2008 MCI J4500; is that correct?

23 A. I don't know if it's feasible or
24 prudent.

25 Q. Okay. 12 is customer requests.

005873

1 Do you know of any customer requests to
2 MCI for S-1 Gards or any -- well, let's stick with
3 S-1 Gards.

4 A. Just recently we found one oral request
5 of it. We just found that very, very recently in
6 talking to an individual who mentioned that one
7 customer in a preproduction meeting brought it up.

8 Q. Okay. And do you know who that customer
9 was?

10 A. Austin, Texas. Capital Metro.

11 Q. Capital Metro. What kind of buses or
12 coaches do they purchase?

13 A. D coaches.

14 Q. And what do they use those for?

15 A. They use them in the commuter market in
16 Austin, Texas, we presume.

17 Q. And so they asked about the S-1 Gard?

18 A. They asked, as I understand, orally.

19 Q. Is there another way to ask?

20 A. Well, it is a bid contract. It wasn't
21 in the bid contract.

22 Q. Oh, okay. Is this what is sometimes
23 referred to as a prebid submittal meeting?

24 A. Well, there's prebid submittal meetings,
25 yeah. Transit authorities come out with a

1 specification for the vehicle in the bid contract,
2 and it was not in the specifics of the vehicle.
3 But it was found that they made this comment in
4 this preproduction meeting where they were buying
5 six buses that -- whether MCI had ever installed
6 an S-1 Gard.

7 Q. Was an S-1 Gard subsequently put on
8 these D coaches?

9 A. MCI -- no.

10 Q. Did MCI get the bid?

11 A. Yes.

12 Q. And sold them 60 D coaches?

13 A. Six.

14 Q. Six?

15 A. Six.

16 Q. But there was no S-1 Gard put on the D
17 coaches?

18 A. By MCI.

19 Q. And what was the -- was it put on by
20 someone else?

21 A. We understand that to be the case.

22 Q. Okay. And what kind of MCI buses were
23 these? D coaches?

24 A. Yes.

25 Q. Okay. And when did this happen, if you

1 know?

2 A. 2016 sometime. When they were
3 installed?

4 Q. Um-hum.

5 A. We don't know.

6 Q. Okay. But this is a coach as opposed to
7 what you would refer to as a transit bus?

8 A. It was what we call a commuter bus, and
9 it is based on a coach.

10 Q. And I know it's been almost -- or only
11 two years, but are you aware of any problems that
12 they've had with the S-1 Gard on the D series
13 coaches purchased by the Austin transit authority?

14 A. The only information we have at this
15 time is that they've had a lot of damage with the
16 S-1 Gards.

17 Q. And what's your source of information
18 for that?

19 A. The service rep. I asked him, what's
20 their experience? He said they're just having a
21 lot of damage problems.

22 Q. What's his name?

23 A. Carl Puncick [phonetic].

24 Q. Can you spell the last name?

25 A. P-u-n-c -- I don't recall. I'm not sure

005876

1 the spelling is correct.

2 Q. Is he an MCI employee?

3 A. Yes.

4 Q. Is he stationed in Texas?

5 A. I think so.

6 Q. Do you know what part of Texas?

7 A. I do not.

8 Q. Okay. If you have a person next to a
9 J4500, there's basically no barrier between the
10 tires and the person; right?

11 A. Certainly the tires are exposed, if
12 that's what you mean.

13 Q. Yeah, the tires are exposed.

14 And in the transit buses with spats, the
15 tires are not exposed; right?

16 A. Yeah, part of the tire is not exposed.

17 Q. Okay. And what is your understanding,
18 if any, with regards to whether or not rotating
19 tires in the rear of a bus creates some sort of
20 suction effect?

21 A. Creates a suction effect?

22 Q. Right.

23 A. Never noticed any suction effects.

24 Q. Have you ever heard of that as being a
25 potential hazard?

005877

1 A. No.

2 Q. Okay. I only have one of these. Why
3 don't we mark that.

4 What number do you have on there?

5 A. 6.

6 Q. Exhibit 6 purports to be a publication
7 in an engineering journal by a man named Green
8 discussing potential rear tire suction. Have you
9 ever seen that article before?

10 A. I think I saw it here recently.

11 Q. Prior to the litigation, have you seen
12 this article before?

13 A. I have not.

14 Q. So now that you have seen the article,
15 you are aware of Mr. Green's contention, I'll call
16 it, that the rotating tires create some sort of
17 suction?

18 A. That's what he contends.

19 Q. In fact, if you flip over to
20 "Conclusion," could you read me the first
21 sentence. Do you see his conclusion there?

22 A. In paragraph 1, yes.

23 Q. And what does the first sentence say?

24 A. "As described in the Bernoulli" --

25 Q. Bernoulli; right?

005878

1 A. Bernoulli.

2 Q. Okay.

3 A. Is that the Bernoulli analysis he did?

4 Q. I think he referred to the Bernoulli
5 principle. Do you know what that is, in general?

6 A. In general.

7 Q. Okay. Why don't I quote directly from
8 Bernoulli, 1738 publication, "Hydrodynamica."

9 "An increase in the speed of a fluid
10 occurs simultaneously with a decrease in pressure
11 or a decrease in the fluid's potential energy."

12 Do you understand that being Bernoulli's
13 principle?

14 A. That's what I understand is the basis
15 for it.

16 Q. Okay. Now, applying Bernoulli's
17 principle to the rotating rear tires of an MCI
18 J4500, would you agree or disagree that that
19 creates a negative pressure zone that can act as a
20 suction?

21 A. I don't know that.

22 Q. Don't know one way or the other?

23 A. I don't know that it creates a negative
24 pressure zone.

25 Q. And do you know one way or the other

005879

1 whether it's a suction effect?

2 A. I don't know that.

3 Q. You do not know that?

4 A. I do not know that.

5 Q. Okay. But Mr. Green contends there is.

6 A. That's what he says there.

7 Q. Okay. Has MCI done any sort of testing

8 or analysis to determine whether or not what

9 Mr. Green claims is true?

10 A. Not that I'm aware of.

11 Q. Okay. And what's the date of

12 Mr. Green's paper?

13 A. 2001.

14 Q. What's the year that the J4500 came out?

15 A. 2000, 2001.

16 Q. Okay. And since you don't know whether

17 or not there is a suction from rotation of the

18 rear tires, can I assume that MCI did not do

19 anything in terms of design engineering to try to

20 decrease the amount of suction in the rear tires?

21 A. Well, since we don't know there is a
22 suction in the rear tires, no, we did not do any
23 design work to solve something that we didn't know
24 occurs.

25 Q. And since you don't know whether or not

1 that occurs, you also didn't provide any sort of
2 warnings to purchasers with regards to that
3 potential hazard; correct?

4 A. I don't know that that's a potential
5 hazard. And, therefore, if it's not a potential
6 hazard, we wouldn't give a warning.

7 Q. Okay. All right. But you would agree
8 that there's some blind spot less than a foot;
9 right? We've already talked about that?

10 A. I already discussed the fact that a
11 mirror by itself is a blind spot. The A-pillar
12 can be a blind spot. And the driver has to move
13 in his seat, or whatever is necessary, to look
14 around.

15 Q. Okay. All right. And we talked about
16 drag coefficient a little bit. As we sit here
17 today, do you know what the drag coefficient of a
18 J4500 is?

19 A. I do not.

20 Q. Can you give me any kind of range, like
21 .35 to .55? Anything?

22 A. No.

23 Q. Okay. Same question for the E series.
24 Do you know what the drag coefficient of that is?

25 A. No, I do not.

1 MR. KEMP: That's it, Your Honor.

2 THE COURT: Okay. Very good.

3 MR. KEMP: Your Honor, we have one
4 exhibit I'd move to admit, but I'd like to reserve
5 my right to do that after lunch. I'm not
6 suggesting we go to lunch now, but I'm saying I
7 just want to do it after lunch because I think
8 there's going to be a lot of discussion about it.
9 We have a witness in the hallway. I'd like to
10 call this witness.

11 THE COURT: Very good. I'm just going
12 to take a two-minute comfort break to check on
13 something. I'll be right back.

14 THE MARSHAL: Please remain seated.
15 Department 14 is in session.

16 (Whereupon, a recess was taken.)

17 THE COURT: Please call your next
18 witness.

19 MR. KEMP: Judge, we'd call Mary
20 Witherell.

21 THE CLERK: You do solemnly swear the
22 testimony you're about to give in this action
23 shall be the truth, the whole truth, and nothing
24 but the truth, so help you God?

25 THE WITNESS: I do.

1 THE CLERK: Thank you. Please be seated
2 and please state and spell your name.

3 THE WITNESS: Mary Witherell,
4 W-i-t-h-e-r-e-l-l.

5 THE CLERK: Thank you.

6 MR. KEMP: Good morning, ladies and
7 gentlemen.

8 DIRECT EXAMINATION OF MARY WITHERELL
9 BY MR. KEMP:

10 Q. Good morning, Mrs. Witherell. I was
11 hoping you'd wear your nice pink shirt today.

12 A. No, I thought I'd go neutral.

13 Q. All right. Would you -- you've stated
14 your name. How long have you lived in Nevada?

15 A. Since January 2000.

16 Q. And have you ever lived in the Las Vegas
17 area?

18 A. No, sir.

19 Q. Where do you live at?

20 A. Reno, Nevada.

21 Q. Okay. Do you have what's called a CDL,
22 a commercial driver's license?

23 A. Yes, sir, I do.

24 Q. And how long have you had that?

25 A. Since probably 1994.

005883

1 Q. And we'll get to buses in a minute, but
2 did you start out with your CDL with some other
3 type of equipment?

4 A. Yes, sir. Well, I was in the military
5 for 23 years. And then, when I retired, I did
6 asphalt construction work in South Carolina for
7 seven years with Ray Construction. I drove a
8 service truck and an 8- to 12-ton steel wheel.

9 And then, in 1998, in September, I was
10 hired on at Frontier Tours & Travel in Fairfield,
11 California, driving a tour bus.

12 Q. Okay. Let's go back to the military.
13 Did you drive big trucks in the military?

14 A. A 2 1/2-ton truck.

15 Q. And that's called a deuce and a half?

16 A. Yes, sir.

17 Q. Deuce and a half means 2 1/2 tons;
18 right?

19 A. Yes, sir.

20 Q. And that's the standard big truck you
21 see in all the military pictures?

22 A. They have 5-ton and on up, yeah.

23 Q. But you drove the 2 1/2-ton?

24 A. Correct, sir.

25 Q. All right. And then you said you

005884

005884

1 started doing sort of construction vehicles also
2 in the military, or was that after the military?

3 A. After the military. I retired in '93.

4 Q. So when did you start driving
5 construction vehicles?

6 A. In '94.

7 Q. What kind of construction vehicles would
8 those be?

9 A. It was a service truck class B.

10 Q. Can you tell us a little more of what
11 that is?

12 A. Had diesel, oil, all the different
13 hydraulic fluids and different fluids to service
14 all the asphalt construction equipment.

15 Q. And that was 8 to 12 tons?

16 A. Yes, sir.

17 Q. So you went from the 2 1/2-ton to the 8-
18 to the 12-ton. And then, finally, you got to
19 buses; right?

20 A. Yes, sir.

21 Q. When did you first start driving a bus?

22 A. In September of '98.

23 Q. Okay. And you've driven different types
24 of buses?

25 A. Yes, sir.

005885

1 Q. Can you tell me what different types of
2 buses you've driven?

3 A. I've driven Setras, Van Hools, DINAs,
4 TEMSAs, Prevost, MCIs.

5 Q. Okay.

6 A. That's it.

7 Q. And these are all what they would call
8 coaches, touring buses?

9 A. Yes, sir.

10 Q. All right. And when you said MCI, have
11 you driven what's known as the MCI J4500?

12 A. Yes, sir, I have.

13 Q. On more than one occasion?

14 A. Yes, sir.

15 Q. Hundreds of occasions?

16 A. Yeah, I would say a hundred or more.

17 Q. And, in general, are you familiar with
18 the concept that air blasts come out of the side
19 of moving buses?

20 A. Yes, sir.

21 Q. And can you describe for the jury what
22 your understanding is of that concept?

23 MR. ROBERTS: Your Honor, may we
24 approach?

25 THE COURT: Yes.

005886

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

3 BY MR. KEMP:

4 Q. Okay. Mrs. Witherell, do you remember
5 the question? I don't really, so --

6 A. The air blast?

7 Q. Yeah. Would you tell the jury your
8 personal experience with air blasts and buses.

9 A. Well, I know, depending on where the
10 compressor is, normally, when it shoots off,
11 there's a blast that comes out. But then also, as
12 the air disperses from the front of the bus and
13 comes -- you know, because it's a large vehicle,
14 it comes around the side of the bus.

15 Q. Okay. And you've driven a number of
16 different kinds of buses?

17 A. Yes, sir.

18 Q. Do you have any information as to
19 whether or not the air blast is different in
20 different types of buses?

21 A. I would say, personal opinion, it's the
22 same.

23 Q. Okay. Have you been provided any
24 information from any manufacturer or any other
25 source that there's a difference in the drag

005887

1 coefficient or air blast in different types of
2 buses?

3 A. No, sir.

4 MR. ROBERTS: Objection. Compound.

5 THE COURT: Sustained.

6 MR. KEMP: Let me break it down.

7 BY MR. KEMP:

8 Q. Have you been provided any information
9 from a manufacturer as to whether there's a
10 difference in the air blasts of different buses?

11 A. No, sir.

12 Q. So, as we sit here today, you don't know
13 whether the J4500 air blast is different than,
14 say, a Volvo blast? You don't have any idea?

15 A. No, sir.

16 Q. Now -- all right. Have you heard of air
17 blasts as being involved with bicycles?

18 MR. ROBERTS: Objection. Calls for
19 hearsay.

20 BY MR. KEMP:

21 Q. During the time period you've been
22 working in the bus industry, have you heard about
23 this?

24 THE COURT: Overruled.

25 THE WITNESS: Air blasts compared to?

005888

1 BY MR. KEMP:

2 Q. Air blasts that impact bicycles next to
3 a bus or truck.

4 A. Well, we were always taught -- and I, as
5 a safety director, used to teach, you know --

6 Q. Don't tell me about training; just tell
7 me about your personal knowledge.

8 A. Yes, sir, that you have to be cautious
9 of how close you are and -- because there is a
10 possibility, you know, that it could --

11 Q. Make the bike wobble?

12 A. Yes, sir.

13 Q. So you knew that?

14 A. Um-hum.

15 Q. Now, what is your understanding as to
16 whether or not there's any sort of pulling effect
17 or suction from the rear wheels of buses?

18 A. Just my personal opinion and what I've
19 experienced, there is, like, a draft. And, again,
20 that's why you have to be mindful when you're
21 passing pedestrians and bicycles.

22 Q. And when you say "a draft," are you
23 referring to a draft out from the rear wheels or
24 suction into them?

25 A. Sucking in.

005889

1 Q. And -- okay. Now, with regards to
2 ability to see, is there a term for the right-hand
3 side of a bus that denotes an inability to see?

4 A. There's -- you have several blind spots.

5 Q. Okay. And is the blind spot worse on
6 the left side of the bus than it is on the right
7 side of the bus?

8 A. The right side is your worst.

9 Q. And why is that?

10 A. It's just the positioning of the mirror.
11 And you have to lean, and there's certain areas
12 that, just sitting in the driver's seat looking in
13 the mirror, you know, you won't be able to see.

14 Q. Okay. And why is it different -- the
15 driver sits on the left side of the bus?

16 A. Yes, sir.

17 Q. So this is why the right side is more --

18 A. Yes, sir.

19 Q. -- a tougher area?

20 And you have driven J4500s?

21 A. Yes, sir.

22 Q. Is the right-side blind spot worse in a
23 J4500 than the left-side blind spot, if any?

24 A. The only problem to me that was worse
25 was the left side, in that, you know, it would

005890

1 block a pedestrian or a car. And you had to, you
2 know, rock and roll, move, to make sure that --

3 Q. Okay. The J4500 has a right-side blind
4 spot?

5 A. Yes, sir.

6 Q. And that's true of every J4500 you've
7 been in?

8 A. It's true of every bus I've been in.

9 Q. Including every J4500 you've ridden in?

10 A. Yes, sir.

11 Q. And when was the last time you rode a
12 J4500?

13 A. Probably 2011.

14 Q. And so, as of 2011, the J4500 still had
15 what you considered to be a right-side blind spot
16 problem?

17 A. Yes, sir.

18 Q. Now, as you approach an object on the
19 right of you with the bus, does the blind spot
20 problem get better or get worse, in your
21 experience?

22 A. As you -- it's as you're starting to
23 pass it, then it gets -- it starts to get worse.

24 Q. And why is that?

25 A. Because you can, with your field of

005891

1 vision, you can see in front of you, but then as
2 you're coming toward that right front of the bus,
3 there's a field that's a blind spot.

4 Q. And different buses have the dashes
5 higher up and lower up; is that correct?

6 A. Right. Yes.

7 Q. And you're familiar with that?

8 A. Yes, sir.

9 Q. And the J4500 has a relatively high
10 dash?

11 A. Yes, sir.

12 Q. And have you ridden in buses or know of
13 buses that have a low dash?

14 A. Yes, sir.

15 MR. KEMP: Shane, could I have a slide
16 to illustrate this point?

17 MR. GODFREY: Which slide?

18 MR. KEMP: The ...

19 BY MR. KEMP:

20 Q. Okay. Can you see the bus on the right,
21 Mrs. Witherell?

22 A. Somewhat.

23 Q. Do you need to move down a little bit?
24 If you need to move down, let me get you a mic.

25 THE MARSHAL: The mic is over there.

005892

1 Thank you. There you go.

2 BY MR. KEMP:

3 Q. Okay. Mrs. Witherell, the bus on the
4 right is a J4500. Would you show the jury what
5 the dash is.

6 The bus on the right is the J4500. Do
7 you need a pointer?

8 A. The dash is where it slopes down here.

9 Q. Okay. And do you see the red line there
10 on the top?

11 A. Yes, sir.

12 Q. What is that called that's in front of
13 the driver?

14 A. Well, it's the front corner of the bus.
15 And that is a blind area as well if you're walking
16 in front of it.

17 Q. Okay. And do you see -- the one on the
18 left, see how it's lower?

19 A. Yes, sir.

20 Q. And you're familiar in general with this
21 concept that some buses have lower dashes than
22 others?

23 A. Um-hum. Yes, sir.

24 Q. Here you go.

25 And which bus has a greater blind spot,

005893

1 in your experience, the one that has a higher dash
2 or a lower dash?

3 A. Well, it would be the one with the
4 higher dash because you have more of a blind area.

5 Q. And that's on the right side as well?

6 A. Yes, sir.

7 Q. And why --

8 A. Well, on the MCI, it kind of slopes down
9 a little bit.

10 Q. And why is that more on the right side
11 with the higher dash?

12 A. It's because of -- if you don't have the
13 mirrors or something, if somebody is walking in
14 front of the bus, there is a blind spot in there.

15 Q. Now, you referenced mirrors. Do you see
16 the two different types of mirrors here?

17 A. Yes, sir.

18 Q. And the one on the left, what would you
19 call the one on the left that kind of hang down
20 over the front, like, antennas?

21 A. We used to call them just grasshopper
22 mirrors.

23 Q. Okay. Have you heard the term "European
24 mirrors"?

25 A. Yeah.

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1 Q. That's the technical term?

2 Now, in your experience -- well, first
3 of all, have you driven a bus like the one on the
4 left with European mirrors?

5 A. Yes, sir, I have.

6 Q. And you've also driven the J4500?

7 A. Yes, sir.

8 Q. In your experience, is the blind spot
9 more or less in the bus with the European mirrors?

10 A. Well, personal opinion, I think the
11 European, you've got better field of vision
12 because the different way the mirrors are
13 positioned in the arm up here.

14 Q. So you have less of a blind spot with
15 the European mirrors?

16 A. You can see more, in my opinion.

17 Q. And that would include along the right
18 side?

19 A. Yes, sir.

20 Q. Okay. Now, I asked you why a J4500
21 that's approaching a bicyclist, you said the blind
22 spot would get greater the closer you get. Do you
23 remember that testimony?

24 A. As your right front corner gets up
25 toward the bus, and then as you get back toward

005895

1 the back, there's some more blind spots on the
2 side.

3 Q. So it's harder to see the bicyclist if
4 you're 5 to 10 feet away than if you're 10 to
5 15 away?

6 A. Well, you should be able -- but, again,
7 you've got to be aware and you've got to move and
8 look and --

9 Q. Now, the Setra bus, you mentioned, is
10 something you've driven before?

11 A. Yes, sir.

12 Q. Does the Setra bus have European
13 mirrors?

14 A. Not the older ones, but the newer models
15 do, yeah.

16 Q. And do you prefer -- do you have a bus
17 preference, your favorite kind of bus?

18 A. Setra.

19 Q. Why is that?

20 A. It's more bus-driver-friendly, easier to
21 handle. It's got the tag wheel that turns. And
22 you can maneuver a lot better.

23 Q. Less blind spots?

24 Yes?

25 A. Yes.

005896

1 Q. And if the only thing we were worried
2 about here, if the only factor was right side
3 visibility, which would you prefer?

4 A. A Setra.

5 Q. Compared to the J4500?

6 A. But that's any other bus that doesn't
7 have the European mirrors.

8 Q. Okay. So, in other words, you would
9 prefer a bus like we have on the right with
10 European mirrors?

11 A. Yes, sir.

12 Q. Because there's less blind spots?

13 A. Yes, sir.

14 Q. Okay. Now, do you know what a proximity
15 sensor is?

16 A. Yes, sir.

17 Q. And a side proximity sensor?

18 A. Would detect -- notify you of anything
19 that would be on your side.

20 Q. Do you think proximity sensors are a
21 good idea?

22 A. In my personal opinion, yeah.

23 Q. And why is that?

24 A. Just because the right side of the bus
25 is -- you know, like I said, you've got more blind

1 spots on your right side than the left side of the
2 bus.

3 Q. Okay.

4 A. And anything is better as long as -- you
5 know, anything that increases the safety is better
6 for everybody.

7 Q. And with regards to cameras, have you
8 seen buses that have cameras for their front,
9 side, or angles?

10 A. Yeah. Yes, sir, I've seen rear-end --

11 Q. You can sit down, Ms. Witherell. Why
12 don't you give me the mic. Thank you.

13 A. We came down to Vegas to do a -- we were
14 doing the -- taking them out to the speedway.
15 Anyway, they had a bus. I don't recall what brand
16 it was, but they had a camera that showed the
17 front so that the passengers -- and it was mainly
18 for, like, if you were on a tour or something so
19 that everybody on the bus could see what was going
20 on in the front. And I thought that was kind of
21 neat.

22 Q. Including the driver?

23 A. Including the driver, but it can also be
24 a distraction.

25 Q. Okay. Now, with regards to your -- you

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1 came down to Las Vegas during NASCAR weekend. Is
2 that what you said?

3 A. Yeah. When we were with Frontier, and
4 then when we became part of Ryan's, we used to
5 come down and do shuttles.

6 Q. When you saw the bus with the front
7 camera, what year would that be approximately?

8 MR. ROBERTS: Objection. Relevance.

9 THE WITNESS: I can't recall right now.

10 THE COURT: Sustained.

11 BY MR. KEMP:

12 Q. But it was when you were with Ryan's
13 Express?

14 A. Yes, sir.

15 Q. And when did you leave Ryan's Express?

16 A. Well, I quit in February 2011. I'm
17 sorry. February 2010. I came back in July of
18 2011.

19 Q. So it would have to be somewhere
20 between -- before 2010?

21 A. Well, and then I worked until 2014, was
22 when they actually closed. They closed the Reno
23 division, then the Sacramento division. And then
24 I worked out of my house just doing the IFTA
25 report.

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1 Q. I'm just trying to figure out when this
2 time was that you saw the cameras.

3 A. 2014.

4 Q. So it would have had to be somewhere
5 before 2010, 2011 because of when you worked for
6 Ryan's Express?

7 A. Yes, sir.

8 Q. Would it be before that? 2006? 2005?

9 A. It would be in that timeframe, sir.

10 Q. So somewhere in 2005, 2006 you saw the
11 bus with the front camera?

12 A. Yes, sir.

13 Q. Did that have a screen so the driver
14 could better see what's on -- what the camera was
15 showing?

16 A. Well, it was up top, so I don't recall
17 that the driver could actually see the screen
18 unless they looked up.

19 Q. Okay. Have you seen other buses with
20 cameras?

21 A. Backup cameras.

22 Q. And side, front cameras?

23 A. No, sir.

24 Q. Okay. And, again, why do you think
25 buses should have side proximity sensors?

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1 A. Just anything that would improve safety.
2 Again, because of the -- anybody that has a CDL
3 will tell you the right side of any vehicle is --
4 you know, you've got to watch more careful because
5 of the blind spot.

6 Q. And one that has a high dash and regular
7 mirrors, not European mirrors, would have a bigger
8 blind spot?

9 A. Well, the blind spot is still the same.
10 It's just whatever you have to alleviate and help.

11 MR. KEMP: Okay. No further questions,
12 Your Honor.

13 THE COURT: Okay. Mr. Roberts.

14 MR. ROBERTS: Thank you, Your Honor.

15 CROSS-EXAMINATION OF MARY WITHERELL

16 BY MR. ROBERTS:

17 Q. Good afternoon.

18 A. Good afternoon.

19 Q. And it's Ms. Witherell; right?

20 A. Witherell. Say it fast, you're okay.

21 Q. Witherell. Okay. My name is lee
22 Roberts. If you remember, we met up in Reno last
23 year when you were deposed.

24 A. Right, sir.

25 Q. Very good. I'd like to talk a little

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1 bit more about your background, get a little bit
2 more of your background and experience for the
3 jury.

4 You talked to Mr. Kemp about your
5 experience driving buses and trucks in the
6 military; right?

7 A. Right, sir.

8 Q. And you've driven a lot of large
9 vehicles over many, many years; is that fair?

10 A. Yes, sir.

11 Q. Okay. Do you also have training and
12 experience as a safety manager teaching people
13 about bus safety?

14 MR. KEMP: Your Honor, can we approach?

15 THE COURT: Yes.

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

18 BY MR. ROBERTS:

19 Q. Just a second, Ms. Witherell.

20 Your experience, were you a bus driver
21 or a motor coach driver?

22 A. We preferred to be called motor coach
23 drivers as opposed to bus drivers.

24 Q. Okay. And in the industry there's
25 generally a distinction drawn between the two

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1 types of vehicles; correct?

2 A. Yes, sir.

3 Q. And they're generally used in different
4 ways; correct?

5 A. Yes, sir.

6 Q. As you sit here today, how many
7 different brands of buses, again, can you recall
8 driving?

9 A. I'd say there's probably five or six.

10 Q. And within that five or six -- for
11 example, MCI -- how many years have you driven MCI
12 motor coaches?

13 A. I'd say probably eight -- eight years.

14 Q. Okay. Did you drive several different
15 models of MCI motor coaches?

16 A. Yes, sir. The Renaissance and the J45.

17 Q. And the J4500 -- excuse me. I'm losing
18 my voice here. Getting a little bit of a cold.

19 Okay. Hopefully that's better.

20 The J4500 is the most recent model motor
21 coach that you've driven; correct?

22 A. Yes, sir.

23 Q. And you've actually driven the 2008 MCI
24 motor coach or -- yes?

25 A. Yes, sir.

005903

1 Q. You talked to Mr. Kemp about blind
2 spots. In your experience, has every bus and
3 truck that you've ever driven had a right-side
4 blind spot?

5 A. Yes, sir.

6 Q. With regard to the MCI J4500, did you
7 ever feel that, due to the blind spot, you could
8 not --

9 MR. KEMP: Your Honor, can we approach?

10 THE COURT: Yes.

11 (A discussion was held at the bench,
12 not reported.)

13 BY MR. ROBERTS:

14 Q. If I could complete my question,
15 Ms. Witherell.

16 Going back to the MCI J4500, and we've
17 talked about the blind spot issue, did you ever
18 feel, as a driver, that you could not see enough
19 in order to drive safely and avoid pedestrians and
20 bicyclists and other motor vehicles?

21 A. No, sir, not as long as you're doing
22 everything you're supposed to do.

23 Q. Okay. And what are you supposed to do
24 as a bus driver?

25 A. Well, you have a circle of safety around

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1 the bus, and you need to know what's in that
2 circle of safety. You need to be aware of what's
3 ahead of you, what's to the sides of you, and
4 what's to the rear of you. You constantly got to
5 use your field of vision and your mirrors.

6 Q. And do you just sit stationary?

7 A. Oh, no.

8 Q. Okay.

9 A. You've got to move and look. And even
10 sometimes I've even had to adjust the mirror to
11 see a little bit better of a certain area or
12 whatever.

13 Q. So the J4500, on the right side, does it
14 have blind spots that you can't see anything no
15 matter what you do as a driver?

16 A. You have to move, you know, to see them,
17 but you can pretty much see most of the blind
18 spots.

19 Q. So if the A-pillar is in the way, you
20 can lean forward, you can lean back, and you can
21 see around it; correct?

22 A. Unless it's a big pillar, I guess.

23 Q. So you're driving an MCI J4500 and
24 you're approaching a bicyclist on the right-hand
25 side. And Mr. Kemp asked you, you know, is the

1 blind spot worse as you approach 5 to 10 feet.

2 In that scenario, as you're approaching
3 the bicyclist on the right-hand side, at what
4 point, if you sat stationary, would that blind
5 spot kick in? While the bicyclist was still in
6 front of you or when he was parallel or when he
7 was behind you?

8 A. When he's probably roughly, I'd say,
9 maybe 6 to 10 feet in that corner, you might not
10 be able to see him, and then just as he gets, you
11 know, almost to the edge of the door there.

12 Q. So explain when he gets to the edge of
13 the door. Would his front tire be even with the
14 front of the bus or a little bit behind the bus?

15 A. It would be probably right as it's
16 getting kind of even with the front corner of the
17 bus, the front tire.

18 Q. Okay. So the front tire of the bicycle
19 is about even with the front tire of the bus.
20 That's about where the blind spot would kick in?

21 A. Yes, sir.

22 Q. And if the bicyclist was 10 feet in
23 front of the bus, there's no blind spot; correct?

24 A. No, sir.

25 Q. What about 36 feet in front of the bus?

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1 A. Well, if you're using your field of
2 vision, you know the bus -- the bicycle was there.

3 Q. And in the scenario where you were
4 overtaking a bicycle, driving the bus, there would
5 be no blind spot until he was parallel, but you'd
6 already know he was there if you were paying
7 attention; right?

8 A. Right, sir.

9 Q. In general, as compared to other motor
10 coaches you've driven, were you generally pleased
11 with the visibility of the J4500?

12 A. In general, yes, sir.

13 Q. Mr. Kemp talked to you about the high
14 dash. Did you say that the high dash might create
15 more of a blind spot in front of the bus?

16 A. If you have pedestrians walking in front
17 of you.

18 Q. That would be pedestrians really close
19 to the bus; right?

20 A. Yes, sir, especially children.

21 Q. Would that high dash affect your ability
22 to see something out in front of the bus more than
23 5 or 10 feet away and off to the right side?

24 A. More than 5 feet? No, sir.

25 Q. You've talked about the European mirrors

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1 on the Setra. Your personal preference is for a
2 European mirror; correct?

3 A. Yes, sir. It takes some getting used
4 to, but they kind of show you different angles
5 because the mirrors are at different degrees in
6 that arm.

7 Q. As a general rule, do all drivers prefer
8 European mirrors?

9 A. It's a personal preference.

10 Q. And are there any drawbacks to having a
11 European mirror on a bus?

12 A. Yes, sir.

13 Q. What are those?

14 A. Trees, bushes, buildings.

15 Q. And so that's a potential hazard to have
16 the mirrors up there where they are?

17 A. Yes, sir, because they hang out over the
18 front of the bus.

19 Q. And, again, with the European mirrors,
20 your preference, because they have a little less
21 of a blind spot than the standard mirror; correct?

22 A. Yes, sir. I think your field of vision
23 is a lot better.

24 Q. But with either mirror, you're going to
25 have to pay attention and you're going to have to

1 move; correct?

2 A. Yes, sir.

3 Q. The European mirrors don't eliminate the
4 right-side blind spot, do they?

5 A. Not completely, sir.

6 Q. Now, Mr. Kemp asked you a couple
7 questions about air blasts. Do you recall that?

8 A. Yes, sir.

9 Q. And you've personally experienced the
10 air displaced by the front of a bus when it goes
11 by you personally; correct?

12 A. Yes, sir, I have.

13 Q. And did you call that an air blast
14 before this litigation?

15 A. I just called it air displacement, you
16 know.

17 Q. Okay.

18 A. You just know it's coming.

19 Q. And in your personal experience, did the
20 J4500 have more air displacement than any other
21 vehicle that you personally drove?

22 A. In my personal opinion, I think pretty
23 much every bus is about the same.

24 Q. Do you think you needed a warning that a
25 large vehicle like a bus would create air

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1 displacement when it drove? Anyone need to warn
2 you about that or was it obvious?

3 A. Well, we warn people not -- you know, we
4 used to warn them not get close as the bus was
5 coming in or out, you know.

6 Q. I'm talking about you personally. Is
7 that something you already knew?

8 A. Through experience, yes.

9 Q. And you've known that all the way from
10 back when you were driving trucks in the military;
11 right?

12 A. Yes, sir.

13 Q. Mr. Kemp asked you if you'd ever heard
14 of a bus making a bicycle wobble due to the air
15 displacement.

16 A. Yes, sir.

17 Q. In your personal experience, have you
18 ever seen that happen?

19 A. I've never seen it happen.

20 Q. Okay. But you felt the air
21 displacement; correct?

22 A. Yes, sir.

23 Q. When buses drove by you?

24 A. Right, sir.

25 Q. Have you personally ever felt in danger

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1 due to that setting?

2 A. No, because I try to stay at least 2,
3 3 feet from a bus coming by or any large vehicle
4 that's coming by.

5 Q. Based on your personal experience -- and
6 I want to talk about both the displacement from
7 the front end and then the suction that you talked
8 about toward the rear. In your personal
9 experience, how fast would the bus have to be
10 going for that effect to be hazardous to a
11 pedestrian or cyclist?

12 MR. KEMP: Judge, can we approach?

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

15 THE COURT: Ladies and gentlemen, we're
16 going to take a 10-minute break. I'd like you to
17 stay on this floor.

18 You're instructed not to talk with each
19 other or with anyone else about any subject or
20 issue connected with this trial. You're not to
21 read, watch, or listen to any report of or
22 commentary on the trial by any person connected
23 with this case or by any medium of information,
24 including, without limitation, newspapers,
25 television, the internet, or radio.

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

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

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

17 I'm going to make that a 15-minute
18 break. See you then.

19 THE MARSHAL: All rise. 15-minute
20 recess.

21 (Whereupon, the following was held
22 outside the presence of the jury.)

23 THE COURT: Counsel, before you start, I
24 need a break.

25 MR. ROBERTS: That's fine, Your Honor.

1 (Whereupon, a recess was taken.)

2 THE COURT: Back on the record.

3 MR. KEMP: Your Honor, two points.

4 First, Mr. Roberts committed a direct
5 violation of motion in limine No. 1, which was
6 reaffirmed by your more recent order. If you
7 remember, the Court ordered him to be precluded
8 from referring or arguing to the jury in regards
9 to the alleged negligence of any third party, in
10 this case, the bus driver. He asked this
11 witness -- and I'm citing 732, line 3, from
12 today's transcript. He said, "You'd already know
13 he was there if you were paying attention."

14 You would already know the bicycle was
15 there, if you, the bus driver, were paying
16 attention.

17 That was nothing more than a deliberate
18 and blatant violation of the Court's order. And
19 now he's given his video guy the slides that some
20 of these witnesses have done as to where the bus
21 and the bicycle were when they were passing, such
22 as the one that Mr. Pears -- the Plantz one we
23 showed. So now he intends to really violate the
24 Court's orders.

25 But, Your Honor, I would ask that the

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1 jury be told that the alleged negligence of a
2 third party is not a defense in this case, because
3 he committed a knowing and deliberate violation of
4 the Court's order. I don't know how worse it gets
5 than that.

6 "You'd already know he was there if you
7 were paying attention."

8 That was his question, Your Honor. And
9 for him to -- now he's going to try to go even
10 deeper into this violation. It's just outrageous,
11 Your Honor. We would ask for a corrective
12 instruction when the jury comes back.

13 THE COURT: Mr. Roberts.

14 MR. ROBERTS: Thank you, Your Honor.

15 First of all, I'll do the easy one. The
16 photograph of the bus and bicycle on Mr. Kemp's
17 map was a photograph taken with Ms. Kolch, and it
18 was being prepared for the afternoon deposition of
19 Ms. Kolch. I was not intending to use it with
20 this witness. So the actual --

21 THE COURT: Ms. Who?

22 MR. ROBERTS: Ms. Samantha Kolch, one of
23 the eyewitnesses. She's scheduled to appear this
24 afternoon, and that's for her testimony, not this
25 witness.

1 With regard to the blind spot, the whole
2 question, the ultimate issue before the Court, is
3 whether or not this blind spot is unreasonably
4 dangerous. How big is it? Can it be overcome
5 with standard operating procedures? Is it
6 something where something disappears into a black
7 hole and no matter what you do, you can't see? Or
8 if you rock 'n' roll, the way you're supposed to
9 do and a bus driver is trained to do, whether or
10 not you can see.

11 It goes to the severity of the blind
12 spot and the dangerousness of the blind spot, and
13 I'm entitled to elicit that after he elicits the
14 opinion from this witness that the blind spot
15 exists on the right side.

16 And he elicits when you can see
17 something and when it would disappear. I can say,
18 but it wouldn't disappear if you leaned forward
19 and leaned back. You could still see it. And how
20 would you know to lean forward and lean back?
21 Because you've observed it coming in.

22 This goes to how dangerous the blind
23 spot is and whether it's unreasonably dangerous.
24 And it's also going to go to causation as to
25 whether the presence of this blind spot and the

005915

1 lack of a side sensor actually had anything to do
2 with the cause of this accident.

3 So I don't think that I've violated any
4 motion in limine. I haven't talked about anyone's
5 negligence.

6 MR. KEMP: Judge, he said, quote, if you
7 were paying attention, unquote. He didn't say,
8 How big is it? Could you see it from this angle?
9 He didn't say that. He said, if you -- referring
10 to the bus driver -- were paying attention.

11 So he solicited testimony from this
12 witness attempting to show that Mr. Hubbard was
13 contributory negligent. And the Court has been
14 pretty clear on this order.

15 Defendant is precluded from referring or
16 arguing to the jury in regard to the alleged
17 negligence of any third party.

18 And early on in the order, you talked
19 about Mr. Hubbard. I mean, it's pretty clear
20 whose third-party negligence we've been talking
21 about during this case.

22 But he said, quote, if you were paying
23 attention, clearly implying that the bus driver
24 was not paying attention and that's why he missed
25 it, Your Honor.

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1 So that's why the jury should be
2 instructed at this point that the alleged
3 negligence of a third party is not a defense. And
4 that's the law. He hasn't argued that that's not
5 the law.

6 But he's committed the violation. I
7 think we should address it right now. We can't
8 just wait until the end, let the jury sit here for
9 three weeks and think, oh, geez, it's all the bus
10 driver's fault. Mr. Roberts established that with
11 Witherell.

12 If he had said, "Could you see it here,
13 could you see it there, could you see it here, in
14 your experience?" that's one thing. But he asked
15 her only if you were not paying attention, only if
16 you were not paying attention. Those are his
17 words, Judge, "if you were paying attention."

18 That's what killed it. That's what made
19 it a violation of a motion in limine. And he did
20 it on purpose, Your Honor.

21 MR. ROBERTS: Your Honor, this goes to
22 the very heart of our defense to causation of
23 proximity. We've already elicited testimony from
24 their expert reconstructionist that if those
25 vehicles maintain the same speed, move them back

005917

1 one second, move them back two seconds, move them
2 back three seconds, there is no blind spot if you
3 move back one second, two seconds, three seconds.
4 The blind spot doesn't exist.

5 And, although there is a blind spot,
6 according to this witness and Mr. Caldwell, as
7 soon as the bike and the bus become parallel and
8 the front tire of the bus is even with the bus,
9 it's not an unconditional blind spot. You can
10 still see something there if you move forward and
11 move back. You can still see.

12 So this alleged blind spot simply didn't
13 cause the accident because the bicycle was visible
14 as the bus was overtaking the bicycle, and the
15 bicycle remained visible even after it moved into
16 the alleged blind spot if the driver was doing
17 what they were supposed to be doing.

18 It's like saying, well, the brakes --
19 talking about brakes. If the driver never put on
20 the brakes, then a defect in the brakes didn't
21 change it -- didn't cause the accident.

22 They have to prove causation. And we
23 have to show -- be able to show and to prove
24 through this witness and others -- that where the
25 bicycle most likely was was not in a blind spot up

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1 to a certain point. And, after that point,
2 there's no causation if the bus driver had
3 complete visibility up to that point.

4 THE COURT: Okay. To be frank with you,
5 when you -- before Mr. Kemp objected, my notes
6 with respect to that question have a star next to
7 them because the first thing that popped into my
8 mind was Mr. Hubbard and if he was paying
9 attention. So -- and that's something that is
10 not -- I thought I was pretty thorough in my
11 order. Okay?

12 MR. ROBERTS: But I haven't talked about
13 Mr. Hubbard, Your Honor.

14 THE COURT: No, but, Mr. Roberts, if a
15 driver is paying attention -- and this case
16 involves Mr. Hubbard, who was a driver as well --
17 as one of the, you know -- so I am concerned about
18 that.

19 Because, in my view, if they can draw a
20 parallel between if Mr. Hubbard -- Mr. Hubbard was
21 or was not paying attention, then -- and I
22 understand the causation issue and, you know, the
23 contributory and comparative negligence. I've
24 gone over this over and over to the point where I
25 had to -- I decided to draw up a different -- an

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1 order that was correct on the law. Okay?

2 But I do -- I do believe that -- I'm not
3 certain that you did that on purpose. I don't
4 think that's correct. But I do think that asking
5 that question elicits in the mind of this jury --
6 because I think it is very possible that if you
7 were paying attention, then you would have seen --
8 seen the pedestrian, the bicycle, whatever, in
9 front. And it suggests that there's a possibility
10 that there's negligence there on the part of the
11 driver. And that's what I thought when you asked
12 the question.

13 MR. ROBERTS: I understand, Your Honor,
14 but take it further and closer to this. If the
15 allegation is there should have been a side
16 proximity sensor, a little light on the mirror
17 that goes off if someone is in your blind spot
18 like they have on thousands of vehicles that their
19 expert has listed in his report, if the driver
20 says, "I'm looking straight ahead. No, I wasn't
21 looking over at my mirror. I was looking straight
22 ahead," how could whether that light is there or
23 comes on or goes off have anything to do with the
24 cause of the accident?

25 He would have to be looking in his

005920

1 mirror to see if there was something to the side.
2 He'd have to be looking at his mirror to see if
3 the light was on. There's no causation if he
4 never looked at his mirror. And I wasn't going
5 there, Your Honor, but I think that you can get
6 that close with the causation.

7 THE COURT: I think it's a very fine
8 line, but I think the way that you asked the
9 question, suggesting that -- as I just indicated,
10 that if the driver had been paying attention, then
11 the person -- pedestrian, whatever -- would have
12 been seen. So I am concerned about that because
13 it's too close to the line.

14 MR. ROBERTS: I understand, Your Honor.
15 I'd note for the record I don't believe there was
16 any timely objection made, and, therefore, no
17 curative instruction is appropriate. It's too
18 late to object to that question, but I will
19 refrain from asking any similar questions in the
20 remaining --

21 MR. KEMP: Now he's saying, "I got away
22 with it, so let it go, Your Honor."

23 THE COURT: No, no. I, as you've
24 noticed, am not fond of curative instructions and
25 everything else. But Mr. Kemp did object

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1 immediately. I mean, as soon as -- at least that
2 was my perception.

3 MR. KEMP: Your Honor, I objected before
4 he even asked this question.

5 THE COURT: I mean, very quickly. I
6 thought it was right after.

7 MR. ROBERTS: Judge, I --

8 MR. KEMP: Judge, all we would ask is
9 that the jury be instructed as to what the law is,
10 exactly like you have in the order, "Any
11 negligence by the driver is foreseeable as a
12 matter of law and thus cannot be used to insulate
13 the defendant from liability."

14 They agree that's the law. They agree
15 that's the law, so why not tell the jury right
16 now? In fact -- I mean, what's my remedy? He's
17 got away with it. He's got it planted in the
18 minds of the jury. The only remedy for me is to
19 try to dig back in and dig it out and make it
20 worse. So I need a curative instruction. And
21 this is the law. You haven't heard them once
22 dispute that this is the law.

23 THE COURT: No. I am inclined to give a
24 brief curative instruction because I do think that
25 it's very possible that, in the jurors' mind,

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1 there may be a suggestion that the driver was
2 negligent.

3 MR. ROBERTS: Your Honor, if you're
4 going to give a curative instruction, we'd also
5 request that you give the instruction on when a
6 product is defective and when it's unreasonably
7 dangerous. Because Mr. Kemp elicited from this
8 witness, "Why do you want proximity sensors --
9 side sensors?"

10 "Because safer is always better."

11 That's been their argument from day one,
12 safer is always better. That's not the law. So
13 if you're going to start giving instructions, Your
14 Honor, we would request that you give the
15 instructions also on product defect at the same
16 time and when something is unreasonably dangerous
17 as a matter of Nevada law.

18 MR. KEMP: Judge, they just want to
19 dilute the curative instruction. That's all they
20 want to do. If you recall, I asked at the very
21 beginning of the case that all the instructions be
22 given, or at least the key ones.

23 So I would submit that we should just
24 instruct the jury when they come back that any
25 negligence by the driver is foreseeable as a

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1 matter of law and thus cannot insulate the
2 defendant from liability, unquote. That's the
3 Court's order. That's the law. That will address
4 the situation.

5 MR. BARGER: Your Honor, may I say
6 something?

7 THE COURT: Yes, of course.

8 MR. BARGER: I think if you give that --
9 I hear what the Court is saying, but I --

10 THE COURT: Do you understand what I'm
11 saying? I hope so.

12 MR. BARGER: I'm sorry. No, I hear you.

13 If you give that one specific sentence
14 instruction, I think it overemphasizes it. And I
15 would join in with -- maybe you ought to just give
16 all the instructions, all the ones that you
17 normally would give that Mr. Kemp asked for that
18 we discussed early on. That might be the way. So
19 it's not highlighted with big yellow things; you
20 just give them all. If you just tell them the
21 law, you're telling them the law at this point.

22 MR. KEMP: Judge, they just got
23 testimony that the driver wasn't paying attention
24 so it's all his fault. I've asked for a curative
25 instruction to correct that problem. That's why

1 the instruction should be given now. That's why
2 it shouldn't be buried in a bunch of other
3 instructions so the jury misses it. It should be
4 a simple curative instruction given now.

5 MR. ROBERTS: Your Honor, if I could
6 just add one more thing, this whole door was
7 opened by Mr. Kemp. He asked the bus driver the
8 hypothetical.

9 "Assume you're driving a bus. You're
10 coming up on an object. When does it become hard
11 to see? When does it enter your blind spot?"

12 That question assumes that she's looking
13 and she sees it, and he left it that there was a
14 blind spot and it disappeared.

15 I'm entitled to go into that and to
16 qualify it and to show that there are ways to see
17 the object when you know it's there because you've
18 approached it.

19 MR. KEMP: Judge, it's my motion. I
20 should get the final word.

21 They're just trying to filibuster this
22 issue forever. They said, quote, if you were
23 paying attention. I mean, that's what they said.
24 Okay? They knew what they were doing. And all
25 we're asking is the Court give the instruction

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1 that they don't dispute that's the law. They
2 don't dispute that's the law.

3 They've committed the violation of the
4 motion in limine. Your Honor even noted it. I
5 noted it. So I don't see any reason not to give a
6 correction -- corrective instruction. And, you
7 know, it's my motion. I should have the final
8 word. The filibuster should stop.

9 THE COURT: But, before that, I just
10 want to respond to Mr. Roberts.

11 Mr. Roberts, I understand what you're
12 saying with respect to causation, but I think it's
13 the way that you asked the question, suggesting
14 that if someone were not paying attention.

15 MR. ROBERTS: Then the blind spot is
16 irrelevant.

17 THE COURT: Well, the thing is, she's
18 already testified that the driver has to move
19 around and look and see and do all sorts of things
20 and that that's -- you know, if I had never heard
21 anything about this, I believe I would understand
22 that they have to adapt to the bus, but I --

23 MR. ROBERTS: And adapt to the situation
24 that develops in front of them. A bus driver is
25 not going to bob and weave to look at something in

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1 their blind spot if they're not changing lanes and
2 they've got no reason to believe something's
3 there.

4 THE COURT: I am concerned about the way
5 the question was asked --

6 MR. ROBERTS: I understand.

7 THE COURT: -- Mr. Roberts, sincerely.

8 You know what? We were going to allow
9 them to take a lunch at 2:00 p.m; correct?

10 MR. KEMP: Well, Your Honor, the only
11 problem is Ms. Witherell is on a 4:30 flight. I
12 don't mind that, but --

13 THE COURT: Okay. You're used to how I
14 operate. I'm going to take five minutes, ten
15 minutes --

16 MR. KEMP: Thank you, Your Honor.

17 MR. ROBERTS: Thank you, Your Honor.

18 THE COURT: -- and think about it a
19 little bit because I'm going to try to get it
20 right.

21 THE MARSHAL: All rise. Court is in
22 recess, five minutes.

23 (Whereupon, a recess was taken.)

24 (The following proceedings were held
25 outside the presence of the jury.)

1 THE COURT: I've taken a look at --
2 reviewed everything, the motion in limine No. 1.
3 I've looked at the question, which did occur, as I
4 indicated, for -- or to me to be concerning to
5 begin with.

6 I'm going to at this time give a
7 curative instruction. And this is what I plan on
8 saying:

9 The Court has decided that it is prudent
10 to instruct the jury on one point of law at this
11 time, while you will be given thorough
12 instructions later. Any negligence by the driver
13 is foreseeable as a matter of law and thus cannot
14 insulate defendant from liability.

15 That's it. That's what I'm going to do.
16 Do we need to continue to speak to her out of the
17 presence?

18 MR. KEMP: Only if he wants to go down
19 this area.

20 MR. ROBERTS: Yes, Your Honor. I'd like
21 to see if I can lay a foundation for the opinion
22 that she gave in her deposition.

23 With the Court's permission, I'd also
24 just like to make a proffer as to her opinion that
25 she doesn't believe that the blind spots or the

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1 air blast on the J4500 were unreasonably dangerous
2 based on her own personal experience.

3 I understand Mr. Kemp's argument that
4 that goes to an ultimate issue. Assuming I can
5 lay a foundation, NRS 50.295 states, "Testimony in
6 the form of an opinion or inference otherwise
7 admissible is not objectionable because it
8 embraces an ultimate issue to be decided by the
9 trier of fact."

10 So if she has the foundation to give
11 that opinion, I believe it's appropriate for her
12 to give it.

13 MR. KEMP: Judge, you entered another
14 motion in limine on this saying that lay witnesses
15 cannot talk about -- they filed a motion in limine
16 saying that I can't get Erika Bradley, for
17 example, to say what the cause of the wobble was.
18 They've taken a position that lay witnesses cannot
19 give these kind of expert opinions. And so we
20 entered a motion in limine on it.

21 So what do we do, open it up and make
22 all the fact witnesses experts? I don't think so,
23 but this is the ultimate issue, whether the bus is
24 unreasonably dangerous. And if you listened real
25 carefully to the rule he read, it says "embraces."

1 They can dance around the area, but they can't
2 give an opinion. I've never seen a lay witness
3 give an opinion on the ultimate issue in the case.

4 So a bus driver can give an opinion as
5 to whether or not the product is unreasonably
6 dangerous without hearing all the evidence like
7 the experts are getting, without reviewing all the
8 depositions? You know, it's a ridiculous request,
9 Your Honor.

10 THE COURT: Mr. Roberts?

11 MR. ROBERTS: Yes, Your Honor. The
12 motion in limine that was granted applies to lay
13 witnesses are able to testify as to their personal
14 perceptions and any inferences rationally based on
15 those perceptions.

16 The whole point that I made to the bench
17 was that, based on her training and experience,
18 she qualifies as an expert bus driver. She's
19 driven six different buses. She's driven trucks.
20 She's been a commercial driver for years. She's
21 driven the J4500 itself probably thousands of
22 times. That qualifies her to give an expert
23 opinion on whether or not it's dangerous.

24 And Mr. Kemp has left in the jury's mind
25 the implication that it is dangerous. He

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1 solicited the fact that the blind spots are bigger
2 in the J4500 than in the Setra, the mirrors are
3 different, and that her preference is the Setra.

4 So he's elicited to the jury that it's
5 got bigger blind spots with the implication that
6 it's more dangerous than the Setra. I should be
7 able to elicit whether she actually thinks the
8 J4500 is dangerous based on the testimony she's
9 already given on direct.

10 Thank you, Your Honor.

11 THE COURT: All right. I did, when we
12 were at the bench, allow her to testify to her
13 expertise because she has the experience and the
14 knowledge for I forget how many years of driving
15 and so forth and has driven this coach or a very
16 similar coach, I believe, for eight years.

17 So I will let her opine what she thinks,
18 but I'm not going to call her an expert. Okay?

19 MR. ROBERTS: Okay.

20 THE COURT: And it's very, very slim.
21 Okay? Very limited.

22 MR. ROBERTS: Okay.

23 THE COURT: All right?

24 MR. ROBERTS: So just the one question
25 and then --

1 THE COURT: Yes. What she thinks after
2 driving -- you know, what -- in her opinion, you
3 know, what does she think -- what her personal
4 perception is, what she thinks. I think that's
5 reasonable. She's -- you know, I think that's
6 reasonable.

7 So I will allow that, but you have to be
8 very careful how you ask it. And keep it very,
9 very minimal, Mr. Roberts, please.

10 MR. ROBERTS: Okay. Thank you, Your
11 Honor.

12 THE COURT: All right. Let's -- let's
13 get going. Let's bring her back in. I just want
14 the witness first.

15 MR. BARGER: Judge, can we approach?

16 THE COURT: Go ahead.

17 MR. ROBERTS: Thank you, Your Honor.

18 BY MR. ROBERTS:

19 Q. Hi, again, Ms. Witherell.

20 A. Hi.

21 Q. So we were talking about the wind -- air
22 displacement that a bus or a truck or other
23 vehicles make.

24 A. Yes, sir.

25 Q. Okay. Have you had occasion to have

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1 lots of buses of different brands pass you as part
2 of your job history?

3 A. Yes, sir.

4 Q. And they've passed you as close as
5 3 feet?

6 A. Yes, sir.

7 Q. And they've passed you 5 feet?

8 A. Yes, sir.

9 Q. And every now and then, do they pass you
10 closer than 3 feet?

11 A. On occasion, yes, sir.

12 Q. Okay. Think back in your mind to every
13 time that that's happened over the last 20 years.
14 Have you had buses or trucks pass you at 5 miles
15 an hour?

16 A. Um-hum. Yes, sir.

17 Q. 10 miles an hour?

18 A. Yes, sir.

19 Q. 15 miles an hour?

20 A. Yes, sir.

21 Q. 20 miles an hour?

22 A. Yes, sir.

23 Q. 25 miles an hour?

24 A. Yes, sir.

25 Q. 30 miles an hour?

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1 A. Yes, sir.

2 Q. 35 miles an hour?

3 A. Yes, sir.

4 Q. 40 miles an hour?

5 A. Yes, sir.

6 Q. 45 miles an hour?

7 A. Yes, sir.

8 Q. And higher than 45 miles an hour?

9 A. Yes, sir.

10 Q. Okay. Based on your own personal
11 experience, do you have a personal opinion of how
12 fast a bus would have to be going 3 feet away from
13 you before you would feel that that air caused a
14 safety hazard?

15 A. Around the 45 and higher range.

16 Q. And you've personally experienced a bus
17 going by you at 45 miles an hour?

18 A. Yes, sir.

19 Q. And you felt that was a hazard?

20 A. If you're too close to the bus, yes,
21 sir.

22 Q. But it didn't actually hurt you on those
23 occasions?

24 A. No, sir.

25 Q. Okay. Thank you, ma'am.

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1 THE COURT: Mr. Kemp?

2 REDIRECT EXAMINATION OF MARY WITHERELL

3 BY MR. KEMP:

4 Q. Mary, Mr. Roberts asked you whether you
5 had experienced different air blasts or air
6 displacement at 5, 10, 15, 20, 25, 35, 40; right?
7 You remember that?

8 A. Yes, sir.

9 Q. First of all, I think you've already
10 said you don't know whether different buses have
11 different air displacement?

12 A. No.

13 MR. ROBERTS: Objection.
14 Mischaracterizes her testimony.

15 BY MR. KEMP:

16 Q. Do you know that one way or the other?

17 A. In my opinion, I would assume they're
18 probably about the same.

19 Q. Right. So you said it was the same?

20 A. Um-hum.

21 Q. All right. And with regards to the
22 difference between, say, 25 miles per hour and
23 45 miles per hour, do you know what the difference
24 is, if any, in air displacement?

25 A. I would just say that aerodynamics, the

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1 faster the bus is going and the air coming around
2 the side of the bus from the front would be
3 greater the higher the speed.

4 Q. But you don't know, for example, if
5 25 miles per hour, the air blast comes out 5 feet
6 2 inches, and 45 miles per hour, it comes out
7 5 feet 4 inches. You don't know that; right?

8 A. No, sir.

9 Q. And you can't recall specifically any
10 air blast that you've experienced -- you have no
11 specific recollection of an air blast at 25, 30,
12 35, 45, do you, as we sit here today?

13 A. Up on Donner Pass, chaining the bus and
14 some of the trucks coming by and buses.

15 Q. Okay. But you don't know how fast those
16 trucks and buses were going by? I mean, you don't
17 know; they just went by you? You don't know --

18 A. No, I can just assume. Yes.

19 Q. So you're speculating that there's a
20 difference --

21 A. Yes, sir.

22 Q. Based on your personal experience,
23 you're speculating on how fast what was going past
24 you; right?

25 A. Yes, sir.

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1 Q. So you really don't know whether a bus
2 produces a different air blast at 42 as opposed to
3 45 as opposed to 40? You don't know, do you?

4 A. I couldn't say for certain, no.

5 Q. I mean, based on your own personal
6 experience?

7 A. Right.

8 Q. Okay. Because you haven't tested that;
9 right? You haven't done any tests where you've
10 stood in front of buses and had them come past you
11 at different speeds to see if there's more or less
12 air blast?

13 A. Not to see if they have more or less air
14 blast, but I have been passed by buses at various
15 different speeds.

16 Q. And let's talk about 25 miles per hour.

17 A. Okay.

18 Q. Mr. Roberts asked you if the bus was 3
19 or 4 feet away, would you consider it dangerous.
20 If the bus was, say, 6 inches away, would you
21 consider the air displacement of a
22 25-mile-per-hour bus dangerous?

23 A. In my personal opinion, yes.

24 Q. Okay. That's 6 inches. How about a
25 foot?

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1 A. I would still consider it dangerous.

2 Q. And how about 2 feet?

3 A. A little safer.

4 Q. Safer, but you still should avoid it?

5 A. Yes, sir.

6 MR. KEMP: All right. Thank you.

7 RECROSS-EXAMINATION OF MARY WITHERELL

8 BY MR. ROBERTS:

9 Q. In your years of experience driving a
10 bus, do you have the ability to estimate how fast
11 a vehicle is going within 5 miles an hour?

12 A. I could just give you a guesstimate. I
13 can't give you an exact.

14 Q. Mr. Kemp used the word "speculation."

15 A. Yes, sir.

16 Q. Speculation just means I got no idea,
17 but maybe it could be. So versus when you say a
18 guesstimate, do you mean that you can't tell me
19 exactly but you know that that's an approximation?

20 A. I would agree with that, yes, sir.

21 Q. Okay. And when you drew a distinction
22 between 25 miles an hour at 3 feet away not being
23 hazardous and 3 feet away at 45 miles an hour
24 starts to get hazardous, do you have enough
25 foundation, from your personal experience, to be

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1 pretty sure that 25 is not and 45 is hazardous?

2 A. I would probably agree with that.

3 Q. And have you ever been passed by a bus
4 at 6 inches away at 25 miles an hour?

5 A. Not 6 inches.

6 Q. So you're probably just guessing about
7 that one; right?

8 A. Well, about a foot, so I can imagine.

9 Q. And what did you feel when a bus passed
10 you a foot away?

11 A. Well, you feel the air and it's kind of
12 unsteady, unstable. You feel a little bit
13 unstable, but --

14 MR. ROBERTS: Okay. No further
15 questions, Your Honor.

16 MR. KEMP: Judge, I have no further
17 questions.

18 Do you want us to argue about it, Your
19 Honor?

20 THE COURT: Yeah, I'd like to -- let's
21 wrap this up.

22 (A discussion was held at the bench,
23 not reported.)

24 (Discussion off the record.)

25 THE MARSHAL: All rise.

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1 (The following proceedings were held
2 in the presence of the jury.)

3 THE MARSHAL: All the jurors are
4 present, Your Honor.

5 THE COURT: Thank you.

6 Do the parties stipulate to the presence
7 of the jury?

8 MR. ROBERTS: Yes, Your Honor.

9 MR. KEMP: Yes, Your Honor.

10 THE COURT: Before we go on, I'd just
11 like to talk with you for a moment. The Court has
12 decided that it is prudent to instruct the jury on
13 one point of law at this time. You will be given
14 thorough instructions later. And that's simply
15 any negligence by the driver is foreseeable as a
16 matter of law and thus cannot insulate defendant
17 from liability, if any.

18 Please go on.

19 MR. ROBERTS: Thank you, Your Honor.

20 BY MR. ROBERTS:

21 Q. Okay. Ms. Witherell, you have a flight;
22 right?

23 A. Yes, sir.

24 Q. So we'll try to get through this
25 quickly. One last subject matter.

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1 You told Mr. Kemp that you'd driven a
2 bus sometime before 2014 that had some sort of
3 front sensors; correct? Was it a front camera or
4 front sensor?

5 A. Between when, sir?

6 Q. It was before 2014, I believe, when you
7 were here in Las Vegas.

8 A. Yes, sir. It had a camera where you
9 could see what the driver is seeing, you know,
10 when it was on the screen.

11 Q. And it was on the screen up there?

12 A. Yes, sir.

13 Q. And was that for the driver to use
14 driving the vehicle or make a record?

15 A. Well, the purpose of it was you could
16 use it for a record, but also to basically, on a
17 tour, to let the people on the bus see what's up
18 ahead.

19 Q. Okay. So it wasn't for the driver's use
20 to drive the coach safely?

21 A. No, sir.

22 Q. Okay. How many buses would you say you
23 drove before 2014, going all the way back?

24 A. I'd say probably about six different
25 ones.

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1 Q. Six different ones, different model
2 years, probably hundreds --

3 A. Manufacturers, yes.

4 Q. Hundreds of different buses?

5 A. Yes.

6 Q. Did you ever drive a bus that had a side
7 proximity sensor?

8 A. No, sir.

9 Q. Have you ever seen a bus prior to 2014
10 with a side proximity sensor?

11 A. No, sir.

12 MR. ROBERTS: Thank you very much,
13 ma'am.

14 MR. KEMP: I'll be brief.

15 FURTHER REDIRECT EXAMINATION OF MARY WITHERELL
16 BY MR. KEMP:

17 Q. You recall Mr. Roberts' discussions
18 about warnings and air blasts?

19 A. Yes, sir.

20 Q. And you've told me that you don't know
21 one way or the other whether or not all buses
22 produce the same type of air blast; right?

23 A. Right, sir. I would assume they all do.

24 Q. Okay. And if one produces twice the air
25 blast of another bus, do you think that

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1 manufacturer should give a warning?

2 A. Yes, sir.

3 Q. Why is that?

4 A. Just more knowledge that you have for
5 the public's knowledge.

6 Q. And you said you're generally pleased
7 with the field of vision of the J4500.

8 Do you recall that testimony?

9 A. Yes, sir.

10 Q. But you're more pleased with the Setra
11 and the other buses; right?

12 A. And the European mirrors.

13 Q. So their field of vision is better than
14 what you have with the --

15 A. In my opinion, yes, sir.

16 Q. In your opinion, based on riding buses
17 for 20 years -- or driving buses?

18 A. Yes.

19 Q. Okay. And back to the air blast. You
20 have personally stood next to a J4500 at about
21 25 miles per hour a foot away; correct?

22 A. Yes, sir.

23 Q. Tell the jury what you felt.

24 A. Just it's -- you feel the air as it's
25 coming by you. And it's a little unsteady feeling

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1 that you feel.

2 Q. While you're standing there, it made you
3 feel unsteady?

4 A. It just -- it's -- I wasn't stumbling.
5 It just gave you the feeling of being unsteady.

6 Q. What do you mean by that? Knock you off
7 your feet or make you unsteady? What do you mean,
8 unsteady?

9 A. Just with the air and the bus coming by,
10 you know, if it were obviously faster, in my
11 opinion --

12 Q. Let's stick with 25 miles per hour.

13 A. Okay. It's just you can feel a motion.

14 Q. A motion from the air?

15 A. Yes, sir.

16 Q. Is that what you're saying? Okay.

17 All right. Is the same true at 2 feet?

18 A. Yes, sir, not as bad probably.

19 Q. Okay. And when you get out to 5 and
20 6 feet, like you talked about with Mr. Roberts, it
21 goes away; right?

22 A. Yes, sir.

23 Q. Okay. Now, it's your view that all
24 buses should have proximity sensors; correct?

25 A. Well, I would always err on the side of

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1 safety and anything that makes anything safer and
2 better, but that's just like not all cars or
3 everything have --

4 Q. That's your opinion, as a bus driver for
5 the last 20 years, that all buses should have
6 proximity sensors?

7 A. On the right side maybe, yeah.

8 Q. On the right side?

9 A. Um-hum.

10 MR. KEMP: Thank you.

11 MR. ROBERTS: Thank you, Your Honor.

12 RECROSS-EXAMINATION OF MARY WITHERELL

13 BY MR. ROBERTS:

14 Q. I want to go back to when I was asking
15 you about the air generated by these big buses.
16 You said you personally felt air being displaced
17 by a J4500 passing you within 3 feet; right?

18 A. Yes, sir.

19 Q. Have you also felt air from at least
20 five other different brands of buses?

21 A. Yes, sir.

22 Q. Did the J4500, in your opinion, create
23 more air than any of the other different buses?

24 A. No, sir. I think they're all about the
25 same. That's my opinion.

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1 MR. ROBERTS: Thank you, ma'am.

2 FURTHER REDIRECT EXAMINATION OF MARY WITHERELL
3 BY MR. KEMP:

4 Q. You think they're all about the same,
5 but you don't know because you haven't tested it;
6 right?

7 A. They all feel about the same, the ones
8 that have passed.

9 Q. But you do know that some of them have
10 better mileage than others; right? Do you know
11 that?

12 A. Some of them, yes, sir.

13 Q. And do you know that some of them have a
14 better what they call drag coefficient than
15 others? Do you know one way or the other?

16 A. No, sir, I don't.

17 MR. KEMP: Thank you.

18 MR. ROBERTS: Nothing further, Your
19 Honor. Thank you.

20 THE COURT: Thank you.

21 MR. KEMP: Unless the jury has
22 questions, Your Honor.

23 THE COURT: No questions from the jury.
24 You're excused. Thank you very much.

25 THE WITNESS: Thank you, ma'am, or Your

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1 Honor.

2 THE COURT: All right. Even though
3 you've just had a break longer than the Court
4 anticipated, I think it's time for a lunch break
5 now. So we're going to take about an hour and 15.
6 Do you think that's enough?

7 MR. ROBERTS: That's enough, Your Honor.

8 MR. KEMP: That's fine.

9 THE COURT: So should be back here at
10 3:45.

11 You're instructed not to talk with each
12 other or with anyone else about any 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're 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

1 own.

2 You're not to talk with others, text
3 others, tweet others, message others, google
4 issues, or conduct any other kind of book or
5 computer research with regard to any issue, party,
6 witness, 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 You must be back at 3:45. Thank you.

11 THE MARSHAL: All rise.

12 (Luncheon recess.)

13 THE MARSHAL: All rise. All the jurors
14 are present, Your Honor. Department 14 come to
15 order.

16 THE COURT: Parties stipulate to the
17 presence of the jury?

18 MR. ROBERTS: Yes, Your Honor.

19 MR. CHRISTIANSEN: Yes, Your Honor.

20 THE COURT: All right. Great.

21 Counsel.

22 MR. CHRISTIANSEN: Plaintiffs would call
23 Samantha Kolch.

24 THE CLERK: You do solemnly swear the
25 testimony you're about to give in this action

1 shall be the truth, the whole truth, and nothing
2 but the truth, so help you God.

3 Thank you. Please be seated and please
4 state and spell your name.

5 THE WITNESS: My name is Samantha Kolch.
6 S-a-m-a-n-t-h-a. Last name is K-o-l-c-h.

7 MR. CHRISTIANSEN: May I proceed, Your
8 Honor?

9 THE COURT: You may proceed.

10 DIRECT EXAMINATION OF SAMANTHA KOLCH
11 BY MR. CHRISTIANSEN:

12 Q. Good afternoon, Ms. Kolch.

13 Ms. Kolch, where do you live? In what
14 city?

15 A. Las Vegas, Nevada.

16 Q. How long have you lived here in Las
17 Vegas?

18 A. 23 years.

19 Q. Where did you go to high school?

20 A. Cheyenne High School.

21 Q. That's here in Las Vegas?

22 A. Um-hum. Yes.

23 Q. Did you go to a university?

24 A. I went to UNLV.

25 Q. And did you graduate?

005949

1 A. I did.

2 Q. What year?

3 A. 2013.

4 Q. And what was your major?

5 A. Hospitality management.

6 Q. Where are you currently employed?

7 A. Starbucks.

8 Q. How long have you been so employed?

9 A. For three and a half years.

10 Q. I want to take you back to about 10
11 months ago, April the 18th, 2017. Where were you?

12 A. At first I was at a motorcycle
13 dealership when I got my new motorcycle. Then
14 afterwards, I went to Red Rock Casino with my
15 fiance.

16 Q. So you got a new motorcycle. Is this
17 the first motorcycle in your life or is this an
18 upgrade of some type?

19 A. It's an upgrade. I used to have a 250,
20 and then we got me a bigger one.

21 Q. The motorcycle on that day, what kind
22 were you riding?

23 A. That day we purchased me a Daytona 675
24 Super Sport.

25 Q. Help the ladies and gentlemen of the

005950

1 jury understand what part of town you purchased it
2 in and sort of the surface streets, I think, that
3 you traveled to get to where you ultimately
4 observed the incident we're here to talk about.

5 A. The motorcycle dealership is on Sunset
6 and Decatur. And then we were going near downtown
7 Summerlin, was where we wanted to go that morning.
8 So we took side streets all the way up. I went
9 all the way up Sunset and then turned onto Fort
10 Apache and then up Sahara. So we took all side
11 streets. And then we were on the west side of Red
12 Rock Casino when the accident happened.

13 Q. If I told you that street that goes
14 east-west -- and you were pointing west towards
15 the casino? Is that as I understand it?

16 A. The casino is here. We were on this
17 side of it.

18 Q. Let's do this. How about I grab a big
19 map and maybe help you.

20 A. Yeah.

21 Q. This is Charleston right here?

22 A. Um-hum.

23 Q. And this is Pavilion Center and the Red
24 Rock Casino.

25 A. Okay.

005951

1 Q. Griffith Peak?

2 A. Um-hum.

3 Q. Yes?

4 A. Yes.

5 THE MARSHAL: Can you speak into the mic
6 there.

7 THE WITNESS: Yes. So we took all side
8 streets. So I would believe that we would have
9 been on Griffith Peak.

10 BY MR. CHRISTIANSEN:

11 Q. And in which lane were you in, if you
12 recall?

13 A. I was in the left turn lane.

14 Q. So if I got a closer blowup, could you
15 maybe point us out to where exactly you were?
16 This is just a zoom-in of the same intersection.
17 So this is Red Rock up here, Griffith Peak,
18 Pavilion Center.

19 Are you oriented?

20 A. Yeah. I was near where that black car
21 is, yeah.

22 Q. Where the black car -- this obviously
23 was not taken at the time in question. You and --
24 I didn't ask you, who were you with?

25 A. I was with my fiance.

005952

1 Q. Who is that?

2 A. Zach Kieft.

3 Q. What was he riding? I know what you
4 were riding.

5 A. Zach rides a Triumph Bonneville 850.

6 Q. For us persons who don't know anything
7 about motorcycles --

8 A. It's like a cafe racer. So it's not as
9 fast as mine, but --

10 Q. But you were both on motorcycles?

11 A. Yeah, we were both on motorcycles.

12 Q. And you were at the stoplight about
13 where that black car is?

14 A. And we were side by side. So he was
15 closest to the median and I was on the outside of
16 him but still in the same left lane.

17 Q. You were on the right side of him.

18 A. Yeah.

19 Q. When was it -- why don't you tell the
20 ladies and gentlemen of the jury what it was you
21 observed, and then we'll sort of boil it down from
22 there.

23 A. When we were at the red light at that
24 intersection ready to go, we observed a bicyclist
25 who was heading down Pavilion Center drive past

005953

1 the Red Rock. We observed him and a bus going
2 through the intersection, and then we heard a
3 noise. And then when I looked up, the bicyclist
4 was on the ground. And then so we went off our
5 motorcycles to go see if he was okay.

6 Q. Okay. Great. We're going to show you
7 some video. I'm going to show you some pictures.
8 Let's start with -- at some point did us lawyers
9 find you and Zach in terms of trying to figure out
10 what it was you witnessed?

11 A. Yes.

12 Q. And who was it that ultimately tracked
13 you down?

14 A. Archie, the private investigator. And
15 then Archie was in linked with you, and then you
16 came and saw us as well.

17 Q. All right. Did you ultimately come sit
18 for a deposition? And I think the date of your
19 deposition was August the 30th of 2017.

20 A. Yes, I did.

21 Q. And Mr. Kemp took your deposition?

22 A. Yes, he did.

23 Q. He had longer hair back then.

24 A. He did.

25 Q. Okay. And remember this big board?

1 A. Yes, I do.

2 Q. During your deposition, were you asked
3 to place things where -- place the bus and the
4 bike where it was you first observed them?

5 A. Yes.

6 Q. And in August you would have been about
7 four and a half months following the incident,
8 which took place April the 18th. So a little bit
9 closer in time than we are today; is that fair?

10 A. Yeah.

11 Q. Were you able to do that?

12 A. Yes, I was.

13 MR. CHRISTIANSEN: Judge, I think by way
14 of stipulation, I'd move for the admission of
15 Exhibit 462.

16 MR. ROBERTS: No objection, Your Honor.

17 THE COURT: Okay. Very good. Admitted.

18 (Exhibit 462 was admitted.)

19 BY MR. CHRISTIANSEN:

20 Q. Ms. Kolch, I'm going to put a photo up
21 on the overhead. That's a photo that was taken
22 during your deposition when you were asked to
23 place these to-scale models on this big map for
24 Mr. Kemp; is that fair?

25 A. Yes.

1 Q. Where was it that you placed the
2 bicycle?

3 A. In the bike lane.

4 Q. Of southbound Pavilion Center?

5 A. Yes.

6 Q. It looks like you placed it about at the
7 stop line?

8 A. Yes.

9 Q. Can you see from there?

10 A. Yeah.

11 Q. So pretty close to that?

12 A. Um-hum. Yeah.

13 Q. Yes?

14 A. Yes.

15 Q. And you were asked to place the bus?

16 A. Yes.

17 Q. And does the picture up there reflect
18 where you placed the bus?

19 A. Yes.

20 Q. Looks like --

21 A. In the right lane.

22 Q. The right lane. And about even or a
23 little bit behind, a tiny bit behind the --

24 A. Tiny bit behind the bicyclist.

25 Q. Did I get that close to right?

005956

1 A. Yes.

2 Q. Okay. And you are -- you and Zach, just
3 so the jury is oriented, are somewhere over right
4 about here; is that right?

5 A. In the left turn lane, yeah.

6 Q. You can kind of see the median, palm
7 fronds from the median there.

8 Why don't you tell the ladies and
9 gentlemen of the jury what you saw the bicyclist
10 doing immediately before the bus passed him.

11 A. The bicyclist was pedaling. Yeah.

12 Q. Was he pedaling straight?

13 A. He was pedaling straight.

14 Q. In the bicycle lane?

15 A. In the bicycle lane.

16 Q. And was the bus overtaking or going
17 faster than the bicycle?

18 A. Yes.

19 Q. I can see by way of an angle -- and if I
20 use Mr. Kemp's favorite little pointer thing --
21 you're sort of looking at this from a western --
22 northwesterly angle?

23 A. Correct.

24 Q. That's north to my right. That's the
25 angle by which you viewed the bus and the bike?

1 A. Correct.

2 Q. And once the bus passed the bike, were
3 you able to see the bike anymore?

4 A. No, I wasn't.

5 Q. Now, I want to slow this down with you
6 because I -- how long was it before the bus passed
7 the bike that you actually physically observed
8 both bus and bicycle?

9 A. When we were at the stoplight, I looked
10 up, and I saw the bicyclist and the bus. And I
11 saw the front of the bicycle. I could see the
12 front wheel, but I couldn't see the back wheel.

13 Q. I'll tell you the person riding the bus
14 was Dr. Kayvan Khiabani. Could you see
15 Dr. Khiabani pedaling?

16 A. I saw one leg that was bent, so yeah.

17 Q. Looked to you as if he was pedaling?

18 A. Yeah, it looked to me as if he was
19 pedaling.

20 Q. Going straight southbound in the bike
21 lane?

22 A. Yes.

23 Q. How long do you think you actually
24 looked at the bus and the bicycle before you
25 looked away?

005958

1 A. A second.

2 Q. And what was the next thing you did, if
3 I have to sort of break it down in time with you?
4 What was the next thing you looked at?

5 A. When I looked up -- since we stopped, I
6 just look around my surroundings. And then, since
7 I saw we had a red light, I looked over. I saw
8 the bus and the bicyclist. And then I looked down
9 at my gauges. And then I talked to my fiance a
10 little bit while we're waiting for our light to
11 turn green.

12 Q. Okay. Did the bike disappear behind the
13 bus from your line of sight?

14 A. Yes.

15 Q. Then what happened?

16 A. And then I heard a noise, so I looked
17 up. And then my eyes first went to the bus. And
18 the bus was already across the intersection. And
19 he was stopped. And then when I looked more to
20 the right, that's when I saw the bicyclist. He
21 was actually on the ground, and he was not on the
22 bike anymore.

23 Q. Okay. So the bus had come across this
24 intersection?

25 A. He came across the intersection. I

1 wasn't looking at them when they went through the
2 intersection.

3 Q. Understood.

4 A. When I looked back up, the bus was
5 stopped, and he was in the left lane closest to
6 that median, yeah.

7 Q. Somewhere in this area?

8 A. Right there.

9 MR. CHRISTIANSEN: May I approach the
10 clerk, Your Honor?

11 THE COURT: Yes.

12 MR. CHRISTIANSEN: These are the Pears
13 photos, Mr. Roberts.

14 (Discussion off the record.)

15 MR. CHRISTIANSEN: 218 and 219, maybe?
16 I apologize.

17 THE CLERK: I have 218 and 219.

18 MR. CHRISTIANSEN: Thank you, Ms. Clerk.

19 THE CLERK: You're welcome.

20 MR. CHRISTIANSEN: I'm avoiding the
21 PowerPoint. I'm trying to just go old school.

22 BY MR. CHRISTIANSEN:

23 Q. This is a picture that was entered into
24 evidence Friday, Ms. Kolch.

25 And it shows northbound Pavilion Center

005960

1 as Exhibit 218, Mr. Roberts.

2 And first, if I zoom in, Ms. Kolch, with
3 you, do you see the bicycle on the ground?

4 A. Yes, I do.

5 Q. Was that approximately where the bicycle
6 was after the bus went through the intersection?

7 A. I don't think anyone moved the bike.

8 Q. Okay.

9 A. It's a hard angle to tell where the bike
10 was.

11 Q. Sure. If I back out -- remember, you
12 told the ladies and gentlemen of the jury the bus
13 had stopped in the left-hand lane on the south
14 side of the intersection.

15 Do you see the back of the bus?

16 A. Yes.

17 Q. Does that -- is that consistent with
18 your recollection?

19 A. Yeah.

20 Q. And if I show you a little better angle,
21 which is what's been previously admitted as 219,
22 again, that's looking northbound --

23 A. That looks correct.

24 Q. Where the bicycle is at in 219 appears,
25 from your memory, to be where the doctor and the

005961

1 bike came to rest after the bus went through the
2 intersection?

3 A. Correct.

4 Q. And the bus is somewhere like about
5 right here from the photos; right?

6 A. Yes.

7 Q. I don't want to drop it off.

8 Ms. Kolch, were you able to see what
9 happened once the bus passed the bicyclist?

10 A. No.

11 Q. I'm sorry?

12 A. No, I didn't see anything that happened
13 once the bus passed the bicyclist; I just saw the
14 bus.

15 Q. Okay. And if I move the bus up here in
16 the left lane, the bicycle, can you tell me
17 about -- to the best of your ability to predict,
18 about where it came to rest somewhere in this
19 intersection on its side?

20 A. It was kind of near the median of people
21 turning out of Red Rock, like, in front of it.

22 Q. There?

23 A. Yeah.

24 Q. Okay.

25 Shane, can I have the Red Rock video,

005962

1 please.

2 Ms. Kolch, we're going to show you the
3 video that was obtained from the parking structure
4 on -- I guess it would have been the southwest
5 corner of the Red Rock Casino.

6 I forgot to tell you, Sam, there's a
7 little screen right in front of you. You can look
8 there.

9 (Video playing.)

10 BY MR. CHRISTIANSEN:

11 Q. Do you see the two people -- what did I
12 do with Will's pointer? All right.

13 You told the ladies and gentlemen of the
14 jury that you and Zach were on bikes. Are these
15 you two?

16 A. Yes.

17 Q. Are those two persons you and Zach?
18 Sorry?

19 A. Yes, it is.

20 Q. Go ahead and play it forward.

21 And you're on the left; is that right?

22 A. Yes.

23 MR. CHRISTIANSEN: Will you stop it
24 right there for a second, Shane.

25 (Video paused.)

005963

1 BY MR. CHRISTIANSEN:

2 Q. Do you see the water bottle from the
3 doctor's bike that's in between the palm fronds?

4 A. Yes.

5 Q. And you and Zach are still westbound on
6 your bikes at this point?

7 A. Zach is off of his bike.

8 Q. That's Zach on foot?

9 A. That's Zach near the crosswalk, yeah.

10 MR. CHRISTIANSEN: Go ahead, Shane,
11 please.

12 (Video playing.)

13 BY MR. CHRISTIANSEN:

14 Q. Did you guys say anything to each other
15 before Zach jumped off and ran over?

16 A. No. As soon as Zach saw someone on the
17 ground, Zach just got up and ran over there.

18 Q. And who's that right in the middle of
19 the intersection?

20 A. That's me.

21 Q. What caused you to run over there after
22 Zach ran over?

23 A. I'm assuming it's something that Zach
24 did that gave it away that something wasn't right.

25 When Zach ran over there, I thought the

005964

1 bicyclist was okay because I thought he was trying
2 to get up. So when Zach ran over there, I thought
3 Zach would just pat his back, make sure he's
4 feeling okay.

5 And then Zach must have, like, either
6 put his hands up or slowed down really quickly to
7 where I thought Zach probably needs more support.
8 So that's why I got up to go see what happened.

9 Q. So if I'm understanding you correctly,
10 immediately following the bus going through the
11 intersection, you saw the bicyclist on the ground?

12 A. Right.

13 Q. Tell the ladies and gentlemen of the
14 jury what you saw him doing personally, what you
15 personally observed from however many feet that is
16 there in the street.

17 A. When the bus passed and I heard the
18 noise and I looked up and I saw the bicycle on the
19 ground, I saw the bicyclist. And I thought he was
20 trying to get up. So he was laying down. And I
21 thought he was trying to get up. So that's why I
22 didn't get off, because I thought, oh, he's
23 already about to rise, he's fine.

24 Zach gets up for everyone who he thinks
25 might be injured. So Zach just ran over there.

1 And then when Zach got over there, I thought maybe
2 I was wrong.

3 Q. I take it Zach does something that, as
4 his fiance, you recognized things may be more
5 serious than you initially thought, and that's why
6 you ran over?

7 A. Correct.

8 Q. So the record is clear, because we take
9 everything down with the court reporter here, you
10 kind of moved your shoulders a little bit. Was
11 that what the doctor was doing?

12 A. Yes, that's what the doctor was doing.

13 Q. And how many times did you see him do
14 that over what period of time?

15 A. He probably moved both shoulders about
16 twice, and probably about two seconds' worth of
17 time.

18 Q. Is that as sort of Zach is running
19 across the street?

20 A. That was actually before Zach even got
21 all the way over there. When I first looked up
22 and Zach was already getting off of his bike, I
23 saw the bicyclist trying to get up. And then Zach
24 started running over there. But once he did it
25 that first initial time, he never moved again, the

005966

1 bicyclist.

2 Q. Okay. Help the ladies and gentlemen of
3 the jury understand which direction the bicyclist
4 was laying.

5 And this block has your last name on it.
6 Rather than that goofy sticky, I'm going to put
7 you right where -- is that about where you were at
8 on the map?

9 A. Correct.

10 Q. Okay. We saw the bike and how it was
11 laying. Which direction was the doctor's head
12 facing, to the best of your recollection?

13 A. The doctor's head is, like, where he
14 started, I guess, and his feet are the closest to
15 the bus. So he's laying straight in the road.

16 Does that make sense?

17 Q. Well, we'll make it make sense.

18 Are his feet -- if we use that map to
19 your right there, are his feet facing the casino?
20 Are they facing you and Zach or some other
21 direction?

22 A. His feet are facing towards the bus.

23 Q. Towards the bus which is over here?

24 A. Yes.

25 Q. More southbound?

005967

1 A. Yeah. So his feet are facing towards
2 the bus, and his head, of course, is on --

3 Q. Facing more northbound?

4 A. Right.

5 Q. So when you're viewing him, you're sort
6 of seeing him from a side angle --

7 A. A side view.

8 Q. -- as he moves his shoulders and his
9 torso sort of lifts a bit because you think he's
10 trying to get up?

11 A. Yeah.

12 MR. CHRISTIANSEN: Keep playing the
13 video.

14 (Video playing.)

15 BY MR. CHRISTIANSEN:

16 Q. And why don't you tell the ladies and
17 gentlemen of the jury what happens after you --
18 that's you in the middle of the street, Ms. Kolch?

19 A. That's me in the middle of the street.

20 MR. CHRISTIANSEN: Shane, why don't you
21 play forward and I'll tell you where to stop.

22 Why don't you stop it right there,
23 Shane.

24 BY MR. CHRISTIANSEN:

25 Q. Ms. Kolch, you see that white -- I'm

005968

1 going to call it a box truck because I don't have
2 a better term for it?

3 A. Yes.

4 Q. That truck -- did that truck stop?

5 A. That truck stopped, yes.

6 Q. And what happened? Did somebody get
7 out?

8 A. A gentleman got out who's probably mid
9 30s. He got out and he told us he used to be a
10 paramedic. And so he looked at the bicyclist who
11 was on the ground. And the first thing he said
12 was, "This will be a 50-50 chance of his
13 survival," that it would all come down to the
14 paramedics and what they could do for him.

15 Q. At about that time, is anybody calling,
16 like, 911 or something like that?

17 A. Zach is calling 911.

18 Q. And are there others -- besides the
19 gentleman who drove the box truck; yourself; your
20 fiance, Zach, are there others that are starting
21 to come around the bicyclist?

22 A. The only other people that came near the
23 bicyclist was the bus driver, who was on his cell
24 phone. And then there was what I found out later
25 is a gardener. It was just a gentleman who was

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1 recording. I didn't know he was recording, but
2 there was video of it.

3 But there was a gardener who was
4 wearing, like, a yellow shirt, I believe. And
5 then, other than that, there were just people
6 standing on the sidewalks. They never came near
7 the bicyclist, though. They just kind of watched
8 from afar.

9 Q. What, if anything, did your fiance,
10 Zach, do to assist the gentleman who got out of
11 the box truck who said he was a paramedic or had
12 some paramedic training?

13 A. Once the paramedic got there, there was
14 more bleeding happening. So I told Zach I didn't
15 really want to see it, so I left. When I came
16 back, I found out that Zach took off his flannel
17 overshirt that he had, and the paramedic used that
18 somehow for the gentleman who was bleeding.

19 Q. Okay. So I can try to stay with you
20 chronologically, you run across the street and you
21 see the doctor; is that fair?

22 A. Correct. Yeah.

23 Q. What is it you first observe before you
24 go away for a minute?

25 A. When I first went up there, I saw road

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1 rash down his arm, his right arm. And then I also
2 saw road rash that was down one of his calves.
3 And I just thought, man, that must hurt. So then
4 I looked up at his face. And first there was no
5 bleeding, but I could see that it was, like,
6 swollen around his mouth. And then -- do you want
7 me to keep going?

8 Q. Sure. You're doing great.

9 A. And then he started coughing up blood a
10 lot, and his nose started bleeding. And he
11 started, like, gurgling on his blood. And mucus
12 was coming out as well.

13 And when that was happening, that's when
14 the paramedics started arriving and talking to us.
15 And then I started noticing that there was blood
16 coming out of the doctor's ears. And then -- so I
17 told Zach I didn't really want to see where this
18 was headed. So then I left to the parking lot. I
19 didn't leave the area.

20 Q. You went back and got your bike and put
21 it in the Red Rock parking lot, or you just walked
22 to the parking lot?

23 A. I believe I went and I got my
24 motorcycle, and I moved my motorcycle to the
25 parking lot and stayed with it.

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1 MR. CHRISTIANSEN: Your Honor, I think
2 I'm getting the high sign for a restroom break
3 from one of the jurors. Mr. Kemp noticed.

4 THE COURT: I have to admonish. Okay?

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

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

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

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1 You are not to form or express any
2 opinion on any subject connected with this trial
3 until the case is finally submitted to you.

4 Let's take five minutes if everyone
5 needs a bathroom break.

6 THE MARSHAL: All rise.

7 (Jury excused.)

8 THE COURT: Please be seated.

9 Let's go off the record. Thank you.

10 (Whereupon, a recess was taken.)

11 (The following proceedings were held
12 in the presence of the jury.)

13 THE MARSHAL: All the jurors are
14 present, Your Honor.

15 THE COURT: Parties stipulate to the
16 presence of the jury?

17 MR. ROBERTS: Yes, Your Honor.

18 MR. CHRISTIANSEN: Yes, Your Honor.

19 THE COURT: Please continue.

20 MR. CHRISTIANSEN: Thank you, Your
21 Honor.

22 BY MR. CHRISTIANSEN:

23 Q. Ms. Kolch, to the best of your
24 recollection, what type of clothing -- or how was
25 the cyclist dressed?

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1 A. The cyclist was wearing very
2 professional clothing for cyclists, I guess. So
3 he had cyclist pants on -- or, sorry -- shorts on,
4 and then he had, like, a sports T-shirt on, and
5 then he had a helmet on.

6 MR. CHRISTIANSEN: Why don't, Shane, you
7 play a little bit more of this, the Red Rock
8 video. This is Exhibit 3, I believe.

9 BY MR. CHRISTIANSEN:

10 Q. Are those the people that you can sort
11 of see through the fronds standing around the
12 bicyclist?

13 A. Yes.

14 Q. And the guy in the green, is that the
15 landscaper you sort of remember?

16 A. Yes.

17 Q. Okay.

18 A. The guy in the red is the white truck
19 driver. The guy standing next to him is -- that's
20 Zach. And then the guy who just walked up in the
21 white shirt, that's the bus driver who's on the
22 phone.

23 Q. Is that Zach on the phone with the phone
24 up to his left ear, or is that somebody else?

25 A. The guy in the white shirt, that's the

1 bus driver. Zach is the one in the black top and
2 then gray pants.

3 Q. Is this about the time, somewhere in
4 here, where you say Zach called 911?

5 A. Yes. Yeah. I think the bus driver --
6 or, sorry -- the truck driver is actually on
7 Zach's phone right now talking to 911. And that's
8 me walking across the street to leave.

9 MR. CHRISTIANSEN: All right. We can
10 stop it there, if you would, Shane.

11 Shane, would you go to Exhibit 4, which
12 has been entered into evidence.

13 BY MR. CHRISTIANSEN:

14 Q. The ladies and gentlemen of the jury
15 last Friday, Ms. Kolch, saw the video that was
16 taken by the landscaper. His name is Luis
17 Sacarias. I'm simply going to play a little bit
18 for you. I know you have -- that's your
19 preference; is that right?

20 A. Yes.

21 Q. And I'm going to have the volume on
22 because that's actually -- I want you to explain
23 to the ladies and gentlemen of the jury what's on
24 that volume that led me to find you.

25 A. Okay.

1 Q. Okay?

2 MR. ROBERTS: Your Honor, may we
3 approach?

4 THE COURT: Yes.

5 (A discussion was held at the bench,
6 not reported.)

7 BY MR. CHRISTIANSEN:

8 Q. Sam, I'm just going to play the audio,
9 and I want you to tell me if you recognize from
10 your own memory the audio of what was going on
11 that day in April of last year. Okay?

12 A. Okay.

13 Q. Just the volume, no pictures.

14 A. Okay.

15 (Audio played.)

16 MR. CHRISTIANSEN: That's good, Shane.

17 BY MR. CHRISTIANSEN:

18 Q. Do you recognize in general that that
19 was sort of the conversation that was going on
20 about the time that the video depicted?

21 A. No. It sounds like it might have been
22 the white truck driver.

23 Q. At some point, you've seen the video
24 previously; is that fair?

25 A. I don't know if I've ever seen this

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1 video. I remember being told that there was a
2 video from a gardener, and in the background you
3 can hear Zach on the 911.

4 Q. Good enough. And we'll just leave it at
5 that. So I'd like to back this up to before the
6 accident and put it where you had the bus and the
7 bike.

8 They were both in their own
9 representative lanes?

10 A. Correct.

11 Q. Did you ever see the bicyclist swerve?

12 A. No.

13 Q. Did you ever see the bicyclist turn?

14 A. No.

15 Q. I'll show you what was used yesterday as
16 a demonstrative.

17 MR. CHRISTIANSEN: Can I have the ELMO,
18 Ms. Court Recorder, please.

19 BY MR. CHRISTIANSEN:

20 Q. Did you ever observe the bicyclist do
21 some type of maneuver reflected in the photo?

22 A. No.

23 Q. Was he always upright?

24 A. He was always upright.

25 Q. Always going straight southbound,

1 pedaling, to your knowledge?

2 A. Correct. To my knowledge, yes.

3 Q. Did you observe any changes in the
4 cyclist's physical condition from the moment you
5 saw him trying to move his shoulders, I think is
6 the description you gave me from when you were
7 back on your bike, until when you walked away that
8 we saw you on the video?

9 A. Yes. When I walked away and then I came
10 back later to see if me and Zach could go, which
11 was probably about three to five minutes that I
12 was gone, mainly it was just that there was now a
13 pool of blood below the bicyclist's back, and then
14 there was also a lot more swelling in the face,
15 again near the mouth, and then also on the side of
16 his face.

17 Q. Was that worse than your initial
18 observation of the doctor?

19 A. Yes.

20 Q. And I'm sorry. If you told me, I missed
21 it. The amount of time that elapsed in between
22 your first observation and when you saw the one
23 you just described for the jury?

24 A. Three to five minutes.

25 Q. Let me show you what has been entered

005978

1 into evidence yesterday as Exhibit, I think, 216A.
2 This is a picture of sort of the same area from
3 what you've described in your observation, but the
4 bicycle is over in the right turn lane as if to
5 turn into Red Rock Casino.

6 A. I never thought he was trying to turn
7 into Red Rock.

8 Q. That's inconsistent with your
9 recollection?

10 A. Yes.

11 Q. And, by the way, prior to this event,
12 did you know Dr. Kayvan Khiabani?

13 A. No.

14 Q. Or any member of his family?

15 A. No. I looked them up after the
16 accident, but before the accident, I didn't know
17 them.

18 Q. The ladies and gentlemen of the jury
19 heard last week from the gardener, Mr. Sacarias,
20 who put a Post-it on that, placed himself right
21 about there. His recollection was that the bike
22 was in the bicycle lane just like yours.

23 Did you know that?

24 A. No.

25 Q. Okay. A different person, a lady named

1 Mrs. Bradley, who's in a car behind the bus, also
2 at her --

3 MR. ROBERTS: Your Honor, may we
4 approach?

5 THE COURT: Yes.

6 (A discussion was held at the bench,
7 not reported.)

8 MR. CHRISTIANSEN: Judge, by way of --
9 plaintiff would move in 216B. I believe I gave it
10 to. If I didn't --

11 MR. ROBERTS: No objection, Your Honor.

12 THE COURT: Very good.

13 MR. CHRISTIANSEN: It's from the Bradley
14 deposition, Your Honor.

15 THE COURT: Okay. It's admitted.

16 (Exhibit 216B was admitted.)

17 BY MR. CHRISTIANSEN:

18 Q. I'm going to show you, Ms. Kolch, yet a
19 third witness, Ms. Bradley. This is by way of,
20 over no objection, 216B. She's the lady in the
21 car behind the bus.

22 Where does she place that bike? Where
23 you do, in the bike lane?

24 A. That's what it looks like.

25 Q. Did you ever see the bicyclist out of

005980

1 the bike lane?

2 A. No.

3 Q. Did you ever see him do anything
4 erratic?

5 A. No.

6 Q. But to my understanding and at this
7 angle right here, Ms. Kolch, as soon as that bus
8 goes by the bike, you can't see the cyclist
9 anymore?

10 A. Correct.

11 Q. Until the bicyclist is passed by the
12 bus, did he appear to be in control of his
13 bicycle?

14 A. Yes.

15 Q. Was he vertical?

16 A. Yes.

17 Q. Was he wobbling?

18 A. No.

19 Q. And after you lose sight of him, you
20 just don't know what happens?

21 A. I don't know what happened.

22 Q. Just to complete the circle, once you
23 move your bike, your motorbike and your new
24 motorbike, into the Red Rock parking lot, do you
25 ever go back and -- I guess you told us you did go

005981

1 back.

2 For what period of time do you go back
3 and stand with Zach and observe the cyclist?

4 A. When I went back down there, there were
5 officers there already. So there were two
6 officers, and Zach just got done talking to them.
7 So I just looked over at the bicyclist, and then
8 that's when I saw the blood pool and also the
9 swelling. And then -- and then once -- I just
10 told Zach, "Are we allowed to go?" and he said,
11 "Yeah, the officer said that we're okay to go."

12 Q. Did you observe any of the first
13 responders rendering aid to the cyclist?

14 A. No.

15 Q. About how long, to the best of your
16 recollection, Sam, did it take from what you
17 remember Zach calling 911 to when the first
18 responders arrived?

19 A. Three minutes.

20 Q. Relatively short period of time?

21 A. Yeah.

22 MR. CHRISTIANSEN: Court's indulgence.

23 THE COURT: Yes.

24 MR. CHRISTIANSEN: That concludes direct
25 examination. Thank you, Sam.

005982

1 CROSS-EXAMINATION OF SAMANTHA KOLCH

2 BY MR. ROBERTS:

3 Q. Good afternoon, Ms. Kolch.

4 A. Hi.

5 Q. And we met at your deposition last year.

6 A. Yes.

7 Q. Do you remember? Lee Roberts.

8 A. Yes.

9 Q. But we had not met or been introduced
10 prior to your deposition; right?

11 A. Correct.

12 Q. It was Mr. Christiansen that you met
13 before you were deposed?

14 A. Correct.

15 MR. ROBERTS: Your Honor, may the
16 witness step down?

17 THE COURT: Yes.

18 BY MR. ROBERTS:

19 Q. I'd like to just go over the lanes at
20 the scene with the jury to make sure we have an
21 understanding of the configuration of the
22 intersection where the accident occurred.

23 A. Okay.

24 THE MARSHAL: Mic, Counsel.

25

005983

1 BY MR. ROBERTS:

2 Q. You're over on this side of the
3 intersection, across from the casino, waiting to
4 turn left; correct?

5 A. I'm right like this.

6 Q. Okay. Right here. And you were going
7 to -- you planned to turn left; is that right?

8 A. Yes.

9 Q. So as you're looking back across the
10 intersection, the lane closest to you is a
11 left-hand turn lane; correct, ma'am?

12 A. Correct.

13 Q. And then there are two through lanes for
14 vehicles to proceed through the intersection; is
15 that correct?

16 A. Yes.

17 Q. During your deposition, you stated that
18 when you first looked across the intersection, the
19 bus was in the right through lane; is that right?

20 A. Yes.

21 Q. And that's the through lane further from
22 you; right?

23 A. Yes.

24 Q. So the through lane closest to you, you
25 referred to as the left through lane?

005984

1 A. Yes.

2 Q. Or the left drive lane?

3 A. Yes.

4 Q. And then the bus was in the right
5 through lane; is that right?

6 A. Yes.

7 Q. And then next is the --

8 A. Bike lane.

9 Q. -- bike lane. And then beyond the bike
10 lane is a right turn lane; correct?

11 A. Yes.

12 Q. Okay. When you first observed the bus
13 and the bicyclist, could you place the bus back
14 where you first observed it.

15 A. And then since I was here, when I looked
16 over, I could see the front part of his bike but I
17 can't see the back, and then I saw the bus.

18 Q. Okay. And this board was at your
19 deposition together with these vehicles; correct?

20 A. Yes.

21 Q. And the pictures that we saw were
22 pictures of the actual board and vehicles after
23 you placed them there during your deposition;
24 right?

25 A. Yes.

005985

1 Q. Okay. You can take the stand again.
2 Thank you, ma'am.

3 MR. ROBERTS: So if I can display
4 Exhibit 462, which was admitted by
5 Mr. Christiansen.

6 THE COURT: Yes.

7 BY MR. ROBERTS:

8 Q. Okay. Spin around here. Okay. And
9 this is a picture taken at your deposition;
10 correct?

11 A. Correct.

12 Q. To the best of your recollection, when
13 you looked across and saw the bike, you remember
14 it was in the bike lane?

15 A. Yes.

16 Q. And the bus was in the travel lane?

17 A. Yes.

18 Q. Your impression was they were both where
19 they were supposed to be; right?

20 A. Yes.

21 Q. Did the bicyclist appear to be right in
22 the middle of the bike lane?

23 A. Yes.

24 Q. So if the bike lane is 5 feet wide, he
25 was about 2 1/2 feet from the demarcation of the

005986

1 bike lane closest to the bus; right?

2 MR. KEMP: Your Honor, can we approach?

3 THE COURT: Yes.

4 (A discussion was held at the bench,
5 not reported.)

6 BY MR. ROBERTS:

7 Q. New question. Was the bus all the way
8 up hugging the line designated the bike lane, or
9 was it a little bit inside of the bike lane?

10 A. I don't --

11 Q. Little bit closer to you? Do you
12 remember?

13 A. I don't know that. I just remember
14 seeing them distinctly next to each other, but I
15 didn't think anything of they're close to each
16 other or anything.

17 Q. Okay. Can you give any estimate of how
18 close you believe they were when you first saw
19 them?

20 A. No.

21 Q. Okay. So, as I recall your testimony,
22 you were looking at the bus and the bicycle for
23 about one second. Is that right?

24 A. Yes.

25 Q. And within that one second, the bus had

1 moved beyond the cyclist, and so you couldn't see
2 the cyclist at some time within that one second;
3 right?

4 A. Yes.

5 Q. And then you looked down at your
6 gauges --

7 A. Yes.

8 Q. -- on your motorcycle?

9 A. Yes.

10 Q. You looked back up, and the bus was in
11 the left travel lane now, the one closest to you;
12 right?

13 A. Yes.

14 Q. So at some point while you were not
15 watching, the bus moved from the right travel lane
16 further from you to the left travel lane closer to
17 you; correct?

18 A. Yes.

19 Q. Mr. Christiansen asked you if you ever
20 saw the bicycle swerve; correct?

21 A. Correct.

22 Q. And you said no?

23 A. Correct.

24 Q. But you couldn't see the bicycle at all
25 after the bus blocked it; right?

005988

1 A. Yes.

2 Q. I'm going to show you Exhibit 219, which
3 Mr. Christiansen displayed to you.

4 Okay. And this -- you verified that no
5 one moved the bicycle that you saw after you
6 arrived at the scene; correct?

7 A. Correct.

8 Q. And if we -- right here is the bike
9 lane; correct?

10 A. Correct.

11 Q. And then we look beyond the intersection
12 and we can see the bike lane. Can you see that?

13 A. Yes.

14 Q. So is it fair to say that the resting
15 position of Dr. Khiabani and the bicyclist was at
16 least 5 feet outside the bike lane?

17 A. Yes. He was not laying inside the bike
18 lane.

19 Q. Okay. So at some point when your vision
20 was blocked, the cyclist moved from the bike lane
21 to 5 feet outside the bike lane toward the bus;
22 correct?

23 A. The bicyclist's body was not in the bike
24 lane.

25 Q. And is it fair to say, when you saw the

005989

1 resting place of Dr. Khiabani after the accident,
2 you're thinking, how did this accident take place?
3 He was in the bike lane and now he's outside the
4 bike lane, and that puzzled you; correct?

5 A. Yes.

6 Q. If I could now show you Exhibit 216A.
7 And this was a similar picture taken when a
8 different witness was moving the vehicles around
9 as to what he recalled. And this is Plantz.

10 So is it fair to say that his
11 recollection of the position of the bus and the
12 bicycle as they entered the intersection is pretty
13 much exactly like yours except he's got the
14 bicycle about 3 or 4 feet to the -- toward Red
15 Rock Casino?

16 A. Yes.

17 Q. But other than that, you would agree
18 with his recollection?

19 A. Yeah.

20 Q. I'd like to talk to you about when you
21 first saw Dr. Khiabani after the accident. And
22 you told Mr. Christiansen that he moved first one
23 shoulder and then the other shoulder, maybe twice
24 for each shoulder; is that fair?

25 A. Yes.

005990

1 Q. And when you were initially recalling
2 that, you thought he had maybe moved for a split
3 second.

4 Do you remember saying that?

5 A. Yes.

6 Q. But your best recollection now is it may
7 have lasted about two seconds?

8 A. Yes.

9 Q. A thousand one, a thousand two?

10 A. Yes.

11 Q. And after that, did you see any type of
12 movement of his shoulders?

13 A. No.

14 Q. And with regard to the rest of
15 Dr. Khiabani's body when you were observing it,
16 you saw the shoulders move. Did his arms ever
17 move at all?

18 A. No.

19 Q. Did his legs ever move at all?

20 A. No.

21 Q. Can you say, as you sit here today,
22 whether the movement of the shoulder was
23 purposeful? Or, in words you may have used, could
24 it have just been a spasm or a spaz?

25 A. I would like to say it was purposeful

005991

1 just because that was the interpretation that I
2 got from it, was I thought he was trying to stand
3 up. But, I mean, if you get hit by, like -- you
4 know, if you hit something, I'm not sure what
5 spasm would look like from the body.

6 Q. So when you thought he was trying to get
7 up, you were pretty far away from the doctor;
8 correct?

9 A. Yes.

10 Q. And you couldn't see the extent of his
11 injuries?

12 A. Correct.

13 Q. At any time when you got closer to him,
14 did you see any sign that he was responsive in any
15 way?

16 A. No.

17 Q. Were people trying to talk to him?

18 A. No. We were standing near him, really
19 close to him. And then we were saying, like, "Oh,
20 my God, that's a lot of blood," you know, stuff
21 like that. And he never, like, blinked or you
22 couldn't see anything -- any type of response from
23 him.

24 Q. No blink? No response?

25 A. I didn't even know if he'd be able to

1 hear us or not.

2 Q. On the tape I thought I heard someone
3 saying something like "Hang in there"?

4 A. Yeah. It didn't sound like Zach. I
5 don't remember anyone saying that, so that's why I
6 would think it was the truck driver, but --

7 Q. But you never saw him respond in any way
8 to anything anyone did?

9 A. No.

10 Q. Did he ever make any facial expressions
11 that would be indicative of pain from the time you
12 were first able to observe him?

13 A. No.

14 MR. ROBERTS: Thank you very much,
15 Ms. Kolch. I appreciate it.

16 REDIRECT EXAMINATION OF SAMANTHA KOLCH
17 BY MR. CHRISTIANSEN:

18 Q. Ms. Kolch, I'd just like to follow up
19 briefly and try to get the measurements right,
20 because you've got a chart next to you so we don't
21 have to guess and minimize it.

22 This bike lane, if you look over here,
23 is 4-foot-6; is that right?

24 A. Yes.

25 Q. And the first or westmost southbound

005993

1 travel lane is 11 feet?

2 A. Right.

3 Q. And the folks in the jury heard
4 yesterday that the right turn lane into Red Rock
5 is 11 or 12 feet if you count the gutter.

6 A. Okay.

7 Q. All right? The picture that Mr. Roberts
8 showed you when he said that there was only 3-foot
9 difference was from Mr. Plantz. That was 216A, I
10 believe.

11 Now knowing the measurements of --
12 you've got a 12-foot lane here, a 4 1/2-foot bike
13 lane, and then the bus, I mean, really the
14 difference between you and Mr. Plantz is closer to
15 8 or 9 feet, isn't it? Not 3 feet?

16 A. Yeah, 6 to 8 feet difference.

17 Q. Right. And you never saw Dr. Khiabani
18 try to pull this stunt, as depicted in the
19 demonstrative exhibit; correct?

20 A. No.

21 Q. No, you did?

22 A. No, I didn't see him try that.

23 Q. And just so let's try to make some sense
24 of it. If the doctor -- we'll try to use -- with
25 his bike, after the bus passes him, decides he's

005994

1 going to make this aggressive turn, where is he
2 going to go right into?

3 MR. ROBERTS: Objection. Calls for
4 speculation.

5 THE COURT: Overruled.

6 THE WITNESS: Do I answer? Oncoming
7 traffic.

8 BY MR. CHRISTIANSEN:

9 Q. Okay. So the defense's theory is he was
10 turning into oncoming traffic?

11 A. Yes.

12 Q. Across four lanes of travel and two
13 travel lanes, six lanes?

14 A. Yes.

15 Q. With a 45-foot bus next to him?

16 A. Yes.

17 MR. CHRISTIANSEN: Nothing else.

18 RECROSS-EXAMINATION OF SAMANTHA KOLCH

19 BY MR. ROBERTS:

20 Q. So, Ms. Kolch, if the bike lane is
21 4-foot-6, 6 inches narrower than 5 feet, halfway
22 in between the bicyclist would have been 2 feet
23 3 inches from the demarcation line of the bike
24 lane closest to the bus; right?

25 A. That was a lot.

005995

1 Q. 4-foot-6, halfway, that's about 2-3;
2 right?

3 A. Yeah.

4 Q. So he was at least 2 foot 3 inches away
5 from the bike lane when the bus was out toward you
6 from the bike lane; right?

7 A. Yes.

8 Q. And as the bus is pulling through the
9 intersection, he's moving further from the bike
10 lane by a whole lane; right? 11 to 12 feet
11 further toward -- closer to you?

12 A. Well, I don't know when the bus went
13 into the left lane.

14 Q. At some point between the beginning of
15 the intersection and the end of the intersection,
16 he went into the left lane?

17 A. Yes.

18 Q. Okay. So we know the bicyclist was in
19 the bike lane, the bus was in the bus lane?

20 A. Yes.

21 Q. Is it fair to say, based on your
22 observation, the bus never could have made it over
23 into the bike lane?

24 A. I don't think it's fair for me to say
25 that.

005996

1 Q. So Mr. Christiansen said he wanted you
2 to make sense of this. Can you think of any
3 reason that the bicyclist left the bike lane and
4 ended up on the ground in the bus's travel lane?

5 A. No. Something that I do think is
6 interesting is, if you look at that map, doesn't
7 it seem like the bike lane is more into the right
8 lane travel once you get past the intersection?
9 Right?

10 Like, looking at this picture, doesn't
11 it look like this bike lane runs into the right
12 turn lane? So this bus lane, if he was -- or if
13 this bike lane, if he went straight through, he'd
14 already be in the right lane.

15 So that's why it's hard to say. I mean,
16 really, it's the fault of the street. Who's at
17 fault? I didn't see what happened. But because
18 of how they did the street, you both are meant to
19 end up in the same lane.

20 Q. And I know the dimensions are a little
21 odd in the intersection. Why don't you take this
22 straight rule and put it across and see if the
23 bike lane actually does make it across the
24 intersection. Put it parallel to the travel lane.

25 A. What? Like this?

005997

1 Q. Right. Does that clarify in your mind
2 that the bike lane continued across the
3 intersection without encroaching into the bus's
4 travel lane?

5 A. I mean, I never thought it did, but
6 looking at this picture, it doesn't look like it
7 goes straight. It looks like it goes upwards.

8 Q. Okay. Thank you, Ms. Kolch.

9 MR. ROBERTS: Nothing further, Your
10 Honor.

11 MR. CHRISTIANSEN: Nothing else, Your
12 Honor.

13 THE COURT: Thank you.

14 THE MARSHAL: Any more questions?

15 We have one question.

16 That's it? Just one?

17 (A discussion was held at the bench,
18 not reported.)

19 THE COURT: All right. Ms. Kolch, the
20 jury has a question for you. And you may answer
21 it if you know. Okay?

22 THE WITNESS: Okay.

23 THE COURT: All right.

24 Was the doctor's helmet knocked off as a
25 result of the accident or was it removed by one of

005998

1 the witnesses?

2 THE WITNESS: I do not know. In my
3 deposition, they asked me if the helmet was still
4 on the bicyclist, and I don't really recall. I
5 remember seeing some balding of his head, but I
6 don't recall seeing the back side or the top part
7 of his head. But I didn't witness anyone remove
8 the helmet.

9 THE COURT: Okay.

10 Any other questions from the attorneys?

11 MR. CHRISTIANSEN: No, Your Honor.

12 MR. ROBERTS: No, Your Honor.

13 THE COURT: Thank you very much. You're
14 excused.

15 THE WITNESS: Thank you.

16 (Witness excused.)

17 THE COURT: Looks like a good time to
18 wrap it up.

19 MR. CHRISTIANSEN: Yes, Your Honor.

20 THE COURT: Tomorrow we'll start at 9:30
21 sharp. I'm going to admonish you for the evening
22 and thank you for your patience today.

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

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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 medium 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 re-create any aspect of the case, or in any other
12 way investigate or learn about the case on your
13 own.

14 You're 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 are 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 Ladies and gentlemen, have a great
23 evening. See you in the morning.

24 THE MARSHAL: All rise.

25 (Jury excused.)

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