

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 for people, right, and he wanted to become a
2 doctor and help people with whatever issues that
3 they had. And he knew that if he stayed in Iran,
4 he could do that, but it would involve him risking
5 his life, considering, like, the conditions and
6 the bombing and the shootings that were happening.

7 And so he said, "In order for me to do
8 that, and to the best I could do it, I had to
9 leave." And so he left on a backpack, and he
10 walked out of the country to Pakistan at 17, and
11 he didn't talk to his parents for two years.
12 And then , from Pakistan, he sort of figured
13 things out, that Montreal was accepting people
14 from the Middle East at the time. And so he came
15 to Montreal with no money.

16 I think he worked in a few restaurants
17 in Karachi, Pakistan, to get enough money to fly
18 over. And then he sort of just was figuring
19 things out on his own. And so he had to go live
20 in the -- he was living on his own at, I think,
21 19, in the poorer side of Montreal. He didn't
22 speak any French and not great English at the
23 time. And so he had to do what he could.

24 So I think -- so he had to kind of get
25 by. So he started working at McDonald's to get

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1 himself through and other small places. And he
2 was working night jobs and day jobs and so on and
3 so forth.

4 So he kind of came all by himself. And
5 it wasn't until he was here that he called his
6 parents. They didn't know if he was alive, if he
7 was well, or where he was in the world. So he
8 kind of called them and said, "I'm here, and I've
9 got a home, but things are still shaky."

10 Q. And "here," you mean Montreal?

11 A. Montreal, yeah.

12 Q. And it's sort of second nature to you,
13 but I had to learn about it. So would you explain
14 to the jury the French issue in Montreal, French
15 versus English?

16 A. Yeah. So Montreal is a bilingual city,
17 but the majority of it is French, and so the
18 majority of the people speak French. That's the
19 main culture -- the main language of the city.
20 There's only a small part of the city that speaks
21 English. So it's difficult -- it's difficult to
22 get by.

23 So my brother and I are going through
24 the same thing; right? We're moving there. I'm
25 17. I don't speak any French. And so that's been

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1 a serious barrier for me, like, in terms of making
2 friends, meeting people, meeting girls. Like, in
3 school and everything, like, the only class that
4 I'm flunking -- I study really hard, but the only
5 class that I'm flunking is French class. And my
6 brother too, like, he's -- that's the real
7 barrier. That's a big barrier for us right now.

8 Q. Okay. Was that a similar barrier to the
9 one your father had to overcome?

10 A. Yeah, absolutely.

11 Q. At age what?

12 A. Same age, 17, 19

13 Q. You mentioned that your dad worked at
14 some point at a McDonald's.

15 A. Yes.

16 Q. Did you recently find some proof of your
17 dad's employment?

18 A. Yeah.

19 Q. Tell us what you found.

20 A. So when my dad passed away and my mom
21 was in the hospital, I was digging through stuff
22 to find, like, love letters and stuff like that to
23 show her. I found a bunch of them, but when I was
24 looking through, he had kept the 1980s McDonald's
25 hats that he used to wear with the mesh in the

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1 back with the blue rim; right? And he had a bunch
2 of them. He had, like, 20 of them. And I still
3 have them. I don't -- I mean, he kept them to
4 show where he came from; right?

5 But, yeah, that's what I found. That's
6 how I really knew because, I mean, people had told
7 me, but I was like -- I couldn't see that, right,
8 my dad working at a McDonald's, right, to get
9 himself by.

10 Q. Was your dad proud of the path he'd
11 taken?

12 A. I think he was. I think -- I think he
13 came from nothing and he made himself into
14 something. And he appreciated the opportunities
15 that were given to him. And he took everything he
16 could get. I mean, nothing was given to him, so
17 he knew he had to go out there and get it. So
18 that's what he did. So I think he was proud of
19 where he came from.

20 Q. Help us understand your relationship
21 with your father pre mom being ill.

22 A. So my dad and I were always really
23 close, still are. And we often talked about all
24 sorts of stuff, right, whether it was sports --
25 mainly music. And he was, like, the main person

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1 in my life, right, when I'd go to him for
2 problems, whatever problems they were.

3 And it was especially at this time,
4 like, after I'd gone through most of puberty, he
5 was, you know -- he had really taken on the task
6 of, like, helping me decide my future and going on
7 and teaching me lessons of what it means to be a
8 good man and how to overcome certain things, if
9 you have an issue with a person, how to resolve it
10 in the proper way; right? All the things that he
11 learned and what every father should be teaching
12 his son. He was doing an amazing job of it at the
13 time.

14 And we were just -- you know, things
15 were really picking up and the ball was rolling,
16 and he was helping me with college applications.
17 And he was reading all sorts of books on how to
18 get from Clark or from Las Vegas into one of the
19 best schools, which is -- ultimately would be what
20 he did at my age as well. So he was helping me,
21 trying to put me in a better place for that.

22 Q. You guys live in Las Vegas. How come
23 your dad was reading books about universities?
24 Was it because they're American?

25 A. Yeah, yeah. So he was reading -- he was

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1 reading literature and books on how to get into
2 the best schools, right, so I could have the best
3 education and the best teachers, which is what he
4 did for -- in deciding how I went to Clark; right?
5 He looked at all the schools in Vegas, and he
6 said, "That's where my son's got to be." So
7 that's what he was doing for university level.

8 Q. On Friday, the ladies and gentlemen of
9 the jury listened to your mom's video deposition
10 that I took in September 22nd of last year. Do
11 you remember when we were getting ready for that?

12 A. Yeah.

13 Q. Your mom told the people on the jury
14 that your dad was a passionate guy about things?

15 A. Yeah.

16 Q. Help us, from his oldest son's
17 perspective, understand what that -- what that
18 sort of looked like.

19 A. Yeah. My dad was always passionate
20 about, like, all sorts of stuff. So he would,
21 like -- he would find a passion and totally, like,
22 dive into it. And so, from a young age, he was
23 always obsessed with music; right? He had a rock
24 band back in Iran, then he had one in medical
25 school until he met my mom.

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1 So whatever it was, whether it was,
2 like, cigars or watches or history of the United
3 States or different countries, whatever it was, he
4 really, like, dove into those topics and, like,
5 got the best out of them, whether it was reading
6 or so on.

7 He was obsessed with operas. And so he
8 would read books or get the movies or he would --
9 I mean he would never leave to go travel and see
10 them, but he would really educate himself about
11 those topics. And he would become really
12 passionate about them and really -- when you saw
13 him talk, like, you couldn't help but listen,
14 right, because he was just -- he knew so much
15 about them and he wanted to share.

16 And that was the same thing with
17 medicine; right? I think, when he was going to
18 medical school, my mom and them would bus
19 together, right, because that was -- a lot of the
20 time that they would spend together, he would tie
21 surgical knots on the metal bar that's above the
22 seat, right, when you're riding the bus, and
23 practicing. He knew he wanted to become a doctor.
24 He knew "this is what I got to do and I got to be
25 the best at it," so he would tie surgical knots to

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1 make sure they were all perfect. So he was a
2 super passionate guy.

3 Q. You said something about your dad's
4 hair. It reminded me your mom said something
5 about your dad's hair in the video deposition.

6 Did your dad immediately get on super
7 well with your mom's family?

8 A. No.

9 Q. Help us understand that.

10 A. So my mom's parents and my mom's family,
11 they're more really proper -- I guess you'd call
12 it a really proper Persian family. And so when my
13 parents started dating, my dad had super-long
14 rocker hair. He didn't look like a medical
15 student; right? He was an extremely smart guy,
16 top of his class, but he was, you know, wearing
17 the jean jackets and rocking the cool sunglasses
18 and wearing the long hair.

19 And so, at some point, my mom started
20 falling in love with my dad, so they sort of,
21 "Hey, you've got to meet my parents." And so my
22 mom was living in an apartment that my
23 grandparents could come and live, like, three
24 months out of the year to visit her. And so when
25 they were there, my dad came over for dinner.

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1 And my grandpa really sternly, like, sat
2 at the table, and he asked him, he said, "So what
3 do you intend to do with my daughter?" Imagine,
4 they'd only been dating for a few months or so, or
5 a year. And my dad was like, "We're just dating.
6 We're just talking and, you know, enjoying
7 ourselves."

8 And my grandpa didn't really like that,
9 like he wanted -- my grandpa met my grandma
10 and then got married, like, three days later. So
11 he didn't really -- that approach wasn't really
12 the old-fashioned way. And so my grandpa told my
13 dad, like, "You can't set foot in this apartment
14 again. You need to leave." Right? "You can't
15 see my daughter."

16 And so they left, they went back to Iran
17 because they lived there for most of the time.
18 And my dad abided by that. He never set foot in
19 the apartment, but he continued to see my mom. So
20 when she would have, like, graduation parties or
21 after final exams, like, he would wait outside
22 whether it was raining or something, because he
23 wasn't allowed to come in. He respected their
24 wishes because he knew he was going to marry her
25 at some point, so he was going to abide the rules

1 of her father.

2 And so he'd wait outside while they had
3 the party, and she'd come out and then they'd talk
4 outside. He never came in. But, eventually, at
5 my current guardian, right, my uncle's wedding, my
6 uncle wanted my dad to be part of the wedding.
7 And so my grandpa had issues with that, but they
8 made up. And then, to this day, they're good.

9 Q. They got over the initial --

10 A. They got over the initial bump, right.

11 Q. Tell us about your father's relationship
12 with your little brother, Keon.

13 A. So my father was always just invested in
14 us; right? I think his main role was being a
15 father and then being a doctor and everything
16 else. He was always at our practices for sports
17 or our music lessons or our shows or our school
18 plays or so on and so forth.

19 And I think, for me, as I started to
20 become more of a man, he was really teaching me
21 those lessons and he was preparing to teach my
22 brother those lessons, and he was kind of starting
23 that, but he never got to.

24 But they had a -- they had a very --
25 very tight relationship as well. I mean, my

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1 brother played drums, my dad played guitar, and
2 they played drums together. They were really
3 close.

4 Q. How about Keon and mom?

5 A. Keon and mom were arguably much closer.
6 My mom -- when he was diagnosed with ADHD, she
7 took on that role as that person who would really
8 be there for him. I mean, my dad was as well, but
9 my mom was reading all the books and seeing all
10 the doctors and getting all the tests and seeing
11 where his IQ and everything was to see how he
12 would -- what we needed to do for him, right, in
13 terms of where he needed to go to school and so
14 on.

15 So my mom and Keon were always -- were
16 always really close emotionally.

17 Q. You talked about your immediate family.
18 We've shown the ladies and gentlemen a couple of
19 pictures. I'm going to show some more in a
20 second.

21 Other than your mom and dad, did you and
22 Keon have any other family here in Las Vegas in
23 January of last year?

24 A. No.

25 Q. Your folks' anniversary, was it

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1 regularly a big deal for them?

2 A. Not a huge deal, but every now
3 and then they would express their love for each
4 other and their friends would throw a party for
5 them. But, usually, they'd keep it pretty down
6 low, but every now and then they would show it,
7 yeah, absolutely.

8 Q. All right. See if I can find -- here.
9 Let me show you just a couple pictures, Aria.

10 This is Exhibit 259C. Who's that a
11 picture of?

12 A. My mom and my dad.

13 Q. And do you know when that was
14 approximately?

15 A. Around the same time as the other
16 photos.

17 Q. You've got a monitor right to your left.

18 A. Oh, okay.

19 Q. You're free to look on either one,
20 whichever is easier. Let me show you 259D. Is
21 that a picture of your family?

22 A. Yeah. That's in -- that's somewhere in
23 Europe. I don't remember where, but I think it
24 was in Austria.

25 Q. That's you sticking your tongue out?

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1 A. Yeah.

2 Q. All right.

3 A. My mom liked selfies a lot, and my dad
4 didn't like selfies a lot, so it was a rare shot
5 of all four of us getting a selfie together.

6 Q. 259E, I'll put up for you.

7 A. That's -- that's myself, most of the
8 boys in the family, and then my dad, my brother,
9 and my two uncles.

10 Q. So let's see if we can point everybody
11 out. So the jury has only seen pictures of
12 people.

13 A. Okay.

14 Q. Who's this fellow?

15 A. That's my Uncle Siamak.

16 Q. Siamak is right there. He's in court
17 with you?

18 A. Yes.

19 Q. Siamak is the executor of both of your
20 parents' estates?

21 A. Yes.

22 Q. And your uncle?

23 A. Yes.

24 Q. Who's this boy?

25 A. That's my brother, Keon.

1 Q. This is you?

2 A. That's me.

3 Q. Who are these four fellows?

4 A. So we have --

5 Q. Start with me right here.

6 A. That's Kayvan. That's Siamak's oldest
7 son.

8 Q. Kayvan, like your dad was Kayvan?

9 A. Yeah, same name.

10 Q. Who's that boy?

11 A. That's Alec, Siamak's youngest son.

12 That's Zacharia. That's Babak's
13 youngest son.

14 Q. Who's this one, the guy right here?

15 A. That's Babak. That's my mom's older
16 brother. That's my guardian now. That's who I
17 live with.

18 Q. Babak and his wife, Marie-Claude, are
19 your guardians?

20 A. Yes.

21 Q. And, lastly, who's that boy?

22 A. That's Noah. That's Babak's oldest son.

23 Q. All right. Those are the photos people
24 on the jury have seen to date.

25 I want to show you a few more that were

007764

1 entered by way of stipulation this morning -- I
2 actually think the ladies and gentlemen may have
3 seen them in the opening statement -- and have you
4 tell us who's in the pictures.

5 259G, who's in there, Aria?

6 A. That's my dad and myself and my brother,
7 yeah.

8 Q. Would that have been about the time you
9 all made your way to Las Vegas?

10 A. Yes. My brother was born when we moved
11 here. So that would be about the time, maybe a
12 little bit after.

13 Q. All right.

14 259H?

15 A. That's again my dad and my brother and
16 I.

17 Q. Your dad's got his arms around the two
18 of you?

19 A. Yeah.

20 Q. You're small at the time. Did that
21 change over the years?

22 A. A little bit. He couldn't fit around
23 us, but he still tried. He did it every day
24 pretty much.

25 Q. I've tried to put these in somewhat of a

007765

1 chronological order. 259I, looks like you guys
2 are getting a little bit older?

3 A. Yeah, missing two teeth.

4 Q. That's you without the teeth?

5 A. Yeah. That's me on the left, my brother
6 on the right, and then my dad is in the middle.
7 Again, the same pose.

8 Q. 259J?

9 A. Yeah. That's us biking. I don't
10 remember. I think -- I don't remember where we
11 were --

12 Q. That's okay.

13 A. -- but that's me on the left, my brother
14 in the middle, and my dad on the right.

15 Q. Who is the great photographer in all
16 these pictures?

17 A. My mom.

18 Q. All right.

19 A. Yeah.

20 Q. 259K?

21 A. That's again the three of us: myself,
22 my dad, and my brother. I think we were skiing.

23 Q. And I'm terrible with ages. How old do
24 you think you are in that picture, Aria?

25 A. I'd say I'm 13, maybe.

007766

1 Q. About the age your brother was when your
2 father passed?

3 A. Yeah.

4 Q. Okay. 259L?

5 A. That's again my brother, my dad, and I.
6 We were jumping in waterfalls.

7 Q. The ladies and gentlemen of the jury on
8 Friday got to hear your mom tell stories about
9 your dad always encouraging you to take off your
10 clothes and jump in the water.

11 A. Yes.

12 Q. Is that something you guys did a lot?

13 A. Absolutely.

14 Q. Did your dad like the water?

15 A. Absolutely.

16 His rule was -- like, when we would go,
17 like, hiking some places, like, whatever body of
18 water we'd see, we had to be in it. So whether it
19 was a lake or a river or a waterfall, we'd go in.

20 Q. He was passionate about that too?

21 A. Yeah, exactly. Passionate about nature
22 and being outside and -- yeah, being with nature
23 in the mountains and the forests and everything
24 like that.

25 Q. In the family, Aria, before mom is ill,

007767

1 who's the planner of all these excursions?

2 A. My dad, a hundred percent.

3 Q. And in what fashion did your dad plan
4 things, sort of a casual, nonchalant, when we get
5 there, we'll see what's going on, or was it
6 different?

7 A. No. When we did trips, my dad had
8 everything planned so we could see the most --
9 because he was extremely passionate about these
10 countries. So he would read about all their
11 history from the time they became a country until
12 today, what was cool to see, what was fun to do,
13 what would be good for us, what would be good for
14 my mom.

15 My mom didn't always -- you know, she
16 wanted to do some girly stuff. And so he would
17 plan the trip for every day and everything. But
18 there was still a level of freedom; right? You
19 weren't stuck on this schedule, but he knew about
20 everything. He was like a personal tour guide;
21 right? He would know, oh, that's that or this is
22 that and we're here for this and so on and so
23 forth.

24 Q. All right. You talked about your mom.
25 Let me show you some pictures of your mom and dad,

007768

1 Exhibit 259M, which has been entered into
2 evidence.

3 Is that your folks?

4 A. Yes.

5 Q. In the -- just by way of a
6 demonstrative, we all saw your mom in the video
7 deposition -- and I'll just put it up, Aria, for
8 you -- September 22nd of last year.

9 Katy -- I'm sorry -- your mother had
10 short hair?

11 A. Yeah.

12 Q. How did your mom prefer to keep her
13 hair?

14 A. Long and -- yeah, long.

15 Q. And was mom particular relative to
16 her -- you called it girly stuff -- her
17 appearance?

18 A. Yes. She loved her -- if I can quote
19 her friends, she loved her makeup and she loved
20 her shoes and her hair. She always had -- she cut
21 it once, I think, when my brother was born. And
22 she didn't like it at all, so she hides those
23 pictures. She loves her long hair.

24 Q. Let me show you a few more pictures,
25 Aria.

007769

1 259N, another photo of your folks?

2 A. Yes.

3 Q. 259O. This is sort of a different pose.
4 What's this a picture of your parents doing?

5 A. This is them dancing and having a --
6 having a really good time. I remember I took this
7 photo. And so this is, like, a party they had. I
8 don't know if it was for their anniversary or,
9 like, New Year's maybe, but they were just having
10 a ball. You can see the way they're looking at
11 each other. And they were always really good at
12 dancing too.

13 Q. And the last picture I've got for you at
14 this point is 259P. They're sort of two photos
15 within a photo. Help us -- maybe you can orient
16 us as to what we're looking at, Aria.

17 A. So the photo in the white frame is a
18 photo of their wedding, and this photo was taken
19 on their anniversary. And so they're kissing on
20 their anniversary above the photo of their
21 wedding.

22 Q. So the wedding is on October the 23rd,
23 19-ish years ago?

24 A. Yes.

25 Q. And this is another October the 23rd a

007770

1 few years back?

2 A. Yes.

3 Q. Is that sort of typical of the
4 anniversary parties that you witnessed as a boy
5 growing up?

6 A. Yes. Absolutely.

7 Q. All right. Prior to January the 22nd,
8 did both your parents work full-time?

9 A. Yes.

10 Q. You started to tell the ladies and
11 gentlemen of the jury when you learned that your
12 mom was sick. Do you remember in time when that
13 was?

14 A. End of January, January 27th.

15 Q. If we use your birthday as --
16 February 2nd as a watermark, were you getting kind
17 of close to your birthday?

18 A. Yeah, within a week.

19 Q. And what does -- a young man turning 16,
20 what kind of test does a guy like you want to take
21 so you can drive?

22 A. I had my permit test that I had to take.

23 Q. How many times did you have to take it,
24 Aria?

25 A. I had to take it once.

007771

1 Q. Well, how many times did you pass it?

2 A. Once.

3 Q. How many times did you not pass it?

4 A. Twice.

5 Q. All right. So the jury heard -- or
6 watched in opening statements the speech you gave
7 at your dad's funeral here in Las Vegas. I'm
8 going to play it again for them right now. But
9 there was reference to, the day before, you
10 getting your learner's permit. And I wondered in
11 my own mind, why are you waiting until so late in
12 the day to get your learner's permit?

13 Can you help us -- did you really wait,
14 or did you sort of get forced to wait?

15 A. Funny story. So when I turned 15 1/2,
16 which is when you can go get your permit, the day
17 after I went to go get to take the test. So I
18 thought that, if I could do other stuff, I could
19 do this test without studying. And so my mom told
20 me, "You need to study," and I didn't study. So I
21 went and I didn't pass.

22 And she was, like, "How did you not
23 pass? I told you to study."

24 And then I was like, "Yeah, I didn't
25 study."

007772

1 And then two months passed, and then I
2 went to go try to take the exam again. Again, I
3 really wanted to do it without studying, so --
4 typical teenager. So I didn't pass again.

5 Then my dad said, "Okay. This day we're
6 going and you're going to pass. And that's it."

7 My mom took me the two times before, and
8 my dad was, like, this is getting ridiculous. And
9 especially my mom was diagnosed with cancer, and
10 it would be much easier if I could drive. Right?
11 My dad's at work, and she needs to go to
12 appointments and get checkups.

13 So I went to go take the test. So we
14 went to the first DMV. I think it was the one on
15 Flamingo. So we walked in. He picked me up from
16 school, and we drove like a half hour to get
17 there. We walked in, and they said, okay,
18 everything is open except for the testing units,
19 the computers. So I was ready to go home. Right?
20 I was, like, I don't have to do it today. I don't
21 have to fail again. And then he said, "No, no.
22 We're driving 45 minutes the other way to Sahara.
23 You're going to get it today," which is very much
24 my dad. Right? You're going to go; you're going
25 to get it done; we're going to get it done today.

007773

1 So we're driving over there. Now I'm
2 getting scared, right, because we've invested,
3 like, an hour and a half, two hours into me
4 getting my permit. We're going to have to get
5 there; we're going to have to wait.

6 So we get there, I go in, and I passed.
7 And that was -- that was the day before he passed
8 away.

9 Q. All right. We're going to get to that
10 date.

11 When your family learns your mom is
12 sick, what changes in the house?

13 A. I mean, we knew she was sick, but the
14 fact that my dad was there, like, we weren't --
15 the fact that nobody was scared -- right? My dad
16 wasn't scared. My dad was, "Okay. This has
17 happened. She's going to beat it." That's it.
18 And my mom was confident. Right? But my dad was
19 confident. He was taking action and getting her
20 the best treatment and so on and so forth.

21 So not much changed in that sense.
22 Right? We were still functioning. My mom was
23 still working full-time. My dad was still working
24 full-time. We're still getting picked up from
25 school. Everything was still going really well,

007774

1 and everything was looking positive.

2 Q. Okay. Did mom continue to work?

3 A. Yes.

4 Q. Have you been to your mom's office?

5 A. Yes, many times.

6 Q. After mom was diagnosed, did she have to
7 undergo chemotherapy?

8 A. Yes.

9 Q. I'm going to show you what's been
10 entered as 259F into evidence. And the jury has
11 seen it.

12 Help us understand what this is at your
13 mom's office, Aria.

14 A. That's -- that's a picture of the
15 kitchen in the office, and that's a bed that one
16 of the people who worked there made for her so she
17 could -- because she knew she had to see patients.

18 There's people who needed care, and
19 there's people who had been with her for 10 years
20 that she needed to see and she cared about them.
21 But she knew she had to rest, right, if she wanted
22 to overcome the cancer. So she would rest in the
23 kitchen and then go back to work. And this is --
24 yeah.

25 Q. All right. Now let's talk about April

1 the 18th. Where were you and what were you doing
2 when you learned that something had happened to
3 your dad?

4 A. So -- well, I was picked up from school
5 by a family friend, which wasn't abnormal, right,
6 because both my parents were working. So that
7 would happen on occasion, once a month, once every
8 two weeks. And they took me to their house. And
9 we were preparing to study for a math test that we
10 had the next day, which we were going to cram for
11 because we didn't study. We procrastinated.

12 So what happened was we went to her
13 house, and then they kind of sat me down and they
14 said, "Okay. Your dad's been in an accident."

15 And I was, like, okay. I mean, actually
16 my -- yeah, they said, "Your dad's been in an
17 accident."

18 And I was like -- I wasn't -- I wasn't
19 freaking out because I thought by "accident," they
20 meant car accident. Right? I mean, he'd been
21 rear-ended once before, like, 10 years ago. So I
22 was, like, okay. And that's all they told me.
23 That's all they knew.

24 So I immediately went, and I called my
25 brother and I asked him. He's like, "Aria, what's

007776

1 going on?" He asked me, "Do you know what's going
2 on?"

3 And I said no.

4 He's like, "Dad's been in an accident."

5 And I said, "Yeah, I know that."

6 And I was kind of confused about why he
7 was so worried, and he told me he was on his bike.
8 That's when I realized, okay, it was something --
9 something serious.

10 And so I told him -- he was with my
11 dad's parents at home. So he told them, "I gave
12 them, like, a fidget spinner and stuff to keep
13 them calm." These are toys for ADHD, so he gave
14 it to them to keep them calm.

15 And so then he said -- he's like --
16 he's, "Okay. We'll figure out what's going on."

17 So I called my mom. My mom answered.
18 She was calm. Right? Her voice was stable.

19 And I was, like, "Okay. Well, can I
20 speak to him?" I was like, "Is everything okay?"
21 It's, like, dad went to the hospital. I said,
22 "Can I speak with him?"

23 She's like, "No, no, no. He can't speak
24 right now. Talk to you later."

25 I was like okay.

007777

1 And it just kind of progressed from
2 there. I just kind of hung out at the house for a
3 little while. I told my grandparents -- talked to
4 them on the phone. They don't speak English, so I
5 was speaking in Farsi with them, trying to let
6 them know.

7 Because they were at home, and they said
8 bye to my dad, but he never came back. They were
9 the ones who -- they were like, well, he's been
10 gone for three hours. This is not normal.

11 Yeah, that's kind of the progression
12 of...

13 Q. At some point, who sort of organizes the
14 scene where you and your brother talk to your mom
15 about what's occurred to your father?

16 A. My mom? We were brought into another
17 family friend's home. And there my mom said we'll
18 talk about it later. So we went there, and we saw
19 my mom. And she greeted us like usual. I mean,
20 obviously, it was quiet. You could feel there was
21 something, like, in the air.

22 And then she said, "Okay. We need to
23 sit down". So we sat down on the couch. There
24 were other people in the house, and they kind of
25 gave us privacy. And it was then that she told

007778

1 us.

2 Q. What did she tell you?

3 A. She said, "Your dad has been in a bike
4 accident and didn't make it."

5 And then-- I have an essay that I wrote
6 for English class about what my body went through
7 when it happened.

8 Q. Would that maybe be easier than talking
9 about it --

10 A. Yeah.

11 Q. -- reading what you wrote?

12 MR. CHRISTIANSEN: May I approach,
13 Judge?

14 THE COURT: Yes.

15 BY MR. CHRISTIANSEN:

16 Q. Rather than having you describe it, you
17 wrote an essay for school?

18 A. Yeah.

19 Q. Would you prefer to read that?

20 A. Yes. So my English teacher told us --
21 asked to write a narrative about something that
22 had happened to us.

23 MR. CHRISTIANSEN: Aria, before you do,
24 Judge, Mr. Barger would like to approach, I think.

25 THE COURT: Certainly.

007779

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

3 THE COURT: Just going to go off the
4 record for a few minutes. If you need to stand up
5 and stretch or anything like that, please feel
6 free to do so.

7 (Discussion off the record.)

8 MR. CHRISTIANSEN: Judge, I think we're
9 ready whenever the Court is.

10 May I proceed, Your Honor?

11 THE COURT: Absolutely. Are we back on
12 the record?

13 BY MR. CHRISTIANSEN:

14 Q. All right, Aria. Go ahead and read what
15 it is you wrote for school to describe that day.

16 A. So it's titled "The Silence of the
17 Sight."

18 "My skin began to burn. The feeling of
19 a searing metal so close to my skin that my ears
20 would begin to melt. My ears began to ring.
21 Thoughts crashed like waves directed on a single
22 concentrated area, creating an overload of
23 incomprehensible signals. My body began to shake.
24 A traumatic state of agony. Temples throbbing,
25 though my fists could not remain still. My eyes

007780

1 immediately filling with a salty fluid that would
2 drip onto my lower lip, finding its way out to my
3 parched taste buds. Although I was seated on the
4 old tea-stained couch, I could no longer feel my
5 feet on the rug, my back against the pillow. I
6 felt as though I was falling, falling through the
7 carpet.

8 "My alarm went off three times, but I
9 never heard it. My mother walked in and opened my
10 blinds, her usual method of quietly but
11 effectively waking me up. Like any other day, I
12 woke up and took my time getting dressed. Once
13 dressed and groomed, I proceeded to go downstairs
14 to prepare to leave. After saying good-bye to my
15 father's parents, who were visiting from Iran, and
16 kissed my mother, I jumped in the car ready to
17 take on the day.

18 "I was more lively than usual. The
19 thrill of receiving my drivers permit the day
20 before had not yet rubbed off. On the way to
21 school, like every other morning, my father and I
22 had one of our very common 20-minute-long
23 conversations about what was going on in the
24 world. With the sunrise ahead of us and the
25 silence of the city at 6:30 a.m., we had a very

1 peaceful commute.

2 "Once at the school, I said good-bye and
3 went to my first class. The bell rang, and the
4 halls flooded with 3,000 students. Being one of
5 them, I pushed my way through the bevy of angsty
6 teens to the classroom in which my club was
7 meeting. During the meeting, I received a text.
8 The text message came from a classmate and a very
9 close family friend. She was offering me a ride
10 home.

11 "After my club's meeting, I headed out
12 to the front of the school and met my friend and
13 older sister. The ride offered by my peer was not
14 a surprise. It happened frequently on days when
15 my club met. They mentioned that I was heading to
16 their home to do homework and study with their
17 daughter. We were in the same math class, and we
18 had an exam scheduled for the following day. Once
19 at their home, I set up my study materials to
20 prepare for the long night of cramming that
21 awaited me.

22 "Before diving in, sister told me that
23 she had something else to tell me. 'Your father
24 has been in a car accident,' the older sister told
25 me with the utmost solemnity.

1 "My initial reaction, a laugh. I began
2 to laugh at how it was possible that a God or a
3 universe could put my family in such a position,
4 how my mother could have had a metastasizing set
5 of rogue cells and a husband who has wrecked his
6 car in an accident. Despite this, I was not too
7 worried. My father had been rear-ended before,
8 and it only ever ended with repairs in a car shop,
9 never a hospital.

10 "Being away from home, I immediately
11 called. My brother, flustered, answered the phone
12 and asked me where the hell I was. He asked me if
13 I knew what was going on. I respond with a 'Yes.
14 Dad has been in a car accident.'

15 "My brother, after a silence so
16 deafening, responded, 'He went for a bike ride and
17 hasn't come back yet.'

18 "I began to run through every possible
19 and impossible stream of events that could have
20 occurred. My brain went into overdrive while my
21 voice remained calm. I spoke to my father's
22 parents, being bombarded with questions about his
23 current state. These questions I could not answer
24 with the very questions my mind had been answering
25 on its own. My mind had created hundreds of

1 answers to tens of questions that were burning
2 holes in the minds of my family members. None of
3 these answers were correct.

4 "I wanted to speak to him. I dialed my
5 mother. She answered like she would any other
6 day. After hearing the stability in her voice, my
7 heart rate eased. She told me he was not able to
8 talk now, but she would call me back soon.

9 "I spent the next hour on the phone with
10 my brother and grandparents, making sure to keep
11 everyone calm. I spoke to them about my day and
12 asked to hear about theirs. I made sure to keep
13 their minds from wandering to precarious places.
14 Wandering was the worst thing we could do.

15 "I was taken to a neighbor's home, along
16 with my brother, to see my mom. As I arrived, I
17 was welcomed with hugs and kisses from family
18 members. My brother and I walked up the driveway
19 and to the front door. Without knocking, we
20 walked in through the front door that was already
21 left ajar.

22 "Through the caliginous hallway, we
23 walked together with my mom in the kitchen. She
24 greeted us both with a hug, as she always did.
25 Guiding us to the old tea-stained couch, she

1 wanted to speak to us. As people entered the
2 home, the sight of three of us alone on that couch
3 brought them to tears. My mother began to speak
4 with an arm around us.

5 "My skin began to burn."

6 Q. Did you write this essay close in time
7 to when you went through this?

8 A. I wrote this essay about three weeks
9 ago, four weeks ago.

10 Q. Does it fairly and accurately reflect
11 sort of your memory of that bad day?

12 A. Yeah. I couldn't forget it.

13 Q. Now I want you to, if you can, tell us
14 what you observed your brother go through that
15 day.

16 A. My -- my brother -- so he got home from
17 school. He was picked up. He didn't -- he was
18 picked up before me. And when he got home, my
19 grandparents told him, "Where is your dad? He
20 hasn't come back yet."

21 My brother doesn't speak much Farsi, but
22 he understood enough and he was confused. And so
23 he called my mom. And I think he spoke to her
24 briefly, and she told him, like, "Oh, your dad's
25 been in a bike accident, but don't worry.

1 Everything is okay."

2 So he wrote a letter to my dad, like a
3 page letter, telling him that -- how he hopes
4 everything is okay. He's going to speak to him
5 later. Tell him about the day, how everything is
6 going, and hopes -- he's fine and that everything
7 is good and that he's taking care of his parents,
8 that his parents -- he doesn't have to worry about
9 his own parents, that he took care of them. He
10 gave them his little toy that keeps people
11 distracted.

12 And then my brother -- my brother and I
13 met at the home. And he -- he -- he couldn't take
14 it.

15 Q. Okay. How old was Keon?

16 A. 13.

17 Q. About the age that one picture I put up
18 of you?

19 A. Yes.

20 Q. And when you say Keon couldn't take it,
21 help me understand what that means.

22 A. It's hard to put into words, but he --
23 he already -- he started having trouble in school,
24 more trouble than he used to with his ADHD. He
25 had trouble with his friends. His friends didn't

007786

1 know how to approach him.

2 He was having problems at home. He was
3 just -- he just didn't know -- he would dive into
4 video games, which is what he spent most of his
5 time doing.

6 I told him, "You should stop playing so
7 much video games because it's just not good for
8 you."

9 And he's like, "That's the only thing
10 that could take my mind off of it."

11 For me that was music, but for him it
12 was going into a different world and playing a
13 different character.

14 So that's what he did when he -- he
15 was -- he struggled with it, and he's still
16 struggling with it. I don't think he's -- yeah.

17 Q. We saw your speech. The judge let me
18 play it for the people in the jury during opening
19 statement.

20 The letter that you're referring to, is
21 that the last, sort of, part of your speech?

22 A. Yes.

23 Q. And who's standing next to you and
24 what's he doing during that speech?

25 A. We asked my brother -- when they asked

007787

1 me if I wanted to speak at my dad's funeral, I
2 said yes. They said, "Can you ask your brother if
3 he wants to speak?"

4 I asked him, and he said, "No. But just
5 read my letter. I'll come up with you."

6 So he came up with me. I gave my
7 speech, which you heard, and then I read his
8 letter. He was fidgeting with his hand on the
9 side and he was crying his eyes out.

10 Q. You told us about yourself. You told us
11 about your brother.

12 Mom. Tell us about your mom.

13 A. My mom -- there's so much to say. She
14 was the most caring person I'd ever met, like,
15 ever, whether it was in books, in movies, or in
16 real life. And that -- that always confused me at
17 how somebody could be so -- so kind, because -- I
18 mean, at this point I was just being exposed to
19 the world and seeing all the sorts of terrible
20 people there are in the world out there.

21 And I was, like, how is somebody so
22 kind? She never judges anybody and she cares so
23 much about her patients that she'd go in on
24 weekends, on Saturdays, on Sunday nights. Like,
25 during the middle of dinner, she'd get a call and

1 she'd go.

2 And that was the main thing that stuck
3 out to me about my mom, was her ability, when
4 she'd see somebody, to not judge them. And she
5 always told me -- I spoke about it in my speech at
6 her funeral -- that, like, when you see somebody
7 on the street, don't judge them.

8 And I always said people -- we judge
9 people. Right? That's just what we do as human
10 beings, or even as animals. Like, you judge
11 people. You have perceptions of them based off of
12 what they're doing at the time or what they're
13 wearing or if somebody cuts you off on the
14 highway, you immediately think, oh, wow, what a
15 mean person. But maybe they're in a rush to go do
16 something that's much more important or so on and
17 so forth.

18 So she always taught me these lessons,
19 and we'd often get into arguments about how I
20 should never judge anyone. And sometimes I'd say,
21 "Well, that's just what humans do."

22 But she was always able to keep her eyes
23 open, and she never -- she's the only person I've
24 ever met who doesn't have any enemies. Everybody
25 loved her. Everybody who I met loved -- even

007789

1 people who did bad things to her, took advantage
2 of her, she still -- she never wanted revenge,
3 never wanted anything bad for them.

4 Q. Okay. That's your mom generally?

5 A. Yeah.

6 Q. Tell us what you observed the night she
7 had to tell you and your brother your father had
8 passed.

9 A. She -- after she told us, we went into a
10 room, a bedroom, in the same house. And we
11 just -- I mean, I was freaking out. Not openly,
12 right. I wasn't, like, running in circles. But
13 in my mind, I was just in overdrive, and my
14 brother, the same thing. We were kind of talking
15 to each other but not really talking to each
16 other.

17 She had known for longer than we had,
18 but she -- I mean, she -- she held together on the
19 outside, but I could tell on the inside she was
20 falling apart. The one person she had been with
21 her whole life, you know, is gone now in the time
22 that she needs him most. So she -- like she'd
23 often sleep with his T-shirt at nighttime and all
24 sorts of stuff.

25 Q. Explain if you would -- the time your

007790

1 dad passes, mom is going through chemotherapy?

2 A. Yes.

3 Q. Before your mom -- before your dad
4 passed, who took your mom to lots of her doctors
5 appointments?

6 A. My dad.

7 Q. Dad is a doctor; right?

8 A. Yes.

9 Q. What was the family -- I think you told
10 us -- the family's outlook was generally positive?

11 A. Yeah. My dad -- my dad wasn't -- wasn't
12 worried. He took care of the situation. "We're
13 going to get you the best treatment." Just like
14 he was passionate about cigars or operas or my
15 college education, he became passionate about
16 helping my mom and making sure she got better.
17 That's what he spent his time doing. Reading,
18 seeing people who were in the same age group, who
19 had the same genetic makeup, what's happened to
20 them, and what he could do to help her.

21 Q. Supportive?

22 A. Yes. Extremely.

23 Q. Did you have a chance, after your father
24 passed away, to see how the lack of his support,
25 his absence, affected your mother?

007791

1 A. Yes.

2 Q. Help us understand -- none of us were
3 there, Aria, so help us understand how it affected
4 your mom.

5 A. My mom and my dad, it was -- like I
6 said, they were a good team. Right? They bounced
7 off each other with everything. Right? No one
8 person did everything alone. And so everything
9 they did as a family and everything we did
10 together was all a joint decision between the two
11 them.

12 And especially when you have to make
13 huge decisions about who's your doctor, what kind
14 of chemotherapy you're getting, what's going to
15 happen in the future, you know what I mean? You
16 know, like, all those big decisions that happens
17 when somebody is diagnosed with stage 4 cancer,
18 she needed him, and she -- they were always
19 together and they were always making decisions
20 together and they were always real good at that.

21 And my dad, after she was diagnosed, the
22 only thing that kept her positive was my dad being
23 there and being, okay, this is all working well.
24 Everything was going well. So we weren't worried.
25 Although she was stage 4, she was -- she was doing

007792

1 amazing. Right? She was still able to work.

2 She was -- every day she was getting
3 better. And my dad was there to keep kind of the
4 energy going in the house to make sure everything
5 was still flowing the same way, to make sure that
6 nothing skipped a beat. Right? He was there to
7 make sure everything was working.

8 And then when he wasn't there, like,
9 none of us -- none of us knew what to do. Right?
10 Not because we all depended on him, but we all
11 depended on each other. So when one piece is
12 missing, especially in a time when you need all
13 the pieces there and working all together, it made
14 it extremely difficult.

15 Q. Did your mom grieve privately?

16 A. Yes. Well, my mom felt that she needed
17 to -- she needed to hold it together for me and
18 Keon. And she felt that she -- she had to hold on
19 and fight for me and my brother. But -- so most
20 of her grieving was done in private, but you'd
21 catch her every now and then on the couch or when
22 she was doing something or on her way or driving
23 or see something that reminded her of him, yeah,
24 she'd cry.

25 Q. Sound like prior to your dad's passing,

007793

1 he offered a lot of support and comfort to your
2 mom. Is that fair?

3 A. Absolutely.

4 Q. Did you have a chance to observe your
5 mom without that support and comfort after your
6 dad passed?

7 A. Yes. After my dad passed, my mom -- my
8 mom needed that support and comfort. And she was
9 getting it to some extent from me and my brother
10 and all her friends and community. It was -- I
11 mean, the people who came when they heard what
12 happened, it was -- it was insane.

13 And they were offering so much love and
14 support, but nothing could ever match what my dad
15 would have given her and what he was giving her.
16 And you could tell she wasn't the same person.

17 And then slowly, after time went by, her
18 health started to decline because, I mean, she
19 needed somebody there with her, right, like she
20 had her whole life, my dad. And even when she was
21 diagnosed, the months leading up to before he
22 died, everything was working out well because he
23 was there. And then, after, when he wasn't,
24 everything went to hell.

25 Q. Did your mom keep a piece of your

007794

1 father's jewelry on her after he passed?

2 A. Yes. She wore his wedding band on her
3 neck, a necklace.

4 Q. Aria, you told me about your brother and
5 your mom. How did you grieve?

6 A. I -- I mean -- when my dad passed, I'm
7 the oldest son. So I had -- I took on the role in
8 the family as the man of the family. And I felt
9 that I had to hold it together. As long as I was
10 holding it together, my mom could hold it
11 together, my brother could hold it together, my
12 mom's parents could hold it together, my dad's
13 parents could hold it together, everything would
14 be fine. And so that's what I had to do on the
15 exterior; right? So I very, very rarely cried in
16 the open; privately and through music.

17 Q. I'm not musically inclined, so help me
18 understand how one grieves through music.

19 A. So I play multiple instruments. I play
20 guitar -- mostly guitar and piano, violin, drums,
21 bass. And I listen to a lot of music. I listened
22 to a lot of music with my dad and he influenced my
23 tastes, but also we butted heads on a lot of
24 stuff.

25 But I ended up listening to a lot of

007795

1 music and recording a lot of music. And I
2 recorded a lot of songs, not necessarily they had
3 vocals or lyrics, but just a lot of guitar songs
4 or piano songs, and so on and so forth, to kind of
5 help me express what I needed to express because
6 there's no words in English, right, to express
7 what you feel. And music, it's like, for me, was
8 the channel. Like, for my brother, it was
9 something else. For my mom, it was something
10 else. But, for me, that's how I did it, and how I
11 continue to do it.

12 Q. Your dad passed in April of last year.
13 The next window of time is -- if I -- we'll do
14 this. Why don't I just use the day of your mom's
15 deposition, September 22nd. This is just a photo
16 from the video the ladies and gentlemen of the
17 jury saw on Friday. It is about 20 days before
18 your mom passed away?

19 A. Yeah.

20 Q. Physically, how is your mom doing at
21 this time?

22 A. I mean, you can see she doesn't look the
23 same as like she used to in the other photos with
24 my dad and with us. And she was -- she was
25 starting to get really tired and fatigued and

007796

1 couldn't do as much, which frustrated her because
2 her whole life she was somebody who was always
3 doing stuff; right? Whether it was as a mom, as a
4 wife, or as a dentist, or as a friend, she was
5 always actively doing things; right? She could
6 never just sit. And that can get hard for her.
7 She couldn't do things. She would get tired
8 halfway through the day and she would have to take
9 a nap, which she never had to before.

10 Q. At some point in time, sort of towards
11 the end of September, did your mom have to go to
12 the hospital?

13 A. Yes.

14 Q. Around that time, what discussions, if
15 any, did your mom have with you and your brother
16 about your future, you and Keon, what was going to
17 happen to you?

18 A. She -- she spoke to us about what the
19 plan would be if she passed away, which was not an
20 easy conversation. You can imagine, right?
21 Because, at that point, I was not thinking it
22 would be anytime soon and neither was my brother.

23 And so she -- I mean, it was pretty
24 cool. She involved us in the planning of what
25 would happen to us. Usually, I guess, most

007797

1 parents would sign a document and say, okay, this
2 is what I want for my children. But she involved
3 us in that conversation.

4 So she said, "Well, Babak and
5 Marie-Claude are going to be your guardians.
6 You're going to move to Montreal," and so on and
7 so on.

8 Q. Did you want to pick up in the middle of
9 your junior year and move to Montreal?

10 A. No.

11 Q. Where did you want to finish school?

12 A. I wanted to finish at Clark High School.
13 And I honestly fought for that, but I really,
14 really tried to make that work to make sure I
15 could stay at Clark. That's where my parents
16 wanted me to go, that's where they set it up, and
17 that's where I thought would be the best place for
18 me.

19 I was trying to get into one of the
20 hardest schools to get into in the world, and I
21 had set up, like, my teachers and who was going to
22 write my letters of recommendation and when I
23 would take my SATs. I was really studying really
24 hard. And so that was all, like, planned. My dad
25 helped me plan that. I didn't want to throw that

007798

1 away and move to a different country and start at
2 a new school because they have a different
3 education system there. But that's where I wanted
4 to finish, and that's where I still want to
5 finish, but it just didn't work.

6 Q. Part of your desire to finish at Clark
7 have something to do with that's where your dad
8 wanted you to go?

9 A. Yes. Absolutely.

10 Q. And you said you fought. Knowing you a
11 little bit, was it more of a healthy debate?

12 A. Yes. Oh, absolutely. I mean, the fact
13 that my uncles even let me look at the options and
14 let me talk to them about it like I was a real
15 adult was really good for me. Because I was,
16 like, okay, we can make the decision together
17 versus somebody is making it for me, which is what
18 my mom ultimately wanted for us.

19 Q. How about Keon? Did you get to observe
20 what Keon had to sort of process through upon
21 realizing your mom might not make it?

22 A. He -- he had a hard time coming to the
23 realization. Like, he had a hard time facing
24 that -- that this was going to happen. He didn't
25 want to believe that this was going to happen,

007799

1 that he was going to move. I mean, he had just
2 started high school, and being a freshman in high
3 school with 3,000 kids is not easy. And he had
4 just started to make friends and meet girls and so
5 on.

6 And he had -- and then the whole thing
7 was coming to him that, oh, I might be moving
8 soon. I might have a completely different life.
9 I'm going to be speaking a different language in a
10 different country and living in a different home
11 with different parents. Like, all of that at one
12 time was too much for a kid like him to handle.

13 Q. When you say "for a kid like him," does
14 Keon outwardly express emotions differently?

15 A. Yes.

16 Q. You're his big brother. Tell me how he
17 does it.

18 A. He's a very complex individual. He -- I
19 can't even fully understand it. And my mom and my
20 dad had a hard time, and his teachers and his
21 friends have a hard time understanding him. But
22 he has a very difficult time handling grief and
23 pain and everything like that.

24 And so whether it's physical or
25 emotional, he channels it through anger; right?

007800

1 He'll get angry, and he'll put that anger into
2 something else because he doesn't want to yell at
3 someone or do something. So he'd go on his drums
4 and bang it out, or he would play his video games
5 and so on. I could tell he had trouble because he
6 didn't know how to talk to someone about it. He
7 didn't have somebody he could talk to about it.

8 He wanted to talk to my mom about it,
9 but he thought, "If I talk to my mom about it,
10 it's just going to remind her of the pain," and so
11 on and so forth.

12 MR. CHRISTIANSEN: Ms. Court Recorder,
13 can I have the control to my side, please.

14 Shane, can you show me the Keon clip,
15 please.

16 (Video played.)

17 "QUESTION: Tell me to the extent you can
18 what you went through when you learned your
19 father passed.

20 "ANSWER: It was really hard for me. I
21 just, like, couldn't believe what happened.
22 It was just, like, what the hell? It was so,
23 like -- it was so surprising."

24 MR. CHRISTIANSEN: That's good, Shane.
25

007801

1 BY MR. CHRISTIANSEN:

2 Q. That's a clip the jury got to hear of
3 Keon last week. As his big brother, what's that
4 saying to you?

5 A. He's -- he's all cried out. He's -- he
6 doesn't know what to do -- he doesn't know what
7 else to say. He's just beyond -- beyond any of
8 that.

9 Q. Did Keon ever have blond hair before
10 your parents passed?

11 A. No.

12 Q. That depo was taken November the 3rd, so
13 about three weeks after your mom passed?

14 A. Yep.

15 Q. Help us understand the last few days of
16 your mom's life, Aria.

17 A. So my mom was taken to the hospital, and
18 my brother and I were told that she was being
19 taken for a test. And then she never left after
20 the test. So we were -- I slept in the hospital
21 for one or two nights. It's a string of a blur of
22 not comprehending what's going on; right?

23 You're in the hospital at 17 with your
24 14-year-old brother and, like, everybody is flying
25 in from everywhere. You're kind of confused.

007802

1 And, basically, it took me a few days to hit me,
2 but I understood that it's either going to
3 happen -- she's going to pass -- she could pass in
4 the next hour or the next three days or the next
5 two weeks.

6 And I didn't comprehend that at the
7 time. Like, I couldn't -- I knew I had to do
8 certain things because I knew I had to do them,
9 but I didn't know why I had to do them. And those
10 certain things were I went back to the house and
11 I'd dig through a bunch of stuff. I wanted her to
12 see old letters, pictures, like my dad's diploma,
13 her diploma, pictures of them together, love
14 letters written back and forth, all that sort of
15 stuff, the McDonald's hat, all that sort of
16 things, right? I mean, ultimately, she's
17 preparing to go with him.

18 So it was -- it was, like, days of not
19 sleeping and sort of sleeping during the day and
20 so forth. And I wasn't in school. And the family
21 was coming in. People were flying in from all
22 over the world. And I was told by my mom, she
23 said, "Call these people. I want to say goodbye
24 to them."

25 And that was the toughest thing because

007803

1 I had to make phone calls and tell people, "You
2 need to come." So people drove, they flew. And
3 it was just -- like, looking back at it, it was
4 just a blur. It was -- it was extremely
5 difficult.

6 Q. We heard from your aunt, Marie-Claude,
7 last week via her videotaped deposition that, at
8 times, she even slept with your mother at the
9 hospital. Do you recall that?

10 A. Yes.

11 Q. Physically, what was your mom going
12 through?

13 A. I don't know the medical terms, but I
14 can tell you what I saw. I mean, she was thinning
15 in the face. I had never seen her look like that.
16 And her hair was thinner than what you saw there.
17 She had, like, a yellowish tint in her eyes from
18 some sort of chemical or something in her body.
19 She had all these tubes tied up to her. Her legs
20 were bloating, they were growing. They were,
21 like, three times their size. And she couldn't
22 move.

23 So she had -- I mean, seeing your mom
24 like that, somebody who you had seen your whole
25 life who was working out, running, doing all sorts

007804

1 of stuff with the family and enjoying that, was
2 really difficult to see.

3 Q. In your mind, had your dad been around,
4 how would things have been different? Not
5 physically; I don't want to talk about that. How
6 would the dynamics of your family have been
7 different had your dad been there to go through
8 this with your mother?

9 A. I think -- I think she would have been
10 in a much better place knowing that he was there
11 with her; right? Because she -- ultimately, she
12 wanted that. She was wearing his ring. She had a
13 bunch of pictures of him in the room. And she was
14 trying to mimic or create the environment of him
15 being there, right, although he couldn't be there.

16 So -- right? She had her wallet,
17 pictures on her phone. She would go through them
18 every day and so on. And so I think my dad being
19 there would have helped her mental state. I'm not
20 sure about physical. I mean, I'm pretty sure she
21 would have done much better than she would have if
22 he was there, but in terms of mentally and the
23 family dynamic, everything would have been much
24 stronger.

25 Q. Aria, what day did your mom pass?

007805

1 A. October -- October 12th.

2 Q. Early morning hours, sort of right after
3 the midnight hour?

4 A. Yes.

5 Q. Before your mom passed, you talked --
6 the ladies and gentlemen of the jury heard your
7 mom explain that there were some documents you and
8 your brother got to read and sign. Is that what
9 you were referring to as being pretty cool that
10 your mom involved you with?

11 A. Yes. Those documents were the list of
12 20 or so things that would happen in case she
13 passed away, who the family trust would go to,
14 where we would live, who would take care of us,
15 where we'd go to school, all those decisions.

16 Q. After your mom passes, we know the
17 order -- which I may not have covered with you,
18 Aria.

19 Back when your dad, in April, dies, the
20 funeral that we saw your speech of was from Las
21 Vegas. Was that the first service?

22 A. Yes.

23 Q. Where did you bury your father? I'm
24 sorry. I forgot to ask you that question.

25 A. In Montreal.

007806

1 Q. Did you have another service for your
2 dad in Montreal?

3 A. Yes.

4 Q. Jump forward with me to October. Your
5 mom passes on the 12th. What's the order of the
6 services for Katy, for your mother?

7 A. We did the reverse. So we did Montreal
8 service first and then we did a service in Las
9 Vegas.

10 Q. Do you remember in time when the
11 Montreal service was from the time she passed
12 away?

13 A. I don't remember exactly, but within a
14 few days.

15 Q. Marie-Claude, your aunt, told the jury
16 on the video that she recalled taking -- her and
17 Alicia taking their eight kids and then you, Babak
18 and Siamak and your brother showing up the next
19 day with suitcases to Montreal.

20 Do you remember that?

21 A. Yes.

22 Q. What was it like to pack a suitcase and
23 leave your house?

24 A. I mean, everybody moves in their
25 lifetime, but moving under these circumstances

007807

1 was -- I mean, again, like, I'm in shock the whole
2 time; right? I'm like how -- like, six months
3 ago, right, my dad passed away and now I'm flying
4 to a different country to live there.

5 I mean, I was in disbelief. I was -- I
6 was just doing stuff by doing stuff. I wasn't
7 even like -- it was -- I can't really even explain
8 what it was like.

9 Q. Were those the first words you uttered
10 in the speech at your mom's funeral in Montreal,
11 "six months ago, I was standing here doing the
12 same thing"?

13 A. Yeah.

14 Q. Where did you bury your mom?

15 A. Right next to my dad in Montreal.

16 Q. I'm going to show you what's been
17 entered by way of stipulation as Exhibit 118.

18 MR. CHRISTIANSEN: Ms. Court Recorder,
19 can I have back the ELMO. I'm sorry. That's my
20 fault. Sorry about that.

21 BY MR. CHRISTIANSEN:

22 Q. What's that exhibit, Aria?

23 A. That's my mom and dad's headstone.

24 Q. At the Mount Royal Cemetery in Montreal?

25 A. Yes.

007808

1 Q. Buried next to each other?

2 A. Yes.

3 Q. Let's talk about -- so when you arrive
4 in Canada with the suitcases, as we heard from
5 Marie-Claude and you, did you -- was it to stay?

6 A. Yes.

7 Q. How does an American citizen go about
8 getting into a Canadian school?

9 A. It's probably one of the most difficult
10 things to do. So coming from the U.S., the
11 Canadian high school system is different. They
12 finish in 11th grade and not 12th grade.

13 And every student is bilingual, so you
14 speak English and French. And so we only speak
15 English.

16 And every student, at the end of their
17 high school career, has to take certain exams,
18 certain tests, right, in order to pass, get a high
19 school diploma. I mean, I was planning on getting
20 a high school diploma in the states, but things
21 didn't work out. And so I had to take -- I had to
22 take five exams that I had no idea what they were
23 within the span of two months, three months in
24 order to graduate high school or else I wouldn't
25 have graduated high school.

007809

1 And in order to get -- I went to school
2 in an English school, but in order to get that, it
3 was weeks and weeks of calls between the
4 government and the ministry of education in Canada
5 to allow us to go to an English school because
6 most students in Montreal go to French school.
7 All of Babak and Marie-Claude's kids go to French
8 school. And to get my brother and I to go to
9 English school was a task.

10 And then, even after that, I had to
11 learn all of Canada's history in the span of five
12 weeks in order to pass and graduate high school.
13 I had to learn all of physics in six weeks. My
14 math, I got an equivalency for because I went to
15 an advanced math school. But the English test and
16 the French tests, those were extremely
17 challenging. And so I studied like crazy, which
18 helped me keep my mind off of what was going on.
19 But, about a month ago, I passed the exams and I'm
20 set to graduate high school.

21 Q. Aria, after your mom and dad passed
22 away, did you have any family members -- adult
23 family members, here in Las Vegas, Nevada, that
24 could care or provide parental love and support
25 for you?

007810

1 A. No.

2 Q. What was the -- during the healthy
3 debate about Aria staying at Clark or going
4 elsewhere, what was the straw that broke the
5 camel's back? What was the final thing that made
6 you decide to go to Canada? Who was it?

7 A. My brother.

8 I wanted to stay at Clark. Like I said
9 before, I had a lot of good friends. I had -- I
10 mean, we -- just three weeks ago, they got three
11 kids into Stanford and two into Harvard and so on.
12 And that's what I wanted to go for and I didn't
13 want to leave that.

14 I had spent 2 1/2 years developing that,
15 working towards becoming the president of clubs,
16 and really studying extremely hard with these
17 other kids who were also studying really hard.
18 And I didn't want to leave. But my brother had to
19 leave. He couldn't stay and finish high school
20 because he was only in 9th grade.

21 And I knew that my parents put me at
22 Clark and put my brother at Clark for me to take
23 care of him; right? That was their vision. It
24 was for me to go to the same school as my brother
25 so I could take care of a kid with ADHD who had

007811

1 now lost both his parents. So I knew that that's
2 exactly what I needed to do. So, in the end, I
3 decided to go to school in Montreal regardless of
4 having to study for six weeks all of Canadian
5 history and physics and math and English and
6 French and so on and having to make new friends
7 and go to a completely different school because my
8 brother, he needed me. He needed me to be there
9 for him.

10 Q. The extended family that you live with
11 in Montreal, are they close?

12 A. Extremely.

13 Q. What are your feelings about them?
14 Grateful?

15 A. Absolutely. We've always been close.
16 My mom, it's her older brother. We'd go visit
17 every summer or every other summer to see them and
18 the kids. We're a group of 10 cousins. I'm the
19 oldest. But, again, that comes with its own --
20 its own problems.

21 Q. Given your choice, would you rather be
22 here with your dad?

23 A. Yes.

24 Q. How about your brother?

25 A. Here with my dad. It's not -- it's not

007812

1 easy living there. It's difficult. I mean, we
2 have great support, but --

3 Q. Did you have -- it sounds like, in your
4 mind, you believed your mom gave you some choices.
5 Did your brother have any choices at 13?

6 A. She gave him -- she gave him the ability
7 to choose, but he knew -- he knew that he was
8 going to move and that's what was going to happen
9 to him.

10 Q. You described for the ladies and
11 gentlemen of the jury some of the experiences you
12 got to have with your dad as you got a little
13 older. And you used puberty, I think, as the
14 watermark of what you remembered.

15 What experiences did you get to have
16 that Keon missed with your father?

17 A. My dad was always -- I mean, you can see
18 in the photos, he was always there for us. Like,
19 we'd wrestle on the couch or, like, we'd make a
20 band. My brother would play drums, I'd play bass,
21 and my dad would play guitar. We'd play rock
22 songs and so on. He was very hands-on in that
23 sense at soccer games and band performances.

24 And then when we got older, even more,
25 which is amazing. Right? Because usually kids

007813

1 distance themselves from their parents. I got
2 even closer. My dad was there to not only help me
3 with academics but just in terms of life advice.
4 Like, what happens when you have a problem with a
5 friend, right, and you want to fix that problem?
6 Like, the best way to learn is from your dad or a
7 guy who's been through that.

8 Or if you want to ask a girl out on a
9 date, how do you do that? How do you go about
10 doing that? And he was the master at that.

11 So all these sort of lessons that I got
12 to learn as I got older, my brother,
13 unfortunately, won't get -- or at least not the
14 same from his own father.

15 Q. What do you do to try to fill that void
16 for your brother?

17 A. I -- it's -- it's hard. I try to -- I
18 try to think like my dad would, which is not easy.
19 When something happens to Keon, what do I tell him
20 that's something that my dad would tell him? How
21 do I teach the messages that my dad would teach?
22 Like, if he has an issue with a friend at school
23 or he's having behavioral problems because of his
24 ADHD, what would my parents tell him?

25 And I don't know what it is. So I have

1 to kind of think like my parents would. He's not
2 going to get the same thing that I got. So I have
3 to do my best to translate that.

4 Q. Was it discussed within your family
5 whether you and your brother would go on past high
6 school to college and graduate school?

7 A. Yes.

8 Q. And what was the expectation relative to
9 your father helping with those types of things?

10 A. He was the -- just like he was the main
11 leader in terms of planning the vacations, he was
12 the one planning our futures and helping us plan
13 our futures to where we would go to school and
14 help us with whatever it is you want to do --
15 doctor or musician or businessman or whatever it
16 is.

17 Q. Financially, was your dad the main
18 breadwinner in the family?

19 A. Yes.

20 Q. Any doubt in your mind he would have
21 always taken care of your mother?

22 A. No doubt in my mind.

23 Q. Junior year is this year?

24 A. Yes.

25 Q. They have proms in Canada? Dances?

007815

1 A. Yes.

2 Q. Is that a type of a thing that your dad
3 won't get to see you go through, and your brother?

4 A. Yes.

5 Q. High school graduation?

6 A. Yep.

7 Q. College?

8 A. Yeah.

9 Q. Girlfriends?

10 A. Yeah.

11 Q. Wife?

12 A. Yeah.

13 Q. Kids?

14 A. Yeah.

15 Q. Lastly, Aria, why don't you help us
16 understand the thing that makes you the most proud
17 about your dad.

18 A. What makes me the most proud of my dad
19 is his ability to come from nothing, zero, with no
20 family and no support, to being able to create a
21 family where he is the -- where he is the support
22 and he is the one who's putting us in a better
23 place than he was because of his ability to do
24 good and to strive and to study hard and to really
25 create opportunities for himself and for his

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1 family.

2 Like, I've never met somebody who's able
3 to overcome what he did. Right? Leaving your
4 parents at 17 and going to a different country and
5 learning a new school system there and being able
6 to manage that and work at a McDonald's and to
7 drink the condensed milk there because you
8 couldn't afford milk at a grocery store and to do
9 all those things that he did just so he could
10 create a better life for his kids. That's what
11 will ultimately drive me into, hopefully, being as
12 good a dad as he was.

13 Q. How about as good of a husband? Tell us
14 about the running joke between your mom and your
15 dad. The ladies and gentlemen got to hear it from
16 your mom. She said your dad was picky and she
17 told your dad she felt lucky he picked her.

18 A. Yes. They always had a running joke of
19 who loved who more. It was a big game of
20 flirting. They were really good at it. And I
21 said it in my speech, but, like, if I can find,
22 like, love like that at some point in my life, I'm
23 super, super lucky.

24 And he was -- he was a picky guy.
25 There's a funny story, actually, that he -- I

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1 mean, when he wanted to -- he knew he was going to
2 marry my mom, but he gave her a test. So he came
3 home one day and he said, "I've been robbed.
4 Everything I've got is gone." It wasn't much at
5 the time, but "Everything I've got is gone."

6 And my mom -- and he was testing to see
7 if my mom would stay with him. Right? He knew
8 she would, but he just wanted -- he just wanted --
9 would play games with her, and he continued to do
10 this all throughout -- all throughout their
11 marriage. Right? April Fool's jokes or so on.
12 They'd plan a trip, a staycation at a hotel here
13 or so on and so forth. He always -- he always
14 played games with her, and she loved it. She
15 acted like she was angry. It was a big flirting
16 game. I told you, it's true love.

17 But he asked her. He said, "Everything
18 I've got is gone."

19 And she said, "Let's fix it." She
20 started taking steps. Eventually he told her,
21 "I'm just kidding," and she got really angry at
22 him.

23 But that was -- I mean, they'd play
24 these sorts of games with each other about who
25 loved who more and what they would do if certain

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1 things happened.

2 And that was their relationship. And it
3 stayed like that until the very end. I mean, it
4 would amaze me. Like, I'd see my friends' -- my
5 friends' parents grow old and kind of grow
6 separate. And you don't see that among them, but
7 their love was like the same day. Like, in that
8 picture, it's like the same picture. Right? It
9 happened, like, 20-something years or 19 years
10 later, and then 19 years ago was the same, same
11 thing.

12 Q. Aria, you reminded me of a housekeeping
13 matter that I need to take care of.

14 At your dad's funeral, not only did you
15 give a speech, which the people of the jury have
16 seen, but you also put a musical compilation and
17 some photos together; is that fair?

18 A. Yes.

19 Q. We've marked that as Exhibit 117, I
20 think, B. Did you pick the music?

21 A. Yes.

22 Q. I remember one of the songs was a Bee
23 Gees song?

24 A. Yes.

25 Q. And what was that?

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1 A. "How Deep Is Your Love."

2 Q. Was that something your dad sang to your
3 mom regularly?

4 A. Yeah.

5 Q. And that video stream is just to music.
6 After you went through the introduction, there's
7 no words to it; is that right?

8 A. Pardon?

9 Q. The collage that kind of you did of all
10 the family photos, it's played to music of your
11 choosing?

12 A. Yes.

13 Q. Music that had important sentimental
14 value to your parents?

15 A. Yes. Yes. The songs, like "How Deep Is
16 Your Love" or two Persian songs was -- I mean, I
17 made a joke of my dad, like, if he didn't play
18 guitar or sing, he couldn't have got my mom. But
19 those are songs that he used to sing for her on,
20 like, their first dates or on stage and so on.
21 That's what he did.

22 He had a band in medical school, and he
23 invited her to a gig, right, to woo her. So he
24 played a love song, and he fell off the stage and
25 broke his back. And my mom -- my mom took care of

007820

1 him, took him back to his apartment and made him
2 pasta.

3 Q. You mean he got hurt. He didn't really,
4 like, snap his back or any

5 A. No. He -- he injured his back.

6 Q. Got it, got it.

7 A. But I'm sure he acted like it was worse
8 so he could get her to take care of him.

9 Q. Hamming it up big.

10 Finally, Aria, your family had expenses
11 for the burial of your dad and transport of him
12 back to Canada?

13 A. Yes.

14 Q. We won't go through that. Mr. Barger
15 has been kind enough to stipulate to those, but I
16 wanted to make sure that was incurred. It was?

17 A. Yes.

18 MR. CHRISTIANSEN: Court's indulgence.

19 THE COURT: Certainly.

20 MR. CHRISTIANSEN: Aria, nothing else
21 from me, buddy.

22 MR. BARGER: Can we take a short break,
23 restroom break?

24 THE COURT: 10-minute break?

25 We're going to take a 15-minute break,

007821

1 ladies and gentlemen. I'm going to admonish you.

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

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

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

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

007822

1 15-minute break.

2 THE MARSHAL: All rise. Jury is
3 exiting.

4 (Whereupon, a recess was taken.)

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

7 THE MARSHAL: Please remain seated.
8 Come to order.

9 THE COURT: Are we on the record? Let's
10 go back on the record.

11 THE COURT RECORDER: We're on the
12 record, Your Honor.

13 THE COURT: All right. Before the
14 plaintiff rests, I have a couple questions about
15 exhibits, but we can do that during the -- once we
16 have the jury.

17 MR. CHRISTIANSEN: We were going to try
18 to do the housekeeping stuff. I think Ms. Works
19 has already talked to your clerk. We're going to
20 double-check over lunch, Your Honor.

21 THE COURT: Very good.

22 MR. ROBERTS: Your Honor, I had
23 something. Marshal --

24 THE MARSHAL: I'll just get them lined
25 up.

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1 MR. ROBERTS: May I approach?

2 THE COURT: Certainly. Thank you.

3 MR. ROBERTS: Your Honor, there's one
4 thing that we're considering going into on
5 cross-examination of this witness.

6 THE COURT: Yes.

7 MR. ROBERTS: And it goes back to
8 Friday, to the videotaped deposition of Katy
9 Barin.

10 THE COURT: Yes.

11 MR. ROBERTS: And we believe that that's
12 opened the door to otherwise inadmissible
13 evidence, but because this is a very sensitive
14 issue, I thought it appropriate to raise it with
15 the Court and to get the Court's permission on
16 both whether the subject can be inquired into and
17 permissible scope.

18 THE COURT: Certainly.

19 MR. ROBERTS: The trial testimony from
20 Friday is what I've handed the Court, page 238 of
21 the official transcript. This is Katy Barin
22 talking, and she talks about how we don't have his
23 income, her husband, Dr. Khiabani. "So it's had a
24 huge -- I mean, my older son," and that's the
25 witness that's on the stand now.

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1 THE COURT: Yes. What line are you?

2 MR. ROBERTS: I'm on line 22, Your
3 Honor.

4 THE COURT: Okay. Very good.

5 MR. ROBERTS: "So it's had a huge -- I
6 mean, my older son, and I think even Keon, they're
7 very conscious of that. They're always worried,
8 and they're constantly worrying about the future
9 and, oh, we're broke. Honestly, one of the first
10 things Keon, he was like, 'Can we afford to live
11 in this house?'"

12 Line 8 and 9 on page 239, but "Can we
13 afford to do that for me the same way we did for
14 my brother?"

15 Later on in the page, they're worried
16 they can't afford birthday gifts for friends
17 because they're broke and they don't have any
18 money.

19 And then with regard to Aria also,
20 scholarships --

21 THE COURT: What page? I'm sorry.

22 MR. ROBERTS: Page 239, lines 12 through
23 16, is where this witness is concerned that he
24 can't afford birthday gifts for friends "because
25 we're broke. We don't have any money."

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1 THE COURT: Understood.

2 MR. ROBERTS: Now, the Court has already
3 held that evidence of the settlements with the
4 other defendants are not admissible. And, in
5 fact, we're very aware of the general rule set
6 forth in Moore v. Bannen, 799 P.2d, 564, where the
7 court adopted the Vermont rule and that said in
8 order to avoid speculation by the jury, improper
9 speculation, that the jury cannot be informed
10 about the existence of settling co-defendants and
11 that both the amount of the settlement and the
12 existence of a settlement is inadmissible due to
13 that concern.

14 The statutory prohibition is at NRS
15 41.141, Subsection 3, where the legislature
16 provided that if a defendant in such an action
17 settles with the plaintiff before the entry of
18 judgment, the comparative negligence of that
19 defendant in the amount of the settlement must not
20 thereafter be admitted into evidence nor
21 considered by the jury.

22 So we've got two prohibitions, the
23 comparison negligence of the defendant that
24 settled out and the settlement. We've got to be
25 careful that, inquiring about this issue, we don't

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1 run afoul of that statutory prohibition and the
2 general rule in Moore v. Bannen.

3 I think, without the plaintiffs playing
4 this testimony, that this witness and his younger
5 brother believed they had no money and they were
6 broke, there would be no need to go into this.
7 But, really, the fact that they're broke and have
8 no money is not relevant to any issue the jury has
9 to determine. And it would seem to only be played
10 to the jury to attempt to influence the jury to
11 render a decision through improper sympathy to the
12 boys because they're broke and this is the only
13 way they'll have money, is if they give them an
14 award.

15 We're all familiar with the idea of
16 opening the door. I think a very helpful
17 description from the 9th Circuit was, quote,
18 "Under the rule of curative admissibility, or the
19 opening-the-door doctrine, the introduction of
20 inadmissible evidence by one party allows an
21 opponent, in the court's discretion, to introduce
22 evidence on the same issue to rebut any false
23 impression that may have resulted from the earlier
24 admission."

25 So in this case the false impression is

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1 that the boys have no money and that they're
2 broke. And as the Court is aware, there is on --
3 we have -- it's under seal and we have an audience
4 here, but the Court is aware of the substantial
5 nature of the prior settlement. So, therefore,
6 there is a false impression with the jury now due
7 to the plaintiff eliciting testimony that the boys
8 are broke and have no money.

9 There may be a way to address this
10 without eliciting any implication of settlement,
11 and that deals with the testimony by the witness
12 just before the break that he was now familiar
13 with the terms of the family trust and that had
14 been shared with him.

15 So my thought was is to remind the jury
16 of the testimony from Dr. Barin, tell the witness
17 what the jury heard. "You mentioned before the
18 break that you've had the terms of the family
19 trust explained to you. Is it fair to say, based
20 on your total knowledge of the finances of you and
21 your brother, you're no longer concerned about
22 having enough money? You don't think you're broke
23 anymore?"

24 And that's all I would want to do and
25 leave it at that. Thank you, Your Honor.

1 MR. KEMP: Your Honor, first of all,
2 there was a motion in limine ruling on this, and
3 the Court has ruled that they cannot bring in the
4 fact or amount of the prior settlements. They've
5 never filed a motion for a hearing on this. The
6 testimony he's referring to of Dr. Barin was
7 played on Friday. That is not testimony that the
8 kids are broke. That is testimony that, after the
9 death, the kids had a discussion with their mother
10 about whether they're broke or not. This
11 discussion took place in April 2017, which is six
12 months before the Michelangelo settlement.

13 And also point out the Michelangelo
14 settlement still hasn't been approved by the
15 probate court or the state court, so it's still a
16 contingent settlement.

17 But, in any event, there was no evidence
18 presented by the plaintiffs that the kids were
19 broke at this point in time. All there is is a
20 discussion in this deposition of a concern about
21 being broke.

22 And if they had had a problem with this
23 area, they should have brought it up when we did
24 the page/line designations of Dr. Barin. They
25 didn't object to this. They didn't make one

1 comment about it. They just let it come in.

2 So, first of all, there's been no
3 opening the door here because this is not a
4 discussion about the current financial situation
5 of the children. It's a discussion about their
6 concerns after their father died.

7 Second of all, they should have raised
8 this earlier, Your Honor. And so to suggest that
9 we're going to violate a motion in limine, do
10 something that's prohibited by Nevada law, the
11 Moore case, never done by any court in this
12 jurisdiction, allowing evidence of settlements of
13 other defendants, based upon this, Your Honor,
14 this is just a real -- I wouldn't even call in a
15 Hail Mary pass, Your Honor.

16 So for this reason, there should be no
17 discussion whatsoever about the trust, the amount,
18 you know, anything of that nature, Your Honor, no
19 discussion whatsoever. There's been no door
20 opening here whatsoever.

21 THE COURT: Mr. Roberts.

22 MR. ROBERTS: Your Honor, I haven't
23 suggested that I should be able to get either the
24 existence or the amount of settlement into
25 evidence. And even if none of the settlements had

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1 happened, they've now brought in the fact that he
2 thought he was broke in April, and they've now
3 elicited evidence that there's a family trust.

4 Certainly, I should at least be able to
5 inquire that "The jury heard these discussions.
6 They happened right after your father died. You
7 weren't aware of the family finances. You're now
8 aware of the family trusts and the general
9 finances of the family. You don't have that
10 concern anymore, do you?" And leave it at that,
11 Your Honor.

12 THE COURT: I have a question for you,
13 Mr. Roberts. Were you or anyone on the defense --
14 any of the defense counsel, did you have an
15 opportunity to view Dr. Barin's deposition before
16 it was played?

17 MR. ROBERTS: I did not, Your Honor.
18 Another attorney in my office did. Mr. Barger
19 reviewed and tried to resolve the conflicts that
20 remained, but he was only looking at things the
21 parties had objected to. So he hadn't read -- he
22 had not looked at this either.

23 MR. KEMP: Judge, Mr. Roberts was at the
24 deposition. He attended.

25 MR. ROBERTS: I did. I did. I did

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1 attend the deposition.

2 THE COURT: Yes, I heard you
3 cross-examine.

4 MR. ROBERTS: I didn't know it hadn't
5 been objected to until I heard it in court.

6 MS. WORKS: Your Honor, Mr. Barger and I
7 negotiated, with respect to those page/line
8 designations, at length. The clips in their
9 entirety, a transmission of the transcript was
10 sent to defense counsel the night before the
11 deposition was played. The video -- the video
12 clip in its entirety was sent to the defense the
13 night before it was played. They had the
14 opportunity to object, to review the designations.
15 Even after we argued, they had a final before it
16 was presented to the jury, and not once was the
17 objection raised.

18 MR. ROBERTS: So, again, Your Honor,
19 assuming that any objection has been waived, what
20 we're left with is them putting in this
21 evidence -- them putting in this evidence, not
22 us -- and them eliciting that he now knows about
23 the family trust.

24 So I should at least be able to inquire
25 with the witness about the things they have

007832

1 affirmatively put into evidence, even if I've
2 waived any objection with regard to the fact of
3 the settlement making it very misleading for the
4 jury to believe that the boys are broke at this
5 point in time.

6 THE COURT: Anything else,
7 Mr. Christiansen, Mr. Kemp?

8 MR. CHRISTIANSEN: Judge, the only thing
9 I'd ask you to do is take a look at the pattern
10 jury instruction that says that whether or not
11 something is received or paid is irrelevant.

12 "The right to receive support from
13 another is not destroyed by the fact that the
14 former does not need the support or by the fact
15 that the latter has not provided it."

16 That's our pattern instruction that
17 you're going to give. So none of this is
18 relevant. All it is is an effort to taint the
19 jury against this family.

20 And there's nothing -- I'm looking at
21 the quote from Aria, and I didn't ask any
22 questions about a trust. Aria answered who the
23 family trust would go, where we would live.
24 Didn't say the money, who the family trust would
25 go, where we would live, who would take care of

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1 us, where we would go to school, all those
2 decisions.

3 Nothing about money. The trust doesn't
4 elicit money necessarily. It could be who's going
5 to take care of you, you know, who's going to be
6 your guardian.

7 So, clearly, they're just making stuff
8 up in an effort to taint the jury.

9 MR. ROBERTS: Nothing further, Your
10 Honor. They've elicited this. It isn't relevant.

11 As Mr. Christiansen said, under the
12 instruction, what support he got before
13 Dr. Khiabani died is not relevant one way or
14 another. It doesn't preclude him from getting it,
15 but the fact that it would be relevant, they could
16 put it on if he did get support.

17 But I'm really a little bit lost as to
18 why -- whether he's broke is not relevant to his
19 claim for loss of support. So the only reason
20 they would want the jury to know he's broke is to
21 cause the jury to render an award based on an
22 improper basis.

23 So if we can fix this if the jury has
24 been misled because they've heard evidence he was
25 broke in April but he's no longer -- feels he's

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1 broke today, I should be able to fix the
2 misleading of the jury through that evidence they
3 elicited.

4 THE COURT: I understand the variegated
5 concept. It's -- the inability to discuss
6 settlements or any type of settlement negotiations
7 or anything like that, that's almost paramount,
8 right --

9 MR. ROBERTS: Yes, I agree.

10 THE COURT: -- you know, in the law.
11 And I would like to review the Moore case. I know
12 I've read it before, but sometimes it's good for
13 me to take a look at it. But I must tell you that
14 understanding that -- and, you know, parties -- I
15 mean, it's not the shortest trial. I know there
16 are much longer ones, and objections perhaps are
17 not made and so forth. And it happens to both
18 parties -- okay? -- or more parties when there are
19 more parties.

20 But I am concerned that this came in
21 after having the ability to review it because, the
22 truth is, I probably wouldn't have let that in,
23 but it didn't have anything to do with me. So,
24 you know, I'm not the one that stipulated or was
25 involved in that, because, when I reviewed it, I

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1 had the same concern. But I'm trying to let you
2 try your own cases instead of interjecting myself.

3 But I'm not -- I'm not, Mr. Roberts,
4 open to, you know, turning this basic tenet in our
5 law about discussing settlements, settlement
6 negotiations, or anything that even comes clear
7 because I think that's a very -- that's very
8 dangerous. I mean, it's been pretty clear always.

9 So -- and I know I need to -- I'm going
10 to take five to ten minutes -- I'm sorry -- and
11 then -- before -- before you start your cross.
12 Excuse me.

13 (Whereupon a short recess was taken.)

14 THE MARSHAL: Please be seated. Come to
15 order.

16 THE COURT: Are we back on the record?

17 THE COURT RECORDER: Just a moment, Your
18 Honor.

19 Okay. We are on the record.

20 THE COURT: All right. We're on the
21 record.

22 Okay. I've just reviewed Moore
23 v. Bannen and also NRS 41.13 -- or excuse me --
24 141.3. And considering the legal issues and the
25 paramount -- the understanding of the paramount

007836

1 consistent rules in our jurisprudence with respect
2 to not bringing existence or amount of settlement,
3 I am -- I do understand your risk -- your concern
4 about the possible prejudice, Mr. Roberts.

5 However, because there was no objection
6 at the time of this deposition, but especially
7 because the defense had the ability to review the
8 tape and go through this, I feel that, the other
9 side, the risk of prejudice that they discuss in
10 Moore is that the jury may believe that there's a
11 windfall to the plaintiffs already. So I'm not
12 going to allow that. Okay?

13 MR. ROBERTS: Thank you, Your Honor.

14 MR. BARGER: Judge, there's one
15 suggestion that I would like for the Court to
16 consider.

17 THE COURT: Yes.

18 MR. BARGER: And I understand it's the
19 Court's ruling. I'm not trying to change your
20 mind at all.

21 The suggestion is maybe counsel could
22 agree that that -- those paragraphs wouldn't be
23 argument, because I think it is kind of
24 misleading. In other words, that they wouldn't
25 argue that the kids were all concerned --

1 MR. KEMP: We won't show it or argue it.

2 MR. BARGER: That may be helpful.

3 THE COURT: Happy to hear. I think
4 that's very reasonable. Okay?

5 MR. CHRISTIANSEN: Yes, Your Honor.

6 MR. BARGER: I'm not going to have any
7 cross for the young man, but I would think he
8 probably, just for the record, has to take the
9 stand and I'll say no questions. I'm not going to
10 ask him anything.

11 THE COURT: Okay.

12 MR. CHRISTIANSEN: Can I bring him back
13 in, Your Honor?

14 THE COURT: Sure.

15 THE MARSHAL: Are we ready on both
16 sides, Counsel?

17 MR. CHRISTIANSEN: Yes.

18 MR. BARGER: Yes.

19 THE MARSHAL: Ready, Your Honor?

20 THE COURT: Is there any
21 cross-examination?

22 MR. BARGER: There won't be, but I think
23 I need to say for the record, "no questions."

24 THE COURT: Yes.

25 MR. CHRISTIANSEN: After that, would the

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1 Court be wanting to take our lunch break at that
2 point and then do the housekeeping stuff we talked
3 about and then the defense can start after lunch?

4 THE COURT: I think that's probably a
5 good idea.

6 MR. CHRISTIANSEN: Okay. Thank you,
7 Your Honor.

8 MR. ROBERTS: And, as you recall,
9 Mr. Henriod also is going to make a motion for the
10 defense at the close of their case.

11 THE COURT: Yes.

12 MR. BARGER: And I think a brief was
13 filed.

14 THE COURT: I haven't had a chance to
15 look at it.

16 MR. BARGER: I understand.

17 THE COURT: You're excused.

18 THE WITNESS: Okay. Thank you.

19 MR. CHRISTIANSEN: Judge, I think we
20 need the --

21 THE COURT: Oh, wait. I'm sorry. We
22 may have questions from the jury.

23 MR. CHRISTIANSEN: That's true, Judge.

24 MR. BARGER: I think, on the record, I
25 have to, in front of the jury, say there's no

007839

1 questions.

2 THE COURT: Okay.

3 Jerry, sorry about that.

4 (The following proceedings were held
5 in the presence of the jury.)

6 THE MARSHAL: All rise.

7 All the jurors are present, Your Honor.

8 THE COURT: Thank you, Marshal.

9 THE MARSHAL: Please be seated. Come to
10 order.

11 THE COURT: Do the parties stipulate to
12 the presence of the jury?

13 MR. ROBERTS: Yes, Your Honor.

14 MR. CHRISTIANSEN: Yes, Your Honor.

15 THE COURT: Mr. Barger?

16 MR. BARGER: May it please the Court.

17 Sir, I have no questions for you. Thank
18 you.

19 THE COURT: Okay. All right.

20 THE MARSHAL: Any questions?

21 THE COURT: Any questions from the jury?

22 THE MARSHAL: No questions, Your Honor.

23 THE COURT: You're excused.

24 THE WITNESS: Thank you.

25 THE COURT: Okay. I think at this time

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1 we should take our afternoon break, our lunch
2 break. And we are going to be going over some
3 legal issues during that break, so I think we
4 should take a little bit longer. Let's have you
5 back at 2 o'clock. And I'm going to admonish you
6 quickly.

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

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

23 You're not to talk with others, text
24 others, tweet others, message others, google
25 issues, or conduct any other kind of book or

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1 computer research with regard to any issue, party,
2 witness, or attorney involved in this case.

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

6 Please make sure that you refrain from
7 speaking to one another about any testimony that
8 you've heard and any notes you've taken.

9 Thank you, ladies and gentlemen. See
10 you at 2 o'clock.

11 THE MARSHAL: All rise.

12 (Jury excused.)

13 (The following proceedings were held
14 outside the presence of the jury.)

15 THE COURT: Please be seated.

16 All right. Do you prefer to go on the
17 record now or take care of things at 1:30? I
18 haven't had a chance to read the --

19 MR. BARGER: I would think it would be
20 more appropriate that you'd have a chance to read
21 the documents, and then we'll come back early and
22 make the arguments. That would be what I would
23 think would be appropriate.

24 MR. KEMP: Are we talking about the
25 Rule 50 motion?

1 MR. BARGER: Yeah.

2 MR. KEMP: That's fine with me, Your
3 Honor.

4 THE COURT: Also, I'd like you, during
5 that time, to take a look at Plaintiffs'
6 Exhibits 197 and 198. I just don't show that
7 they've been admitted into evidence.

8 And I would alert the defense to the
9 same thing, should any of your exhibits not be
10 admitted.

11 MR. KEMP: 197 has not been admitted
12 into evidence, Your Honor.

13 We understand that 198 was admitted when
14 we were at a side conference.

15 THE COURT: Was it? Do you have the
16 date?

17 MR. KEMP: That was the one that was
18 admitted for constructive notice. We were
19 supposed to fashion some sort of jury instruction.

20 THE COURT: What date?

21 MR. BARGER: And 197 has not been.

22 MR. KEMP: 197 has not been offered or
23 admitted, and 198 was admitted at the side --

24 MR. BARGER: With some sort of counsel
25 getting together with an instruction.

1 THE COURT: All right. Let's meet
2 here -- do you think 1:30 is sufficient time?

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

5 THE COURT: Is there anything else I
6 need to review?

7 MR. KEMP: Maybe 1:45, Your Honor.

8 MR. BARGER: Yeah, it might be, so
9 everybody can eat real quick.

10 THE COURT: I'm open to whatever works
11 for everyone.

12 MR. CHRISTIANSEN: Thank you, Your
13 Honor.

14 (Luncheon recess taken.)

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

17 THE MARSHAL: All rise. Department 14
18 is back in session. Please be seated. Come to
19 order.

20 THE COURT: I've reviewed the matter,
21 the brief by Motor Coach Industries, Inc.

22 MR. BARGER: Judge, may I ask a
23 question? Not to interrupt. I am from out of
24 state, but don't they have to rest in front of the
25 jury first before we argue the motion?

1 THE COURT: Before they rest, I wanted
2 to make sure about a couple of exhibits. Yes,
3 they do.

4 MR. BARGER: I'm sorry. I didn't mean
5 to interrupt.

6 THE COURT: No, no, no. They can rest
7 when the jury comes back. I purposely didn't do
8 that just in case. By the way, I would do the
9 same thing if they were defense exhibits.

10 MR. BARGER: Of course. I understand.

11 THE COURT: Okay. So let's see.

12 MR. HENRIOD: Do I take it, then, that
13 you are prepared for us to argue that as soon as
14 they do close?

15 THE COURT: Well, the way that I am, I
16 would study this more, but I think -- I've
17 reviewed everything that you've given me, and I've
18 taken a look at, you know, what's coming up about
19 the trial.

20 Would you like to argue it now?

21 MR. HENRIOD: I mean, once it becomes
22 appropriate after they've closed.

23 THE COURT: They have to rest.

24 MR. HENRIOD: But, yes, we'd prefer to
25 do it as soon as it's appropriate.

1 THE COURT: Let's see --

2 MR. KEMP: Judge, I don't think we want
3 to bring the jury back and send them out. I've
4 agreed with them to stipulate to allow them to
5 make a motion to the Court and we can argue it
6 after we're done today. They have to make the
7 motion after we rest. There's nothing that says
8 we have to make the argument after we rest. We
9 just have to preserve it.

10 MR. HENRIOD: We don't want to draw it
11 out today, and I respect the fact that the jury is
12 out there. And I don't think it will take that
13 long. I can try to be succinct.

14 Our concern is -- and we just want this
15 to be clear -- I think especially the punitive
16 damages claim and the fact that that's hanging out
17 there has been an excuse to bring up a lot of junk
18 in questioning. And I don't think that it ought
19 to infect the trial any longer.

20 So I just want that to be clear as to
21 why our preference is to argue it as soon as
22 possible.

23 THE COURT: Certainly. Are you
24 comfortable, Mr. Henriod, with Mr. Kemp
25 stipulating to being able to argue this before

007846

1 they rest or would you prefer --

2 MR. HENRIOD: I am okay doing it at the
3 end of the day if it's clear that that is our
4 reservation, but we really would prefer not to.

5 MR. ROBERTS: You want to argue it now.

6 MR. BARGER: What she's saying is do you
7 want to bring the jury in and rest and then bring
8 them back out and then argue? That's what she's
9 saying.

10 MR. ROBERTS: Or do you want to argue it
11 now?

12 MR. HENRIOD: We can argue it now.

13 MR. KEMP: The problem I see, Your
14 Honor -- it's their case. If they have an expert
15 here and we argue this --

16 MR. BARGER: We'll take him out.

17 MR. KEMP: I don't care if he's here. I
18 just care about the time.

19 THE COURT: I'm concerned about the
20 record. And I've never reviewed an order like
21 this before resting. So I don't know if that's
22 going to be an error. I hate this whole thing
23 that --

24 MR. HENRIOD: I appreciate that. I'd
25 prefer to do it by the book as well. I know it's

007847

1 going to seem odd for the jury, but I think
2 they'll understand that there's a transition when
3 they hear plaintiff rest.

4 THE COURT: Yes. Not to take advantage
5 of the jury, but Marshal Ragsdale tells me that
6 they're having a great time together. There's a
7 difference between that and an angry jury. So at
8 least they're not upset. They're happy when it
9 takes a little bit longer. That's not why I'm
10 taking a little bit longer, but doesn't seem to be
11 a problem.

12 MR. HENRIOD: I hear you. I won't drone
13 on.

14 MR. KEMP: Judge, maybe I wasn't clear.
15 What I was suggesting is we rest, they approach
16 and make their formal motion, we get the expert
17 out of the way, and we argue at the end of the
18 day. The expert is probably going to take at
19 least two hours. If we piddle around until 3:00,
20 we may not be able to get it done today.

21 MR. HENRIOD: I won't belabor points.
22 I'll be quick. We'd like to do it before we start
23 our case. Thank you.

24 THE COURT: Very good. So we're going
25 to bring the jury in. Before we do that, I just

007848

1 wanted to -- did you review any exhibits that --

2 MR. CHRISTIANSEN: Judge, we've checked
3 with Ms. Clerk. There are two exhibits, 117A,
4 which is Aria's speech at his dad's funeral, and
5 117B, which is the collage that his mom spoke
6 about Friday and Aria spoke about today, which is
7 at the end of the funeral. We need to extract
8 those from 117 as a whole.

9 We've submitted 117, which is the entire
10 funeral. I'm told that Ms. Clerk says if we
11 extract those and bring them tomorrow, that's
12 fine. Subject to those two, we have everything in
13 that we need in.

14 MR. BARGER: If I recall, the funeral
15 video was they originally submitted the whole
16 thing. We objected. You said take out a few
17 parts, and they did.

18 THE COURT: Yes. I allowed some viewing
19 of the guests and the speech given by his son and
20 when he read the other son's statement.

21 MR. BARGER: Can I inquire from Pete,
22 that's what's on the tape; right?

23 MR. CHRISTIANSEN: What's in evidence --
24 or what's not in evidence. The proposed exhibit
25 is the entire funeral. What I intend to extract

1 from that is the speech you allowed me to play in
2 opening statements, which we preadmitted, and then
3 what I had Aria testify to today, which is just
4 essentially it's a PowerPoint presentation of a
5 bunch of family in pictures with music in the
6 background.

7 MR. BARGER: I've told counsel that I
8 don't have an objection to that music -- those
9 pictures, but I think for the record we probably
10 need not to have the whole funeral admitted into
11 evidence.

12 THE COURT: No, I didn't admit the
13 entire --

14 MR. CHRISTIANSEN: We're on the same
15 page, Mr. Barger and I.

16 THE COURT: Just so you know what page
17 I'm on, and it's not an ego thing. I just want to
18 make sure. Remember you offered three videos, I
19 think, at the beginning, and two are not to come
20 in. One was to come in with exactly what you
21 showed --

22 MR. CHRISTIANSEN: Yes, ma'am.

23 THE COURT: -- at the beginning.

24 MR. BARGER: With that understanding,
25 we're on the same page. I understand.

1 THE COURT: Okay. All right.

2 MR. CHRISTIANSEN: I agree with
3 everything the Court said.

4 THE COURT: And you want to augment?

5 MR. CHRISTIANSEN: I want to augment via
6 Dr. Barin's testimony on Friday, and then I closed
7 the loop, I thought, with Aria today that he did a
8 collage of pictures of his parents that's played
9 at the end of the video with music that was
10 special to them. There's no testimony on it
11 besides sort of the Bee Gees music playing in the
12 background.

13 THE COURT: Is the collage -- some of
14 the photographs that you extracted for opening,
15 were they part of that collage?

16 MR. CHRISTIANSEN: They were, Your
17 Honor.

18 MR. BARGER: And I told him I was fine
19 with that.

20 THE COURT: Okay.

21 MR. CHRISTIANSEN: I'll make sure I show
22 Mr. Barger that. Those two items I need to
23 extract from the entire 117, and I'll bring them
24 to your clerk tomorrow, Your Honor.

25 THE COURT: And make sure Mr. Barger has

007851

1 a chance to review that.

2 MR. CHRISTIANSEN: I will, Your Honor.

3 MR. BARGER: That's fine.

4 THE COURT: One other thing,

5 Mr. Pepperman. How are you today?

6 MR. PEPPERMAN: I'm good, Your Honor.

7 How are you?

8 THE COURT: I'm doing well. Thank you
9 very much.

10 The gentleman from The Venetian is
11 asking -- I don't know.

12 Marshal Ragsdale?

13 THE MARSHAL: He was just following up
14 from what he stated on Friday that he could wait
15 until Monday, and he just wanted some instruction
16 on what's going on.

17 MR. PEPPERMAN: Yes, Your Honor, as
18 discussed on Friday, I emailed Ms. Lesani, the
19 associate general counsel for The Venetian this
20 morning. I advised her that Mr. Lennon -- how we
21 left it on Friday, we were to give Mr. Lennon the
22 cashier's checks and that we'd work it out
23 separately.

24 And then this morning I wrote and
25 advised her that he said he didn't need the money

007852

1 until today, so we did not give him the cashier's
2 check on Friday.

3 THE COURT: Hoping that they would --

4 MR. PEPPERMAN: I said if it's your
5 preference to pay him directly, then we won't give
6 him the cashier's checks, but it has to be done
7 today. If you cannot -- if The Venetian cannot
8 pay him today or The Venetian prefers for us to
9 use the cashier's checks, let me know and we'll
10 give him the cashier's check today. I also said,
11 "If I don't hear back from you by today, we'd give
12 him the cashier's check this afternoon."

13 And so far I haven't heard back from
14 her.

15 THE COURT: Okay. Mr. Pepperman,
16 actually, the preference was for them to pay, not
17 what her preference was, but --

18 MR. PEPPERMAN: That's what I said. If
19 the preference is to pay him directly, we would
20 rather do that and give the cashier's check. If
21 you're unable to pay him by today, let me know and
22 we'll give him the cashier's check.

23 My concern was just that he gets paid
24 today. I asked The Venetian to pay him directly
25 if they could and, if I didn't hear back from her,

007853

1 that we'd give him the cashier's check.

2 THE COURT: All right. We'll wait until
3 the end of the day. But here's the issue. Will
4 you please -- this can't be that difficult. I
5 really have a concern because it's an unusual
6 situation. The parties have stipulated to it or I
7 would not do this. But for -- Marshal Ragsdale
8 represents me. Do you see what I'm saying?

9 MR. PEPPERMAN: Of course.

10 THE COURT: So, essentially, his
11 reaching out and handing the envelope to
12 Mr. Lennon is coming from the Court, which I've
13 explained many times on the record that that's
14 really not -- that's not something that's
15 generally done. I can't -- again, it can't come
16 from the Court. I can't -- you know, isn't there
17 any way that this woman -- I forgot her name right
18 now, but counsel can give you the amounts that are
19 going to be deducted? Because then Marshal
20 Ragsdale is going to have to explain to him that
21 this is a check for this much, but then you're
22 going to have to be deducted later for this.
23 That's asking too much.

24 Do you understand what I'm saying?

25 MR. PEPPERMAN: Yes. And I've talked to

007854

1 her about the amount, and she said that the amount
2 is in line with what his check would be.

3 THE COURT: Including all of his
4 deductions for social security?

5 MR. PEPPERMAN: Yes, after deductions.

6 THE COURT: All right. Well, I need to
7 know that amount before the jury is released
8 today.

9 MR. PEPPERMAN: Before the cashier's
10 check's released?

11 THE COURT: Before the jury is released,
12 which means Mr. Lennon will have the cashier's
13 check or however we decide to do it or you decide
14 to do it. I need to know what those deductions
15 are going to be.

16 MR. KEMP: Didn't we have that from his
17 checks that the marshal gave us on Friday?

18 THE COURT: I think it's possible, but,
19 you know, depending on -- you know, sometimes
20 there are certain deductions that are taken out
21 every two weeks, sometimes -- I don't know what
22 system they're under. I don't know if he has to
23 pay certain dues.

24 So if they mirror that, it would be no
25 problem, Mr. Kemp, you know. But I don't know

007855

1 that.

2 And, Mr. Pepperman, is it impossible
3 that we can't find that out -- this is 2018, and
4 I've been asking for these numbers for a few days
5 now.

6 MR. PEPPERMAN: Your Honor, maybe that's
7 where the confusion comes from. The Venetian will
8 be paying Mr. Lennon with all the deductions and
9 everything worked out. This \$1,100 is just so he
10 gets it today and he's not delayed in receiving
11 the amount.

12 But any amount -- he's going to get paid
13 his regular amount from The Venetian. It's just
14 this \$1,100 in cashier's check, if we end up
15 giving it to him, will be credited to what we
16 reimburse The Venetian.

17 So if you look at it separately, The
18 Venetian will be paying him his regular pay minus
19 all the deductions. All that will be in the
20 normal course. And this \$1,100 is just so he gets
21 paid today, by today, when he needs it, and it
22 will be given back to The Venetian as
23 reimbursement. So he would get, like, a check
24 with no money, so to speak.

25 THE COURT: Did you sign the agreement

007856

1 yet?

2 MR. PEPPERMAN: We have not signed any
3 agreement.

4 THE COURT: Why? I'm not trying to be
5 difficult, but, I mean, seriously, that's part of
6 this entire -- this is all predicated on the
7 agreement; correct?

8 MR. PEPPERMAN: Well, we have an
9 agreement. The agreement is in place.

10 THE COURT: The agreement isn't
11 signed -- it's not executed yet; right?

12 MR. PEPPERMAN: Well, The Venetian
13 requested something in writing to memorialize it
14 for that end, for their end. But for our
15 purposes, everything has been agreed to. They're
16 getting paid. This is some sort of administrative
17 error.

18 THE COURT: It hasn't been memorialized
19 in writing.

20 MR. PEPPERMAN: Yes, we've agreed in
21 writing. We've agreed on the phone. We've talked
22 about it in email.

23 THE COURT: I know about the phone. I
24 thought you didn't have an email about it.

25 MR. PEPPERMAN: I have communications

007857

1 with them going back and forth about what we
2 talked about on the phone.

3 MR. KEMP: Judge, they did pay the one
4 juror his two weeks.

5 THE COURT: I know. But he's in a
6 different department.

7 MR. KEMP: I know. But it kind of
8 shows --

9 MR. PEPPERMAN: That's kind of the
10 problem here. I'm dealing with Ms. Lesani, but
11 she's -- she's contacting payroll and they're
12 dealing with different departments. It's an
13 administrative error on The Venetian's side of why
14 he didn't get paid on time.

15 THE COURT: At the end of the day, it's
16 not going to matter. It's going to be my error if
17 you don't have an agreement in place that's been
18 executed. Usually we all know that that's
19 critical.

20 So I'd like you to please make sure
21 that's executed before the end of the day. And I
22 want to see at least a photocopy of the agreement
23 that's executed.

24 That's a reasonable request,
25 Mr. Pepperman.

007858

1 MR. KEMP: We're not arguing, Your
2 Honor.

3 MR. PEPPERMAN: Your Honor, I can only
4 promise to do my best. Like, I've emailed her
5 this morning a couple times and haven't heard
6 back. So I will --

7 THE COURT: Mr. Pepperman, have someone
8 drive there with authority and have it executed.
9 I mean, we're in the same city. The Venetian is
10 right there.

11 MR. PEPPERMAN: I will do everything
12 within my power to get it signed by today.

13 MR. KEMP: Judge, I will send him. He
14 will go.

15 THE COURT: Thank you. Thank you. It's
16 just that I need to have backup. I've already
17 done something highly unusual, even though it's
18 been stipulated to.

19 MR. KEMP: I just want to make sure none
20 of this conversation can be construed as a waiver.
21 We are still taking the position that we agreed to
22 the two weeks. We filed the letter of references
23 to the court.

24 THE COURT: I understand that. I'm not
25 arguing that point.

1 MR. KEMP: Fine.

2 THE COURT: But the agreement is
3 something that should have been in place already.

4 MR. KEMP: I understand.

5 THE COURT: All right. We took care of
6 that. So we're going to bring them in. You're
7 going to rest.

8 And then, Jerry, we're going to give
9 them a little break while we hear this motion, and
10 then they'll be back in.

11 THE MARSHAL: All rise.

12 (The following proceedings were held
13 in the presence of the jury.)

14 THE MARSHAL: All the jurors are
15 present, Your Honor.

16 THE COURT: Thank you.

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

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

21 MR. ROBERTS: Yes, Your Honor.

22 MR. KEMP: Yes, Your Honor.

23 THE COURT: Mr. Christiansen.

24 MR. CHRISTIANSEN: Your Honor, subject
25 to the matters we spoke to a few minutes ago,

007860

1 plaintiffs rest.

2 THE COURT: So with respect to the trial
3 chronology, I just want to inform you that the
4 plaintiffs have now presented their case, and
5 we're going to take a break to discuss some legal
6 matters that have taken me a little bit longer.
7 Don't be mad at them.

8 So as soon as you come back, it's my
9 understanding that the defense will start with
10 their case. Correct?

11 MR. ROBERTS: Yes, Your Honor.

12 THE COURT: So moving to the second part
13 now. Okay?

14 Do you stipulate to not reading the
15 admonishment for a few minutes? They're just
16 going straight back.

17 MR. ROBERTS: Yes, Your Honor. That's
18 correct.

19 THE COURT: Jerry, they can't leave the
20 room or the restrooms.

21 THE MARSHAL: Okay. All rise.

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

24 THE COURT: Please be seated.

25 Jerry, just close that door. I know

007861

1 they're down the hall. Okay.

2 Good afternoon, Mr. Henriod.

3 MR. HENRIOD: Good afternoon, Your
4 Honor. At this time MCI moves for judgment as a
5 matter of law on all claims pursuant to NRCP 50A.
6 I'll be as brief as I can, and I think I can be
7 pretty brief.

8 Let me start on compensatory damages. I
9 don't think that there has been sufficient
10 evidence that this coach was more dangerous than
11 the ordinary user with ordinary knowledge in 2007
12 would have expected. I don't think there has been
13 any evidence that the ordinary user with ordinary
14 knowledge would have expected rear tires to not be
15 a dangerous place to be.

16 There's been no evidence that in 2007
17 the ordinary user with ordinary knowledge in the
18 community would have expected side sensors. As a
19 matter of fact, the only evidence is that that was
20 cutting edge and that it was still experimental,
21 but at very least that it was cutting edge. And
22 the fact that a vehicle is not cutting edge does
23 not make it defective. That would make every new
24 development cause every other road -- or every
25 other vehicle on the road to be defective

007862

1 automatically, and that's just not the law.

2 Every one -- you've heard a lot of
3 evidence about air disruption, and even Erika
4 Bradley talked about at times that she's been
5 walking down the street or riding a bike casually
6 and felt air disruption.

7 I think we've all felt air disruption,
8 whether we're on the sidewalk, whether we're
9 riding a bike casually, when we're on the road and
10 being passed by a semi. In general, it is a
11 concept that we're all familiar with.

12 The issue is whether or not there is
13 some type of critical mass of that air disruption
14 to cause a real danger, so much so that it makes a
15 vehicle dangerous, more dangerous than might
16 otherwise be expected for a very large vehicle.
17 We haven't heard that.

18 In terms of visibility, well,
19 Mr. Hubbard didn't testify that he was somehow
20 surprised by the extent of visibility in this
21 coach, and he drives them professionally. He's
22 around them.

23 And even on visibility -- you know what?
24 Let's talk about causation. We saw the schematic
25 that was drawn up to demonstrate what the view

007863

1 would have been while the bicyclist is right down
2 there in the lower right-hand corner. And the
3 idea there was to show how obstructed the view of
4 that person was.

5 Except that, even if that's the case --
6 and, again, I'm making assumptions on Rule 58,
7 construed the evidence in a light most favorable
8 to them. Even if at that very moment, if he was
9 that close, if the view of him would have been
10 obstructed, well, the evidence from virtually
11 everyone was that the bus had overtaken him. So
12 there would have been a long period of time when
13 he was visible.

14 Also on causation, the side sensors.
15 Haven't heard that those even would have come into
16 play since the bus didn't turn, and, in
17 particular, there was no turn signal that
18 Mr. Hubbard initiated.

19 Any of us who have a side sensor in our
20 car, we know that you only start to see that when
21 you've actually indicated that you're going to
22 turn; otherwise, it would just be going off all
23 the time on a freeway when you have cars going
24 past. And here there was no evidence that he took
25 any action that would have activated a side sensor

007864

1 alarm even if they had one.

2 MR. BARGER: He can step out.

3 Bob, just step out.

4 MR. KEMP: I didn't realize you were
5 going to go into factual detail.

6 MR. HENRIOD: On the S-1 Gard causation,
7 there was medical testimony that this particular
8 crush injury might have been avoided. I recognize
9 that there was that. But I don't think that there
10 is substantial evidence that death overall or
11 even -- well, yeah -- that death would have been
12 avoided, because we have a bus hitting not just
13 the head but the head on the end of a neck at
14 25 miles an hour.

15 And a lot of us have been in cases where
16 you can need a fusion surgery even when you are in
17 a traffic accident case. But there's been no
18 evidence that -- a head getting knocked around at
19 25 miles an hour, that there would have been
20 survival in that case. To some extent, we are all
21 bobbleheads, so to speak, and nobody spoke about
22 that.

23 So I think we have real causation issues
24 and liability issues on the defects themselves,
25 but let me jump to the punitive damages. This is

007865

1 not a punitive case. I don't think there has been
2 any evidence that we acted with conscious
3 disregard. And that needs to be clear and
4 convincing evidence to the reasonable person.

5 I mean, I understand that there is a
6 range on reasonableness, and that's what we're
7 looking at with the Court's gatekeeping function
8 right now, what is within the realm of reasonable
9 findings that a jury can make? And, here, by the
10 clear and convincing standard, I don't think there
11 is any evidence that would substantiate a
12 reasonable person finding that we acted
13 despicably.

14 What do they have to show? I mean, this
15 is statutory. Under 42.001, they have to show
16 that we had knowledge. Let's assume that all of
17 their defect claims in and of themselves have
18 merit. Let's assume, for the sake of argument,
19 that the product is defective.

20 But to warrant punitive damages, even
21 assuming that, the Court would have to find that a
22 reasonable jury could find by clear and convincing
23 evidence that MCI knew of these dangers and they
24 knew that they were probable dangers and that we
25 deliberately did nothing about it.

1 This is not a Ford Pinto case, where
2 there was an awareness of some danger and we
3 elected not to do it because of bean counters
4 telling us that it would be expensive.

5 The best thing that they have in support
6 of this punitive theory is to bring up a bunch of
7 people and say, "Hey, did you know about X, Y, and
8 Z? Did you know about air blasts? Did you know
9 about suction at the tires? Did they do anything
10 about it? Was there any type of training on
11 that?"

12 And what they keep getting from
13 everybody is, "Well, I knew about air disruption
14 in general, but air blasts? No. Suction at the
15 rear tires? No."

16 What they've asked are questions that
17 are designed to make it seem like there are
18 dangers. The questions assume there are those
19 dangers. And then they try to get the witnesses
20 to suggest MCI despicably didn't tell people about
21 them.

22 Well, really, what we're seeing from all
23 of that testimony is that there was no knowledge
24 of these probable dangers, even assuming that they
25 exist. Put simply, a defendant cannot be unaware

007867

1 of a product's defect. Well, a defendant that is
2 unaware can hardly be said to consciously
3 disregard. That is a serious standard. We had to
4 actually know. We had to actually know of the
5 particular defect, and we had to know that there's
6 something that we could do about it.

7 I know that a knife is sharp; I don't
8 know that there's anything I can do about that.
9 Some things are unavoidably unsafe. So to warrant
10 punitive damages, you have to not only be aware of
11 the potential danger, but you have to be aware
12 that there's something you can do about it. And
13 there's no evidence of that.

14 On warnings, well, one, we have to know
15 of the danger. And even assuming we know of the
16 danger, we have to know that our users don't also
17 know that. We have to be aware of their potential
18 ignorance such to disavow them. We don't see
19 that.

20 There is, in punitive damages, no
21 constructive notice. Red flags is the closest
22 that you come to constructive notice.

23 It's interesting. I was searching
24 online in a punitive damages treatise for the term
25 "red flags." I found one reference in the entire

1 thing to red flags, and it was a parenthetical to
2 a Nevada case, Countrywide. But even there, the
3 notion of red flags is chosen carefully, I think,
4 by Justice Parraguirre, because a red flag by
5 definition has to be something that is
6 conspicuous, something that the normal person
7 would see and notice and something that flags in
8 red that you should be aware of and act on.

9 Something being out in the world such as
10 this 1980 article, that is not a red flag. There
11 are a number of things that we saw in their
12 motion -- in their opposition to our motion for
13 summary judgment that never came in, a 2000 press
14 release about the 2008 Volvo. We never got into
15 that correctly. We never got into an article
16 about the VORAD from 1994. We never got into
17 "Today's Trucking" from 2005. We never got into
18 what had been their Exhibit No. 7 about the
19 Bugatti.

20 The punitive damage claim got this far
21 because there was a lot of stuff thrown up on the
22 wall. But now we're looking -- all the cards are
23 on the table. What did we have? What did we
24 know? And the one thing that we actually
25 possessed was that 1993 wind tunnel test.

007869

1 But what we were looking for there --
2 and the evidence all bears this out. What we were
3 looking for was the impact on fuel consumption.
4 We weren't looking for any safety ramifications of
5 that. There's no issue that is mentioned in the
6 report or the findings that would create some
7 flag, much less a red flag, that there are safety
8 implications that a professor from Washington
9 might come in and connect dots to a safety issue.

10 We don't have any of that. And we need
11 not only the information from which you could
12 infer some type of safety issue; we have to know
13 there is a safety issue. It's like drugs that are
14 prescribed off-label. They are designed to treat
15 something, they're approved to treat something,
16 and then, later on, as people continue to do R&D
17 and doctors look at problems, people begin to
18 wonder, well, is there something else that this
19 information is useful for? Is there something
20 else that this drug could be used for?

21 And, here, I think that that's what we
22 have with the 1993 information from which
23 Dr. Breidenthal could come in and say, "Well, this
24 data is enough for me to extrapolate to a safety
25 issue, given my background knowledge and

007870

1 connecting the dot with another study from the
2 '80s. That is not a red flag to us that there was
3 something in the 1993 test with a safety
4 implication.

5 Even assuming that Dr. Khiabani fell
6 because he was knocked over by an air blast or
7 even that an air blast caused him to wobble, there
8 is no evidence that a bus has ever knocked over a
9 pedestrian or a bicyclist because of air
10 displacement. There's plenty of evidence about
11 tragic accidents and collisions, but there is no
12 evidence that anybody has ever been knocked over
13 by an air blast.

14 There's a reason none of us have uttered
15 the sentence "one of those bus air blast cases."
16 This is all new. And I don't even buy it. But
17 it's new and there couldn't be conscious
18 disregard.

19 And then, on managing agent, that is a
20 different managing agent under the statute than
21 the evidentiary managing speaking agent. There,
22 we're not talking about somebody who comes in as a
23 witness because they have knowledge and bind the
24 company; we're talking about something much more
25 particular.

007871

1 We're talking about the ultimate
2 decision-maker who, on these plans, would have to
3 know that there is this dangerous aspect to the
4 vehicle, and I don't care. This is a dangerous
5 vehicle, and I greenlight production anyway.
6 That's what you need when it comes to ratification
7 by a managing agent. We don't have any evidence
8 of that either.

9 And I don't think this is a can that can
10 be kicked down the road. Every day that this goes
11 forward, that they're allowed to ask inflammatory
12 questions that suggest that we were negligent in
13 the way that we trained or that we were negligent
14 in the way that we designed, that there are safer
15 ways that we could do this, it just continues to
16 exacerbate a prejudice that's already there, but
17 we could at least stop it from getting worse.

18 And so, Your Honor, that is why we are
19 making the motion now. If we need to, we'll make
20 it again later. But, at very least, I think that
21 we need to get rid of this punitive damage claim
22 so that it does not continue to infect the trial.

23 THE COURT: Thank you.

24 MR. KEMP: Judge, this is the -- let me
25 put this on for a better record.

007872

1 Judge, this is the same issue that was
2 addressed in their motion for summary judgment.
3 They filed two motions for summary judgment. One
4 was to get rid of the defect claim and one was to
5 get rid of the punitive claim. We filed an
6 opposition to it, and that opposition cited a lot
7 of the same evidence I'm going to cite now. In
8 addition, we have a lot more evidence in trial.

9 He started out with compensatory, so I'm
10 going to start out with compensatory.

11 THE COURT: Will you please speak
12 slower.

13 MR. KEMP: Yeah.

14 He started out with compensatory
15 damages, so I'm going to start out with
16 compensatory damages.

17 First, he said we've had no testimony
18 from an ordinary user about any of these products.
19 That's not true. We had testimony from
20 Mr. Hubbard, the driver of the bus, who testified
21 that, in his opinion, there should be a proximity
22 sensor. We had testimony from Ms. Witherell, the
23 woman from Reno. She said that a bus should have
24 a proximity sensor. We had a bus safety
25 specialist that's employed by the bus drivers

007873

1 union, the 200,000 persons, Mr. Sherlock. He said
2 there should be a proximity sensor.

3 So three different -- those are bus
4 drivers, all three of them. And all three of them
5 said that this bus should have had a proximity
6 sensor.

7 And he referred to it as cutting edge.
8 Well, the evidence -- and Mr. Sherlock testified
9 to this -- is that Eaton was available in 2005.
10 The Eaton side sensor was available in 2005. And,
11 also, we've admitted an exhibit that shows that
12 BCI, Bus Coach International, actually put an
13 Eaton proximity sensor on their bus in 2007.
14 Okay?

15 And, you know, counsel says, well, MCI
16 didn't know about it. Again, Your Honor, that is
17 the story that they put the ad right under it for
18 the MCI bus. So, clearly, they knew about it.
19 But, in any event, it was clearly available. And
20 I don't think waiting two years to put on a pretty
21 compelling safety device is something that can't
22 be argued to be conscious disregard.

23 Two years, Your Honor? If it had been
24 two days, maybe -- two weeks, two months -- but
25 two years it was available and their competitor

007874

1 was using the proximity sensor?

2 All right. Flipping over to visibility.
3 We have direct testimony from Mr. Sherlock that
4 this was a dangerous condition, the right-side
5 visibility problem. And counsel says, "Well,
6 there's been no testimony linking it together in
7 causation."

8 Well, Mr. Sherlock testified, one, that
9 the side sensor, a proximity sensor, would make a
10 difference in this case.

11 Two, he testified specifically that the
12 right-side defects would have made a difference.

13 Can I have those two, Shane.

14 MR. GODFREY: Yes.

15 Ms. Recorder, would you switch me over,
16 please.

17 THE COURT RECORDER: Yes.

18 THE COURT: What was number two?

19 MR. KEMP: This is Mr. Sherlock's
20 testimony on both points, Your Honor. This is the
21 causation testimony he says doesn't exist in this
22 case.

23 (Video played.)

24 "QUESTION: Okay. And with regards to
25 the good right-side visibility that you've

1 outlined and the bad right-side visibility
2 that -- that this bus has, if you had cured
3 those problems, would that have made a
4 difference, in your opinion?

5 "ANSWER: It seems extremely likely that
6 Mr. Hubbard would have seen the bicycle
7 coming his way earlier if the bicycle wasn't
8 something like 90 percent obscured."

9 MR. KEMP: It's direct expert testimony
10 on the causation with regards to the first
11 problem, the right-side visibility.

12 The second issue was this proximity
13 sensor issue. And, again, counsel kind of took
14 the same tack that Mr. Terry took with Sherlock,
15 that, oh, it's just a side proximity sensor, you
16 wouldn't see anything in front of you. That was
17 directly contradicted by Mr. Sherlock. And let me
18 show you this clip, where he again ties causation
19 to that defect.

20 (Video played.)

21 "QUESTION: Okay. So if that's the kind
22 of sensor that is on the bus, the side
23 proximity sensor that's on the bus, that
24 sensor would provide no information about
25 Dr. Khiabani, would it?

007876

1 "ANSWER: I don't think that's true. It
2 depends on the sensor range of operation. If
3 it's one of these that has 180 degrees, it's
4 going to alert you to the presence of the
5 doctor. If it's the 360 designs, it's going
6 to alert you to the presence of the doctor.
7 If it's a wide sensor on the front which is
8 integrated into these systems, then it would
9 tell you about the doctor."

10 MR. KEMP: Your Honor, I don't want to
11 play his whole testimony, but he continued to say
12 that if the bus driver had been given a warning
13 .10 or .12 seconds earlier, that would have
14 allowed him to steer away. And, as you know,
15 defense contends that the bus just hit him by 1 or
16 2 inches. So, obviously, it would have then been
17 causation in this case.

18 So those go to the compensatory claim.
19 Now let's move to the punitive claim.

20 In their brief, they say that punitives
21 are unusual or rare in products cases. That is
22 flat-out not true.

23 In the Pinto case, 100 million punitive
24 award.

25 In the Teva case that we tried in front

1 of Judge Walsh for the defective propofol sizing,
2 \$500 million award.

3 In an Actos case a couple years ago in
4 federal court, \$2 billion award.

5 In the Wyeth case, the one from Reno
6 that they cite in the brief, Wyeth was making, I
7 think, Prempro, and they were supposedly hiding
8 European studies, there's a punitive award there.

9 Usually, the punitives come in the
10 product cases. That's the typical case for them.

11 And they cite Granite States on page 5
12 of their brief. That's a case I like to discuss
13 because that illustrates the conscious disregard
14 standard. And in that case, that was the one up
15 in Reno where Granite Construction Company was
16 building a road -- I think that's I50 up there
17 connecting Reno and Carson City.

18 So they were building a road and there
19 was a bull going back and forth in some pasture
20 there. And the reason that they allegedly were
21 consciously disregarding known safety measures is
22 that they didn't build a fence there. The court
23 found that they knew that if you put a fence, that
24 would separate the bull from coming into the
25 highway. And what happened, of course, is the

007878

1 bull went into the highway and it collided with
2 some motorists who got killed.

3 But that case held that general
4 knowledge that a bull was dangerous and could go
5 onto a freeway, and general knowledge that if you
6 built a fence, you could separate bulls from
7 freeways, that was sufficient for punitive
8 damages. And it's conscious disregard of known
9 safety measures. Okay? And that's pretty much
10 the standard that's used in all the cases.

11 But let's take a look at this particular
12 case. We talk about aerodynamics. Okay? It's
13 different than the Pinto case. In the Pinto case,
14 Ford Motor Company had not yet designed and made
15 the barrier to protect gas from leaking out of a
16 Pinto. The testimony in that case was that it
17 would cost \$5 to do so, but they hadn't even made
18 that part yet.

19 In this case, they made the safer
20 alternative part back in 1993. That's 26 years
21 ago. That's a full 15 years before the bus in
22 this case was made. They made the safer
23 alternative part, being the streamlined part that
24 would prevent air blasts.

25 And, you know, they say, "Well, we were

007879

1 just testing for fuel." Your Honor, they hired
2 Dr. Cooper, who was the aerodynamics guy who wrote
3 the article back in 1985 on the optimum radii to
4 get a better aerodynamic efficiency. That's the
5 guy who did it. And it was a very -- I mean,
6 you've seen the test over and over again. It was
7 a very extensive round of testing.

8 And they knew -- they knew as an
9 absolute fact from that testing that they had a
10 poor-performing product because that testing
11 showed that the CJ3 bus that was tested -- which,
12 if you recall, we had a picture of that on the
13 left and a picture of that on the right -- and
14 Dr. Breidenthal testified that, you know, if the
15 picture didn't tell you that already,
16 Dr. Breidenthal testified that's pretty much the
17 same as the J4500. That test had a .60 drag
18 coefficient. Dr. Breidenthal also testified that
19 the CJ4500, in his opinion, would have a .6.

20 But they knew from that testing that the
21 Volvo, their competitor, only had a .4. So they
22 knew about it. And this was back in 1993, 15
23 years before they made the subject bus. And we've
24 heard nothing -- it's unbelievable. The silence
25 on the other side as to why they didn't use the

007880

1 safer alternative part, it's amazing. They
2 develop it, but they just didn't use it.

3 But they certainly knew about a known
4 safety measure because they actually built it.
5 And, again, you go back to the Granite States.
6 Yeah, they knew bulls could travel across the
7 road, they knew fences would stop bulls, but they
8 didn't make an actual alternative safer part and
9 neither did the Pinto case.

10 The next thing they talk about is the
11 right-side blind spots. "Oh, we didn't know about
12 it." Mr. Hoogestraat was designated as the PMK on
13 right-side blind spots. He admitted knowing about
14 it. He was on the design team for this bus. So
15 the PMK on the design team knew about the
16 right-side blind spot. They didn't do anything
17 about it.

18 And we heard from Mr. Sherlock going on
19 for an hour what they could have done about it.
20 They could have -- rather than have the opaque
21 door, they could have had glass down there.
22 Rather than have a wide side pillar -- A-pillar,
23 they could have had a more narrow A-pillar.
24 Rather than have the high dash, the highest in the
25 industry -- which not only he confirmed, but

007881

1 Mrs. Witherell testified about this -- rather than
2 having that high dash, they could have had a low
3 dash like we had with the BCI.

4 And, if you remember, when we presented
5 his testimony, we put the BCI dash right side by
6 side with the J4500 dash and showed that they knew
7 about it. They could have obviously put on the
8 proximity sensor. I mean, that would have been a
9 simple solution.

10 And then, you know, not only did
11 Hoogestraat admit to it, but Couch testified that
12 they did line-of-sight studies on the right-side
13 blind spot, which they conveniently could not find
14 to produce to the plaintiffs in this case.

15 So, anyway, there's actual knowledge of
16 the right-side blind spot by Couch, who's the vice
17 president of design. He's not -- he's not just a
18 designer like Lamothe was; he's the vice president
19 in charge of the entire design project. And
20 Hoogestraat, who, again, he's the PMK. So they
21 knew about that, Your Honor.

22 Moving to proximity sensors. You know,
23 Hoogestraat testified that he knew that there was
24 off-market kit. That's what he testified to.
25 Again, he was the PMK they produced on proximity

007882

1 sensors. And of course they knew there was
2 off-market kit because Eaton was out there selling
3 this proximity sensor to a lot of people,
4 including the competitor on the leading industry
5 publication that they put the ad on. So, clearly,
6 they knew about it.

7 Now, moving to protective barriers.
8 They always try to make the issue from the
9 protective barriers in general to a specific kind
10 of protective barrier, the S-1 Gard. On
11 protective barriers in general, Hoogestraat said
12 that he knew that there were protective barriers
13 that could protect a right rear tire. Couch said
14 that they had the expertise to make one. So they
15 clearly knew about this potential. And, again,
16 Hoogestraat was produced as the person most
17 knowledgeable on protective barriers.

18 All right. Now, referring specifically
19 to the S-1 Gard, here's the testimony on that:
20 50,000 buses had the S-1 Gard. And then we had
21 Mr. Barron's testimony. Barron said he told MCI.
22 He didn't say he told just Universal Coach. If
23 you take a close look at his deposition, he said
24 he told MCI.

25 But assuming that the only knowledge

007883

1 that was transmitted was to the Universal Coach
2 president -- which was Mr. Pablo Ferraro or
3 Fierros, something like that -- he was directly
4 supervised by Mr. Bernacchi, the president of MCI.

5 So to suggest that they didn't have
6 knowledge of the S-1 Gard, I don't think is
7 appropriate. But, like I said, they've already
8 admitted that they had knowledge of barrier
9 protectors in general.

10 And so for those reasons, we have a lot
11 more conscious disregard of not one, not two, not
12 three, but four different types of safety
13 devices -- one, the safer part; two, the
14 right-side blind spot problem; three, the
15 proximity sensors; and four, the S-1 Gard -- than
16 we had in the Granite States case. And like I
17 said about the Pinto case, they actually made the
18 safer alternative part in this case, they just
19 didn't use it, referring to the aerodynamic front.

20 For those reasons, Your Honor, and for
21 all the reasons that we've set forth in the
22 opposition brief, the punitive damages claim is
23 well-supported in this case and should go to the
24 jury.

25 MR. HENRIOD: I hear that we knew in

007884

1 1993 that there was a safer alternative and that
2 we didn't use that safer alternative, except that
3 there was no issue about safety discussed in 1993.

4 So whether or not a decision was made to
5 spend -- to adapt the vehicle based on the
6 information that we found for fuel economy
7 purposes, it doesn't have anything to do with what
8 was understood at the time to be safety-related
9 and it doesn't matter how many times they just say
10 that. And it's one of the problems with allowing
11 this claim to linger around.

12 Another issue, again, that just taints
13 the idea of barrier guards in general, and the
14 fact that, well, you could have put on a spat, but
15 you didn't even do that. Well, there's been no
16 argument that having a spat on this vehicle would
17 have made any difference.

18 So the problem with this punitive damage
19 case, when there was nothing in our records or in
20 any of the people that were asked -- in the
21 testimony of anybody that was asked about the
22 known safety ramifications of any of these issues
23 at the time, is that it gives them excuse to just
24 continue to throw junk up against the wall like
25 this spat issue.

007885

1 And even on the 1993 wind tunnel test,
2 Breidenthal didn't testify. He didn't have a
3 substantial basis for concluding that the J4500
4 didn't integrate lessons that we had learned from
5 the 1993 test. There isn't even something to
6 connect that dot.

7 So what we knew, what could have been
8 safer, what could have been safer alternatives,
9 what we knew about those alternatives, linking
10 those to safety, is really just a rhetorical
11 assertion. There has not been any evidence of
12 that.

13 Yes, you have -- everybody knows that
14 bulls can be dangerous on the road. And everybody
15 knows that, if you put up a fence, you might keep
16 the bull from getting onto the road. And that is
17 the type of knowledge that we're talking about.

18 Here, not everybody knows, assuming it's
19 true, that air blasts knock over pedestrians, and
20 I don't hear it contested that there was any
21 evidence that that was known to be a dangerous
22 condition, and that is the only potential
23 dangerous condition to which the 1993 wind tunnel
24 testing would have been relevant.

25 I understand there are a lot of cases, a

007886

1 lot of product cases, that can support a punitive
2 damage claim. But by their rationale, virtually
3 every product case would support a punitive damage
4 claim. Whenever there is an assertion that a
5 manufacturer is aware of an alternative design
6 that might be a little safer and isn't using it,
7 well, that would make a punitive damage claim of
8 almost every product defect case. Otherwise, we
9 would all be driving Hummers because there is
10 something about my vehicle that makes it not as
11 safe as a Hummer, and Volvo knows that. That's
12 not the test.

13 Yes, there are product cases that
14 support them. This isn't one of them.

15 Unless Your Honor has any questions, I'm
16 done.

17 THE COURT: Okay. I'm going to deny
18 Motor Coach Industries' brief -- or motion for
19 judgment as a matter of law NRCP 58. I do believe
20 that the plaintiffs have proffered sufficient
21 evidence -- they have produced enough evidence,
22 sufficient evidence, that a jury could find
23 oppression or malice or basically with respect to
24 conscious disregard.

25 I agree that with respect to --

007887

1 actually, I have notes that are very similar to
2 the ones Mr. Kemp just enunciated. So there have
3 been witnesses that testified to sufficient --
4 with respect to the compensatory damages and the
5 punitives as well.

6 I can give you this in writing later,
7 but, basically, my notes are very similar to what
8 Mr. Kemp just enunciated.

9 MR. HENRIOD: Very well.

10 THE COURT: All right. Why don't we
11 bring the jury in.

12 MR. BARGER: Can we have two minutes
13 before we start?

14 THE COURT: Sure.

15 (Discussion off the record.)

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

18 THE MARSHAL: All rise.

19 All the jurors are present, Your Honor.

20 THE COURT: Okay. Thank you very much.

21 THE MARSHAL: Please be seated. Come to
22 order.

23 THE COURT: We are going to get started
24 with the defense case, defendants' case.

25 MR. BARGER: May it please the Court.

007888

1 THE COURT: Yes, please.

2 MR. BARGER: We call Robert Rucoba, Your
3 Honor.

4 THE MARSHAL: Remain standing and raise
5 your right hand towards the clerk.

6 THE CLERK: You do solemnly swear the
7 testimony you're about to give in this action
8 shall be the truth, the whole truth, and nothing
9 but the truth, so help you God.

10 Be seated.

11 MR. BARGER: Your Honor, we've had
12 previously marked and identified as Defendants'
13 Exhibits 515 through 566, and we would offer those
14 at this time.

15 MR. KEMP: No objection, Your Honor.

16 THE COURT: Very good. They're
17 admitted.

18 THE CLERK: Sir, would you please state
19 and spell your name.

20 THE WITNESS: Yes. My name is Robert
21 Rucoba. That's spelled R-u-c-o-b-a.

22 MR. BARGER: May I proceed, Your Honor?

23 THE COURT: Please proceed.

24 DIRECT EXAMINATION OF ROBERT RUCOBA

25 BY MR. BARGER:

007889

1 Q. Please introduce yourself to the ladies
2 and gentlemen of the jury.

3 A. Yes. Hello. As I said, my name is
4 Robert Rucoba. I am an engineer. I live in
5 Houston, Texas.

6 Q. Okay. And what is your profession?

7 A. I am a -- I have a bachelor of science
8 in mechanical engineering. My profession is
9 accident investigation and reconstruction.

10 Q. And who do you work for, sir?

11 A. I work for a company called Carr
12 Engineering, Incorporated.

13 Q. And where is that company located?

14 A. They are located in Houston, Texas.

15 Q. And what does that company do?

16 A. That company does a couple of things.
17 Number one, it's involved in accident
18 investigation and reconstruction. It also is
19 involved with vehicle dynamics, testing, as well
20 as some large-scale computer simulations.

21 Q. Now, would you call yourself an accident
22 reconstructionist?

23 A. Yes, I do.

24 Q. And that's what you've been retained
25 here to discuss; correct?

007890

1 A. Yes, that is correct.

2 Q. Now, what I want to do is go over your
3 background and just generally where you went to
4 school and what you did after you went to school,
5 your career pattern.

6 A. Sure. My college career began at Purdue
7 University. I transferred to the University of
8 Houston, which is where I got my degree, my
9 bachelor of science degree, in mechanical
10 engineering.

11 While at University of Houston, I was a
12 member of Pi Tau Sigma, which is a national
13 mechanical engineering honor society. I was a
14 member of Tau Beta Pi, which is also a national
15 engineering honor society.

16 Since I graduated, I went to work
17 briefly for a company called TH Hill Associates,
18 and they were doing failure analysis in the field
19 of oil field pipeline products. But then I went
20 in to work for Carr Engineering in 1986.

21 Q. And what have you done since 1986 with
22 respect to Carr Engineering?

23 A. With respect to Carr Engineering, I have
24 been involved primarily in the areas of accident
25 investigation and reconstruction. I get involved

007891

1 in vehicle dynamics testing. And I also get
2 involved in the computer simulation areas as well.

3 Q. Approximately how many accidents have
4 you investigated or reconstructed since 1986
5 through today?

6 A. In my 30-plus year -- 30-year-plus
7 career, I've reconstructed over 1800 crashes.

8 Q. Would you tell the ladies and gentlemen
9 of the jury what societies -- what professional
10 societies that you're a member of?

11 A. Yes. I'm a member of the American
12 Society of Mechanical Engineers. I'm a member of
13 the Society of Automotive Engineers. And I'm also
14 a registered professional engineer in the state of
15 Texas.

16 Q. Okay. Have you authored some
17 publications that have been published in
18 peer-reviewed magazines and articles?

19 A. Yes. As part of the role at Carr
20 Engineering to try to push the envelope or to move
21 the technology ball down the road, we --
22 periodically we will publish peer-reviewed
23 technical articles, and those are generally
24 published through the Society of Automotive
25 Engineers, and I've been a part of those.

007892

1 Q. So the jury has heard from a gentleman
2 named Robert Caldwell. Is he kind of your
3 counterpart in this case to some extent?

4 A. Yes, I'd agree with that.

5 Q. The jury has heard from Mr. Caldwell
6 that he was an accident reconstructionist. We're
7 going to go through your testimony. Candidly, you
8 guys don't disagree too much, do you?

9 A. I would agree with that, yes.

10 Q. All right. So I have a duty to my
11 client to put on the facts. I'm going to be a
12 little bit repetitious, but I'm going to try not
13 to be too much repetitious. Okay?

14 A. That sounds fine.

15 MR. BARGER: All right. So at this
16 time, Your Honor, I would tender Mr. Rucoba as an
17 expert in accident reconstruction.

18 MR. KEMP: No objection, Your Honor.

19 THE COURT: Okay. Mr. Rucoba is
20 qualified as an expert in accident reconstruction.

21 Go on.

22 BY MR. BARGER:

23 Q. I think the jury understands what
24 accident reconstruction is, but would you tell
25 them briefly in your own words how you consider

007893

1 yourself and what you do as an accident
2 reconstructionist?

3 A. Sure. I often get asked that question.
4 I think the real simple answer is that it's sort
5 of like putting together a jigsaw puzzle. I think
6 we've all put together jigsaw puzzles where you
7 dump them out on the table, take it out of the box
8 and dump them on the table. You've got all these
9 pieces, and you've got to start to organize these
10 pieces and put them in the proper sequence;
11 otherwise, you're not going to have the right
12 picture. If pieces sort of fall off the table,
13 you know, you're going to have some incomplete
14 pictures of the puzzle when it's all put together.

15 Accident reconstruction, I tell people,
16 is very much like that. You're starting with
17 pieces of information. You're trying to
18 understand what happened out there on a given
19 crash day, and you're trying to put that
20 information together with all of these various
21 bits and pieces of information that you've been
22 given and try to put together a picture that
23 agrees not only with the physical evidence but
24 also agrees with the laws of physics.

25 Q. When were you first contacted in this

007894

1 case?

2 A. I was first contacted back in 2017.

3 Q. And did you perform an accident
4 reconstruction of what happened out there on the
5 day of the accident?

6 A. I did.

7 Q. All right. Tell the ladies and
8 gentlemen what you looked at and what you did.
9 Okay?

10 A. Okay. Sure. Well, of course, the first
11 thing that we'll start off with is the information
12 that was taken on the day of the crash, things
13 that would be helpful to me to understand the
14 conditions immediately -- just immediately after
15 the event happened. So I will be looking at
16 things such as police photos or the police report.
17 Those are things that I would look and ask for.

18 Q. Let me show Exhibit 515, please. And
19 we're just going to look at some photos that were
20 taken on the day of the accident and some photos
21 that were taken by you and some other people;
22 correct? Eventually?

23 A. That is correct.

24 Q. That's not 517. The next one, please.

25 MR. BARGER: I'm sorry. We have to do

007895

1 it from here? May I hand this clicker to the
2 witness?

3 Let's go to Exhibit 515, which is the
4 next one, please.

5 THE WITNESS: All right.

6 BY MR. BARGER:

7 Q. What I want to do is walk you through
8 and ask you, is that a diagram that was done by
9 people on the scene on the day of the accident?

10 A. Yes, that is.

11 Q. That was not done by you, right?

12 A. No, that is not.

13 Q. So what does that show you, Exhibit 515?

14 A. Well, what you can see there is a layout
15 of the roadway, and you can see that there's some
16 evidence that has been recorded. You can see that
17 there's some -- the bicycle you can see with an
18 arrow pointing towards the bicycle, and then you
19 can see that there is an aerial that's pointing to
20 another piece of evidence called blood.

21 So those are kinds of things that people
22 are documenting on the day of the crash, the
23 physical evidence that's being recorded and the
24 way that that evidence is positioned in the
25 intersection.

007896

1 Q. Mr. Rucoba, you can't put a laser on
2 that particular screen because it won't show up.
3 So we have a pointer, and I'm going to get the
4 Court's permission if you need to point to what
5 you're talking about because we can't put one of
6 those red lights on it.

7 A. Okay.

8 MR. BARGER: Do I have permission?

9 THE COURT: Of course.

10 MR. BARGER: Thank you.

11 BY MR. BARGER:

12 Q. Let me turn to Exhibit 516. You have to
13 click it, I think. There you go.

14 What is that showing?

15 A. That is a -- may I step down?

16 MR. BARGER: With the Court's
17 permission?

18 THE COURT: Yes. Absolutely.

19 THE WITNESS: Thank you. So what you're
20 looking at here is an aerial photograph of the
21 crash site. And I've put here where the impact
22 location is. So you can see this is Charleston
23 Drive; this is the direction where the vehicles
24 were traveling, where the bus and the bicycle are
25 traveling down Pavilion Center. And then this is

007897

1 Griffith Peak Drive at the intersection here,
2 and then over here is the Red Rock Casino that
3 we'll be talking about.

4 BY MR. BARGER:

5 Q. I don't want to go into any detail, but
6 did you have an opportunity to read the
7 depositions in this case?

8 A. I did.

9 Q. And we may or may not talk about that
10 later. The jury has heard a lot of it. And for
11 your information, this is a Google map that's out
12 in front of you here that we may or may not use.
13 But you had a chance to look at that this morning;
14 correct?

15 A. I did.

16 Q. Okay. Now, anything about Exhibit 516
17 that you need -- the jury has seen this, but I
18 just want to put it in perspective. Anything else
19 you need to see?

20 A. No. We can move on.

21 Q. So you can go to the next one.

22 What is 517?

23 A. So, again, another aerial view but sort
24 of getting a little bit closer to the
25 intersection. Again, I've put down here where the

007898

1 impact location is, but it just gives you an idea
2 of just what the general area looks like of the
3 intersection as you get a little bit closer.

4 Q. Okay. Let's turn to Exhibit 518.

5 A. Okay. 518, what I've put down here is
6 the bike lane. And you can see where the bike
7 lane is on either side of the intersection. The
8 purpose of this aerial photograph was to show you
9 how the bike lane is aligned when you're on the
10 north side of the intersection and when you're on
11 the south side of the intersection. In other
12 words, you can pretty much just go straight down
13 the bike lane. You don't have to jog to the left
14 or jog to the right in order to connect back up
15 with this particular bike lane on the south side
16 of the intersection.

17 I thought that the way that this photo
18 was taken and its closeup view and an overhead
19 view would be helpful for everybody to understand
20 how that bike lane is laid out on both sides of
21 the intersection.

22 Q. Let me ask you a question. In
23 reconstructing an accident, do you go to the
24 scene?

25 A. Yes.

007899

1 Q. Did you and your group of folks go to
2 this accident scene?

3 A. Yes, we did.

4 Q. Obviously, you didn't go the day of the
5 accident. When did you go, approximately?

6 A. Approximately in September of last year.

7 Q. And when you went to the accident scene,
8 what did you do?

9 A. Well, we did several things. What I do
10 is, first off, get myself familiar with the
11 intersection. It's the first time for me to be
12 there, just to sort of get an understanding of how
13 the traffic is moving, where things are coming
14 from -- east, west, north, and south -- just to
15 get an understanding where everything is at.

16 And then the next thing is to try to
17 sort of figure out where is the physical evidence
18 laid out in the intersection? Where did
19 everything sort of generally lie?

20 And then I'll take a 100-foot tape
21 measure, and I will define a reference point. I
22 will literally paint something in orange paint on
23 the roadway surface, and then I'll go up and down
24 the roadway north and south in 100-foot intervals
25 because it's going to be something that will be

007900

1 helpful to me when I'm placing all of this
2 physical evidence. And I'll document that with
3 notes or photographs.

4 We also surveyed this particular scene.

5 And then the last thing we did, we
6 actually flew a drone over the scene itself, and
7 the drone took a number of photographs that it can
8 stitch together and then ultimately end up with a
9 three-dimensional view of the scene just based on
10 on the aerial pictures.

11 Q. In addition to going to the scene, did
12 you have an opportunity to inspect the actual bus
13 that was involved in this particular accident?

14 A. I did.

15 Q. Okay. And when did you do that?

16 A. I also did that in September of last
17 year.

18 Q. Okay. And what did you do -- and were
19 there other experts there as well?

20 A. Yes.

21 Q. That we'll hear from in this case?

22 A. Yes, there were other experts that day.

23 Q. And there were experts from Mr. Kemp's
24 client as well there, correct?

25 A. That's true.

007901

1 Q. And all you ladies and gentlemen went
2 out there and inspected the bus together?

3 A. That is correct.

4 Q. All right. And what did you do when you
5 inspected the bus? What was your goal and what
6 did you do?

7 A. Well, what we did was to sort of
8 document what physical evidence is on the bus, try
9 to understand what marks are on the bus that might
10 be related to the crash and sort of document where
11 are they physically on the exterior of the bus?

12 We also look at the bus itself just to
13 make sure that there isn't anything mechanically
14 wrong with the bus that might have been a
15 contributor or a cause to the crash itself.

16 And then one of the things that I'll do
17 to sort of document my findings is I will take
18 photographs. And we also did a laser scan of the
19 exterior of the bus so that we could bring that
20 back to my office and I could look at that in a
21 three-dimensional view and be able to use that in
22 my accident reconstruction.

23 Q. What's a laser scan?

24 A. A laser scanner is a device that allows
25 you to literally map the exterior of the bus

007902

1 itself. It's almost like a laser beam, but it's
2 like a wand. It's almost like a laser beam that's
3 actually capturing the entire exterior. You end
4 up with what is called a cloud, a cloud of data
5 points.

6 But what the laser allows you to do is,
7 as you move the laser around the exterior of the
8 bus, you end up with all of these clouds of data
9 points. Then you can take it back to the computer
10 software and be able to put the clouds together.
11 It will find all of the similar points.

12 And then when it's all done, you end up
13 with a model that you can actually spin around and
14 you can look at in three dimensions.

15 Q. Now, in addition to looking at
16 photographs that were taken the day of the
17 accident and other photographs that were taken,
18 cell phone video and some video from the actual
19 Red Rock Casino, did you utilize that information
20 in an attempt to reach your opinions?

21 A. I did.

22 Q. All right. And by the way, before I
23 forget, when you -- when I ask you for a
24 conclusion or an opinion, I would like for you to
25 base it upon reasonable engineering probability.

007903

1 Okay?

2 A. That will be fine.

3 Q. All right. Now, let's look at Exhibit
4 No. 519. This is 519. What is that?

5 A. That is a still from the cell phone
6 video that was taken by one of the witnesses that
7 was there shortly after the crash happened.

8 Q. That was the gentleman Mr. Sacarias?

9 A. That's correct.

10 Q. What is this showing you?

11 A. Well, what it shows is point of rest --
12 that's what P-O-R means -- point of rest of
13 Dr. Khiabani. What was helpful to me to
14 understand where Dr. Khiabani came to rest based
15 on what I could see in this particular snapshot
16 from the video.

17 For instance, there are some very
18 distinctive cracks that are here on the roadway
19 surface. So when I was out at the scene, I wanted
20 to make sure that I could find those same kinds of
21 cracks so I could be able to properly and
22 accurately locate the point of rest of
23 Dr. Khiabani.

24 Q. Okay. Now, I want to go back. Point of
25 rest means what?

007904

1 A. Means that's where he came to rest when
2 the crash was over.

3 Q. Okay. I think the jury has heard terms
4 and will hear terms from you of point of impact.
5 Is that different from point of rest?

6 A. Yes, it is. Point of impact is
7 different from point of rest in this particular
8 matter.

9 Q. And what is point of impact that we'll
10 talk about later?

11 A. Point of impact is going to be the point
12 of impact between Dr. Khiabani and the motor
13 coach. Point of rest is going to be something
14 different. It will be what happened after
15 Dr. Khiabani ended up -- after engaging with the
16 motor coach and then going off to his point of
17 rest.

18 Q. Okay. So your job is accident
19 reconstruction; right?

20 A. Right.

21 Q. You're not here to talk about
22 aerodynamics and other things; you're here to talk
23 about what you saw at the scene. Right?

24 A. That is correct.

25 Q. All right. Now, Exhibit No. 520, let's

007905

1 go over that. What is that showing you?

2 A. Okay. This is another still from the
3 cell phone video by Mr. Sacarias. And, again,
4 what was useful to me is that it shows the
5 crosswalk. And I can see some of the signal
6 posts. And, again, we've got another crack here.

7 But I can also see now the point of rest
8 of the bike. And I can tell you that I said that
9 that's the bike's initial point of rest. And what
10 I mean by that is that, in later photos, we
11 discovered that the bike has actually been moved
12 to a different location. And so that was helpful
13 to me to understand, okay, there's things that are
14 being moved around, and I need to take that into
15 consideration when I'm doing my accident
16 reconstruction.

17 Q. Okay. So this is the photo taken by the
18 cell phone video; is that correct?

19 A. That is correct.

20 Q. All right. So that is before the
21 bicycle was moved?

22 A. Correct.

23 Q. And, obviously, I would assume that the
24 bicycle was moved by people who were attending to
25 Dr. Khiabani. Is that your understanding?

007906

1 A. I believe that is correct.

2 Q. Okay. Now, let's look at 521.

3 And tell us what this is.

4 A. Again, this is just another still from
5 the cell phone video of Mr. Sacarias. Again, it's
6 just showing things in the background that are
7 close to the bike's initial point of rest:
8 cracks, crosswalks, things that allow me to get
9 myself in the proper position so that I know where
10 to document the point of rest of the bike and the
11 point of rest of Dr. Khiabani.

12 Q. So you going to the actual scene, you
13 stood there, with your eyes --

14 A. I did.

15 Q. -- and you took photographs, and you
16 determined -- did you determine from looking at
17 the video and the other photographs taken by other
18 folks where the point of rest was, and you were
19 satisfied that it was accurate?

20 A. Yes. That is correct.

21 Q. Okay. In the same way that the point of
22 impact that we will prove after a while?

23 A. That is correct.

24 Q. All right. Let's go to 522.

25 What are we seeing here?

007907

1 A. Well, this is another photo. This one
2 happens to be taken by one of the bus passengers,
3 Mr. Pears. And in this particular picture, you
4 can see now what we learned from standing out at
5 the scene. And when you compare the angle that
6 that photo was taken, we learned for the first
7 time that the bike had been moved and that now we
8 needed to document its second position so that we
9 could make sure that we had that factored into our
10 reconstruction.

11 So this is a photo again showing some
12 crosswalks. There are some manhole covers that
13 were right here. So there were some things that I
14 could use to help me properly place the bike after
15 it had been moved and to also help me properly
16 place Dr. Khiabani's point of rest.

17 Q. Let's go to the next photograph, 523.

18 A. So this is another photo that was taken
19 by Mr. Pears. But what you could see here is
20 this, you can see, is where the coach or the bus
21 came to its stopping position.

22 So this was the first picture that
23 actually captured that. So it was important for
24 me to understand where that coach came to rest so
25 that, as I was putting together my reconstruction,

007908

1 I made sure that the path that I created with the
2 bus would take it to its proper point of rest,
3 because, later on, what we determined is that the
4 coach or the bus itself had also been moved to
5 another location.

6 Q. Now, look at 524 and tell us what you're
7 showing there, and point out -- you know, the jury
8 has heard this, but just to keep your testimony in
9 mind, I want to talk about the right travel lanes,
10 the bike lane, and the right turn lane. Okay?

11 A. All right.

12 So this is a photo that's taken on the
13 day of the incident. So what I've done is I've
14 added certain things. You're looking to the south
15 on Pavilion Center Drive. And I've added certain
16 labels. So you can see here is the right travel
17 lane, here is the bike lane, and there is the
18 right turn lane.

19 And, remember, I had said earlier that
20 you've got the bike and you've got the coach that
21 began and had their points of rest at one
22 location, and then, later on, we learned that they
23 got moved? Well, now you can see, at least when
24 this photo was taken, we've determined that the
25 bike and the coach had been moved to a different

007909

1 location, just sort of down the road a little bit
2 for the coach. The bike itself was dragged a
3 little bit to the south down the road.

4 But we at least know that, at the time
5 that this particular photo was taken, the bike and
6 the coach had been moved.

7 Q. Okay. And nobody is criticizing that
8 movement; it's just the fact that it happened
9 after --

10 A. Correct.

11 Q. -- so when you do your reconstruction,
12 you have to go back to where it actually was at
13 the time?

14 A. That is correct.

15 Q. Okay. Now, just for a moment again --
16 and I hate to be repetitious -- but when you say
17 "right travel lane," what does that mean?

18 A. Well, that means that if you're driving
19 south on this road, you've got two lanes here that
20 allow you to just keep on going straight or keep
21 going south through the intersection. When I say
22 that there's a right turn lane, that means there's
23 a lane here where you have to make a right turn
24 when you come to the intersection.

25 So these -- this travel lane here, you

007910

1 could just keep going straight and continue to go
2 south through the intersection without having to
3 turn left or right.

4 Q. And then there's the bike lane?

5 A. And then there is the bike lane here
6 going up to the intersection, and then you'll see
7 it goes onto the other side of the intersection,
8 like I showed in that aerial photograph.

9 Q. We'll talk a little bit more about this
10 later, but Mr. Caldwell, I believe, testified that
11 the impact occurred in the right travel lane. Is
12 that your understanding?

13 A. Yes, that is my understanding.

14 Q. Do you agree that the impact between the
15 bicycle and the motor coach occurred in the right
16 travel lane?

17 A. Yes. Mr. Caldwell and I agree on that.

18 Q. Okay. Do you recall approximately how
19 far he said into the right travel lane that the
20 impact occurred?

21 A. As I recall, I believe he's got it
22 approximately 6 feet into the right travel lane.

23 Q. Is that from the edge of the bicycle
24 lane?

25 A. Yes, that is from the edge of the

007911

1 bicycle lane.

2 Q. Would that be the -- which edge?

3 A. That would be the western edge of the
4 bicycle lane.

5 Q. All right. So if he --

6 A. Excuse me. That would be the eastern
7 edge of the bicycle lane.

8 Q. Show us which edge it is.

9 A. It's going to be this edge right here.

10 Q. Okay. And do you and doctor -- excuse
11 me.

12 Do you and Mr. Caldwell agree that it
13 occurred in that right travel lane?

14 A. Yes, we do.

15 Q. And what did you determine how far into
16 the right travel lane that the impact occurred?

17 A. Approximately 6 feet.

18 Q. Okay. So you and -- is it Mr. Caldwell
19 or Dr. Caldwell -- I don't remember -- expert
20 Caldwell.

21 Y'all agree on point of impact in the
22 bus lane traveling lane; right?

23 A. Yes, we do.

24 Q. All right. Show me, if you would,
25 Exhibit 525, the next exhibit.

007912

1 A. That would be it.

2 Q. And what are you showing us there?

3 A. So all I've done is just taken another
4 photo that was taken on the day of the incident.
5 And what I've tried to do is sort of walk you
6 closer and closer to the middle of the
7 intersection.

8 So the next picture, we're moving a
9 little bit further to the south. And now what
10 you're looking at again here, this is the right
11 travel lane. I've put a label in here for the
12 bike lane. There's the right turn lane.

13 But, again, it's just moving a little
14 bit further to the south closer to the middle of
15 the intersection.

16 Q. Okay. So if -- using this model, you're
17 getting closer to this intersection up there with
18 these photographs; is that correct?

19 A. Right. So we're starting back here and
20 we're walking this way, getting closer to this
21 area here.

22 Q. All right. Show me, if you would,
23 Exhibit No. 526.

24 A. Similar picture -- a similar picture,
25 again, just moving a little bit closer to the

007913

1 south, getting closer to the middle of the
2 intersection.

3 Q. Exhibit 527. Okay.

4 A. Okay. Same thing, just a few more steps
5 closer. You'll see that the bicycle is here. And
6 you'll see, as we step closer and closer, the bike
7 will be getting closer and closer.

8 Q. And 528 is you get closer?

9 A. Yes.

10 Q. All right. And let's look at 529.

11 Now, where are we there?

12 A. 529, we're just about to enter the
13 intersection. And so this is -- right here, this
14 is what is called a stop bar. When you and I
15 drive up to a stoplight, you'll see that white
16 stripe laid across the road. You're not supposed
17 to go any further than that.

18 But that is what is technically called a
19 stop bar. And so what I've tried to do is
20 identify that, because a lot of the reference
21 measurements that people have made in this case
22 are tied to that position on the stop bar, and
23 things are going north and south, and people are
24 making measurements relative to this line here.
25 So it's important. It was important for me to

007914

1 identify this in the picture.

2 And then I've also added the bike lane
3 and the right travel lane. And then you can also
4 see these dashed lines here, and that's the
5 crosswalk just before you get into the
6 intersection.

7 Q. Okay. Now, let's look at 530.

8 Where are we there?

9 A. Just about to step onto the crosswalk in
10 this picture, and that's why I've identified the
11 crosswalk. We're getting a little closer to the
12 bike's point of rest in the middle of the
13 intersection.

14 Q. Okay. You see the two white-looking
15 objects to the right of the bike? There's been
16 some testimony as to what people thought that
17 were. Do you know what those were?

18 A. Yes, I know what those are. Those are
19 water bottles that were on the bike.

20 Q. If you will, look at Exhibit 531.

21 Where are we now?

22 A. Getting a little bit closer. Now we're
23 almost on top of the bike, but you can see now
24 that we are about -- somewhere near the middle of
25 the intersection. And now you can see this is the

1 bike. And then you can see a little bit better
2 that those are water bottles.

3 Q. All right. Looking at 532, which is
4 obviously closer, where are we there?

5 A. So at 532, what we're looking at is the
6 bike. And then there is an area here that I've
7 identified as the point of rest. And that would
8 be the point of rest of Dr. Khiabani.

9 And then there's also some gouges that
10 are here. And what's also noticeable is that this
11 whole area of the bike and the gouges all lie in
12 the right travel lane.

13 Q. Is that the lane the bus was in?

14 A. And that is the lane that the bus was
15 in.

16 Q. I want to step back. Is that bicycle
17 after it was moved, or is that the final resting
18 place of the bicycle?

19 A. That is at the position of the bike
20 after it was moved.

21 Q. And you see the bus way up at the
22 corner? Is that where it was moved?

23 A. Right. And that's where the bus was
24 moved after that first photograph was taken.

25 Q. Okay. We're going to see some video,

007916

1 and the jury has seen several videos. That bus
2 would not be in the video at that location;
3 correct?

4 A. Correct.

5 Q. Okay. Now, let's look at 533.

6 And tell us what you're trying to show
7 in this particular exhibit.

8 A. So if you were to continue south, and
9 you were to step over the bike, and then if you
10 were to turn and look back towards the north in
11 the middle of the intersection, this is what you
12 would see.

13 So what I've showed here is --

14 MR. CHRISTIANSEN: Judge, can we
15 approach just briefly, Your Honor?

16 THE COURT: Yes.

17 (A discussion was held at the bench,
18 not reported.)

19 MR. BARGER: May I proceed?

20 THE COURT: Certainly.

21 MR. BARGER: Thank you.

22 BY MR. BARGER:

23 Q. What is shown by Exhibit No. 533?

24 A. Okay. So, like I said, if you were
25 to --

007917

1 Q. We can't use --

2 A. Okay. Yeah.

3 Q. Let's talk about just approach. Okay?

4 A. Okay.

5 All right. So looking back towards the
6 north, the bike. And now looking back in the
7 direction, you can see the right travel lane and
8 you can see that there are some gouges which
9 are -- now been marked with some cones.

10 And you can see the bike lane is over
11 here, and that's what the -- the purpose of this
12 particular photo was so that I could help you
13 understand what that intersection looks like and
14 where the physical evidence came to rest.

15 Q. So if a person standing there taking
16 this photograph, they're looking back towards
17 Charleston?

18 A. That's correct. That's correct.

19 Q. All right. Now, let's look at
20 Exhibit 534.

21 What is the significance of the cones
22 there? What is it trying to demonstrate?

23 A. Well, you can see the cones are here,
24 and they've got some little white things beside
25 them. And you can see the location of the cones

007918

1 are in the right travel lane. So, again, this is
2 a photo looking towards Charleston.

3 Q. What are the little white things that
4 the cones are showing?

5 A. May I flip to the next exhibit?

6 Q. Yes.

7 For the record, that will be 535.

8 A. So the cones are identifying gouges --
9 fresh gouges that were on the pavement. And you
10 know they're fresh because they have -- kind of a
11 whitish appearance to them. So that's what the
12 cones were marking.

13 Q. And why is that important for your
14 reconstruction?

15 A. Again, that's some physical evidence
16 that I need to take into account when I'm trying
17 to position all of the vehicle -- or trying to
18 position the bike and the bus and the points of
19 rest and try to understand how all of these events
20 unfolded, I have to take into account the location
21 of those gouges.

22 Q. Look at 536. Is this a photograph taken
23 by the coroner?

24 A. Yes, that is. That is a photograph
25 taken by the coroner of Dr. Khiabani's bike.

007919

1 Q. And, if you would, go to 537.

2 What is that showing?

3 A. 537 is a closeup area of the left-side
4 handlebar of Dr. Khiabani's bike. And what's of
5 interest is here in this area. That round,
6 blackish thing is called the brake hood. It's
7 sort of a cover that goes over the left brake
8 handle. And you can see that this is marked by me
9 as the abraded -- it has an abrasion to the top of
10 that brake hood.

11 Q. And I think the jury has seen the actual
12 bicycle, so we can bring it in if we need to.

13 But, right now, do we need to do that?

14 A. No.

15 Q. Okay.

16 You see to the right on the handlebars
17 that round object with a -- an orange strap?

18 A. Yes.

19 Q. What is that?

20 A. That's a speaker, a music speaker.

21 Q. If we go to the next slide, which is
22 538, does that show the bike and it shows the
23 speaker?

24 A. Yes. This is a view looking down on top
25 of the handlebars, and now you can see that

007920

1 circular music speaker.

2 Q. If you would go to 539.

3 And is that a photograph that was taken
4 that day?

5 A. Yes, that is. That's a photo that was
6 taken of the bus on the day of the crash.

7 Q. And without being extremely
8 repetitious -- because people will start throwing
9 rocks at me -- but what are you showing there as a
10 scuff mark?

11 A. There's a black scuff mark that -- we
12 learned after doing the investigation, that that
13 was a scuff mark being made by that brake hood
14 from the bike.

15 Q. And I think all the experts on both
16 sides agree that's a scuff mark made by the
17 bicycle?

18 A. Yes, we do.

19 Q. All right. Look at 540.

20 Obviously, we're going to look at that
21 again, but that's the scuff mark?

22 A. Yeah. It's a little bit closer view of
23 that same scuff mark that we've been talking
24 about.

25 Q. All right. Now, let's go to 541.

007921

1 You told us that you personally
2 inspected the bus and the bike that were involved
3 in this accident; correct?

4 A. I did.

5 Q. At the top, it says "CEI inspection
6 photo." What is that?

7 A. CEI is my company, Carr Engineering,
8 Inc. So we just abbreviate it as CEI.

9 Q. Is this the day of the inspection at the
10 yard?

11 A. Yes. This is one of the many pictures
12 that I took.

13 Q. Okay. And a lot of people took photos
14 that day, did they not?

15 A. Yes, they did.

16 Q. Okay. So let's look at 542. Does that
17 show the scuff mark?

18 A. Yes. That's my photo that shows the
19 scuff mark just behind the right front wheel.

20 Q. When you folks up there -- when you took
21 these photographs, did you actually take
22 measurements and inspect the bus and measure it
23 and look at things like that?

24 A. Yes, we took measurements, photos. Like
25 I said earlier, we did this laser scan. There was

007922

1 a lot of things that were done to document our
2 findings.

3 Q. Okay. Look at, if you will, again, 543.
4 A little bit repetitious, but that's the scuff
5 mark.

6 You actually measured that from
7 different points on the bus, did you not?

8 A. Yes, I did.

9 Q. And measured the length of it?

10 A. Yes, I did.

11 Q. All right. Look at again 544.

12 Now, was this the bike that was involved
13 in the accident?

14 A. Yes. That is Dr. Khiabani's bike.

15 Q. And on that particular day, did you get
16 a chance to thoroughly inspect the bike with
17 everybody else?

18 A. Yes, I did.

19 Q. All right. Now, look at 545. You
20 talked about the abraded brake hood. Can you
21 explain a little bit more -- I don't think there's
22 any disagreement on this, but explain a little bit
23 more what that means and the significance of that.

24 A. Yes. What was significant about that
25 was that is the object that made the scuff on the

007923

1 side of the bus.

2 So one of the things that needed to be
3 done was to try to understand how the bike and the
4 bus came into contact with one another. And what
5 had to happen is we have to have this brake hood
6 match up with that scuff. They have to align.
7 It's the only object that's on the bike that can
8 make that scuff against the side of the -- against
9 the side of the bus.

10 Q. Look at Exhibit 546.

11 Is that the same that you're talking
12 about with respect to the brake hood?

13 A. Yes. And, again, that's sort of a
14 closer view of how that brake hood is abraded.
15 It's been smeared. You can see that this sort of
16 a rubberish cover has been smeared by something
17 that has come from rear to front. In other words,
18 it's some object that is moving from behind the
19 bike and moving forward or beyond the front of the
20 bike.

21 Q. Is that the -- which handlebar -- is
22 that the left side of the handlebar?

23 A. Yes, that is the left-side handlebar.

24 Q. Now look at the next photograph,
25 Exhibit 547. What are you doing there and what

007924

1 are you measuring?

2 A. Well, what we tried to do is put the
3 abraded brake hood up against that scuff mark that
4 was on the side of the bus, the point being that
5 we're trying to understand just what the bike has
6 to do in order to reach that mark.

7 Q. Did you make a determination as to what
8 degree lean it had to be to make that mark?

9 A. Yes. We found that if the bike was
10 completely upright, the brake hood mark -- or the
11 brake hood was too high above the mark. So what
12 we found is that we had to move the bike a little
13 bit away from the side of the bus and lean the
14 bike against the bus at approximately a 25-degree
15 angle.

16 Q. What is that telling you?

17 A. Well, it tells me that the bike is
18 leaning to the left as it went into contact
19 against the side of the bus.

20 Q. Approximately -- did you get a chance to
21 estimate the distance -- I see you have a
22 measuring tape there. What's the purpose of that
23 measuring tape?

24 A. Well, the purpose of the tape was to try
25 to record just how far away the bottom of the bike

007925

1 was, or the bottom tires of the bike were, from
2 the side of the bus when the scuff mark was in
3 contact -- or when the -- the brake hood was in
4 contact with the scuff mark.

5 Q. Did you make a determination how far
6 that was?

7 A. Yes. I estimated it's about 18 to
8 20 inches.

9 Q. Now, what I want to ask you is, from
10 your inspection of the bus itself or the bicycle,
11 were there any mechanical problems with either one
12 that you saw?

13 A. I found no mechanical problems with the
14 bus, no mechanical problems with the bike that
15 caused or contributed to the crash.

16 Q. Now, look at the next one, 548. Is that
17 just a closeup of how the bike came in contact
18 with the bus?

19 A. Yes. That's a closeup of the brake hood
20 on the scuff mark on the side of the bus.

21 Q. Is that still at a 25-degree angle?

22 A. Yes, it is.

23 Q. Now, I want to go back to your scene
24 inspection. Okay? And at the scene inspection,
25 you've told the ladies and gentlemen of the jury

007926

1 what you did. But you mentioned something about
2 you flew a drone over on the day that you went out
3 there.

4 What was the purpose of that?

5 A. Well, the purpose is to ultimately end
6 up with a --

7 Q. Before you go on, describe the drone.
8 It's not some big, giant thing, is it?

9 A. No, no, it's not. It's a small, sort of
10 a helicopter-looking thing. It's got four
11 propellers on it. It's probably about 18 inches
12 by 18 inches.

13 But the purpose is to try to photograph
14 the site, because then it can -- we can take the
15 data and put all of those pictures together. And
16 it does a three-dimensional kind of a matchup of
17 all of the photos so that you can end up with a
18 scene that has all of the poles sticking up and
19 the buildings sticking up. So things that will
20 help me when I need to do some three-dimensional
21 video work that we're going to talk about down the
22 road here in just a little bit.

23 Q. Is the survey that you do out there, is
24 that important to help you determine how the
25 accident happened?

007927

1 A. Yes, it is.

2 Q. All right. Now, when you were at the
3 site, what physical evidence did you still see in
4 September of last year?

5 A. Well, the things that were still present
6 were things like the manhole covers or those
7 cracks that I had showed you earlier or the stop
8 bar or the crosswalk. Those things were present.

9 The gouges, the small gouges, were sort
10 of worn away, but the gouges were sort of close
11 enough to some very distinctive rock patterns that
12 were in the pavement, so it was pretty easy to
13 figure out where those -- where those gouges were
14 located from the photographs.

15 Q. I want you to put up 549.

16 And what is the purpose -- did you take
17 that photograph?

18 A. I did.

19 Q. And what's the purpose of that
20 photograph, please?

21 A. Well, this is a photo that I took, and
22 I'm sort of at the intersection of Charleston and
23 Pavilion Center Drive.

24 So like I told you earlier, I painted on
25 the roadway a reference point. That is my zero.

007928

1 And then I started going in 100-foot intervals to
2 the north. And I found that, in order to get to
3 the intersection of Charleston, you're at about
4 611 feet. So I painted that on the roadway
5 surface.

6 Q. Okay. And the next photograph is where?
7 Exhibit 550.

8 A. So here we are walking -- here I am
9 walking south on Pavilion Center Drive. And I put
10 a blue arrow here on the bike lane, and I am
11 300 feet away from my reference point. I've put a
12 yellow arrow here on the right -- on the right
13 travel lane.

14 Q. I think there's been some testimony
15 there was a transit bus stop prior to getting to
16 the 300-foot mark. Do you recall that transit bus
17 stop?

18 A. Yes, I do.

19 Q. Okay. So if that's 300 and I'm
20 standing, would the transit bus stop be back the
21 bottom of the picture towards me?

22 A. Yes.

23 Q. Show me the next slide if you would,
24 which is Exhibit No. 551.

25 A. So 551, I walked to the south. I'm very

007929

1 close to my 100-foot mark. So I'm about 100 feet
2 away from my reference point. Again, the blue
3 arrow, it shows you the bike lane; the yellow
4 arrow shows you the right travel lane.

5 Q. Are you still walking towards the
6 intersection?

7 A. Yes.

8 Q. Show us Exhibit 552.

9 What are you showing us there?

10 A. So in 552, right here is where it says
11 000. That is my reference point. So that is
12 where I started all of my measurements. And I
13 chose the middle of the stop bar as that starting
14 point.

15 And, again, we're looking at the blue
16 arrow for the bike lane, the yellow arrow for the
17 right travel lane. And then up here you can see
18 is -- in the middle of the intersection is what
19 I've identified as the approximate point of rest
20 of Dr. Khiabani.

21 Q. Okay. That's not point of impact.
22 That's point of rest; right?

23 A. That is point of rest.

24 Q. All right. Look at 553 and tell us what
25 that's showing.

007930

1 A. This is showing what it looks like if
2 you were to walk through the intersection and now
3 you're looking to the south. And you would see
4 that I'm 100 feet beyond my reference point, and
5 the blue arrow is identifying the location of the
6 bike lane where it starts on the south side of the
7 intersection.

8 Q. All right. Now let's look at 554.

9 Now, what is that showing?

10 A. This is what is called 3-D photo
11 analysis, or the real fancy term for this is
12 called photogrammetry. What we're doing here is
13 trying to identify and properly place the point of
14 rest of the bus based on this cell phone
15 photograph.

16 So what's happened here in this
17 particular photo is the drone has created the 3-D
18 view of the scene. It creates and measures the
19 placement of the various poles and the overhead
20 sign posts. And now we can align ourselves in the
21 same fashion as that particular photo and then
22 finally determine just where the point of rest of
23 the bus is based on that picture.

24 BY MR. BARGER:

25 Q. Let's slow down just a second. Where it

007931

1 says "Cell phone photo" on the left, is that the
2 one that's the actual photo taken by Mr. Pears?

3 A. Yes. Yes, that is correct.

4 Q. Now, the one on the right, when you do
5 3-D photo analysis, are you using a computer and a
6 computer program?

7 A. Yes.

8 Q. So be a little bit more specific of what
9 you were doing there and what you were trying to
10 accurately re-create. Okay?

11 A. Sure.

12 Q. And for what purpose.

13 A. Sure. So we're using a program that is
14 called 3D Studio Max. That's the program that
15 takes the drone information and the survey
16 information and puts it together so that I will
17 end up with a scene that I can look at from all
18 kinds of different angles at ground level.

19 But I have all of these posts, if you
20 can see, are done up in green here. I can align
21 myself with the posts relative to the palm trees.
22 I can align myself with the overhead sign and this
23 sign that's right here on the side of the road.

24 So you can use all of that information
25 to basically put yourself in the same position as

1 the photographer and then also be able to use a
2 three-dimensional view of the coach and be able to
3 align that and determine where the coach came to
4 rest.

5 Q. And did you do that with your --

6 A. I did.

7 Q. -- photo analysis?

8 Look at the next slide, which is
9 Exhibit 555. What is that?

10 A. We had some security video footage from
11 the Red Rock Casino. And just like with that cell
12 phone photo that was down on ground level, because
13 we now had a three-dimensional scene, we could now
14 look at the view of the scene from the perspective
15 of the security camera.

16 And the thing that I was trying to do is
17 use that three-dimensional scene to try to
18 accurately place the point of rest of
19 Dr. Khiabani.

20 Q. I'm going to ask you to stop for a
21 second.

22 So let's go back. This is -- you
23 obviously have a video camera that's moving.
24 You're able to stop it and take a still photo. Is
25 that what that is?

007933

1 A. Yeah, that's right.

2 Q. And what are we showing with this
3 particular exhibit, which is No. 555? Do you
4 actually see -- is this after the accident?

5 A. Yes, this is.

6 Q. Do you actually see Dr. Khiabani's area,
7 where he is?

8 A. Right. Yes, we do.

9 Q. I want to delicately ask you what you're
10 seeing here. Okay?

11 A. So this is sort of one snapshot taken
12 from the security camera video. In fact, the
13 coach is still moving through this scene. We just
14 happened to capture it while it sort of was still
15 in the scene in the middle of the view. But the
16 coach is still moving through this scene.

17 What you see here is the palm frond from
18 a tree that is between the security camera and the
19 location where the accident happened. What you
20 can see here is the outline here of Dr. Khiabani.
21 This is a leg. This is a leg. And then there is
22 his left arm is there extending out from just
23 behind the palm frond. He's laid on his back and
24 his legs are pointing towards the security camera
25 in this image.

007934

1 Q. And this is after the accident,
2 obviously?

3 A. That's correct.

4 Q. Now, let's go to your next slide, which
5 is Exhibit 556. What is this showing you?

6 A. Again, this is a 3-D photo analysis.
7 This is photogrammetry. Same concept that we had
8 before when we were talking about trying to
9 position the point of rest of the coach.

10 Using this security camera footage,
11 using the perspective where it was up on top of
12 the building and the 3-D scene that we now have,
13 we are able to line up the point of rest of
14 Dr. Khiabani and pinpoint his point of rest and
15 his position as the -- as shown in this still
16 image from the security camera footage.

17 Q. So on the left photo, that's the actual
18 video stopped; right?

19 A. That is correct.

20 Q. And on the right side, is that -- what
21 are you doing with your photo analysis?

22 A. So what we've done here is we're using
23 the things that are on the ground that we could
24 use. So there were the cracks, the manhole
25 covers, the drone head going overhead so we knew

007935

1 where the security camera was so we could get that
2 proper angle. And then, ultimately, we were
3 trying to lay in the point of rest of Dr. Khiabani
4 so that it would match the security camera.

5 Q. And on the right, on the coach itself
6 where it says "3-D photo analysis," there seems to
7 be some red circles. What are those intended to
8 be?

9 A. Yeah, that is what is called a wire
10 frame. So after we had laser-scanned the bus, we
11 converted it to what is called a wire frame. It's
12 like taking the outline of the bus and just
13 putting a red line on it. But now we have this
14 three-dimensional bus that we could position on
15 this security camera footage. And it was another
16 way to be able to help us create the path of the
17 bus as well as as it passes by Dr. Khiabani's
18 point of rest.

19 Q. Now, those red circles are not intended
20 to be a bicycle, are they?

21 A. No. The red circles represent the tires
22 and the wheels on the bus.

23 Q. Okay. Go to 557. And what are you
24 showing us there?

25 A. Okay. So this is the view again from

007936

1 the Red Rock security camera video. And this is
2 the finished product of our three-dimensional
3 analysis. What we know from the Red Rocks camera
4 footage is that there are 10 frames per second.
5 So what that means is if you were to click, click,
6 click, click, you would count ten times and that
7 would be equal to one second.

8 So every frame that you see in this Red
9 Rocks video means it's one-tenth of a second. The
10 bus has moved one-tenth of a second. The action
11 in the video has progressed one-tenth of a second
12 with each click.

13 Q. Now, it says switch to Attachment 1.

14 MR. BARGER: For the record, Your Honor,
15 Attachment 1 is Exhibit 565.

16 BY MR. BARGER:

17 Q. And what I want to do is -- where is the
18 bus in this particular attachment?

19 A. You'll see the bus is starting to come
20 into view here.

21 Q. Is this approximately the first time you
22 could see the bus in the video?

23 A. Yes, that's correct.

24 Q. All right. And that, for the record, is
25 frame No. 4?

1 A. Yes, that's --

2 Q. All right. Now, in evidence under 565
3 is frames No. 4 through 61. Is that your
4 recollection?

5 A. That is correct.

6 Q. All right. And what -- is each frame
7 one-tenth of a second?

8 A. Right.

9 Q. So in order to go one whole second, how
10 many frames -- that's kind of a silly question.
11 I'm sorry.

12 How many frames do you have to go to get
13 to one second?

14 A. Ten.

15 Q. Okay. Thank you.

16 Now, I want you to walk us through and
17 describe what you're seeing with respect to this
18 particular attachment. Okay?

19 A. So like I said before, we've got our
20 three-dimensional scene. We now know where the
21 camera is, the security camera. So now we've got
22 our three-dimensional bus. You'll see it come
23 into view. This is the red wire frame bus. And
24 we know where Dr. Khiabani's point of rest is, and
25 we know where the crosswalks are, and we know

007938

1 where the curbs are. We have all of that mapped.

2 The ultimate purpose is to try to
3 accurately plot the path of the bus as it goes
4 through the security camera video, because we're
5 looking at it from an angle. What we really want
6 to do is to eventually swing our camera's eye and
7 look directly down on top of it so we can see
8 where everything is as if we were in a helicopter
9 looking down on top of all of the evidence.

10 But you've got to begin with this view,
11 and then you've got to match the bus's position
12 with each frame.

13 Now, I've stopped it at frame No. 9
14 because we could tell from the lineup of the red
15 wire frame on top of the bus in the video, we
16 could tell that the bus is now turning. It's
17 starting to change its heading angle. It's moving
18 to the left or it's rotating to the left.

19 Q. Let me stop you for a second.

20 The jury has heard testimony that at
21 some point, the bus went to its left. Okay? All
22 right.

23 A. Yes, that's right.

24 Q. So is what you're trying to do is to
25 show, through the actual video with your photo

007939

1 computer information, when that occurred and how
2 it occurred; is that correct?

3 A. That is correct.

4 Q. And why is it you want to actually do
5 that to show the jury?

6 A. Well, you want to understand when is it
7 that the bus is actually starting to turn? You
8 want to understand where the point of impact takes
9 place, because that's also captured in the video.
10 You want to understand the path of the bus as it
11 went through the intersection. You want to
12 understand whether or not the bus ran over
13 Dr. Khiabani when he was laid out on his point of
14 rest.

15 Those are the things that need to be
16 understood and need to be analyzed before you can
17 move forward with this reconstruction.

18 Q. Okay. So let's go -- what I want you to
19 do to make this go a little bit faster is to walk
20 through your slides, and each time -- at least for
21 the record -- show what frame number it is. Like
22 that's frame 9 we're looking at.

23 A. Right.

24 Q. Can you walk through that and show what
25 you're trying to accomplish and what you did

007940

1 accomplish? Okay?

2 A. Yes. So I'm going to be stepping
3 through, and each frame we've numbered. So,
4 again, each frame is a tenth of a second. And
5 what we're trying to do is capture certain things
6 that are happening in the video.

7 So as the bus begins to move through the
8 intersection, one of the things that we're seeing,
9 as I've said before, is the coach is turning to
10 the left. The bus is turning to the left in this
11 portion of the video.

12 Q. I think we're clear on this. You're not
13 suggesting the bus was making a left-hand turn?

14 A. No.

15 Q. Okay. Go ahead. I'm sorry.

16 A. Now, the next thing that comes up in
17 this video is there is a dark area that is just
18 behind the right front wheel. And this area
19 that's around the wheel itself, that's called the
20 wheel well. On our cars, that's the thing that
21 kind of goes around the tires. That's called the
22 wheel well.

23 So you can see the wheel well here on
24 the right front. You can see that there's a dark
25 area just behind the wheel well. But as I advance

007941

1 these next few frames, you're going to see that
2 that dark area sort of falls further and further
3 behind against the side of the bus.

4 Q. What is your opinion of what the dark
5 area is?

6 A. It's my opinion that that is the point
7 of impact between Dr. Khiabani's bike and the side
8 of the bus.

9 Q. Okay. Now, before you continue, what
10 frame is it that you first see the bus? Can you
11 go back?

12 A. Yes. You first see the bus at frame
13 No. 4.

14 Q. Okay. And so at frame 4, when you first
15 see the bus, do you see the bicyclist?

16 A. No, you do not.

17 Q. Do you have any idea at that point --
18 and we'll talk further about this -- where the
19 bicyclist is at that point?

20 A. No, I do not.

21 Q. Okay. Now, because it's not on the
22 video, is it?

23 A. It is not.

24 Q. He's not on the video? The bicyclist,
25 Dr. Khiabani, is not on the video?

1 A. He is not.

2 Q. Go back to frame 19.

3 By the way, when do we first see the
4 dark spot that you think is Dr. Khiabani? What
5 frame, just for the record?

6 A. 15.

7 Q. All right. At frame 15 is the first
8 time that you can see what you think is
9 Dr. Khiabani on the Red Rock video; right?

10 A. That's right. That is correct.

11 Q. Okay. Continue with your discussion, if
12 you will.

13 A. As I said, if you go from 15 to 16, 17,
14 18, 19, you can see that there is this gap from
15 this dark spot in the wheel well. That's how we
16 know that it's not something that's attached to
17 the bus; it's some other object.

18 Then if you continue, you'll see that
19 the bus goes by where Dr. Khiabani's point of rest
20 ultimately takes place. And as you step through
21 this video, you'll see this is now Dr. Khiabani is
22 at his point of rest. The bus is departing the --

23 Q. For the record, go back to frame 38. Is
24 is that where you first see Dr. Khiabani at his
25 point of rest?

007943

1 A. Yes.

2 Q. And we've discussed that it's your
3 opinion, obviously, at that point, that's
4 Dr. Khiabani; correct?

5 A. That is correct.

6 Q. Now, continue past 38.

7 A. And then you'll see that, as the bus
8 continues, we're able to keep the wire frame
9 lineup on the exterior of the bus, and then
10 finally it exits the video.

11 Q. Now, I think Mr. Caldwell testified that
12 you and he agreed on the approximate speed of the
13 bus at that point in time.

14 What do you recall that number is?

15 A. We both agreed it's approximately
16 25 miles per hour.

17 Q. There's no real disagreement there?

18 A. No, there isn't.

19 Q. All right. Do you know if the bike
20 speed was estimated by some experts in this case?

21 A. Yes.

22 Q. And what's the approximate consensus of
23 the bike speed?

24 A. It's approximately 13 to 14 miles per
25 hour.

007944

1 Q. Okay. Now, I want to step back and go
2 back to frame 15. And have you -- what I want you
3 to explain to the ladies and gentlemen of the jury
4 is, using these frames, 15, probably back to 9,
5 what amount of time has elapsed when we first see
6 Dr. Khiabani and when you get to frame 15?

7 A. Well, from where the coach begins to
8 turn at frame 9 to where Dr. Khiabani first
9 appears in the video at frame 15, it says that the
10 bus is turning to the left and it is 6/10 of a
11 second into its turn from frame 9 to frame 15.
12 It's 6/10 of a second into its turn when the
13 collision happens.

14 Q. Now, the jury has heard from
15 Mr. Hubbard, the driver, that, I believe, he did
16 make a movement to the left, and they can recall
17 what was said.

18 What is the bus doing as it's making its
19 movement to the left?

20 A. Well, it's turning. It's changing its
21 heading and it is moving out of its right travel
22 lane and is starting to move away from the bike
23 lane.

24 Q. Did you read the testimony as to why
25 that maneuver was being made?

1 A. Yes.

2 Q. And what do you recall that testimony to
3 be?

4 A. The maneuver is being made because the
5 bike is starting to come into the travel lane.
6 It's starting to encroach into the bus's lane of
7 travel.

8 Q. Okay. So let's go back. From frame 9,
9 when you first see Dr. Khiabani, and that's when
10 the bus starts its -- excuse me. Frame 4 is when
11 you first saw it?

12 A. Frame 4 is where we first see the bus.

13 Q. Right.

14 A. Frame 9 is where we can see the bus is
15 turning. Frame 15 is where we first see
16 Dr. Khiabani.

17 Q. Okay. What does that tell you in that
18 6/10 of a second? What does that tell you?

19 A. What it's telling me is that the bus is
20 in its turn. It is already moving out of its
21 travel lane or trying to move away from the bike
22 that is coming into the side of the bus. And it's
23 in that turn, the driver has -- the bus driver has
24 made a decision to turn to the left. And it's
25 6/10 of a second into that turn when the collision

007946

1 occurs.

2 Q. Okay. Now, there was some discussion
3 with some of the witnesses about
4 perception-reaction time. Can you discuss
5 perception-reaction time. Is that something you
6 use in your expertise on a daily basis?

7 A. Yes, we use perception-reaction time all
8 the time in accident reconstruction.

9 It's something that basically describes,
10 for drivers like us, if an event happens, we have
11 a certain amount of time to perceive it; meaning,
12 we see something that happens. And then we've got
13 a certain amount of time to react to that, either
14 apply the brakes or steer. If you add up that
15 time, it's called the perception-reaction time.

16 And so for someone like myself in
17 accident reconstruction, it's important because we
18 have to understand what is happening -- in the
19 phase of the perception-reaction time, where are
20 the vehicles during that phase.

21 Q. Okay. And did you utilize and come into
22 some of your opinions of perception-reaction time?

23 A. I did. I did.

24 Q. And tell us how you utilized that and
25 what perception-reaction time you used.

007947

1 A. Sure.

2 Standard perception-reaction time can
3 range anywhere from about a second and a half to
4 2 1/2 seconds. There's a group of people by the
5 title of the National Highway Traffic Safety
6 Administration. That's the federal government.
7 And they sort of dictate certain things with
8 regard to roadway safety. And one of the things
9 they look at is what is a typical
10 perception-reaction time for drivers. And it's
11 about a second and a half.

12 But there's also another group. And
13 they're called the American Association of State
14 Highway Transportation Officials. And they're the
15 ones that design the roads that you and I drive
16 on. They're the ones that lay out how the
17 turnpike needs to be curved and how wide the lanes
18 need to be. And they also have a
19 perception-reaction time. And their
20 perception-reaction time is typically around 2 1/2
21 seconds.

22 So you've got a typical range for an
23 accident reconstructionist like myself to use that
24 can range from anywhere from a second and a half
25 to 2 1/2 seconds.

007948

1 Q. Okay. Now, go to the next slide, which
2 I believe is Exhibit No. 558.

3 Are we -- I want you to be able to tell
4 your story, but are we there to switch to
5 Attachment 2 at this point?

6 A. Yes, I think we are.

7 MR. BARGER: Your Honor, for the record,
8 Attachment 2 is Exhibit 566.

9 THE COURT: Okay. Very good.

10 MR. BARGER: For the record, Your Honor,
11 Attachment 2 is the same slides, Nos. 4 through
12 71. And it's in evidence. Okay?

13 THE COURT: Okay. Very good.

14 BY MR. BARGER:

15 Q. Now, at some point, you've reached some
16 conclusions, and we'll talk about that. But what
17 did you do -- what is Attachment 2?

18 A. Okay. So Attachment 2 is the thing that
19 I was talking about earlier, where, once we are
20 able to take the Red Rock security camera footage,
21 and knowing that you're at that angle, what you
22 really want to do is you really want to look at
23 what's going on as if we're up in a helicopter
24 looking down. Because that's really what you're
25 trying to understand, is what's the bus doing?

1 What is it doing as it's going through the
2 intersection?

3 So if you know where the bus is in this
4 three-dimensional analysis that I've
5 done, then the last step is to take the camera's
6 eye and then look down on top. And so that's what
7 we're looking at now.

8 So those same -- so those same frames
9 that we were looking at earlier, they're the same
10 frames that correspond to what you're about to
11 see. So if you were to look at this intersection
12 from a bird's-eye view, this is what you would
13 see. And this is the motion of the bus based on
14 all of that three-dimensional photogrammetric
15 work.

16 Q. Okay. You stopped with -- go back to
17 frame 9. Is that the same as the actual frame 9
18 in the video?

19 A. Yes, it is.

20 Q. Let me ask you a question. From a
21 reasonable engineering probability, are your
22 computer -- is your computer work accurate?

23 A. Yes. Yes, it is.

24 Q. You're satisfied with that?

25 A. Yes, I am. I think we had good data

007950

1 with which to work with, and I believe that the
2 accuracy was very good.

3 Q. All right. So what happens at this
4 frame 9 under this computer model?

5 A. At frame 9, the bus is turning left.
6 You can see here you'll start to see the bus
7 itself starts to rotate just as the front end is
8 going up through that crosswalk.

9 Q. At that frame, where is the bus?

10 A. Well, this is the bus.

11 Q. I know. But what lane is it in?

12 A. Oh, it is in the right lane. And that's
13 what I did here, is I shaded the right travel lane
14 and I shaded the bike lane in the light blue.

15 Q. Okay. So the brown is the bus's right
16 travel lane?

17 A. Yes, that would be the initial travel
18 lane of the bus.

19 Q. And the bike lane is the blue?

20 A. Is the light blue.

21 Q. And the bike lane is approximately how
22 wide?

23 A. Approximately 4 feet wide.

24 Q. And the right travel lane is
25 approximately how wide?

007951

1 A. About 11 feet wide.

2 Q. All right. Do you have -- can you go
3 back to Slide 4.

4 Okay. Now, at this point, is that the
5 same as Slide 4 in the actual video?

6 A. Yes, that is.

7 Q. Is that the first time you saw, in the
8 video, the coach?

9 A. That is correct.

10 Q. All right. Now, before Slide 4, do you
11 have any idea as to -- there's been several
12 witnesses testify. Okay? And you've read their
13 testimony, have you not?

14 A. Yes.

15 Q. All right. Do you know exactly where
16 Dr. Khiabani was before Slide 4?

17 A. No, we do not.

18 Q. Okay. It's not in the video?

19 A. It is not in the video.

20 Q. Okay. So we have Erika Bradley who says
21 one thing; we have Mr. Hubbard who says something;
22 correct?

23 A. Correct.

24 Q. You have Ms. Kolch on the other side of
25 the street who says something?

007952

1 A. Right.

2 Q. And the jury will hear from two other
3 gentlemen on the bus, Mr. Pears and Mr. Plantz;
4 right?

5 A. That is correct.

6 Q. And you're not saying any one of them is
7 right and any one of them is wrong, are you, at
8 this point, because you don't know where the
9 bicycle was at this point; correct?

10 A. That is correct. I do not.

11 Q. Okay. But let's go back, and let's walk
12 to square 9, frame 9. And tell us what you did
13 after that.

14 A. What we did after that is we continued
15 to plot the path of the bus because now we could
16 see where it's at in the bird's-eye view. And we
17 can watch the path that it takes as it goes by --
18 well, these are those cones. And you can see that
19 the bus turns to the left and then just continues
20 on a path that's on an angle but continues to go
21 through the intersection sort of pointed slightly
22 to the southeast.

23 Q. Do you know what frame that the impact
24 occurred in?

25 A. Yes. So we would go back to -- the

007953

1 first time we see Dr. Khiabani was frame 15.

2 Q. And where is that located in the right
3 travel lane?

4 A. You can see the bus is turned. Half of
5 it is now outside of the right travel lane. The
6 point of impact is here against the side of the
7 bus. So you can see the point of impact is inside
8 of the right travel lane.

9 Q. From the center of the bike lane to the
10 point of impact in the right travel lane, how far
11 is it?

12 A. From this position right here at the tip
13 of the pointer to the side of the bus at the point
14 of impact would be 8 feet approximately.

15 Q. And why is it 8 feet?

16 A. Well, it's 6 feet from this line to the
17 side of the bus.

18 Q. And you and Mr. Caldwell agree on that;
19 correct?

20 A. We do.

21 And then the bike lane is 4 feet wide.
22 So half of the bike lane would be 2 feet. So add
23 2 plus another 6 gives you the approximate 8 feet.

24 Q. So if there was a bicyclist in the bike
25 lane -- if -- and they were in the center of the

007954

1 lane approximately, it would be how far to where
2 it came into contact with the bus?

3 A. 8 feet.

4 Q. And if it -- if a bicyclist was in the
5 bike lane but was riding right down the east side
6 of the bike lane, the ones closest to the bus, how
7 far would that be?

8 A. That would be 6 feet.

9 Q. So the bicycle lane, would it be
10 anywhere from 6 to 10 feet, right, away from the
11 bus?

12 A. Right. You would be anywhere from 6 to
13 here. And then if you went over to this side of
14 the bike lane, you would add another 4. So that
15 would give you the 10 feet.

16 Q. With respect to -- now, let's don't talk
17 about who saw who in the bike lane or when, if
18 they did. Let's talk about you and Mr. Caldwell
19 agree the accident occurred clearly in the
20 right-hand travel lane; correct?

21 A. Yes, we do agree on that.

22 Q. There's no argument about that?

23 A. No, we do not argue about that.

24 Q. Now, do you need to continue with any
25 slides in this Attachment 2, which is 566?

1 A. No, I think we're good.

2 Q. All right. Now, I want to go back --
3 actually, let's use that slide -- this slide.

4 Now, what is this slide meant to be?

5 A. Well, now that I had my
6 three-dimensional model and I could see where the
7 bus was moving at each tenth of a second -- if you
8 know how fast an object is moving or how much
9 ground is covered in a tenth of a second, then you
10 could determine the speed of the object.

11 And so what we had done was looked at it
12 on that frame-by-frame basis and had broken it
13 down to a tenth of a second. But one of the
14 things I wanted to do is to make sure that my
15 three-dimensional analysis agreed with what we
16 could see just in some really basic things that
17 stood out in the video.

18 So, for instance, we could see where the
19 front of the bus passed the stop bar. And I could
20 see where the front of the bus was at the manhole
21 cover. I knew physically where the stop bar was
22 located. I knew physically where the manhole
23 cover was located. And I could tell you that
24 those were 55 feet apart from one another. And I
25 knew that all of that took place in 1 1/2 seconds.

007956

1 So it was pretty easy for me to just run
2 through a quick calculation to make sure that my
3 three-dimensional analysis was right, and I came
4 up with a 25-mile-an-hour speed, which agreed with
5 what the three-dimensional analysis showed.

6 Q. And agreed with Mr. Caldwell?

7 A. And ultimately agreed with Mr. Caldwell.

8 MR. BARGER: For the record, Your Honor,
9 we were looking at Exhibit 559 for that last one.

10 BY MR. BARGER:

11 Q. So I want you to turn to 560.

12 What are you trying to show here? It
13 says "security video analysis." What does that
14 mean?

15 A. So after we now had an accurate
16 three-dimensional model, one of the things I
17 wanted to look at is at the first time that the
18 bus is visible in the video, what is the position
19 of the bus in its travel lane? Is it centered?
20 Is it over to the right? Is it over to the left?

21 That's the thing that was helpful from
22 the three-dimensional analysis because it told us
23 that the bus was actually positioned to the left
24 of its travel lane, that there was a gap between
25 the side of the bus and the white stripe for the

1 bike lane of about 3, 3.4 feet.

2 So the thing that I learned from the
3 three-dimensional analysis were two things: The
4 bus was positioned over to the left side of his
5 travel lane and that the bus is traveling straight
6 in its travel lane. It's not turned one way or
7 the other; he's going straight down the road, but
8 he is over to the left side of his travel lane.

9 Q. Okay. And what does that tell you as to
10 when the bus started going to the left, if
11 anything?

12 A. Well, we'll know that it's going to the
13 left on frame 9 when we can actually see it turn.

14 Q. Okay. And where is this in relation to
15 frame 9?

16 A. This is at the very beginning. So this
17 is going to be at the first time that it's visible
18 in the video, which was frame No. 4. We're about
19 a half second later.

20 Q. So, going back, the distance -- the time
21 between when you first see the bus starting to go
22 left in this particular frame is 6/10 of a second?

23 A. This is frame 4. So this is when it's
24 first visible.

25 Q. Okay. And then frame No. 9 is where we

007958

1 could see it actually beginning the turn.

2 Q. Okay. Do we have frame 9 -- slide
3 there?

4 A. No, we had it on the other one.

5 Q. Okay. We've seen frame 9?

6 A. Yes, we have.

7 Q. So we've got a lot of frames jumping
8 around here. I want to make sure we're clear.
9 This is frame 4, when you can first see the bus in
10 the video; right?

11 A. Right.

12 Q. Is that when the bus starts to make a
13 movement to the left, first time?

14 A. No.

15 Q. When is the time that the bus starts to
16 make a movement to the left?

17 A. About another half second from this
18 position as it moves down the road, you can see it
19 actually turning.

20 Q. That's frame 9?

21 A. At frame No. 9.

22 Q. Okay. Now, now we can talk about
23 perception-reaction time as it relates to this;
24 correct?

25 A. Right.

1 Q. So what does that mean with respect to
2 the perception-reaction time in that 6/10 of a
3 second? How much time will elapse and how much
4 time will you travel?

5 A. Well, what we're talking about is, in
6 this particular frame for the perception-reaction
7 time, this is the phase where the
8 perception-reaction time is taking place.

9 In other words, we know that, later on,
10 the bus actually begins to turn. And that happens
11 in five frames down the road. But what's
12 happening is, in this particular section of the
13 video, the bus driver must be perceiving and
14 reacting and then getting ready to put in the
15 steer, which is going to happen in frame No. 9.

16 Q. So if someone perceives something and
17 wants to make a steer, is there a period of time
18 that it takes to make that steer?

19 A. Right. Yes.

20 Q. And in that period of time that it takes
21 to make that steer, a moving vehicle, does it
22 move?

23 A. Yes.

24 Q. Okay. And at 25 miles an hour, how is
25 it moving? How far?

007960

1 A. So, like I was talking about earlier, we
2 have a perception-reaction time of a second and a
3 half to 2 1/2 seconds. So let's just say -- let's
4 take the middle of that range. And let's just say
5 it's 2 seconds.

6 So a bus that is traveling at 25 miles
7 an hour is using up 37 feet -- or is traveling at
8 37 feet per second. So if we're talking about a
9 bus that's traveling at 37 feet per second, in 2
10 seconds it's going to travel 74 feet.

11 So in the perception-reaction time
12 period, the bus is still going straight because
13 the driver hasn't done anything with the bus.
14 He's perceiving and reacting, and he's going to
15 travel 74 feet before the bus begins to start to
16 move.

17 Q. Okay. If a person is on a bicycle
18 traveling 13 to 14 miles per hour, the jury has
19 heard how far they're traveling.

20 A. Same thing. So in that same 2-second
21 time period, if you're going to look at just 2
22 seconds of travel, a bicycle that's going 13 to
23 14 miles an hour, if you take the middle of that,
24 is traveling at about 20 feet per second. So in
25 2 seconds, a bike will travel 40 feet.

007961

1 Q. So if, in fact -- okay. So let's go
2 back.

3 If, in fact -- just assume for me for a
4 moment that the bicyclist was in the bicycle lane.
5 Okay? Just assume Erika Bradley is right. Okay?

6 What is the frame, or the distance back,
7 that the bicyclist would be out in front? Am I
8 making sense?

9 Doesn't sound like it, does it?

10 A. Yeah, I think -- I think there's --
11 you've got to throw in one other factor in there.
12 And that is going to be the fact that we know that
13 the bus is actually in its turn when the collision
14 happens.

15 Q. Okay.

16 A. And there is another piece of the --
17 piece of the information that needs to be
18 considered. And that is the bus is already
19 turned, and we're 6/10 of a second into the
20 collision -- into the travel before the collision
21 takes place.

22 So if you're looking at
23 perception-reaction time and the 6/10 of a second
24 that it took to get to the point of impact -- so
25 when we talk about perception-reaction time

007962

1 and then the collision time phase, you've got to
2 take into account 2 seconds plus the additional
3 6/10 of a second because the bus was already in
4 its turn when the collision took place.

5 Q. So if you take back the
6 perception-reaction time to 2 seconds, is that
7 what you used?

8 A. Yes, I looked at it -- I chose a really
9 quick time, and I used a second and a half.

10 Q. Okay. So you used less than 2 seconds?

11 A. I did.

12 Q. So do you have an opinion as to, if
13 Dr. Khiabani was in the bicycle lane, where he
14 would have been with respect to the front of the
15 bus when the bus is perceived and starts its left
16 turn?

17 Does that make sense?

18 A. Yeah, where the bus driver would begin
19 to perceive and react to the presence of
20 Dr. Khiabani?

21 Q. Okay.

22 A. Is that what you're asking?

23 Q. Yes.

24 A. Yes. The bike would be anywhere from
25 about 25 to 29 feet in front of the bus.

1 Q. Okay. So if -- using the video and
2 using your computer analysis, and you use a 1.5
3 perception-reaction time --

4 A. Right.

5 Q. -- and assuming a witness was correct
6 that Dr. Khiabani was in the bike lane, how far in
7 front of the bus would Dr. Khiabani have been as
8 they approached the intersection before he starts
9 to make the left turn -- before the bus starts to
10 make the left turn?

11 A. I think that's what we were just talking
12 about.

13 Q. I know, but just give me that number
14 again.

15 A. Okay. So, again, using a second and a
16 half of reaction time and knowing that he's in the
17 turn, the answer is the bike would be 25 to
18 29 feet in front of the bus.

19 Q. Okay. Now, you're not here to talk
20 about visibility in front of the bus, are you?

21 A. I'm not.

22 Q. That's somebody else's job; right?

23 A. Yes.

24 Q. Let's give the benefit of the doubt.
25 Let's make it a faster perception-reaction time.

1 Let's use a second instead of a second and a half.

2 A. Okay.

3 Q. Can you give us the numbers -- if the
4 perception-reaction time of the bus driver was
5 1 second, how far in front of the bus would
6 Dr. Khiabani have been at the time that he started
7 to move?

8 A. The bus -- or the bike would be
9 approximately 16 to 20 feet in front of the bus
10 when the bus driver would begin to perceive and
11 react.

12 Q. Now, is a perception-reaction time of
13 1 second extremely -- would you use the word
14 "liberal"? I mean, it's pretty hard for a person
15 to do that; right?

16 A. It is. It is. Like I've said before,
17 the published data out there for typical driver
18 perception-reaction time is a second and a half to
19 2 1/2 seconds. So 1 second is extremely quick.

20 Q. So you've given us those numbers. What
21 I want you to do is to look at Exhibit No. 560.

22 That's your actual reconstruction
23 drawing; correct?

24 A. Yes, that is.

25 Q. And what does that tell us?

007965

1 A. Well, this was sort of after taking all
2 of this -- these pieces of the puzzle that I was
3 talking about earlier, you've got the scene
4 information, the vehicle information, the video
5 analysis, all the physical evidence that was on
6 the ground. And putting that into a scale diagram
7 and putting all of that onto a drawing, now we can
8 actually start to see distances involved.

9 For instance, the distance from the
10 point of impact to the first gouge was 18 feet.
11 The distance from the first gouge to the point of
12 rest of the bike was 15 feet. I could see that
13 the bike had been moved a total of 9 feet to its
14 secondary point-of-rest position. I could see
15 where the point of rest of the bus was from the
16 cell phone footage.

17 So this is sort of a compilation, my
18 reconstruction drawing. It's a scale drawing of
19 everything put into the diagram.

20 Q. Look at Exhibit No. 562. What is the
21 video analysis likely impact No. 1? What does
22 that mean? Explain to the jury what you're
23 showing them there.

24 A. So this is a close-up view of frame 15.
25 Remember I was talking about the dark object that

007966

1 was just behind the wheel well of the bus. So
2 this was the close-up view of the point of impact
3 between Dr. Khiabani and the side of the bus.

4 Q. All right. Now, the next slide is 563,
5 exhibit number. What are you showing there with
6 the likely impact under the video analysis?

7 A. This is the impact location based on the
8 three-dimensional scene that I had created with
9 the three-dimensional bus model, and we have the
10 tan line represents the right travel lane, and you
11 can see the blue line is the bike lane. And now
12 we're showing where the bike is coming into
13 contact with the side of the bus. And all of that
14 taking place in that respective view of slide
15 No. 15.

16 Q. So is this your best analysis of what
17 the impact looked like and where it occurred?

18 A. Yes, it is.

19 Q. And that impact is in the right travel
20 lane of the bus; correct?

21 A. That is correct.

22 Q. And it is how far into the travel lane
23 at the point of impact?

24 A. This distance from the edge of the bike
25 lane to the contact point on the bus is

1 approximately 6 feet.

2 Q. Okay. And I want to be very clear
3 again. Go back to frame 94, which is the first
4 time that you see the bus. And I think all the
5 other experts agree with you. Is that your
6 understanding?

7 A. Yes, I think that we do agree on that.

8 Q. You're not here to say where
9 Dr. Khiabani was with respect to what the
10 eyewitnesses saw; is that correct?

11 A. Correct.

12 Q. All right. With respect to if
13 Dr. Khiabani was in the bike lane at the speeds
14 the two were going, he would have -- how far back
15 would he have been if you used the 2.5 reaction
16 seconds in front of the bus?

17 A. I've calculated for the 2.5. It would
18 be further than 1.5.

19 Q. Let's don't go to 2.5. Go to 1.5.

20 A. If we go to the 1.5, the bike is in
21 front of the bus 25 to 29 feet.

22 Q. And if you go to 1 second, which is very
23 very liberal, it's how far in front?

24 A. 16 to 20 feet.

25 Q. Okay. Now, look finally at 564. What

007968

1 are you showing us with that slide?

2 A. The point of impact taking it from the
3 bird's-eye view. Now we can see everything from
4 the top view. We're looking at the impact between
5 Dr. Khiabani and the side of the bus. And if you
6 looked at that and could put a ruler down, we
7 would understand that that point of impact occurs
8 approximately 6 feet from the bike lane. I show
9 that they were at that point of impact location is
10 about 18 feet from the first gouge that was on the
11 ground.

12 Q. Now, I want to switch subjects for a
13 minute. The jury was shown a videotape that came
14 off of YouTube of a vehicle. I think it was an
15 oil tanker-type truck and a bicyclist that
16 occurred in Russia.

17 Have you had a chance to see that video?

18 A. Yes, I did.

19 Q. All right. And have you analyzed that
20 video as far as looking -- taking that video and
21 stopping it frame by frame?

22 A. Yes, I have.

23 MR. BARGER: All right. Your Honor,
24 Attachment 3, which would be Exhibit No. 567, is
25 only offered for demonstrative purposes. It's not

007969

1 being offered as an exhibit to go into evidence,
2 but we're going to show that. And I've discussed
3 that with Mr. Kemp.

4 MR. KEMP: I have no objection, Your
5 Honor.

6 THE COURT: Okay. Very good.

7 BY MR. BARGER:

8 Q. So what we're going to do -- now, you've
9 seen this video, obviously?

10 A. I have.

11 Q. And you had done some -- well, what did
12 you do to the video, by the way?

13 A. Well, first, I went out and found a more
14 complete copy of it. It turned out that there was
15 a longer piece of footage rather than the short
16 video that I was initially provided. So we wanted
17 to first gather that up.

18 And then secondly was to understand just
19 where this took place. It happens in Russia.
20 And then have an understanding of what this
21 roadway looked like so that we could better
22 understand what we're seeing in the video.

23 And so that's what was my analysis as
24 sort of a step-by-step process.

25 Q. So do you have the video that we can

007970

1 show?

2 A. I do.

3 Q. Okay. Can you play it.

4 (Video played.)

5 THE WITNESS: Okay. We're going to play
6 this, just letting it run. What you'll see is a
7 more complete piece of footage.

8 BY MR. BARGER:

9 Q. This takes place in Russia?

10 A. It does. This does take place in
11 Russia, outside of St. Petersburg.

12 Q. What's that right there? Stop it for a
13 second. What is that going to the right? What's
14 happening there?

15 A. So what's happening right here in this
16 lane -- let me get my pointer out. Here.

17 So this intersection, it's like a
18 cloverleaf. I don't know if any of you all know
19 what a cloverleaf is, but it's got --

20 Q. They live in Las Vegas. They know.

21 A. So it's got lanes that are circling back
22 around as they're coming in and coming out into
23 the main highway. So what's happening here is
24 this is one of those lanes that's going to sort of
25 peel off and go on to the cloverleaf section.

007971

1 So what's happening here, this is sort
2 of the end of the far right lane. And what you're
3 going to see is going to be this 18-wheeler that's
4 going to come up and drive on the portion of the
5 roadway that is -- that's not the travel lane.

6 Q. Okay. So let's continue with the video.

7 Okay. Let's go to the next part of the
8 attachment. So what are you showing here?

9 A. All right. So what we're showing here
10 is what is it that the bike rider is doing in this
11 video? The bike rider is moving to the right, and
12 there was some information that had been provided
13 to me that said that he was being pulled to the
14 right and that all he was doing was just driving
15 straight down the road.

16 So Mr. Barger had asked me to look at
17 what is the actual movement of this bike rider in
18 this video?

19 So one of the things that we did is we
20 looked at on a frame-by-frame basis. And I put a
21 green arrow right here on the white stripe that is
22 closest to the bike rider, this blue arrow right
23 here is in line with his back tire, and this
24 yellow line here.

25 What you're going to see is a yellow

007972

1 line starts out like this and then it starts to
2 get narrow, narrow, narrow; and then, all of a
3 sudden, the yellow line switches over to the other
4 side.

5 And what that indicates is that the bike
6 rider in this video is actually slowly moving over
7 to the right side of that white stripe long before
8 the 18-wheeler goes by him.

9 Q. Now, I don't want you to speculate what
10 that rider is doing with his right hand, but is
11 his right arm off the bike, extended?

12 A. Yes.

13 Q. Down to the right?

14 A. Yes, it is.

15 Q. Are you a bicycle rider?

16 A. I am.

17 Q. Well, I don't even need to go there.

18 Is that a signal of some sort? I don't
19 want you to speculate what he's doing, but if
20 somebody was signaling they were turning right,
21 would that be the appropriate type of signal?

22 A. That's typically what you do.

23 Q. Let's continue quickly and finish this.

24 A. I'm going to just sort of step through
25 this. This is the frame-by-frame analysis. But

007973

1 now what you're looking at, whenever we can see
2 that white stripe, you'll start -- now you start
3 to see the white stripe comes into view, and now
4 you'll see that the yellow line is over on the
5 other side, meaning that the bicyclist has moved
6 over to the right. That's what he's intending to
7 do, and then along comes the large truck. All the
8 while, he has gotten further over to the right.

9 Q. Okay. I think we can -- that's good.

10 MR. BARGER: You can take that down. Do
11 you need to show that, that last slide? Okay.

12 BY MR. BARGER:

13 Q. Now, I want you to answer a question,
14 but I don't want you to answer it. Just I want
15 you to pause first. Okay?

16 Do you have opinion, based on reasonable
17 engineering probability, of what caused the
18 collision -- not that, but the collision with
19 Dr. Khiabani and the bus? Don't answer that yet.
20 But do you have an opinion, based upon reasonable
21 engineering probability, of what caused the
22 collision? Is the answer yes or no?

23 A. Yes.

24 Q. Now, pause before you answer this. What
25 is that opinion?

1 A. Dr. Khiabani turned his bike in front of
2 the bus, began his turn in front of the bus and
3 then ultimately ran into the side of the bus.

4 Q. Thank you.

5 Now, one last -- do we have the video?
6 I want to show the video of -- the Red Rock video.

7 (Video played.)

8 BY MR. BARGER:

9 Q. Now, when it gets to the motor coach
10 into the frame, what would be 4, I believe, I want
11 you to stop it.

12 Okay. Now, what I want you to do is
13 back it up until we get to the first car going
14 south in the right-hand lane.

15 That's a car. Okay. And there's
16 another car. And there's another car. And
17 there's a school bus. Now stop it after that last
18 car. And can you go -- are you able to go frame
19 by frame? Okay.

20 Is there a time on that that you can
21 read?

22 A. Yes. Yes. There's a timer. The timer
23 is right here, and it says 10:34:04 right there.

24 Q. Okay. Now, run the video until we see
25 another car before we see the bus.

007975

1 Stop. That's the bus. Okay.

2 Somehow I want to go back to the last
3 car.

4 Is that the last car? Okay. You got
5 that frame right there at 10:34; right? Right
6 there.

7 A. That's the last car right there.

8 Q. I'm sorry. Let's back that up again.

9 MR. BARGER: I apologize, Your Honor.

10 THE COURT: It's okay.

11 BY MR. BARGER:

12 Q. Just back that up. When that car goes
13 at the stop line. That car right there. Okay.

14 What is that time?

15 A. That says 10:34:04.

16 Q. Now, stop it when we get to the first
17 frame you see the bus, please.

18 Stop. So what is that time?

19 A. It's 10:34:17.

20 Q. So how many seconds elapsed from when
21 the last car went into the intersection from when
22 the bus came to the intersection? How many
23 seconds?

24 A. Approximately 13 seconds.

25 Q. Okay. Now, I want to do the same thing

007976

1 on the other side of the median with the lane
2 headed north towards Charleston.

3 So I think that we passed the last car.
4 You need to go back until we see the very last car
5 enter -- that car. Is that it?

6 A. No. I think there's one more.

7 Q. Stop. Was that it?

8 A. I think that's it.

9 MR. BARGER: Can you back that up?
10 That's the car. Can you back that up. I know
11 it's -- okay. Back it, if you will, Brian, as far
12 back to the south when you first can. If you
13 can't do it because it's too fast, let me know.

14 Stop right there. Let's just use that.

15 BY MR. BARGER:

16 Q. What is that time?

17 A. 10:33:57.

18 Q. Now what I want you to do is run the
19 tape until you see the bus.

20 Are there any cars going north?

21 A. No.

22 Q. You saw the bus. And what is the time
23 between, basically, the last car headed north into
24 the intersection and when the bus first appears?

25 A. Approximately 20 seconds.

007977

1 Q. Okay.

2 MR. BARGER: That's fine. You can take
3 your seat, Doctor.

4 Judge, may I have one minute to talk to
5 counsel?

6 THE COURT: Sure.

7 (Discussion off the record.)

8 MR. BARGER: At this time, Your Honor,
9 that's all the questions I have.

10 And I've talked to Mr. Kemp. Can we
11 approach the bench?

12 (A discussion was held at the bench,
13 not reported.)

14 THE COURT: Okay, ladies and gentlemen,
15 we're going to wrap up for the evening. And
16 tomorrow I have a calendar in the morning, so
17 we'll start at 12:30. Please have something to
18 eat before you come. Okay? I'm going to admonish
19 you for the evening.

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

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

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

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

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

19 See you tomorrow at 12:30. Thank you.

20 THE MARSHAL: All rise.

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

23 THE COURT: Sir, you can step down.

24 Mr. Pepperman, do you have a report?

25 MR. PEPPERMAN: Yes, Your Honor. In

1 terms of the payments today, Ms. Lesani wrote that
2 the issue is with what his department entered into
3 the system. Their payroll team was working on
4 reconciling the issue, but I cannot guarantee when
5 they will have an answer for me. So they weren't
6 able to correct the problem, their internal
7 problem, by today.

8 So, as I said before, this was at 3:30
9 or I believe 3:00. So, unfortunately, as I
10 mentioned before, it was a mixup in The Venetian's
11 system with the payroll, and that's what happened
12 and why one juror was paid because they correctly
13 entered it and why one wasn't.

14 I have his paycheck stubs, but, again,
15 The Venetian will pay him and everything will be
16 covered in terms of what comes out, what goes in.
17 The sole purpose of the cashier's check is so that
18 he gets it today as opposed to another time.

19 THE COURT: Understood.

20 THE COURT: Marshal Ragsdale, he needs
21 to get paid today; correct?

22 THE MARSHAL: I'll double-check. He did
23 relay that to me earlier, that he didn't know what
24 was going on, didn't know if he was going to get
25 paid or was concerned about getting paid. But if

007980

1 he could wait another day, I can ask.

2 THE COURT: Do we know when they're
3 going to have this?

4 MR. PEPPERMAN: They know the issue.
5 They want to pay him through The Venetian.
6 They're trying to figure out the payroll problem.
7 I would assume that another day they would be able
8 to do it, but I can't speak for them. I can just
9 let her know -- if he's okay with going another
10 day, I'm sure they could do it. But I'd have to
11 confirm.

12 THE MARSHAL: He just wants some
13 information for sure.

14 THE COURT: Marshal Ragsdale, let him
15 know that he can't be paid -- I'd rather you
16 stipulate to what we're going to say because I
17 don't want it to come from the Court. It's more
18 like there's the ability to pay him today if he
19 needs to be paid today.

20 MR. PEPPERMAN: You can tell him that
21 The Venetian advised that there was an error in
22 the department payroll system. They're working to
23 get it fixed. If he can wait another day, we
24 would hopefully have it resolved by tomorrow.

25 If he absolutely cannot, then we can

007981

1 make arrangements that he receives the pay today,
2 if that's okay with the Court.

3 THE MARSHAL: Okay. I will.

4 THE COURT: That's fine.

5 Okay. Do we have other housekeeping
6 matters in the meantime?

7 MR. BARGER: While we're waiting, maybe
8 we can discuss -- well, obviously, Mr. Rucoba will
9 be back tomorrow at 12:30. Mr. Kemp indicated he
10 wouldn't have him past three.

11 MR. KEMP: I think I would go about an
12 hour, just guessing.

13 MR. BARGER: So we have the bus.
14 Mr. Freeman, Eric Freeman, has made arrangements
15 to have the bus here by 3:00. I guess the real
16 question we need to know is where here.

17 THE COURT: That's something we need to
18 discuss with Marshal Ragsdale.

19 MR. BARGER: My suggestion would be as
20 soon as Will finishes the witness, the witness is
21 finished, then we just do the jury view.

22 Howard Russell sent around kind of a
23 proposed --

24 MR. KEMP: Right. Your Honor, our
25 objection to the proposal is their proposal

1 contemplates -- are we on the record?

2 THE COURT: You need to be on the
3 record. I'm sorry.

4 MR. BARGER: Let me start again. Maybe
5 we can work it out.

6 THE COURT: We're back on the record.

7 MR. BARGER: The issue that they -- I
8 can't speak for Mr. Kemp.

9 THE COURT: Mr. Kemp, would you like to
10 speak?

11 MR. KEMP: Yeah. Your Honor, my
12 issue --

13 THE COURT: What are we talking about?
14 What is the topic now?

15 MR. KEMP: This is what we're talking
16 about, the bus inspection.

17 Mr. Russell sent a proposal either last
18 night or this morning, and seeing the bus from the
19 outside, I have no problem with. Okay. But in
20 his proposal, it contemplated each one of the
21 jurors sitting in the driver's seat and do their
22 own little right-side visibility experiment. And
23 I don't think that's appropriate for a million
24 reasons. Number one, it's a jury experiment,
25 which is not allowed.

007983

1 THE COURT: No, it's --

2 MR. KEMP: Number two, if they had
3 wanted to bring in a right-sided visibility study,
4 like we had Mr. Cohen do, they should have brought
5 it in.

6 Number three, this thing has adjusting
7 seats. So if juror A is, say, 6-foot tall and
8 juror B is 5 foot 2, they're going to have
9 different viewpoints of the right-side blind spot.

10 Number four, the viewpoint that is
11 relevant in this case is that of the driver. So
12 what they -- if they really wanted to do this
13 right, they should have had the driver sit there
14 and got his point of view and done a 3-D
15 visualization like Mr. Cohen did.

16 So that is my observation just to the
17 jurors' experiment. I have no objection of them
18 seeing the outside of the bus and walking around
19 it and hitting it, whatever they want to do on the
20 outside.

21 I think if they start measuring
22 distances between certain points, I think that's a
23 problem. I don't think they'll do that, but, you
24 know, they might have a tendency to doing that to
25 try to confirm where the mark is and the distance

007984

1 between the wheels. I can see a juror doing that,
2 and that, I would call juror experiment. But to
3 just visually walk around the bus and look at it,
4 I have no problem.

5 MR. BARGER: Here is our proposal.
6 Basically -- and it's filed so the Court will have
7 it -- our proposal was to have the Court and the
8 lawyers to be downstairs, subject, of course, to
9 the Court's agreement. The bailiff would simply
10 bring the jurors down to the location. Nobody
11 would say a word. Nobody -- the lawyers wouldn't
12 talk. There's no witnesses to testify. The
13 jurors could not talk to each other.

14 But they be allowed to enter the bus for
15 some period of time and not take measurements and
16 not do experiments, but allowed to enter and sit
17 in the seat of Pears and Plantz and sit in the
18 driver's seat. That was our proposal.

19 I understand that they're objecting to
20 that. I think the Court would probably have to
21 make a decision one way or the other. I don't
22 think we have to decide tonight as long as we
23 agree that we'll have the bus here at 3:00
24 tomorrow, and the Court can think about what
25 you're going to do.

007985

1 MR. KEMP: Judge, actually, we started a
2 bench brief on juror experiments, and that's
3 exactly what this would be, a juror experiment,
4 because they'd go in there and they'd experiment
5 on the line-of-sight views themselves. I just
6 don't think that's appropriate. I agree we can
7 decide this tomorrow morning.

8 THE COURT: I will tell you that I'll do
9 some research, but -- I can't remember the case
10 right now, but the reason why I have to read this
11 long, long thing is because -- well, it wasn't
12 done in a controlled -- this admonishment is so
13 long. As you all know, it wasn't done in a
14 controlled environment, but there were some jurors
15 on a break that started measuring. I read this a
16 while ago.

17 MR. CHRISTIANSEN: They were throwing
18 rocks on coconuts -- it was a murder case -- to
19 see seeing what damage a rock would allegedly
20 cause. And it's no different -- I mean, your
21 admonishment specifically precludes them from
22 doing exactly what the defense proposes they do.

23 THE COURT: I know. But I will read
24 what you've filed.

25 MR. BARGER: Right. We can file

007986

1 something and they can file something and you can
2 decide.

3 MR. ROBERTS: Yes, and we can file
4 something. But I think, based on my understanding
5 of the cases, it's independent, unsupervised
6 experiments that are improper versus, sitting in
7 the driver's seat, I would equate to sending the
8 S-1 Gard back with the jury and having them pick
9 it up.

10 I mean, jurors are allowed to pick up,
11 manipulate, and examine the evidence. The bus is
12 piece of evidence. And they should be able to sit
13 in the seat and walk around the inside and do what
14 they want as long as it's a supervised environment
15 and they're not directly performing an independent
16 experiment without supervision.

17 MR. BARGER: I think the best thing
18 tonight, let them file theirs, we'll file ours,
19 and the Court can decide tomorrow.

20 THE COURT: Very good.

21 MR. BARGER: But I kind of need to know
22 from the marshal where they're going to have to
23 put it.

24 THE COURT: We'll let you know in the
25 morning.

007987

1 MR. BARGER: In the morning, sure.

2 THE MARSHAL: You'll enter on Clark.

3 I'll walk down there with you now if you want.

4 MR. CHRISTIANSEN: It's in that loading
5 dock; right, Marshal?

6 THE MARSHAL: Yes, exactly, on the south
7 side of the building entering from Clark.

8 MR. PEPPERMAN: I think that's been
9 arranged because it's in the stipulation where it
10 would be.

11 MR. BARGER: It's Howard doing it so --

12 THE COURT: It's in the stipulation, but
13 getting it cleared is very --

14 MR. BARGER: I would like to walk down
15 with you and look at it, if that's all right.

16 THE MARSHAL: All right. No problem.

17 THE COURT: So we have okay for the
18 loading dock, because at first that was
19 complicated?

20 THE MARSHAL: Yes.

21 He said it's okay for tomorrow, if we
22 can get things done.

23 MR. BARGER: You're talking about the
24 juror, Mr. Lennon?

25 THE COURT: Oh, Mr. Lennon. Let's

007988

1 finish the topic of the bus. The topic we're on
2 is the bus. 3 o'clock is okay for it to be in the
3 loading dock?

4 THE MARSHAL: Yes, Your Honor.

5 THE COURT: Okay. Very good.

6 Now, let's go to Mr. Lennon. He said?

7 THE MARSHAL: It will be fine.

8 THE COURT: Tomorrow?.

9 THE MARSHAL: Yes.

10 MR. PEPPERMAN: I'll email her and let
11 her know that tomorrow is good and --

12 THE COURT: Yeah, tomorrow is the day.

13 MR. PEPPERMAN: Hopefully, they can fix
14 the problem.

15 THE COURT: Very good.

16 Is there anything else we need to
17 discuss?

18 MR. ROBERTS: There is something, Your
19 Honor, and I'm having trouble following what it
20 is.

21 THE COURT: That's fine. That's fine.
22 I can wait.

23 MR. ROBERTS: Thank you, Your Honor.

24 Maybe we could come early tomorrow to
25 address this, Your Honor, address it right at

007989

1 12:30 with Mr. Russell. There's apparently a
2 disagreement between Mr. Russell and Ms. Works and
3 Mr. Christiansen regarding the rulings that the
4 Court has already made on the Pears deposition.

5 MR. KEMP: No, no, no, there's no
6 disagreement on the rulings; the disagreement is
7 who is going to offer it. So if you agree that
8 you're offering all the testimony, there's no
9 disagreement. Okay?

10 And the reason for that, of course, is
11 because the motion in limine says if you offer the
12 Pears testimony, it opens the door. So we don't
13 want to have anything on the record that suggests
14 we offered it so you can argue that you can wiggle
15 out of the motion in limine.

16 That's the disagreement. So the
17 disagreement is not asking the Court to cut it up
18 again.

19 MR. ROBERTS: Are you talking about
20 trying to get in the private investigator?

21 MR. KEMP: Right, right. Well, I'm
22 talking about the limine. The limine ruling says
23 that if you offer or allude to the testimony, that
24 you're opening the door. That's what the Court's
25 words were.

007990

1 MR. ROBERTS: To the testimony or to the
2 statement that was taken by the investigator?

3 MR. KEMP: Well, you can't take the
4 fruit from the poison tree and say, "Well, we
5 didn't offer the statement, but we offered the
6 words that were in the statement."

7 But, anyway, that's the only issue. The
8 issue is that you agreed that you are the
9 proponent of all the testimony, not just the parts
10 that you designated initially a week ago. Do you
11 see what I'm saying?

12 MR. ROBERTS: You're asking us to offer
13 the part you cross-designated.

14 MR. KEMP: No. We are not designating
15 anything because we don't want to be in this
16 little trap where you say to the judge later,
17 "Well, they offered it. I didn't offer it."
18 That's the reason.

19 But it's not asking the Court to go
20 through it again.

21 Does that make sense?

22 MR. BARGER: I think what I heard you
23 say is that if we attempt to offer anything,
24 you're going to say you can then go into all the
25 investigators?

007991

1 MR. KEMP: Yes.

2 MR. BARGER: That's exactly what you're
3 saying?

4 MR. ROBERTS: Okay.

5 The other thing, Your Honor, is Plantz.
6 We've got designations. We've got plaintiff
7 cross-designations. We've never received any
8 objections to --

9 MS. WORKS: We haven't cross-designated
10 yet.

11 MR. ROBERTS: Okay. We wanted to play
12 this on Wednesday. That's when we've got blocked
13 for it. So I guess they're coming; we just don't
14 have them?

15 MS. WORKS: Correct.

16 MR. ROBERTS: Would the Court like this
17 to start reviewing, or do you want to wait until
18 you have a complete set?

19 THE COURT: I'll take it. I'll take it
20 now so I can start. And let's not forget that the
21 jury instructions are due tomorrow at 5:00.

22 MR. KEMP: That's correct, Your Honor.
23 We've already worked on --

24 MR. ROBERTS: We exchanged some over the
25 weekend, yes.

007992

1 MR. KEMP: And the verdict form too,
2 Your Honor.

3 THE COURT: Thank you. All right.
4 Thank you, Mr. Roberts.

5 Everyone have a nice evening.

6 THE MARSHAL: Court is now adjourned.

7


8 (Thereupon, the proceedings
9 concluded at 5:12 p.m.)

10

11 -o0o-

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

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16 /S/ Kimberly A. Farkas, RPR

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,
v.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

**MOTOR COACH INDUSTRIES, INC.'S
BRIEF IN SUPPORT OF ORAL
MOTION FOR JUDGMENT AS A
MATTER OF LAW (NRCP 50(a))**

1 Because the evidence at trial confirms that there is no basis to award
2 punitive damages against Motor Coach Industries, either directly or through
3 the acts of an employee, MCI seeks judgment as a matter of law on plaintiffs'
4 claim for punitive damages. NRCP 50(a).

5 ARGUMENT

6 To award punitive damages, a jury must find—by clear and convincing
7 evidence—not just that MCI was reckless or irresponsible, but that it engaged
8 in despicable conduct that it knew would likely cause injury. The evidence
9 plaintiffs presented at trial cannot sustain such a finding.

10 In addition, to hold MCI vicariously liable for its employees' alleged
11 wrongful conduct, the jury must find that someone with the authority to set
12 company policy directly engaged in despicable conduct that injured plaintiff, or
13 that such a policymaker had full knowledge of the conduct and its outrageous
14 nature and nonetheless ratified it. Such a finding, again by clear and
15 convincing evidence, is unsustainable.

16 I.

17 WITHOUT EVIDENCE THAT MCI DISREGARDED A 18 KNOWN, PROBABLE HARM, PUNITIVE DAMAGES ARE INAPPROPRIATE

19 A. The Requisite State of Mind for Punitive Damages

20 An award of punitive damages requires a state of mind far greater than
21 mere negligence or even recklessness. *See Countrywide Home Loans, Inc. v.*
22 *Thitchener*, 192 P.3d 243, 255 (2008). Historically, punitive damages have
23 always been improper unless the evidence shows either a willful wrong or
24 damages as an intended consequence. *American Excess Ins. Co. v. MGM Grand*
25 *Hotels, Inc.*, 102 Nev. 601, 606, 729 P.2d 1352, 1355 (1986). Under the current
26 punitive-damages statute, too, a plaintiff may recover punitive damages only
27 where it is proven by “clear and convincing evidence” that the defendant has
28 been guilty of either oppression or malice. NRS 42.005(1).

1 “‘Oppression’ means *despicable conduct* that subjects a person to cruel
2 and unjust hardship with *conscious disregard* of the rights of the person.” NRS
3 42.001(4) (emphasis added). “‘Malice, express or implied’ means conduct which
4 is intended to injure a person or *despicable conduct* which is engaged in with a
5 *conscious disregard* of the rights or safety of others.” NRS 42.001(3) (emphasis
6 added). Implied malice is a discrete basis for awarding punitive damages where
7 conscious disregard is present. *See* NRS 42.001(3); *see also Countrywide*, 192
8 P.3d at 254-55. “Conscious disregard,” in turn, is defined as [1] “the *knowledge*
9 of the probable harmful consequences of a wrongful act *and* [2] a *willful and*
10 *deliberate* failure to act to avoid those consequences.” NRS 42.001(1) (emphasis
11 added). Such an actual consciousness that harm would probably result is
12 equivalent to intent to cause that harm.

13 **B. An Award of Punitive Damages Requires**
14 **Conscious Disregard for a Known, Probable Harm**

15 **1. *Conscious Disregard Means Actual***
Knowledge of the Likely Harm

16 To prove conscious disregard under Nevada law, the defendant must first
17 have *actual knowledge* of a probable harm. *Countrywide*, 192 P.3d at 255.
18 *Countrywide* clarified that actual knowledge can include—at its lowest
19 threshold—a willful and deliberate refusal to avoid probable harmful
20 consequences where the defendant egregiously and intentionally ignores the
21 obvious. *Id.*

22 In *Countrywide*, the defendant mortgage company foreclosed on the
23 wrong condominium while the owners were away on military assignment and
24 threw away all of the owners’ possessions. *Id.* at 246. The company simply
25 ignored numerous clear indications that it was seizing the wrong home and
26 “continued to proceed with the foreclosure despite knowing of the probable
27 harmful consequences of doing so.” *Id.* at 255. Not only did the company’s
28 document file indicate an address mix-up, but it was also obvious the owners

1 had not “abandoned” the unit as the power was still on, and the unit contained
2 the owners’ family picture albums, military service medals, clothing and
3 unopened mail. *Id.* at 247, 255.¹ The mortgage company intentionally ignored
4 these obvious indications that it was foreclosing on the wrong home and
5 proceeded anyway.

6 Just two months after deciding *Countrywide*, the Supreme Court found
7 punitive damages could not be imposed where, although the facts were only
8 slightly different, there was no evidence the defendant actually knew of a
9 probable harm or intentionally ignored the obvious. *See Winchell v. Schiff*, 193
10 P.3d 946 (Nev. 2008). In *Winchell*, a lessor of a cold-storage unit decided to
11 inspect it after she incorrectly concluded that the lessee may have abandoned
12 the unit. *Id.* at 948-49. The electricity was still on and the unit was full of the
13 plaintiff’s inventory of fish. *Id.* The lessor nevertheless had the locks changed,
14 took the keys, and did not turn the alarm back on after disabling it. *Id.* Upon
15 returning and finding a substantial part of his inventory stolen, the lessee sued
16 for the demise of his business and sought punitive damages. *Id.* The court
17 found, however, that the facts did not support a finding of conscious disregard.
18 *Id.* While the court’s reasoning was not explicit, no reasonable jury could have
19 found on these facts that the lessor either had actual knowledge her actions
20 would probably cause someone to break in, or that she intentionally ignored the
21 obvious risk. *Id.* at 953.

22 As *Winchell* illustrates, *Countrywide* did not lessen the definition of

23 ¹ Other indicators of an obvious potential mix-up included the fact that the
24 homeowner’s association fees were up-to-date; the plaintiffs’ names appeared as
25 owners in several documents in the file for the property that should have been
26 foreclosed upon; the defendant’s asset manager saw some of these documents
27 and understood that plaintiffs actually owned the property, but did not consider
28 this problematic; and the asset manager ignored other documents in the
defaulting owner’s file that would have confirmed the plaintiffs owned the
property. *Id.* at 247, 255.

conscious disregard. *Countrywide* merely clarified that conscious disregard may include willfully refusing to become “conscious” of probable harm by deliberately closing one’s eyes to the obvious.

2. The Legislative History to NRS 42.001 Shows that Even Unconscionably Irresponsible Conduct Does Not Justify Punitive Damages

Leading up to the enactment of NRS 42.001, the Court was split over whether there could be “implied malice” in the sense of conduct that deliberately disregarded a probability of harm even without a specific intent to cause, or whether “implied malice” simply referred to a method of proving a defendant’s actual intent to cause harm by circumstantial evidence. *Craig v. Circus-Circus Enterprises, Inc.*, 106 Nev. 1, 21, 786 P.2d 22, 35 (1990). There was no dispute, however, that an “implied malice” standard would at least require an actual awareness of the harm that would result by acting or failing to act. By any measure, an unconscionable but unconscious disregard for the plaintiff’s safety would not subject a defendant to punitive damages. *See, e.g., First Interstate Bank of Nevada v. Jaf Bros Auto Body, Inc.*, 106 Nev. 54, 57, 787 P.2d 765, 767 (1990).

a. CASES LEADING UP TO THE ENACTMENT OF NRS 42.005 REQUIRED ACTUAL AWARENESS OF THE RISK OF HARM

Thus, for example, in *Granite Construction Company v. Rhyne*, 107 Nev. 651, 817 P.2d 711 (1991), the defendant “consciously and deliberately” chose not to erect a protective fence, despite having contractually agreed to do so. *Id.* at 653, 817 P.2d at 714. The defendant was conscious of the harm that could result, because it knew *both* that the purpose of the fence was to protect motorists from cattle wandering onto the roadway *and* that there was a bull on the field that was to be segregated from the thoroughfare. *Id.* at 653, 817 P.2d at 713.

By contrast, in *First Interstate Bank of Nevada v. Jaf Bros Auto Body, Inc.*,

1 the Supreme Court reversed a punitive damages award where a defendant
 2 bank, as a result of its own errors and despite having them called to its
 3 attention by the customer, dishonored the customer's checks, causing damage to
 4 the customer's business. 106 Nev. at 55-56, 787 P.2d at 766. Even then, the
 5 bank failed to correct its records for three months, despite being aware of them.
 6 *See id.* The court concluded that the bank had exhibited, at most,
 7 "unconscionable irresponsibility," which did not amount to conscious disregard
 8 and, thus, would not support punitive damages. *Id.* at 57, 787 P.2d at 767.

9 b. THE LEGISLATURE CODIFIED THE
 10 REQUIREMENT AS "CONSCIOUS DISREGARD"

11 Although *Countrywide* suggested that the Legislature in enacting the
 12 NRS 42.001 definitions had rejected the idea that "unconscionable
 13 irresponsibility" was immune from punitive damages, the legislative history
 14 refutes *Countrywide's* analysis. *Countrywide* read NRS 42.001 to supersede
 15 Justice Springer's concurrence in *Craig v. Circus-Circus Enterprises, Inc.*, that
 16 a manager's "unconscionable irresponsibility" was not an adequate basis for
 17 punitive damages. *Countrywide*, 124 Nev. at 741-42, 192 P.3d at 254 (citing
 18 *Craig*, 106 Nev. 1, 21, 786 P.2d 22, 35 (1990) (Springer, J., concurring)). But
 19 the sponsors of the new NRS 42.001 definitions were clear that "[b]y adopting
 20 the California statutory standards, the bill effectively adopts the standards
 21 advocated in both the plurality *and concurring opinions* in *Craig*." (Leg. Hist.,
 22 at 64; *see also id.* at 51 ("The bill adopts the standard which is closely analogous
 23 to the *Craig* standard which was adopted by our Supreme Court some years
 24 ago." (statement of Senator Mark A. James))). The statute explicitly intended
 25 that "[b]ad judgment, even unconscionably irresponsible conduct . . . does not
 26 reflect the evil mind or motive" necessary for an award of punitive
 27 damages. (Leg. Hist., at 65.) And that is in fact how NRS 42.001 was
 28 interpreted after its enactment. *See Maduike v. Agency Rent-A-Car*, 114 Nev.

1 1, 953 P.2d 24 (1998).

2 In *Maduike v. Agency Rent-A-Car*, for example, the Nevada Supreme
3 Court found punitive damages inapplicable despite repeated misbehavior by the
4 defendant. 114 Nev. 1, 5-6, 953 P.2d 24, 26-27 (1998). In that case, the plaintiff
5 family rented a car from the defendant. When they experienced problems with
6 the car on a drive from Reno to Las Vegas, they called to complain to the
7 defendant, who instructed them to continue driving to its Las Vegas office. On
8 the way, the car caused an accident when the brakes failed. *Id.* at 3, 953 P.2d
9 at 25. The defendant's Las Vegas office refused to repair or replace the vehicle,
10 however, and the plaintiffs had to drive the car back to Reno. On the way, the
11 car malfunctioned, injuring three family members. *Id.* Despite the breadth of
12 the defendant's inattention and callousness, the Nevada Supreme Court agreed
13 that there was no evidence either of defendant's intent to cause hardship or of
14 its conscious disregard for the plaintiffs' rights. *Id.* at 5-6, 953 P.2d at 26-27.
15 Quoting its earlier *Jafbro's* decision, the court noted again that "even
16 unconscionable irresponsibility will not support a punitive damages award." *Id.*
17 at 5, 953 P.2d at 26. See also *Village Dev. Co. v. Filice*, 90 Nev. 305, 315, 526
18 P.2d 83, 89 (1974) (reversing an award of punitive damages where there was
19 evidence of "unconscionable irresponsibility" in a land sales deal, but not
20 enough evidence to show oppression, fraud, or malice in fact). This standard
21 controls the result in this case.

22 **3. A Claim for Punitive Damages in a**
23 **Products Liability Case Requires the Same**
24 **Demonstration of Conscious Disregard**

25 In keeping with *Countrywide*, punitive damages are not recoverable in a
26 products liability case unless the plaintiff demonstrates that the defendant
27 actually knew the product had a dangerous defect when it left the defendant's
28 possession or control. *Sutherland v. Elpower Corp.*, 923 F.2d 1285, 1290-91 (8th